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Court

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No.: **ICC-01/04-02/06**
Date: **14 April 2020**

THE APPEALS CHAMBER

Before: **Judge Howard Morrison, Presiding Judge**
Judge Chile Eboe-Osuji
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA

Public Redacted with public annexes A, B and C

Public Redacted Version of "Prosecution response to 'Defence Appeal Brief - Part II'", 3 April 2020, ICC-01/04-02/06-2500-Conf

Source: **Office of the Prosecutor**

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INTRODUCTION

1. Based on a volume of credible evidence, on 8 July 2019 Trial Chamber VI convicted Bosco Ntaganda of 18 counts of crimes against humanity and war crimes. The Chamber's Judgment is reasoned and replete with detailed references to the evidence that correctly established beyond reasonable doubt that between August 2002 and December 2003 Ntaganda and his forces killed, raped, sexually enslaved, persecuted, forcibly displaced and attacked civilians, pillaged and destroyed their property and attacked protected objects.[1] Not only did Ntaganda issue orders to kill civilians but he murdered with his own hands. Ntaganda and his forces recruited children under 15 years of age to actively participate in hostilities, subjected them to despicable conditions and raped and sexually enslaved them. Ntaganda also raped his own female bodyguards, and others followed his lead.

2. Yet, in the second part of his appeal, Ntaganda misrepresents the proceedings, disputes the fact that crimes occurred and denies all responsibility for these crimes. In Ground 2, he only partially describes the relevant procedural history, omitting relevant events that are fatal to his arguments. He faults the Chamber for the consequences of his own defence strategies at trial, and for seeking to mitigate and prevent attempted witness interference associated with his suspected misconduct in the Detention Centre [REDACTED]. The Chamber fairly and efficiently managed these proceedings, which spanned over three years (264 transcripts of hearings), with 101 witnesses (86 of whom appeared in person), 2,129 participating victims and 1,791 items of evidence. In the remaining grounds (Grounds 4 to 15), Ntaganda discredits Prosecution witnesses, while repeating arguments bereft of reliable evidence. Ntaganda misapprehends fundamental evidentiary principles, and simply disagrees with the Chamber's reasoned, reasonable and correct fact-finding. In so doing, Ntaganda disregards the nature and purpose of appellate proceedings. Moreover, he shows no error, and there is none. The Chamber's decision to convict Ntaganda was founded on reliable evidence and is clear and reasoned. The Chamber's findings on Ntaganda's criminal responsibility are unassailable and his conviction is safe and sound. The Appeals Chamber should confirm it.[2]

CONFIDENTIALITY LEVEL

3. Pursuant to regulation 23*bis*(b) of the Regulations, the Prosecution files this response as confidential since it refers to confidential information. A public redacted version will be filed.

[1] The Prosecution has appealed Ntaganda's acquittal for intentionally directing attacks against the protected objects (article 8(2)(iv)) of the church at Sayo and Mongbwalu hospital: Prosecution Appeal.
[2] The table of contents is in annex A. The Prosecution refers to Trial Chamber VI as the "Chamber".

I. STANDARD OF REVIEW AND SUBSTANTIATION OF ARGUMENTS

4. The Parties agree that the Appeals Chamber should apply the "well established" standard of appellate review for legal and procedural errors. However, the Prosecution disagrees with Ntaganda's suggestion that the Appeals Chamber should approach the margin of deference it gives to a Trial Chamber's factual findings "with extreme caution".[3] Apart from citing some extracts of the *Bemba* Appeals Judgment,[4] Ntaganda proposes no workable alternative.[5] Both as a matter of principle and practicality, the Appeals Chamber should continue to apply the well-established standard of appellate review for errors of fact first set out in *Lubanga*,[6] and subsequently endorsed.[7]

5. As explained below, the Appeals Chamber's primary function is corrective; that is, it reviews whether the Trial Chamber erred. The Statute,[8] the drafting history,[9] jurisprudence[10] and commentary[11] support this interpretation. The Appeals Chambers of other international criminal tribunals, whose governing instruments are similar to the ICC,[12] have likewise adopted a corrective function.[13] Further, appeals proceedings are not concerned with all errors, but only with those which "materially affect" the verdict. Moreover, consistent with the Court's statutory framework, an appellant must adequately substantiate his/her arguments.

I.A. Factual errors should be assessed by a deferential standard of reasonableness

6. In determining alleged errors of fact, international tribunals have consistently applied a deferential standard of review known as the 'reasonableness' standard. This standard was articulated in the first substantive ICTY appeals judgment in July 1999;[14] confirmed in March

[3] Appeal-Part II, para. 4.
[4] Appeal-Part II, para. 4 (referring to *Bemba* AJ, paras. 38, 40, 45).
[5] *See* *Karadžić* AJ, para. 13 ("It is for the party submitting that the Appeals Chamber should depart from such jurisprudence to demonstrate that there are cogent reasons in the interest of justice that justify such departure").
[6] *Lubanga* AJ, paras. 17-27.
[7] *Bemba et al.* AJ, paras. 89-108; *Ngudjolo* AJ, paras. 18-27. *See also* *Bemba* AJ, paras. 38, 40, 42-43, 45 (with some qualification, endorsing the *reasonableness* standard and rejecting the assessment of evidence *de novo*).
[8] Statute, arts. 81(1), 83(2).
[9] Staker and Eckelmans, 'Art. 81', pp. 1922-1923 (mn. 19).
[10] *Lubanga* AJ, para. 56; *Lubanga* SAJ, para. 39; *Bemba* AJ, para. 42; *Bemba et al.* AJ, para. 61.
[11] Although some commentators have suggested that the Statute is unclear on the nature and scope of appellate review at the ICC (*see* Staker and Eckelmans, 'Art. 81', p. 1923, mn. 20), they generally agree that appeals are corrective and not a trial *de novo* (*see* Brady, p. 585; Staker and Eckelmans, 'Art. 81', pp. 1923-1924; Ambos (2016), pp. 549-550; Guilfoyle, p. 172; Stahn, p. 377; Klamberg, p. 623, fn. 668; Kress (2009), p. 151).
[12] ICTY Statute, art. 25 and ICTY Rules, rule 117(C); ICTR Statute, art. 24 and ICTR Rules, rule 118(C); SCSL Statute, art, 20 and SCSL Rules, rule 118(C); STL Statute, art. 26(2); ECCC Internal Rules, rule 104 *but see* rule 110(4) and ECCC Law, art. 36.
[13] *Karadžić* AJ, para. 14; *Rutaganda* AJ, para. 15; *Kupreškić et al.* AJ, para. 22.
[14] *Tadić* AJ, para. 64.

2000;[15] and applied ever since for over 20 years.[16] The ICC Appeals Chamber has likewise endorsed this standard in interlocutory appeals,[17] appeals against reparation orders,[18] and in final appeals.[19] In *Lubanga* (the first appeal against conviction), the Appeals Chamber held:

> when a factual error is alleged, the Appeals Chamber will determine whether a reasonable Trial Chamber could have been satisfied beyond reasonable doubt as to the finding in question. The Appeals Chamber will not assess the evidence *de novo* with a view to determining whether it would have reached the same factual conclusion as the Trial Chamber.[20]

7. This standard means that the Appeals Chamber assesses whether a reasonable Trial Chamber *could* have been satisfied beyond reasonable doubt as to the factual finding in question.[21] Only if it finds that the Trial Chamber's finding (considering the relevant evidence as well as the Chamber's reasoning[22] and application of the standard)[23] was unreasonable or wholly erroneous, does the Appeals Chamber find error. Conversely, if it finds that the Trial Chamber's finding was reasonable, the Appeals Chamber will not find error, even if it might itself have come to another conclusion on the evidence.

8. The deferential standard has been applied regardless of whether the Trial Chamber's finding was based on direct or circumstantial evidence,[24] and regardless of who appealed.[25]

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[15] *Aleksovski* AJ, para. 63.
[16] *Lubanga* AJ, para. 24 (referring to *Blagojević and Jokić* AJ, para. 9; *Aleksovski* AJ, para. 63). *See also* *Tadić* AJ, para. 64; *Karadžić* AJ, paras. 17-18; *Bagosora et al.* AJ, para. 18; *Taylor* AJ, para. 26; *Duch* AJ, paras. 17-19; *Case 002/01* AJ, paras. 88-89. Most recently, it has been formally adopted in the Law on Specialist Chambers and Specialist Prosecutor's Office, art. 46(5).
[17] *Lubanga* AJ, para. 21 (referring to *Ruto et al.* Admissibility AD, para. 56 and *Kenyatta et al.* Admissibility AD, para. 55); *see also* *Ongwen* Defects Motion AD, para. 47.
[18] *Lubanga* Second Reparations AJ, para. 30 (citing *Katanga* Reparations AJ, para. 41; *Lubanga* AJ, para. 21).
[19] *Bemba* AJ, para. 42; *Bemba et al.* AJ, para. 96; *Ngudjolo* AJ, paras. 22-26.
[20] *Lubanga* AJ, para. 27. *See also* *Bemba* AJ, para. 42. Thus, it is the Trial Chamber—and not the Appeals Chamber—which applies the beyond reasonable doubt standard to the material facts and which must conclude that guilt is the only reasonable conclusion: *Bemba et al.* AJ, para. 868 (concerning 'circumstantial' findings).
[21] Appellate deference is integral to the standard of appellate review: *see* *Lubanga* AJ, para. 56 ("the standard of review is deferential to the determinations of the Trial Chamber and the review is primarily limited to whether the Trial Chamber's factual findings were unreasonable, rather than a *de novo* assessment"); *Lubanga* SAJ, para. 39 ("the Appeals Chamber's primary task is to review whether the Trial Chamber made any errors in sentencing the convicted person"); *see also* *Case 002/01* AJ, para. 94 ("the role of the Supreme Court Chamber [is], in addition to correcting legal errors, as mainly verifying whether the burden of proving the elements of the charges was met, rather than in repeating the hearing and substituting the trial findings with its own ones"); *see also* Staker and Eckelmans, 'Art. 81', p. 1923, nm. 21-22.
[22] *See below* fn. 28.
[23] *Lubanga* AJ, para. 22; *see also* *Bemba* AJ Minority Opinion, para. 14 ("In [conducting its corrective review], the Appeals Chamber should take account of the beyond reasonable doubt standard—as is indeed reflected in the standard that was adopted in *Lubanga*—but only to the extent that this was the standard which the Trial Chamber was under a duty to follow").
[24] *Karadžić* AJ, para. 17; *Strugar* AJ, para. 13, *Taylor* AJ, para. 26; *Al Khayat et al.* AJ, para. 16.
[25] *Šešelj* AJ, para. 16; *Popović et al.* AJ, para. 21; *Brđanin* AJ, paras. 13-14; *Seromba* AJ, para. 11; *Ndindiliyimana et al.* AJ, para. 11. If the Prosecution appeals an acquittal, it must show that "when account is taken of the errors of fact committed […], all reasonable doubt of guilt has been eliminated": *see* *Karadžić* AJ, para. 18; *Nyiramasuhuko et al.* AJ, para. 32; *Popović et al.* AJ, para. 21; *see also* *Ngudjolo* AJ, para. 25.

Its application may, however, be qualified when additional evidence is admitted on appeal.[26] The deferential standard is further tempered by the Trial Chamber's duty to provide a reasoned decision under article 74(5);[27] hence, in assessing the reasonableness of a Trial Chamber's factual findings, the Appeals Chamber also considers the Trial Chamber's reasoning in assessing the evidence.[28]

9. The Prosecution submits that the deferential or reasonableness standard of appellate review for factual errors is fully consistent with the Court's legal framework and should remain as the applicable standard for the following reasons.

10. *First*, the deferential standard is consistent with the statutory distribution of functions among Chambers.[29] The primary responsibility of the Trial Chamber is to receive the bulk of evidence,[30] assess witnesses' credibility and the reliability of their testimony,[31] and resolve inconsistencies,[32] decide on the innocence or guilt of an accused on the basis of the evidence submitted and discussed at trial[33] and, in the event of a conviction, to impose a sentence[34] and issue a reparations order.[35] The Appeals Chamber's function is to determine whether the Trial Chamber erred in law, fact or procedure, or on "[a]ny other ground" *and* whether these errors materially affected the proceedings or decision, or had the potential of making the proceedings or decision unreliable or unfair.[36] If and when the Appeals Chamber identifies an error with the required impact,[37] it will decide, within its powers, how to proceed pursuant to article 83(2).[38] Although the Appeals Chamber may "reverse or amend the decision or sentence" or "[o]rder a new trial before a different Trial Chamber" and "[f]or these purposes

[26] *See e.g.* *Blaškić* AJ, para. 24(c) (noting two steps). *But see* *Kupreškić et al.* AJ, para. 75 and *Kvočka et al.* AJ, para. 426.
[27] *Bemba et al.* AJ, para. 93 (quoting *Lubanga* AJ, para. 24, quoting *Kupreškić et al.* AJ, para. 32).
[28] *See* *Bemba et al.* AJ, paras. 97-98 (requiring more reasoning when the underlying evidence is weak, although underscoring that the focus of the Appeals Chamber's analysis is on the evidence); *Bemba* AJ, paras. 43-44, both citing *Case 002/01* AJ, para. 90.
[29] *Lubanga* AJ, para. 56 (appeal proceedings differ in their purpose and nature from trial proceedings); *Gbagbo* Victim Participation AD, para. 11; *see also* *Haradinaj* Judge Patrick Robinson Partially Diss. Op., para. 2 ("trial and appellate bodies have their own respective roles and provinces [and] there are boundaries for what an appellate body can do"); *see also* *Kvočka et al.* Judge Shahabuddeen Sep. Op., para. 103 ("The Tribunal's system […] cannot work if the essential function of the Trial Chamber to find guilt is in whole or in part exercised by the Appeals Chamber"). *See also* Ambos (2016), p. 568 ("The determination of issues of fact […] should, as a rule, remain in the hands of the Trial Chamber", referring to the "corrective nature of the appeal and the general division of labour between the Trial Chamber and Appeals Chamber", and the need for expediency).
[30] Statute, art, 69.
[31] *Lubanga* AJ, para. 57; *see also* *Bemba et al.* AJ, para. 509; *Bemba et al.* Second SAJ, para. 21.
[32] *Bemba et al.* AJ, para. 95 (quoting *Lubanga* AJ, para. 23, quoting *Kupreškić et al.* AJ, para. 31).
[33] Statute, art. 74(2). *See also* art. 66(3); Rules, rule 142.
[34] Statute, art. 76. *See also* Rules, rules 143-144.
[35] Statute, art. 75.
[36] Statute, arts. 81(1), 83(2). *See* *Lubanga* AJ, paras. 28, 56; *Bemba* AJ, paras. 60-62.
[37] *See below* paras. 19-20.
[38] *See* Staker and Eckelmans, Art. 83, p. 1967 (mn. 6). *But see* Nerlich, p. 976.

[…] may itself call evidence to determine the issue",[39] it may not itself hold a re-trial.[40]

11. Unlike some domestic jurisdictions, the Rome Statute does not envisage a third layer of review. Instead, it foresees a two-tier process which sufficiently satisfies the interests of justice. It would be inefficient and imbalanced (and would significantly lengthen and impact on the format of the proceedings) to conduct a second trial on appeal.[41] Indeed, in certain domestic jurisdictions where appellate courts may examine the evidence *de novo* and consider additional evidence (*e.g. berufung*, *appello*), appellate proceedings may involve potentially lengthy evidentiary phases.[42] Moreover, unlike some domestic jurisdictions where juries do not give reasons,[43] ICC triers of fact are professional judges, bound by the Statute to provide a reasoned opinion in writing.[44]

12. Articles 66(3) and 83(1) of the Statute[45] and rule 149[46] must be read in context. These provisions afford the Appeals Chamber the same powers as the Pre-Trial and Trial Chamber *mutatis mutandis*[47] to exercise its statutory functions.[48] They do not allow for a re-trial of the

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[39] Consistently, the Appeals Chambers may enter *de novo* findings after it has found that the Trial Chamber committed certain procedural errors ["if the original TC is no longer available"] (*Bemba et al.* AJ, para. 108) and legal errors (*Karadžić* AJ, para. 16). Even then, judges will not review the entire trial record, but will, "in principle only take into account evidence referred to by the trial chamber in the body of the judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and, where applicable, additional evidence admitted on appeal": *see Šešelj* AJ, para. 14; *Strugar* AJ, para. 15.

[40] At the ICTY/ICTR, Appeals Chambers have entered convictions on appeal and increased sentences: *see Gacumbitsi* AJ, para. 124, p. 73; *Aleksovski* AJ, paras. 186-191; *Šljivančanin* AJ, p. 169. They have also declined to do so in certain circumstances: *Jelisić* AJ, paras. 74-77; *Šainović et al.* AJ, paras. 1604, 1766.

[41] *Case 002/01* AJ, para. 94. *See also Bemba* Judge Eboe-Osuji Sep. Op., para. 46 ("[t]]here may yet be a role for appellate deference at the ICC" as "a matter of judicial policy for purposes of efficiency in the administration of justice. But it is not a matter of law").

[42] Under the German Code of Criminal Procedure (StPO), an appeal or *Berufung* (which is permitted for certain decisions to address factual errors) is a second layer of fact-finding (StPO, § 312 *et seq*.). In principle, the Court of Appeal proceeds the same way as the court of first instance (StPO, §§ 323, 324) and appellate proceedings are a new evidentiary phase during which previously admitted evidence or new evidence is admissible (StPO, §§ 314, 316, 325, 323 III). *See also Berufung* and *Revision*; *Wechsel zwischen Berufung und Revision*. Similarly, the Italian criminal justice system is structured on three levels: first-instance judges, Court of Appeal and Court of Cassation. The Court of Appeal (*appello*) may conduct a fresh evaluation of the evidence admitted at trial and to a limited extent admit additional evidence (CPP, art. 598, 603). *See also* Bolognari, pp. 17, 22.

[43] *See e.g.* UK House of Lords: *R. v. Pendleton*, para. 6 (Lord Bingham of Cornhill) ("a criminal jury gives no reasons. Its answer is guilty or not guilty."); *see also* High Court of Australia: *Fox v. Percy* (Gleeson CJ, Gummow J and Kirby J), p. 9, para. 24 ("Care must be exercised in applying to appellate review of the reasoned decisions of judges, sitting without juries, all of the judicial remarks made concerning the proper approach of appellate courts to appeals against judgments giving effect to jury verdict.").

[44] Statute, art. 74(5).

[45] Statute, art. 83(2) ("*For the purposes of proceedings under article 81 and this article* […]", emphasis added).

[46] Rules, rule 149 ("[…] shall apply *mutatis mutandis* to proceedings in the Appeals Chamber").

[47] The Law Dictionary ("with the necessary changes", quoting *Black's Law Dictionary* (Free Online)).

[48] As such, the ICC Appeals Chamber has relied on article 83(1) in deciding on disclosure requests (*Lubanga* RFA Disclosure AD, para. 9), on the admission of evidence on appeal (*Lubanga* AJ, para. 54), and on addressing matters related to final appeals (*Ngudjolo* Order, para. 19), including on the conditional release of acquitted persons (*Gbagbo & Blé Goudé* Conditional Release AD, para. 53). It has authorised the opening of an investigation after finding that the PTC erred, but made all requisite findings (*Afghanistan* AD, para. 54).

case on appeal.[49] Thus, although the same evidentiary rules apply during all stages of the proceedings,[50] Chambers must apply them within the constraints of their statutory functions.[51]

13. Moreover, and notwithstanding the absence of an explicit provision similar to article 83(1), other international tribunals have provisions similar to rule 149 of the ICC Rules,[52] and their Statutes likewise provide their Appeals Chamber with powers to affirm, reverse or revise decisions taken by Trial Chambers, to order retrials as a remedy,[53] and to call evidence.[54] On occasion, but exceptionally, their Appeals Chambers have relied on inherent powers to employ other powers similar to those of Trial Chambers.[55]

14. *Second,* the deferential standard is consistent with the advantages that Trial Chamber judges enjoy as the primary triers of fact. Notwithstanding some regulated exceptions,[56] the principle of orality makes in-court personal testimony the general rule.[57] Conversely, not only is the right to present evidence limited on appeal[58] but appeal proceedings can be fully conducted in writing.[59] This was intentional. The Appeals Chamber has held that "the Trial Chamber is much better positioned to assess a piece of evidence *in light of all the other evidence presented at trial* than the Appeals Chamber. Accordingly, evidence relevant to a decision pursuant to article 74(2) [..] should, with only limited exceptions, be presented *before* that decision is taken."[60] Against this backdrop, it makes good sense for a Trial Chamber's evidentiary assessments to be, *a priori*, afforded appropriate deference.[61]

15. Other international tribunals have noted the advantage that a Trial Chamber has in observing witnesses in person[62] and have likewise afforded them significant credence and

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[49] Brady, p. 583 ("the Appeals Chamber has the same powers as the Trial Chamber to hear witnesses and receive other evidence. However, this does not mean that its proceedings will necessarily be a 're-trial'").
[50] Rules, rules 63(1)-(2), 122(9).
[51] On the different application of the same evidentiary rules in pre-trial and trial: *see* *Bemba* Admissibility AD, para. 80; *Mbarushimana* Confirmation AD, para. 47.
[52] ICTY/ICTR Rules, rule 107; SCSL Rules, rule 176(B). *See* Staker and Eckelmans, Art. 83, p. 1966 (mn. 4).
[53] ICTY Rules, rule 117(C); ICTR Rules, rule 118 (C); SCSL Rules, rule 118 (C). *But see* ECCC Law, art. 36.
[54] *See* ICTY/ICTR Rules, rule 115; STL Rules, rule 186; SCSL Rules, rule 115; ECCC Internal Rules, rule 108(7); *see* *Rutaganda* AJ, para. 10; *Bagosora et al.* Additional Evidence Decision, para. 8.
[55] *See e.g.* *Mucić et al.* SAJ, para. 16; *Kupreškić et al.* AJ, para. 463; *Muvunyi* Retrial Decision, paras. 12-13.
[56] *See* Statute, art. 69(2); Rules, rule 68; *Bemba* Admissibility AD, paras. 77-78.
[57] *Bemba* Admissibility AD, para. 76 ("The importance of in-court personal testimony is that the witness giving evidence under oath does so under the observations and general oversight of the Chamber. The Chamber hears the evidence directly from the witness and is able to observe his or her demeanour and composure, and is also able to seek clarification on aspects of the witness' testimony that may be unclear"). *See also* *Ruto & Sang* Admissibility AD, para. 84.
[58] *See* RoC, reg. 62. *See* *Lubanga* AJ, para. 58; *Bemba et al.* AJ, para. 509; *Bemba et al.* Second SAJ, para. 21.
[59] *Bemba et al.* AJ, para. 47 (citing *Ngudjolo* Scheduling Order, para. 13).
[60] *Lubanga* AJ, para. 57 (emphasis added); *see also* *Bemba et al.* Second SAJ, para. 21. *Contra* *Bemba* Judge Eboe-Osuji Sep. Op., paras. 65-70.
[61] *Bemba et al.* AJ, paras. 94-95; *Ngudjolo* AJ, para. 24; *Lubanga* AJ, para. 25.
[62] *See e.g.* *Rutaganda* AJ, para. 21; *Taylor* AJ, para. 26; *Nahimana, et al.* AJ, para. 14; *Prlić et al.* AJ, para. 200.

discretion in assessing the witnesses' credibility and the reliability of their evidence.[63] But directly observing the witnesses' testimony is not the only advantage of Trial Chamber judges. Crucially, they observe the unfolding of the evidence contemporaneously and as a whole *throughout* the trial proceedings;[64] they have the deep knowledge of the case required to assess pieces of evidence both separately and holistically including—but not limited to—the credibility and reliability of witnesses.[65] Domestic jurisdictions with very different legal frameworks have acknowledged such advantages.[66]

16. The Appeals Chamber is not similarly placed. Given the "breadth and complexity of trials in relation to alleged international crimes" an Appeals Chamber would face challenges in undertaking a *de novo* review of factual findings requiring familiarity with large amounts of material within a short period of time.[67] Appeals Chambers may not ordinarily be required to consider the entire trial record, but rather those portions cited in the Judgment, by the parties or newly admitted on appeal.[68] Consequently, there may be potential risk when Trial

[63] *See also* *Prlić et al.* AJ, paras. 200-201; *Ntawukulilyayo* AJ, para. 73.
[64] A trial judge is able to reflect on the evidence, individually and holistically, while it is still fresh in mind. *See* *Bemba* AJ Minority Opinion, paras. 6-7; *Haradinaj* Judge Patrick Robinson Partially Diss. Op., para. 5.
[65] *Lubanga* AJ, paras. 22 ("the Trial Chamber is required to carry out a holistic evaluation and weighing of *all the evidence taken together* in relation to the fact at issue"), 239 ("the reliability of the facts testified to by the witness may be confirmed or put in doubt by other evidence or the surrounding circumstances"). *See also* *Musema* AJ, para. 36 ("[o]ne of the duties of a [t]rial [c]hamber is to assess the credibility of particular witnesses" and "[i]n discharging that duty, the [t]rial [c]hamber takes into account all the circumstances of the case [...]"); s*ee also* para. 204. *See also* *Nchamihigo* Judge Pocar Partially Diss. Op., para. 8.
[66] *See e.g.* High Court of Australia: *Fox v. Percy*, p. 8, para. 23 (although a civil case, generally noting the "natural limitations" of an appellate court, if compared to a trier of fact, such as "in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole"), cited in *Bemba* Judge Eboe-Osuji Sep. Op., paras. 50, 59-61, 64-66. *See also* High Court of Australia: *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (Kirby J), paras. 89-90 ("[t]he trial judge hears and sees all of the evidence. The evidence is generally presented in a reasonably logical context. It unfolds, usually with a measure of chronological order, as it is given in testimony or tendered in documentary or electronic form. During the trial and adjournments, the judge has the opportunity to reflect on the evidence and to weigh particular elements against the rest of the evidence whilst the latter is still fresh in mind. A busy appellate court may not have the time or opportunity to read the entire transcript and all of the exhibits. […] these are the real reasons for caution on the part of an appellate court where it inclines to conclusions on factual matters different from those reached by the trial judge. These considerations acquire added force where, as in the present case, the trial was a very long one, the exhibits are most numerous, the issues are multiple and the oral and written submissions were detailed and protracted. In such cases, the reasons given by the trial judge, however conscientious he or she may be, may omit attention to peripheral issues. They are designed to explain conclusions to which the judge has been driven by the overall impressions and considerations, some of which may, quite properly, not be expressly specified"), also cited in *Bemba* Judge Eboe-Osuji Sep. Op., paras. 69-71.
[67] *Case 002/01* AJ, para. 94. *See also* *Kvočka et al.* Judge Shahabuddeen Sep. Op., paras. 73-74.
[68] *See* *Karadžić* AJ, para. 16; *Strugar* AJ, para. 15; *Brđanin* AJ, para. 15. *See also* *Lubanga* AJ, para. 26.

Chambers are not afforded an appropriate degree of deference in appropriate circumstances.[69]

17. The deferential approach does not imply a blanket or automatic acceptance of the Trial Chamber's findings, or the Appeals Chamber's abdication of its duty to scrutinise and question such findings. To the contrary, the Appeals Chamber must consider the findings and the underpinning evidence, together with the Chamber's reasoning, to adequately exercise its corrective function and determine the reasonableness of the verdict.[70] Thus, a "deferential approach" should not be confused with the act of deferring to a Trial Chamber in specific respects; the former reflects an analytical process or methodology and the latter a specific course of action or consequence. The former does not always entail the latter: the "margin of deference" that Trial Chambers are accorded may still be overcome.[71] Whether a finding is considered "unreasonable" will depend on the characteristics of each case.[72]

18. In sum, a Trial Chamber's evidentiary assessments are *a priori* accorded a "margin of deference",[73] and should not lightly be overturned.[74] The Appeals Chamber can do so only "when 'an unreasonable assessment of the facts of the case' carried out by the Trial Chamber 'may have occasioned a miscarriage of justice', which constitutes a factual error".[75]

I.B. Appeal proceedings are not concerned with all errors

19. Not all errors made by a Trial Chamber are sufficient to overturn a conviction or sentence. "[A]ppellate proceedings are not concerned with correcting *all* errors that may have occurred at trial, but rather only those errors that have been shown to have materially affected

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[69] *See* *Popović et al.* Judge Niang Sep. and Diss. Op., para. 11 (noting the potential to expose the judgement "to a number of vulnerabilities" including factual errors when the Appeals Chamber exceeds its authority in reassessing evidence "beyond the strict necessary exercise of an appellate review"); *Bemba* AJ Minority Opinion, para. 7 (review of all the evidence *de novo* "would pose the risk of inaccuracy, given the Appeals Chamber's [] limitations with respect to review of evidence" and might "lead to inordinate delays in the examination of appeals, contrary to the person's right to be tried without undue delay").

[70] *See e.g.* *Bemba* AJ Minority Opinion, para. 15; *Bemba* Judge Eboe-Osuji Sep. Op., para. 73 (citing the Appeals Chamber' task of "thorough re-examination of the evidence").

[71] *See e.g.* *Šešelj* AJ, paras 71, 130, 150, 154, 163 (reversing Šešelj's acquittals, in part, and entering convictions under Counts 1, 10 and 11 of the indictment); *Nyiramasuhuko et al.* AJ, paras. 831, 846, 893, 1320, 1323, 1393, 1561, 1567, 1657, 1678, 1885, 1913, 2088 (Vol I) and paras. 2227, 2248, 2351, 2570, 2600, 2927, 3014, 3030 (Vol II); *Fofana et al.* AJ, paras. 66-76, 129; *Case 002/01* AJ, paras. 454, 537, 540, 631, 704.

[72] *Lubanga* AJ, para. 25.

[73] *Lubanga* AJ, para. 25 (quoting *Gotovina et al.* AJ, para. 50, quoting *Kayishema and Ruzindana* AJ, para. 119: "[t]he Appeals Chamber must *a priori* lend some credibility to the Trial Chamber's assessment of the evidence proffered at trial, irrespective of the approach adopted.").

[74] Ambos (2016), p. 555 ("[t]he threshold for a review of factual errors, by their very nature, must be high"; "[the Appeals Chamber] cannot lightly interfere with the factual findings of a Trial Chamber"); *see also* *Bemba* Judge Eboe-Osuji Sep. Op, paras. 9 ("while taking care to not lightly disturb the factual findings of the trial court"), 79 ("the proper place for the idea of appellate deference (so called) rises no higher than the proposition that the Appeals Chamber should not lightly overturn the factual findings of the Trial Chamber").

[75] *Lubanga* AJ, para. 25.

the relevant decision".[76] Other international tribunals reason similarly and have reviewed only errors of law which have the potential to invalidate the decision and errors of fact which have occasioned a miscarriage of justice,[77] that is, where the error(s) have an "impact" on the verdict[78] and are "critical" to it.[79]

20. Within the framework of article 83(2),[80] the Appeals Chamber has taken a similar approach. Thus, for legal and procedural errors, the Appeals Chamber has required that "in the absence of the error 'the judgment would have substantially differed from the one rendered'",[81] and that factual errors caused a miscarriage of justice[82] because they were critical to the verdict.[83] This is a case-specific determination which, at times, may entail some prognostic assessment of different degree.[84] Yet, in general, "[a]s long as the factual findings supporting [the verdict] are sound, errors related to other factual conclusions do not have any impact on the [t]rial [j]udgement".[85]

I.C. The appellant must sufficiently substantiate his or her appeal

21. An appellant must substantiate *both* that the Trial Chamber erred and that the error had a material impact on the decision. This requirement flows from the Court's legal texts,[86] and

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[76] *Lubanga* AJ, para. 56. *See also* *Bemba* AJ, paras. 60-62. *See also* Roth and Henzelin, p. 1555.
[77] *Karadžić* AJ, para. 14; *Šešelj* AJ, para. 12. "Miscarriage of justice" has been defined as a "grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime": *Furundžija* AJ, para. 37 (quoting Black Law's Dictionary); *Strugar* AJ, para. 18; *Brdanin* AJ, para. 19; *Case 002/01* AJ, para. 99; *Sesay et al.* AJ, para. 32.
[78] *Strugar* AJ, para. 19; *Brđanin* AJ, para. 21.
[79] *Kupreškić et al.* AJ, para 29; *Rutaganda* AJ, para. 23; *Case 002/01* AJ, para. 99; *Taylor* AJ, para. 27; *Sesay et al.* AJ, para. 32. Some Chambers have framed the requirement as the trial chamber having had to rely on the impugned factual finding: *see* *Brđanin* AJ, para. 28.
[80] *See also* Staker and Eckelmans, 'Art. 81', p. 1937, mn. 49; Schabas, pp. 1213-1214.
[81] *Lubanga* AJ, paras. 18-20; *Ngudjolo* AJ, paras. 20- 21; *Bemba et al.* AJ, paras. 90, 99.
[82] *Lubanga* AJ, paras. 25 (referring to ICTY jurisprudence) and 27 (applying the same standard to the ICC given the similarity between the legal frameworks); *see also* *Ngudjolo* AJ, para. 24; *Bemba* AJ, para. 40 (although conflating the standard of reasonableness with the required impact, *i.e.* a miscarriage of justice).
[83] In *Ngudjolo*, the Appeals Chamber held that the acquittal "[must rely] on the absence of this finding [of fact beyond reasonable doubt]": *Ngudjolo* AJ, para. 26. In *Bemba*, the Appeals Chamber held that Bemba would not have not been convicted if the Trial Chamber properly assessed the evidence: *Bemba* AJ, paras. 193-194.
[84] *See e.g.* DRC Arrest Warrant AD, para. 84 (assuming *arguendo* that had the PTC not granted the arrest warrant for reasons other than inadmissibility, the article 58 decision would have been substantially different). In practice, there may not be much difference between the test endorsed by the Appeals Chamber and that in *Bemba* Judge Eboe-Osuji Sep. Op., para. 81 ("An error will qualify as *material* if it reasonably compels the view of *likelihood* that the Trial Chamber might have rendered a substantially different judgment […]; or if the appellate court *could not be sure* that the trial court would have rendered the same judgment had the error not occurred"). Likewise, in limited cases for certain specific procedural errors where a Chamber has failed to adopt a certain course of action, the appellant must demonstrate "the erroneous nature of the inaction" affecting the reliability of the proceedings/decision, but need not show more: *Ngudjolo* Dissenting AJ, para. 30.
[85] *Brđanin* AJ, para. 21.
[86] Statute, art. 83(2); RoC, reg. 57(e) (requiring that a notice of appeal include the grounds of appeal, and "specify [] the alleged errors and how they affect the appealed decision"), 58(2) (requiring that an appeal brief "set out the legal and/or factual reasons in support of each ground of appeal"). *See* Ambos (2016), pp. 551-552

has been consistently recalled and applied by the Appeals Chamber[87] and other international criminal tribunals.[88] Because of the nature and purpose of appellate proceedings and the applicable standard,[89] Appeal Chambers have dismissed appellate submissions which merely repeat the same trial arguments;[90] which simply express disagreement with the Trial Chamber's assessment of the evidence,[91] or which are based on arguments that "do not have the *potential* to cause the impugned decision to be reversed or revised".[92] Such arguments cannot constitute a "realistic complaint" warranting the Appeals Chamber's intervention.[93] This does not amount to a reversal of the burden of proof, which falls upon the Prosecution at trial; nor does it mean that the appellant must perform the Appeals Chamber's function.[94] It is simply a corollary of a party's "evidential burden" to substantiate the allegations it makes on appeal.[95] Whether an appellant sufficiently substantiates their appeal is a case-specific determination and cannot be determined in the abstract.

22. In conclusion, considering the need for consistency, clarity and predictability on such a fundamental question,[96] the Prosecution respectfully requests that the Appeals Chamber

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("[t]he parties have to submit the grounds of appeal [], present arguments in support of these grounds, and explain how the alleged errors affect the appealed decision"). *See similarly* ICTY/ICTR Rules, rule 108; ICTY Practice Direction, paras. 1(c)(ii) and 4(b); ICTR Practice Direction, paras. 1(c)(ii) and 4(b); MICT RPE, rules 133, 138; MICT Practice Direction, paras. 2(c)(ii), 5(b); SCSL Practice Direction, paras. 1, 4, 5, (6)(d); Residual SCSL RPE, rule 108(a); Residual SCSL Practice Direction, paras. 1(c), 4, 5, 6(d); ECCC Internal Rules, rules 105(2), (3); STL Practice Direction, arts. 3(1), 4(1)(b).

[87] *Bemba et al.* AJ, paras. 856, 1456*; Ngudjolo* AJ, para. 284; *Lubanga* AJ, para. 30. *See also Kony* Admissibility AD, para. 48; *Bemba* First Abuse Process AD, paras. 103-104; *Bemba* Review Detention AD, para. 69; *Mbarushimana* Interim Release AD, para. 18.

[88] *Karadžić* AJ, para. 18; *Krnojelac* AJ, para. 11.

[89] *Rutaganda* AJ, paras. 15 ("This system of appeal necessarily affects the nature of arguments that a party may lawfully put forward on appeal and the general burden of proof that such party must discharge"), 18; *Case 002/01* AJ, para. 304 ("assertions of error without further substantiation do not meet the standard").

[90] *Bemba et al.* AJ, paras. 856, 1568, 1584; *see also Karadžić* AJ, para. 19 (citing *Šešelj* AJ, para. 17: "A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting […] intervention").

[91] *Bemba et al.* AJ, paras. 878 (Bemba's piecemeal challenge to the evidence warranted summary dismissal, but deciding to consider it nonetheless), 1034 (citing *Lubanga* AJ, para. 33: "repetitions of submissions made before the Trial Chamber as to how the evidence should be assessed are insufficient if such submissions merely put forward a different interpretation of the evidence"); *see also Prlić et al.* AJ, paras. 25, 175, 209; *Ngirabatware* AJ, para. 11; *Stanišić & Župljanin* AJ, para. 25; *Nyiramasuhuko et al.* AJ, para. 34.

[92] *Karadžić* AJ, para. 19 (emphasis added); *Šešelj* AJ, para. 17; *Ngirabatware* AJ, para. 11; *Stanišić & Župljanin* AJ, para. 24; *Nyiramasuhuko et al.* AJ, para. 34; *Rutaganda* AJ, para. 18; *see also Bemba et al.* AJ, para. 857 (dismissing undeveloped assertions).

[93] *See also Bemba* Judge Eboe-Osuji Sep. Op., paras. 87-88 (requiring "a realistic complaint").

[94] *Contra Bemba* AJ, para. 66.

[95] *Cf. Al-Senussi* Admissibility AD, para. 167. *See also Bemba* AJ Minority Opinion, para. 17 (referring to the principle of "*ei incumbit probation qui dicit non qui negat*").

[96] Djukić, pp. 206-207 ("appellate review must preserve the core of the right to appeal and be exercised with a reasonable degree of clarity and accessibility") and 207 (noting that inconsistencies between appellate standards have not been explained and "[t]his means that the appellate review applied in such situations has been unclear to an unreasonable degree, thus exceeding the discretion afforded by international human rights law to regulate

require Ntaganda to show both that a particular finding was one no reasonable trier of fact could have reached *and* that the purported error affected the reliability of the proceedings and/or materially affected the Chamber's decision.[97] If the Appeals Chamber is minded otherwise, the Prosecution respectfully requests a preliminary ruling setting out the applicable standard of appellate review so that the Parties can adjust their submissions accordingly.[98]

II. NTAGANDA HAD A FAIR AND EXPEDITIOUS TRIAL (GROUND 2)

23. Parties are expected to raise any issues of fairness with the Trial Chamber hearing the case, as they arise, and then the Appeals Chamber will review the correctness of the Trial Chamber's decision(s) in any final appeal. In so doing, the Appeals Chamber should be mindful of the broader context in which the Trial Chamber's decisions are taken. Consequently, appellate claims of unfairness based on a partial and partisan recounting of the relevant procedural history should not succeed. Furthermore, as the Appeals Chamber recently affirmed, an appellant "is required to set out not only how it was that proceedings were unfair, but also how this affected the reliability of the conviction decision."[99] Applying these principles, the Appeals Chamber should dismiss Ground 2. Ntaganda fails to show either that the Chamber committed any error, or that he was occasioned any prejudice or unfairness that affected the reliability of the Judgment.[100]

II.A. *Ex Parte* submissions were minimal, adequately safeguarded, and fair

24. Ntaganda fails to show that the limited use of *ex parte* submissions at trial—for the purpose of maintaining the integrity and fairness of the proceedings, and protecting victims and witnesses, in accordance with the Statute—either occasioned error or unfairness.

II.A.1. Chambers have limited discretion to receive ex parte submissions

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the appellate process"); *see also* *Lukić & Lukić* AJ Judge Morrison Diss. Op., para. 9 ("[c]onsistency requires that any extreme shift in position in the jurisprudence be fully reasoned and considered[.]").

[97] Notwithstanding the different concerns raised regarding the application of the standard in *Bemba*, it is unclear whether there is an alternative formulation to the traditional standard. Moreover, the Appeals Chamber (like the ECCC Supreme Court Chamber in its Case 002/01) expressly rejected the Defence request to depart from the deferential standard, noted that it would not assess the evidence *de novo*, cited *Lubanga* AJ, and expressly endorsed the "reasonableness" standard, albeit with some qualifications: *Bemba* AJ, paras. 38, 40-42, and fn. 44.

[98] Although pursuant to article 21(2) the Appeals Chamber is not bound by its prior decisions, it has indicated that it does not change its jurisprudence lightly and would not depart from it "absent convincing reasons". *See* *Gbagbo* Victims Participation Decision, para. 14. This approach has been adopted in all international tribunals due to, among other reasons, the need for predictability and legal certainty. *See* *Aleksovski* AJ, paras. 107-109; *Karadžić* AJ, para. 13; *Šešelj* AJ, para. 11; *Rutaganda* AJ, para. 26; *Beirut S.A.L. and Ali Al Amin* Jurisdiction AD, para. 71. Notably, despite article 59 of the ICJ Statute, "the ICJ has looked to its prior holdings as evidence of relevant rules and principles of law" as a matter of practice. *See* deGuzman (2016), p. 945, mn. 44*; see also* *Croatia vs. Serbia*, Preliminary Objections Judgment, para. 53.

[99] *Bemba* AJ, para. 62; *Bemba* AJ Minority Opinion, para. 386.

[100] *Contra* Appeal-Part II, para. 5.

25. A chamber has "the discretion […] to determine, within the framework of the applicable law, whether applications by participants are kept *ex parte* or made *inter partes* and whether or not to hold proceedings on an *ex parte* basis".[101] Indeed, a chamber may receive a submission on an *ex parte* basis, provided this is justified "on its own specific facts and consistent[] with internationally recognized human rights standards, as required by article 21(3) of the Statute."[102] Ntaganda is thus incorrect to suggest that *ex parte* submissions are contemplated *only* in article 72(7)(a) of the Statute, and rules 56, 74, 81, 83, and 88.[103] Consequently, his reference to the *Bemba et al.* Appeals Chamber's restriction on resort to inherent powers is inapposite and does not require the recognised discretion to receive *ex parte* submissions to be revisited.[104] Nor can the practice of some national jurisdictions overturn a discretion recognised under the Statute.[105]

26. Furthermore, Ntaganda does not appear to disagree that *ex parte* submissions are only to be received sparingly, and with suitable safeguards. For example, he recalls approvingly that, in England and Wales, "[*e*]*x parte* hearings, outside of those circumstances expressly contemplated by the Statute, are tightly restricted, and require, *inter alia*, that: there be no practicable *inter partes* alternative; they be necessary in the interests of justice; and they be confined to matters necessary to achieve the relevant purpose."[106] This too was the view expressed by Judges Monageng and Hofmański in *Bemba*,[107] and nothing in the Chamber's approach is inconsistent with these principles, which it also endorsed.[108] To the contrary, as the following paragraphs explain, the Chamber repeatedly clarified that it received *ex parte* submissions only when necessary to meet its obligations under the Statute, and on matters that did not bear upon its adjudication of Ntaganda's guilt or innocence.

II.A.2. The Chamber properly maintained the ex parte *status of certain submissions*

27. Ntaganda expresses concern that his interests may be, or may have been, adversely affected by 40 *ex parte* submissions to which he does not have access.[109] This is unfounded,

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[101] *Lubanga* Rule 81 AD, para. 66. *See also Bemba* AJ Minority Opinion, paras. 426 ("applicable law expressly provides for *ex parte* proceedings"), 429 ("*ex parte* proceedings are not subject to a general prohibition"). The majority did not express a contrary view. *See further e.g.* rule 134(1), regulation 23*bis*, regulation 24*bis*(2). The generality of rule 134(1) is further supported by the express saving in rule 87(2)(a).
[102] *Lubanga* Rule 81 AD, para. 66.
[103] *Contra* Appeal-Part II, para. 6. Ntaganda's reference to rule 56 may have been intended to mean rule 57.
[104] *Contra* Appeal-Part II, para. 7 (citing *Bemba et al.* SAJ, para. 79).
[105] *Contra* Appeal-Part II, paras. 8-9.
[106] Appeal-Part II, para. 9 (cases cited in fn. 21).
[107] *Bemba* AJ Minority Opinion, para. 429.
[108] *See e.g.* Second Stay of Proceedings Decision, para. 49.
[109] *See* Appeal-Part II, para. 12 (referring to Annex C of his brief).

and incorrect. Of these submissions, the Prosecution does not itself have access to 12, and therefore cannot further assist the Appeals Chamber.[110] However, its own lack of access strongly suggests that these submissions are not material to the disputed matters at trial. Of the remaining 28 *ex parte* submissions, none originated from the Prosecution. Rather, as shown in confidential Annex C, they pertain to ancillary matters arising from the Court's proceedings in this case, but not to the assessment of Ntaganda's guilt or innocence.[111]

28. Ntaganda glosses over the Chamber's cautious, prudent, and transparent approach to his concerns about *ex parte* submissions.[112] In its most recent composition,[113] for example, it specifically addressed the submissions which continue to be *ex parte*, and explained that they cause no prejudice to Ntaganda.[114] In an annex, the Chamber further detailed each of the submissions in question.[115] Ntaganda has not challenged this explanation, or sought further relief from the Chamber. This was not the first time he received such assistance—two years before, the Chamber assured him in very similar terms that it had "reviewed all its decisions that were not, or only in redacted form, notified to the Defence".[116] To the extent that it declined to grant Ntaganda access at that time, it explained that such measures were "necessary to protect the safety and security of the witnesses or other persons",[117] or that the relevant material "concern[ed] private matters of other detainees".[118] Even before trial, the Chamber had "noted the Defence submissions" regarding *ex parte* filings in the record, but recalled that "it is constantly mindful of the classification of documents as between the parties" and that "it has been transparent in relation to submissions relied upon."[119]

II.A.3. Ntaganda suffered no prejudice by ex parte *submissions to which he since received access*

29. Ntaganda incorrectly suggests that prejudice may simply be presumed, based on the practice of one national jurisdiction.[120] It is not so under the Statute.[121] Rather, the Appeals Chamber must look concretely at the nature and content of the submissions in question,

[110] According to the numbering adopted by Ntaganda in Appeal-Part II, Annex C, these are entries #124, #142, #175, #176, #177, #178, #181, #191, #196, #200, #209, and #210.
[111] *See* Confidential Annex C.
[112] *See* Appeal-Part II, fn. 26.
[113] *See* Recomposition Decision. Judge Herrera Carbuccia was appointed to Trial Chamber VI.
[114] Second *Ex Parte* Material Decision, para. 10.
[115] *See* Second *Ex Parte* Material Decision, Annex.
[116] First *Ex Parte* Material Decision, para. 7.
[117] First *Ex Parte* Material Decision, para. 7.
[118] First *Ex Parte* Material Decision, para. 8.
[119] T-19, 5:5-9.
[120] *Contra* Appeal-Part II, para. 11 (citing authorities of the United States of America).
[121] *Bemba* AJ Minority Opinion, para. 441.

taking account of all relevant context, and determine whether prejudice could actually have arisen. Ntaganda only makes concrete arguments in two respects; otherwise, his generalised remarks are insufficient for those submissions to which he has since received access.[122]

II.A.3.a. Submissions concerning P-0768 are unfounded

30. Ntaganda refers to three submissions which he says contain relevant [REDACTED], of which he was unaware because they were improperly kept *ex parte*.[123] He shows no prejudice, because he knew of the relevant allegations before trial, and merely disagrees with the extent of the redactions that were maintained.[124] The principal allegations in the first of the submissions Ntaganda identifies were contained in the main filing, although the annexed statements were *ex parte*.[125] Ntaganda successfully obtained an order from the Chamber for access to a redacted version of these statements, which were filed on 19 December 2014.[126] The second was separately disclosed to him through eCourt before the trial,[127] even though the filing itself remained *ex parte* until the end of trial.[128] The third was simultaneously filed in a lightly redacted version to which Ntaganda immediately had access.[129] At no point was "consciousness of guilt" or "bad character" evidence considered in determining the charges.[130]

II.A.3.b. Submissions concerning P-0055 are speculative and unfounded

31. Ntaganda refers to an *ex parte* hearing conducted in the presence of P-0055 and his duty counsel, and VWU representatives, memorialised in an *inter partes* summary.[131] Speculating that P-0055 must have "made further prejudicial allegations against Mr Ntaganda", he asserts that all the findings in the Judgment relying on P-0055 are thus unsafe.[132] This conclusion rests on his assumption that the Chamber erred in convening the hearing, in failing to file an unredacted transcript, and because the occurrence of the hearing either created a bias or gave

[122] *Contra* Appeal-Part II, para. 14.
[123] *See* Appeal-Part II, para. 13 (fns. 30-32, referring to P-0768 Submission (#349-AnxA), P-0768 Submission (#349-AnxB), P-0768 Submission (#565), P-0768 Submission (#1313-AnxA)).
[124] *Contra* Appeal-Part II, paras. 13, 20.
[125] *See* Provisional Restrictions Request, paras. 15-26.
[126] *See* Provisional Restrictions Order, para. 48; P-0768 Submission (#349-AnxA); P-0768 Submission (#349-AnxB). A lesser redacted version of these statements was filed on 14 March 2017, and lesser redacted versions of the Provisional Restrictions Request were filed on 9 December 2014, 7 October 2015, and 14 March 2017.
[127] *See* DRC-OTP-2084-0613. A redacted version was disclosed on 21 August 2015 and a lesser redacted version was disclosed on 7 October 2015.
[128] *See* P-0768 Submission (#565). A confidential redacted version of this filing, but not the statement annexed to it, was filed in November 2019.
[129] *See* P-0768 Submission (#1313-AnxA); P-0768 Submission (#1313-AnxB).
[130] *See below* para. 59.
[131] *See* Appeal-Part II, para. 15; *Ex Parte* Hearing Notice, para. 1.
[132] Appeal-Part II, paras. 15, 19-20.

rise to an appearance of bias.[133] These arguments must fail. *First*, the Chamber's power to hear from a witness [REDACTED] is established by article 68(1) and (2), and may in principle be conducted confidentially and/or on an *ex parte* basis if necessary. *Second*, while the Parties have not been provided with a transcript of the hearing, the summary provided is extensive, and based on "verbatim extracts" of what was said by the witness [REDACTED].[134] Ntaganda merely speculates that he "has been deprived of information relevant to P-0055's credibility",[135] and made no serious effort to explore this issue in cross-examination, as he could. *Third*, Ntaganda's undeveloped allegation of bias, or an appearance of bias, is wholly insufficient to overturn the well-established presumption of judicial impartiality, especially when addressing matters of witness protection and security.

II.B. The timing of disclosure of Ntaganda's own non-privileged conversations was not an abuse of process

32. Ntaganda fails to show an abuse of process, or any unfairness, arising from the Prosecution's access to Ntaganda's non-privileged conversations from the Detention Centre, or the timing of its disclosure to Ntaganda of the records made available to it.[136] Since the Chamber has already ruled on this matter, as recalled in *Lubanga*, "the Appeals Chamber's role is not to address these allegations *de novo*", but rather to review the relevant decision(s).[137] The Chamber's decisions were correct in law, reasonable, and should be upheld. While the Chamber elected to treat Ntaganda's initial request for a stay of proceedings as a request for "immediate adjournment", rather than a formal "stay of proceedings", it did so because this was a *lower* standard than "the more stringent standard required to obtain a stay of proceedings" (that a fair trial had become impossible).[138] His second request for a permanent stay of proceedings was considered at the higher standard.[139]

II.B.1. The Prosecution was authorised to access Ntaganda's non-privileged conversations to investigate suspected article 70 offences

33. Relatively early in these proceedings, long before the trial had begun, witnesses had alerted the Prosecution to activities by persons allegedly connected to Ntaganda which

[133] Appeal-Part II, paras. 16-18.
[134] *See Ex Parte* Hearing Summary.
[135] *Contra* Appeal-Part II, para. 17.
[136] *Contra* Appeal-Part II, paras. 21-22, 41.
[137] *Lubanga* AJ, para. 155. *See also Bemba* AJ Minority Opinion, para. 386.
[138] *See* T-159, 3:14-21. Ntaganda took no issue with this approach: *see* Stay of Proceedings ALA Decision; Stay of Proceedings ALA Request.
[139] Second Stay of Proceedings Decision, paras. 19-22.

compromised their safety and security. This triggered the Prosecution's obligation under article 68(1), as well as prompting the opening of an article 70 investigation.[140] Acting on this information, the Prosecution requested—*inter partes*—restrictions to Ntaganda's non-privileged contacts on 8 August 2014, which the Chamber provisionally granted on 8 December 2014.[141] At that time, it also formally notified Ntaganda that the Registry may listen to his non-privileged conversations, and ordered the Registry to conduct a *post factum* review of a sample.[142] It subsequently confirmed the restrictions to be imposed on 18 August 2015.[143] It further indicated to the Prosecution, correctly, that [REDACTED].[144]

34. On 26 September 2015 [REDACTED].[145] This was based on [REDACTED]."[146] While Ntaganda now claims this was erroneous, the merits of this decision are not strictly within the scope of these appeal proceedings—what matters is how the Chamber in this trial ensured the fairness of *its own* proceedings, as it did.[147]

35. In this context, the Prosecution notes that, owing to the nature of the records available, it did not receive intelligible *summaries* even of the limited number of conversations initially identified as a priority for investigation until February 2016.[148] Nor did the Prosecution ever review records of any conversations made by Ntaganda since the start of trial,[149] on 2 September 2015. In total, as the Chamber recalled, the Prosecution accessed "a much more limited volume of recordings than the total number disclosed, of approximately 450".[150]

II.B.2. Records of Ntaganda's non-privileged conversations were not initially disclosable

36. The Prosecution was always frank in its view that it was relieved from a duty to disclose materials obtained for the purpose of the article 70 investigation, pursuant to rule 81.[151] For this reason, when it filed relevant summaries of Ntaganda's communications as part of the process for periodic review of the restrictions imposed upon him by the Chamber, it did so on

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[140] *See e.g.* Prosecution Response to First Stay of Proceedings Request, para. 8.
[141] *See* Prosecution Response to First Stay of Proceedings Request, paras. 10-11. Ntaganda was notified of a redacted version of the Prosecution request.
[142] *See* Prosecution Response to First Stay of Proceedings Request, para. 11.
[143] *See* Restrictions Decision. *See also* Appeal-Part II, para. 23.
[144] *See* Investigator Suspension Order (Final), para. 38. Ntaganda's criticism is groundless: *contra* Appeal-Part II, para. 23. *See* Prosecution Response to First Stay of Proceedings Request, paras. 24-25 (recalling that the Prosecution had seised Pre-Trial Chamber II, but the Presidency reassigned the situation to Pre-Trial Chamber I).
[145] Single Judge Order, para. 7.
[146] Single Judge Order, para. 6.
[147] *Contra* Appeal-Part II, para. 27.
[148] *See* Prosecution Response to First Stay of Proceedings Request, para. 39. *Cf.* Appeal-Part II, para. 29.
[149] *See* Prosecution Response to First Stay of Proceedings Request, para. 40.
[150] T-159, 7:7-10. *See also* Article 70 Access Request, para. 18. *Cf.* Appeal-Part II, para. 21.
[151] *Contra* Appeal-Part II, paras. 25, 27.

an *ex parte* basis.[152] It opposed Ntaganda's request for disclosure, and the Chamber agreed.[153] This was approximately six months after the Prosecution had first received an intelligible summary of some of Ntaganda's non-privileged conversations, pursuant to the Single Judge's Order.[154] The broad scope of the Chamber's endorsement of rule 81 was further illustrated by its observation that article 70 investigations cannot "continue indefinitely in a manner which could impact proceedings" in the trial, and its encouragement to the Prosecution "to conclude relevant portions of its investigation as promptly as possible and to disclose *all resulting information* which may be material to the preparation of the Defence *as soon as possible*."[155] Three months later, the Chamber reiterated this view.[156] Mindful of the Chamber's encouragement, two months later, in early November 2016, the Prosecution triggered measures to ensure the necessary disclosure to Ntaganda.[157]

37. Ntaganda disagrees with the Chamber's ruling that the material gained as a result of the article 70 investigation fell within rule 81, but fails to show any error in it.[158] In essence, he merely expresses his view that disclosure of certain materials "would not have prejudiced" the article 70 investigation—yet this is too high a standard. Under rule 81(2), it suffices that, in the opinion of the chamber dealing with the matter, disclosure "may" prejudice further or ongoing investigations. Rule 81(2) also contains a safeguard, insofar as such material may not be introduced into trial without adequate prior disclosure. Necessarily, any indication by the Prosecution that it might choose to rely in court on information gained from the article 70 investigation thus suggests its good faith view of the temporary application of rule 81(2).[159]

II.B.3. The Chamber properly rejected Ntaganda's request to stay proceedings

38. Ntaganda did not sustain "irremediable prejudice".[160] This was specifically rejected by

[152] *See e.g.* Prosecution Response to First Stay of Proceedings Request, para. 27.
[153] Restriction Litigation Disclosure Decision, paras. 19, 22 ("Rule 81 would justify non-disclosure at this stage"). *See also* para. 20 (the material raised "allegations […] of a very similar nature to the incidents for which the Defence has already been provided with specific details"); T-159, 4:19-5:3 (by virtue of the restrictions litigation, Ntaganda had been on notice of suspected witness interference based on the content of his non-privileged telephone calls "since prior to the commencement of the trial"). The Prosecution and the Defence also discussed such matters *inter partes* as early as March 2015: Prosecution Response to First Stay of Proceedings Request, para. 13. *Cf.* Appeal-Part II, para. 31.
[154] *See above* para. 34.
[155] Restriction Litigation Disclosure Decision, para. 22 (emphasis added). *Cf.* Appeal-Part II, para. 32.
[156] Restriction Review Decision, para. 24. *See also* Second Stay of Proceedings Decision, para. 50. *Cf.* Appeal-Part II, para. 33.
[157] *See e.g.* Prosecution Response to First Stay of Proceedings Request, paras. 30-31; Article 70 Access Request. Ntaganda complains of a further technical problem but this was resolved as soon as he notified the Registry: *compare* Appeal-Part II, para. 34, *with* Prosecution Response to First Stay of Proceedings Request, para. 37.
[158] *Contra* Appeal-Part II, paras. 28, 31-33.
[159] *See e.g.* Appeal-Part II, para. 26.
[160] *Contra* Appeal-Part II, para. 35.

the Chamber, both in addressing his initial request for an adjournment and later in addressing his request for a permanent stay of proceedings.[161]

39. While the Prosecution was duly authorised to access Ntaganda's *non-privileged* conversations, this did not mean that it had "*unfettered access*" to information concerning "the whereabouts of Mr Ntaganda at relevant times, Defence investigations, the identity of potential Defence witnesses and Defence strategy."[162] To the contrary, the Chamber specifically recalled that the Prosecution only accessed "non-privileged telephone conversations made by the accused".[163] It found that this material did contain a "limited"[164] amount of "information on the whereabouts of the accused and other individuals at the relevant times, [and] names of individuals who could have provided information for the Defence and potential witnesses".[165] But while it considered that this information "*may* therefore be *relevant* to Defence strategy",[166] this is quite different from Ntaganda's implication that the Prosecution accessed information pertaining to the actual Defence strategy, which would have been privileged.[167] Nor was any intention to access Defence strategy implied by the Prosecution's acknowledgement that it might seek to use evidence of witness interference to impeach the credibility of relevant witnesses at trial.[168]

40. Ntaganda claims error in the Chamber's initial decision, denying an adjournment due to disclosure of the material pertaining to the article 70 investigation.[169] Beyond expressing his disagreement, he does not show how the Chamber's approach—which was, essentially, to conclude that an *immediate* adjournment would not advance matters, without prejudice to "possible other remedial measures" once Ntaganda identified any concrete prejudice[170]—was unreasonable or unfair. Nor does he show any error in the Chamber's decision denying certification to appeal,[171] due *inter alia* to his failures to identify an appealable issue and to note that the Chamber had not yet ruled on "other future possible remedies."[172]

41. Some months later, Ntaganda requested a permanent stay of proceedings. Out of an

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[161] *See* T-159, 5:19-6:11, 7:18-21; Second Stay of Proceedings Decision, paras. 42-43.
[162] *Contra* Appeal-Part II, para. 21. *See also* paras. 35-36. Ntaganda's implication of prosecutorial bad faith (article 70 investigative measures as a "pretext"), is groundless and should be summarily dismissed.
[163] Second Stay of Proceedings Decision, para. 39.
[164] Second Stay of Proceedings Decision, para. 43.
[165] Second Stay of Proceedings Decision, para. 42. *Cf.* Appeal-Part II, para. 37.
[166] Second Stay of Proceedings Decision, para. 42 (emphasis added).
[167] *Contra* Appeal-Part II, para. 24.
[168] *Cf.* Appeal-Part II, para. 26. *See also* para. 30.
[169] Appeal-Part II, para. 36.
[170] *See* T-159, 2:13-7:24, *especially* 5:11-7:21.
[171] *Contra* Appeal-Part II, para. 36.
[172] Stay of Proceedings ALA Decision, paras. 15-17. *See also* para. 18.

abundance of caution, the Chamber determined that the Prosecution's access to this material was in principle "prejudicial" to Ntaganda, even though it did not justify a stay of proceedings given Ntaganda's failure to identify any "concrete instances" of actual prejudice.[173] On this basis, the Chamber reasonably considered that "any prejudice may be remedied, retroactively and prospectively, through alternative, less drastic measures", including broad restrictions on the use to which the Prosecution could put material obtained through its article 70 investigation, and potentially "allowing the Defence to recall Prosecution witnesses, and/or disregarding certain evidence."[174] Ntaganda is incorrect to assert—without explanation—that the Chamber erred in requiring a showing of prejudice to justify as significant a remedy as a permanent stay of proceedings.[175] Nor indeed does he show any concrete prejudice on this occasion, or indeed explain why the Chamber was unreasonable to consider that alternative measures would suffice.[176] Again, he simply disagrees with the decision denying certification to appeal.[177]

II.B.4. Material from Ntaganda's non-privileged conversations was used restrictively

42. The Chamber was clear that the non-privileged conversations obtained via the article 70 investigation "are not evidence in the present case".[178] When ruling on Ntaganda's request for a stay of proceedings, it further decided that the Prosecution could not use such material "unless specifically authorised by the Chamber as necessary for the determination of the truth", on the basis of a "substantiated request" in advance.[179] As a consequence, very little use was actually made of this material. While the Prosecution did make such an application for its cross-examination of Ntaganda, the Chamber substantially limited its practical ability to use such material,[180] including by requiring "a direct link between the conversation at stake and the charges in the present case",[181] and halting cross-examination on such points.[182] Given the normal state of affairs in cross-examination, when a witness has *no* prior warning at all of what may be put to them, Ntaganda shows no unfairness in the Chamber's ruling.[183]

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[173] Second Stay of Proceedings Decision, paras. 42-43. T-159, 5:19-6:11, 7:18-21. *Cf.* Appeal-Part II, para. 31.
[174] Second Stay of Proceedings Decision, paras. 43, 61-62.
[175] *Contra* Appeal-Part II, para. 38. *See also above* para. 29.
[176] *Contra* Appeal-Part II, para. 39.
[177] *Contra* Appeal-Part II, para. 39. *See* Second Stay of Proceedings ALA Decision.
[178] Second Stay of Proceedings Decision, para. 41. *See also* paras. 9-10, 56.
[179] Second Stay of Proceedings Decision, para. 61.
[180] *See* T-209, 22:4-23:19.
[181] T-209, 23:3-4.
[182] T-243, 14:1-17.
[183] *Contra* Appeal-Part II, para. 40.

II.C. The procedure for the 'no case to answer' appeal was correct and fair

43. As the Appeals Chamber previously confirmed, the Chamber did not err "in the exercise of its discretion by declining to entertain [Ntaganda's] request for a 'no case to answer' procedure", but rather "appropriately balanced both expediency and fairness in the circumstances of [the] trial."[184] Nor did the Chamber abuse its discretion, or otherwise cause any unfairness, in declining to stay its own proceedings pending the resolution of the interlocutory appeal.[185] Ntaganda's further suggestion that the case against him "may not have been established" is speculative—and indeed frankly implausible[186]—as is the suggestion that he was inadequately informed of the charges or could not make an informed choice to testify.[187] The fact that the Judgment subsequently relied on Ntaganda's testimony does not mean, *ipso facto*, that he was prejudiced because he commenced his testimony before the Appeals Chamber ruled on his interlocutory appeal.[188]

II.C.1. The Chamber reasonably declined to order a temporary stay

44. It is well established that, if an interlocutory appeal is initiated, it will ordinarily be for the Appeals Chamber to decide—in its discretion—whether to grant suspensive effect of the impugned decision, pending the appeal judgment.[189] However, on a limited basis, a chamber may be able to stay its own decision at least to afford the Appeals Chamber the opportunity to decide whether to grant temporary relief of this kind.[190]

45. Ntaganda acknowledges that the Appeals Chamber denied his request for suspensive effect,[191] and seems to accept the correctness of its ruling that the relief he sought—"suspension of the trial"—could "not be attained through a suspension of the [Chamber's decision]", which "did not order that the trial continue" but merely "denied a procedural request, namely, a request for leave to file a 'no case to answer' motion."[192] Instead, he criticises the Chamber for not staying the proceedings pending resolution of his interlocutory

[184] No Case to Answer Appeal Decision, paras. 55-56. The Appeals Chamber should treat its interlocutory appeal judgment as *res judicata* for the purpose of this case—to do otherwise would deprive interlocutory appeals under article 82(1)(d) of their function. *Contra* Appeal-Part II, paras. 44-45.
[185] *Contra* Appeal-Part II, para. 43.
[186] *Contra* Appeal-Part II, para. 45.
[187] *Contra* Appeal-Part II, paras. 43, 45-46.
[188] *Contra* Appeal-Part II, para. 47.
[189] *Mbarushimana* Stay Decision, p. 5 (only the Appeals Chamber can order suspensive effect under art. 82(3)).
[190] *See e.g. Lubanga* Suspensive Effect Decision, paras. 2, 11 (noting the Trial Chamber had stayed its decision pending the Appeals Chamber's ruling on suspensive effect). *But see Bemba et al.* Stay Decision, paras. 4-5 (declining to stay a decision once the Appeals Chamber has been seised). *See also* T-209, 26:20-27:5.
[191] Appeal-Part II, para. 46 (fn. 103).
[192] Suspensive Effect Decision, para. 9.

appeal.[193] However, he fails to address the Chamber's reasoning, which expressly considered whether commencing Ntaganda's testimony at that stage would cause "any negative effect or undue prejudice" but concluded that it would not.[194] In particular, it noted its own ability, as a bench of professional judges, to assess Ntaganda's testimony appropriately in light of the outcome of the interlocutory appeal, as well as in relation "to any no case to answer motion" if it was subsequently made.[195] Ntaganda's undeveloped reference to article 67(1)(a) and (g) does not show any error in the Chamber's approach.[196] Indeed, the Chamber expressly took into account "the interests of justice", as well as "the fairness [and] expeditiousness of the proceedings" to which Ntaganda was entitled.[197]

46. Furthermore, Ntaganda also omits his own assurance that, "regardless of the Chamber's decision" on his request for a temporary stay, "we had come to the conclusion that we are able to begin for the first few days [of Ntaganda's testimony] until the Appeals Chamber […] rules on our motion [for suspensive effect]."[198] Nor does he acknowledge that, when the Appeals Chamber dismissed his request, it specifically reminded him that "the Trial Chamber has the power to adapt the proceedings before it in such a way as to address any concerns that Mr Ntaganda may have resulting from the appeal".[199] Ntaganda did not raise this matter with the Chamber when the trial resumed, but simply continued with his testimony.[200] He did not seek the Chamber's assistance, nor does he now identify any deficiency in the Chamber's subsequent approach.

II.C.2. There was a case to answer, of which Ntaganda was fully informed

47. There is no foundation for Ntaganda's implication that he was not aware of the case to answer, based on charges of which he was adequately informed.[201] As the Chamber specifically reminded him, the interlocutory appeal related "to whether a no case to answer motion *must be entertained*", rather than whether such a motion (which had not been considered by the Chamber at first instance) should "necessarily [have been] granted or

[193] Appeal-Part II, para. 43. *See also* para. 45.
[194] T-209, 27:10.
[195] T-209, 27:12-16.
[196] *Contra* Appeal-Part II, para. 43.
[197] T-209, 27:21-22.
[198] T-209, 28:15-22. Counsel also stated that this was "without prejudice", and should "not come into play in the Appeals Chamber's adjudication of our request for suspensive effect."
[199] Suspensive Effect Decision, para. 10.
[200] *See e.g.* T-213, 3:12 (direct examination of Ntaganda resumes).
[201] *Contra* Appeal-Part II, paras. 43, 45.

denied in substance."[202] Consequently, in circumstances where—absent the intervention of the Appeals Chamber—the Chamber had denied Ntaganda leave to make a no case to answer motion in the first place,[203] it was incumbent upon Ntaganda to proceed on the basis that the charges as framed in the Confirmation Decision (read together with the UDCC) continued to operate.[204] Ntaganda's apparent view that he was entitled to assume the Prosecution had not made its case as charged—unless disproved in a 'no case to answer' decision—controverts the interlocutory appeal judgment in this case, which is *res judicata* and must be followed.[205] Consequently, his renewed reference on this point to the national law of selected jurisdictions is immaterial.[206]

II.C.3. Ntaganda made an informed choice to testify, assisted by counsel

48. There can be no doubt that Ntaganda made an informed choice to testify, with assistance of counsel. It is untenable to claim, retrospectively, that such a choice "cannot" be made on a properly informed basis "when the charges could still change".[207] *First*, there was no proper basis for Ntaganda to anticipate such a change.[208] *Second*, Ntaganda elected to testify at least two weeks before he knew whether the Chamber would grant his request to bring a 'no case to answer' motion.[209] As such, his election to testify was made in materially similar circumstances to those after the Chamber had denied his request, and this was not altered by the pending interlocutory appeal proceedings. Furthermore, he made an informed choice to testify early in the proceedings, but he was not obliged to have made this choice. *Third*, Ntaganda was expressly offered a chance to consult with counsel after the Chamber had rendered its decision, denying his request for a temporary stay of proceedings, but declined this on the basis that counsel had addressed the relevant topics that morning "and what could happen one way or another."[210]

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[202] T-209, 27:17-19 (emphasis added).
[203] No Case to Answer Decision, paras. 25, 28. *See also* T-206, 5:1-4.
[204] *See also e.g.* T-19, 6:9-12. *See* UDCC Decision, paras. 39-40.
[205] *See above* fn. 184. The Appeals Chamber considered the approach taken in *Ruto and Sang*: *see e.g.* No Case to Answer Appeal Decision, paras. 15, 44, 47, 54.
[206] *Contra* Appeal-Part II, paras. 44 (fn. 100), 45 (fn. 101).
[207] *Contra* Appeal-Part II, para. 46.
[208] *See above* para. 47.
[209] *See* Appeal-Part II, para. 42 (recalling that the Chamber denied leave to bring a 'no case to answer' motion on 29 May 2017). *Compare* Prosecution Request for Orders concerning Ntaganda's Testimony, para. 7 (recalling that Ntaganda's intention to testify was notified on 12 May 2017).
[210] T-209, 28:6-8. *See also* 28:23-29:1.

II.D. Ntaganda had a fair hearing

49. As an accused person, Ntaganda is entitled to "a fair hearing conducted impartially", including a trial "without undue delay", "in full equality" with other guarantees including "adequate time and facilities for the preparation of the defence".[211] In this regard, the Chamber must ensure that the trial is both "fair *and* expeditious" and conducted with "full respect for the rights of the accused" and with "due regard for the protection of victims and witnesses".[212] It did so.

50. Ntaganda fails to substantiate his claim that "the Chamber erred by systematically prioritising the expeditious conduct of the proceedings at the expense of fairness", and specifically that—in his view—it did not give sufficient "precedence" to "resolving legitimate and significant obstacles to Defence preparation and presentation of its case."[213] His recollection of the procedural history is partial. His five concrete claims—concerning the start of the trial; the conduct of a Defence investigator; the measures to ensure the integrity of the trial; the schedule of witnesses; and the Chamber's decision-making under article 82(1)(d)—show no unfairness when examined in context, nor that the Chamber abused its discretion under article 64 to manage the trial proceedings.[214]

II.D.1. The Chamber properly ordered a limited postponement of the start of trial

51. Ntaganda's trial was originally scheduled to start on 2 June 2015, and the Prosecution complied with the 'conditions' that Ntaganda indicated in 2014 were necessary for his adequate preparation.[215] While he nonetheless submits that the Chamber erred in declining to postpone the start of his trial until his preferred date of 2 November 2015, he fails to identify any error in the Chamber's reasoning. Specifically, the Chamber properly recalled its duties under articles 64 and 67,[216] but considered that Ntaganda did not justify "a postponement of the length requested", especially since "a significant number of the issues raised […] were either already known to [Ntaganda] at the time [he] made submissions on the schedule for preparation for trial, or should reasonably have been anticipated […] at that stage."[217] Other difficulties reported by Ntaganda were, in the Chamber's view, "normal investigative

[211] Statute, art. 67(1)(c).
[212] Statute, art. 64(2) (emphasis added).
[213] *Contra* Appeal-Part II, para. 48.
[214] *Contra* Appeal-Part II, paras. 49-50 (trial commencement), 51-52 (Defence investigator), 53-54 (measures to ensure integrity of trial), 55-56 (witness scheduling)), 57 (article 82(1)(d)).
[215] Appeal-Part II, para. 49.
[216] T-19, 5:13-17.
[217] T-19, 5:18-22. This included "the status of Defence investigations at that time, the impact of changes in the composition of the Defence team and to some extent the potential volume of disclosure".

difficulties that might be anticipated in a case of this nature," or "matters […] which do not legitimately justify" the extent of the postponement requested.[218]

52. Indeed, on appeal, Ntaganda merely repeats some of the same complaints made in 2015, characterising the material circumstances in a partial way.[219] Thus, while he takes issue with "29 new Prosecution witnesses" added in January 2015, this complied with the Chamber's deadlines,[220] and is not unusual in a complex case progressing from confirmation to trial. His claim of a "three-fold increase in Prosecution disclosure in January 2015" neglects to recall that almost 60% of this disclosure was made up of photos and videos taken during exhumations and post mortem examinations, requiring limited review, and a further 20% of *re*-disclosed documents (for example, with redactions lifted).[221] His complaint that the Prosecution failed to meet its disclosure obligations in a timely manner is unsupported and unexplained—but, to the extent it may refer to matters of delayed disclosure or requested disclosure under rule 77, seems to have been specifically taken into account by the Chamber in granting the limited postponement that it did.[222]

53. Ntaganda also fails to show that the limited postponement of the start of trial which *was* granted (until 7 July 2015) was actually unfair or inadequate, or caused him any concrete prejudice.[223] In particular, he omits that the Chamber scheduled *opening statements* for 7 July 2015, but further directed "that the hearing of evidence will commence only *after* the [summer] recess, provisionally in the week of 17 August 2015".[224] In the Chamber's view, this would effectively "provide the Defence with approximately two and a half months of additional preparation time, which the Chamber considers to be entirely ample in the current circumstances."[225] The Chamber expressly noted that, in setting this schedule, it took into account submissions made by the Prosecution and the Legal Representatives of Victims concerning the difficulties of a "significant gap" between opening statements and the

[218] T-19, 5:25-6:3. *See also* 6:4-8.
[219] *Contra* Appeal-Part II, para. 50.
[220] *See* Prosecution Response to Postponement Request, paras. 17-20. *Compare also e.g.* T-19, 17:6-18:23 (further Defence submissions), *with* 24:20-25 (Prosecution counsel: "[a]ll of the witnesses on whom we are relying and the material that we are relying has been disclosed without identity redactions").
[221] *See* Prosecution Response to Postponement Request, paras. 9-16.
[222] *See* T-19, 6:20-24. *See also* 7:22-25. *See further* 19:2-20:2 (Defence), 24:9-25 (Prosecution).
[223] *Cf.* Appeal-Part II, para. 50.
[224] T-19, 7:16-18 (emphasis added). The Chamber subsequently modified the start of the first evidentiary block to 24 August 2015: *see e.g.* Second Postponement ALA Decision, para. 2 (fn. 6). Eventually, the trial started on 2 September 2015 and witness evidence on 15 September 2015: *see above* para. 35; *below* para. 55.
[225] T-19, 7:19-21. *Cf.* Appeal-Part II, para. 50 (characterising the postponement granted by the Chamber as being "mainly to accommodate the Registry's own logistical difficulties"). *See* T-19, 6:20-24.

commencement of the presentation of evidence.[226] It also reminded the Parties of "the potential need[] to reconsider or reset discrete deadlines relating, for example, to the order of witnesses to be called".[227] It did the same in its decision denying leave to appeal,[228] with which Ntaganda simply disagrees without showing any error.[229]

II.D.2. The Chamber adequately addressed the suspension of a Defence investigator

54. The Chamber suspended one of Ntaganda's investigators on the basis of [REDACTED].[230] Ntaganda dismisses the allegations leading to this relief as "[REDACTED]"—without elaboration—and challenges the Chamber's failure, in his view, "to address Defence concerns regarding the impact of the allegations on the integrity of [Defence] investigations to date", and its decision not "to adjourn the trial until *inter alia* either the Defence investigators were absolved or new investigators were in place."[231] In the former respect, Ntaganda is incorrect to claim that [REDACTED] associated with a party to the proceedings must be "address[ed]"—in the sense of resolved—by the Chamber before the start of trial.[232] This claim is not only unsupported by the authorities that Ntaganda cites,[233] but contradicts the practice of this Court.[234] The Chamber adequately addressed the matter, and was entirely reasonable, [REDACTED].[235] Ntaganda's undeveloped citation to five subsequent submissions does not show any error.[236]

55. Likewise, Ntaganda fails to show any error in the Chamber's approach to his request for adjournment, since it *did* grant him a further postponement to the trial date so that opening statements were scheduled for 2 September 2015, and the first witness on 15 September 2015.[237] Ntaganda dismisses this as "a limited extension of no meaningful use",[238] but fails to

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[226] T-19, 7:3-6.
[227] T-19, 7:25-8:2.
[228] First Postponement ALA Decision, para. 20 (noting, "in particular, the Chamber's trial management powers, and the range of measures available to assist the Defence should concrete difficulties arise"). *See also* para. 19.
[229] *Contra* Appeal-Part II, para. 50. *But see* First Postponement ALA Decision, paras. 16-20; *below* para. 68.
[230] Appeal-Part II, para. 51. *See further* Investigator Suspension Order (Provisional), paras. 6-8, 12; Investigator Suspension Order (Final), para. 28, Disposition.
[231] Appeal-Part II, paras. 51-52.
[232] *Contra* Appeal-Part II, para. 51.
[233] *Contra* Appeal-Part II, para. 51, fn. 119). *See e.g. Lukić & Lukić* TJ, para. 1141 (trial commenced on 9 July 2008, *before* the contempt investigations were opened). Nor did the *Lukić & Lukić* Trial Chamber itself resolve *all* allegations of contempt emerging from its proceedings: *see e.g. Tabaković* SJ, *Rašić* SJ (before a different Trial Chamber).
[234] *See e.g.* rules 165(2), 165(4). It follows from the nature of article 70 proceedings, which may be lengthy, that a trial need not be suspended in the interim. *See also* Second Stay of Proceedings Decision, para. 30.
[235] Investigator Suspension Order (Final), para. 29.
[236] *See* Appeal-Part II, para. 51 (fn. 118).
[237] T-22, 5:12-14. *See also* pp. 4:25-5:11 (noting, *inter alia*, that "[t]he Chamber is persuaded that the Defence's current situation affects its ability to prepare for the start of the trial").

recall that the Chamber also left open the possibility for further modifications to the trial schedule, if required—and as the Chamber itself expressly reminded him in its decision denying leave to appeal.[239] He made no such substantiated requests. Nor does he present any concrete information to support his claim that the "Defence was also left without the ability to investigate", beyond an extract of his own press conference on 1 September 2015.[240] This is wholly insufficient.

II.D.3. The Chamber took appropriate measures to ensure the integrity of the trial

56. Shortly before the start of trial, on 18 August 2015, the Chamber determined that Ntaganda had spoken from the Detention Centre to persons who were not registered on his list of non-privileged contacts,[241] used coded language,[242] referred to the identity of two Prosecution witnesses,[243] and discussed certain factual matters pertaining to the case.[244] These findings were based on Registry reports, analysing transcripts or summaries of Ntaganda's telephone conversations in 2014, and specifically passages which were "not, or […] only partially, contested by the Defence."[245] In this context, notwithstanding the different interpretation advanced by the Defence, the Chamber found reasonable grounds to believe that Ntaganda sought "to disclose confidential information or to interfere with witnesses, including […] by way of coaching."[246]

57. Ntaganda criticises this decision because the Chamber did not "hear[] from any of the witnesses involved", and suggests (without further explanation) that the Chamber "failed to invest the necessary time to verify the reliability of the allegations" or "properly adjudicate the issue".[247] Yet he fails to address any aspect of the Chamber's reasoning with specificity, including its reliance on factual allegations which he largely accepted, or its finding that his alternative interpretations were implausible.[248] This is insufficient to show error or unfairness. Nor indeed does he show any material prejudice resulting from the decision.

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[238] Appeal-Part II, para. 52. Notably, Ntaganda refers only to the date set for opening statements.
[239] Second Postponement ALA Decision, para. 25 (noting "the Chamber's trial management powers and the range of measures available to assist the Defence should concrete difficulties arise"). Ntaganda identifies no error: *contra* Appeal-Part II, para. 52. *See* Second Postponement ALA Decision, paras. 22-25; *below* para. 68.
[240] *See* Appeal-Part II, para. 52 (*especially* fn. 122).
[241] Restrictions Decision, paras. 46-47.
[242] Restrictions Decision, paras. 48.
[243] Restrictions Decision, paras. 51, 54.
[244] Restrictions Decision, para. 56.
[245] Restrictions Decision, para. 45. *See further* paras. 46 (unregistered contacts), 48 (coded language), 51 (identity of P-0768), 54 (identity of another Prosecution witness). *See also* para. 56.
[246] Restrictions Decision, para. 50. *See also* paras. 49, 55, 57.
[247] Appeal-Part II, para. 53.
[248] *See above* fns. 245-246.

58. In particular, the suggestion that litigation of matters concerning the integrity of the trial itself caused prejudice, as "time and resources" were taken away from trial preparation, is unconvincing.[249] Counsel must expect pre-trial litigation, and matters relating both to the privacy interests of their client but also the integrity of the proceedings—and the protection of victims and witnesses— may well be of some complexity. Ntaganda's insinuation of prosecutorial bad faith is groundless, and should be summarily dismissed.[250] Moreover, the Chamber remained available to grant any relief that was genuinely required as a consequence of this litigation. Ntaganda fails to show any instance where he requested assistance on this basis, and was denied.

59. Ntaganda's further argument that this matter was not in fact litigated *enough*—which tends to undercut his preceding argument—must also be rejected.[251] At no point in the trial, or in the Judgment, was it suggested that Ntaganda's conduct in the Detention Centre would be considered by the Chamber in determining his guilt or innocence of the charges. Nor does Ntaganda point to any reason to apprehend that it was so considered, bearing in mind that the Chamber was composed of professional judges. It follows that if Ntaganda's conduct in the Detention Centre was not to be considered in adjudicating the charges against him, then it was unnecessary for the Chamber to afford him a greater opportunity to challenge the allegations of his misconduct. The fact that the Prosecution made discrete reference to this concern in seeking protective measures for witnesses cannot be confused with an invitation to the Chamber to take such matters into account for the merits of the case.

II.D.4. The Chamber properly modified the witness schedule

60. Ntaganda recalls that associate counsel was [REDACTED] during P-0790's cross-examination, and that lead counsel was required to finish the examination. He takes no issue with this, but submits that the Chamber subsequently erred in "reject[ing] a Defence request to modify the schedule of witnesses to allow lead counsel […] to prepare" for examining witnesses P-0017, P-0290, P-0800, P-0963, and P-0055.[252]

61. Yet Ntaganda fails again to address or concretely show any unfairness in the Chamber's reasoning, which did *not* reject his request outright.[253] To the contrary, it recognised that "some further modification of the current schedule may be warranted" (balanced with the

[249] *Contra* Appeal-Part II, para. 53.
[250] *Contra* Appeal-Part II, para. 54.
[251] *Contra* Appeal-Part II, para. 54.
[252] Appeal-Part II, para. 55.
[253] *Contra* Appeal-Part II, para. 55.

"significant logistical and other considerations" which also needed to be taken into account),[254] and granted his request to postpone one of six scheduled witnesses ([REDACTED]) to the next evidentiary block.[255] This would "facilitate short breaks in hearings between the remaining witnesses in the block", and afford additional preparation time for lead counsel[256]—who could also call upon support from the "wider Defence team".[257]

62. With regard to [REDACTED], the Chamber further noted that "any additional preparation time required […] should be extremely limited, given that this witness was originally scheduled to testify during the second evidentiary block and […] his testimony was in fact only cancelled on the day on which he was expected to commence".[258] Furthermore, "it was Lead Counsel for the Defence who had prepared for the examination of [REDACTED]", not associate counsel.[259] Similarly, although the Chamber did not take this into account,[260] the Prosecution had submitted that [REDACTED],[261] and expressed the understanding that [REDACTED].[262] Even if these matters were not taken into account by the Chamber, it further demonstrates the lack of prejudice caused to Ntaganda by the Chamber's decision. In the Prosecution's understanding, the net impact of associate counsel's unavailability was simply that lead counsel was required to prepare to cross-examine one additional witness in that evidentiary block ([REDACTED]).[263]

63. Nor does Ntaganda show that the Chamber abused its discretion in dismissing his request for reconsideration of its decision.[264] To the contrary, his request was dismissed because it largely set out submissions for which he had previously sought leave to reply, and otherwise raised matters which the Chamber did not consider as new facts or arguments since its original decision was rendered.[265]

64. Ntaganda contends that he was prejudiced because he was unable to cross-examine P-0290, since in his view "it was impossible to prepare adequately", and the Chamber "refused"

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[254] Schedule Modification Decision, paras. 7-8, 11. *See also* Prosecution Response to Schedule Modification Request, paras. 13-15 (noting other relevant considerations).
[255] Schedule Modification Decision, para. 11. [REDACTED].
[256] Schedule Modification Decision, para. 11.
[257] Schedule Modification Decision, para. 7.
[258] Schedule Modification Decision, para. 10.
[259] Schedule Modification Decision, para. 10.
[260] *See* Schedule Modification Reconsideration Decision, para. 10.
[261] Prosecution Response to Schedule Modification Request, paras. 14, 17.
[262] Prosecution Response to Schedule Modification Request, para. 2. *See above* fn. 255.
[263] *See further below* para. 64.
[264] *Contra* Appeal-Part II, para. 55.
[265] Schedule Modification Reconsideration Decision, paras. 10-12.

his request to recall P-0290 "at the end of the Prosecution's case".[266] But this is a very partial account of what transpired.

65. P-0290 had been called for a relatively limited purpose, primarily to authenticate the radio logbooks tendered into evidence. In addressing the Chamber at the conclusion of P-0290's examination-in-chief, and having reviewed his evidence and other available information,[267] Defence counsel concluded that "there aren't too many issues for us to address as a direct result of the examination-in-chief."[268] Those issues which did arise, he admitted, "could be addressed in cross-examination with limited preparation time."[269] Ntaganda nonetheless sought to postpone the cross-examination because he was "not able at this time to put our case to the witness" or to "obtain evidence which will suit its case".[270] In its carefully reasoned oral decision,[271] which noted the possibility of later recalling the witness if this was justified (including as part of the Defence case), the Chamber "strongly recommend[ed] the Defence to proceed with its cross-examination of Witness P-0290 […] if it indeed wishes to conduct one" because an application to recall the witness at a later time may not be granted.[272] It expressly required counsel to confirm with Ntaganda that he understood the consequences of not cross-examining P-0290 at that time.[273] Ntaganda maintained his position.[274]

66. Later in the same month, Ntaganda requested to recall P-0290 before the end of the Prosecution case, or to allow P-0290 to be called as a Defence witness. In the Chamber's view, this request simply reiterated and elaborated the issues "already mentioned" in the preceding litigation on this issue.[275] It also observed that, while the lack of cross-examination would be relevant in determining the weight to be given to P-0290's testimony, his evidence would also be assessed in light of the evidence in the case as a whole—and, consequently, "the Defence is still in a position to challenge the […] testimony and address issues relating to the Logbooks or *phonie* communications during its presentation of evidence."[276] For these reasons, and considering the practical difficulties in allowing P-0290 to be called as a

[266] Appeal-Part II, para. 56.
[267] T-67, 23:1-5.
[268] T-67, 24:5-6.
[269] T-67, 24:7-8.
[270] T-67, 24:13-15. *See also* 27:8-28:8 (in fact, "the most important issue relates to our absence of investigations"; even with associate counsel there was only "a possibility that we could have been ready").
[271] T-67, 38:8-40:22.
[272] T-67, 40:6-7.
[273] T-67, 40:7-25.
[274] T-67, 43:9-15 (noting intention to "continue building the record for the appeal"). *See also* 41:22-44:15.
[275] First P-0290 Recall Decision, para. 11.
[276] First P-0290 Recall Decision, para. 12.

Defence witness, the Chamber concluded that Ntaganda's request was not "sufficiently substantiate[d]" to justify the remedies sought.[277] However, it underlined that this decision was "without prejudice to any future decision by the Chamber […] to itself recall the Witness at a later stage."[278]

67. Entirely failing to address or acknowledge any of this extensive procedural history, Ntaganda cannot show the Chamber was unfair. He was given every opportunity to cross-examine P-0290, and chose not to do so, on a fully informed basis. Nor did the story end even there. Later in the trial, the Chamber indicated to the Parties that it was considering recalling P-0290, and sought their submissions.[279] Ntaganda *opposed* recalling P-0290, on the basis that "[REDACTED]" since it "[REDACTED]",[280] and noting that [REDACTED].[281] In its subsequent decision, the Chamber expressly noted that one of its reasons for considering re-calling P-0290 was to provide "the Defence with an opportunity to cross-examine [P-0290] in relation to his testimony provided during the Prosecution's case-in-chief", but was mindful of Ntaganda's submissions on the issue as well as the "nature and scope of the expected testimony" in relation to Defence evidence and the totality of the evidence adduced in the case.[282] On this basis, it decided not to recall P-0290.[283] In the Judgment, likewise, the Chamber expressly recalled that P-0290 had not been cross-examined, and decided that it would not draw "any adverse inferences from the absence of cross-examination."[284] It found him to be generally credible.[285] Nonetheless, it would examine any "parallels or discrepancies with the testimony of other witnesses", including Ntaganda himself, "on a case-by-case basis in light of the entirety of evidence".[286] Ntaganda shows no unfairness in this approach.

II.D.5. The Chamber reasonably exercised its discretion under article 82(1)(d)

68. Finally, Ntaganda's depiction of the Chamber as "sealing the trial proceedings from outside scrutiny", based on certifying issues for interlocutory appeal on three occasions, is misplaced and erroneous.[287] As the Appeals Chamber has recalled, "[a]rticle 82(1)(d) of the Statute does not confer a right to appeal", but rather such a right exists only if the "Trial

[277] First P-0290 Recall Decision, paras. 13, 16-17.
[278] First P-0290 Recall Decision, para. 17.
[279] P-0290 Submissions Order.
[280] Defence Submissions on P-0290 Recall, para. 35.
[281] Defence Submissions on P-0290 Recall, para. 36. *See also* para. 44.
[282] Second P-0290 Recall Decision, paras. 12-13.
[283] Second P-0290 Recall Decision, para. 14.
[284] Judgment, para. 145.
[285] Judgment, paras. 146-147.
[286] Judgment, para. 145.
[287] *Contra* Appeal-Part II, para. 57.

Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber."[288] Since Ntaganda makes no concrete effort to argue that the Chamber abused its discretion[289]—nor does he even bother to identify the decisions in question[290]—the Chamber's resolution of matters under article 82(1)(d) cannot assist him.

69. For all the reasons above, Ground 2 should be dismissed.

III. THE UPC CONDUCTED AN ATTACK DIRECTED AGAINST A CIVILIAN POPULATION (GROUND 5)

70. The Chamber reasonably found that "the UPC/FPLC conducted an attack directed against a civilian population between the assault on Bunia in August 2002 and the assault on the same city in May 2003".[291] Based on its comprehensive legal and factual analysis[292] the Chamber was satisfied beyond reasonable doubt of the existence of a course of conduct involving the multiple commission of article 7(1) acts[293] directed against a civilian population.[294] Ntaganda largely reiterates his trial arguments and disagrees with the Chamber's conclusions without showing any legal or factual error.[295]

III.A. The existence of legitimate military operations is immaterial

71. Ntaganda argues that the overall attack was not directed against a civilian population based on the legally faulty premise that simultaneous legitimate UPC[296] military operations[297] negated that the civilian population was the primary target of the attack.[298] This is incorrect: as the Chamber properly noted,[299] the attack need only be *primarily* and not *exclusively* directed against the civilian population.[300] Further, and more importantly, the civilian

[288] *DRC* Extraordinary Review AD, para. 20. *See also* paras. 32, 38.
[289] *See also* *Bemba et al.* Second SAJ, para. 27.
[290] *But see above e.g.* paras. 53, 55.
[291] Judgment, para. 690. Following the order of Ntaganda's appeal, the Prosecution first responds to Ground 5 and then to Ground 4.
[292] Judgment, paras. 662-689.
[293] Judgment, para. 666.
[294] Judgment, para. 672. The Chamber also found that such attack was committed pursuant to an organisational policy (*see* Judgment, para. 689). *See below* paras. 94-108.
[295] *Contra* Appeal-Part II, paras. 58-103.
[296] Throughout this brief, "UPC" encompasses the FPLC, and may be used interchangeably with "UPC/FPLC".
[297] Appeal-Part II, paras. 61-74.
[298] Appeal-Part II, paras. 58-103.
[299] Judgment, para. 668.
[300] *Bemba* TJ, para. 154; *Katanga* TJ, paras. 802, 1104. *See also* *Kunarac* AJ, para. 92 ("the civilian population which is subjected to the attack must be the primary rather than an incidental target of the attack").

population must be the primary *target* and not the primary *purpose* or *motive* of the attack.[301] When the primary target of the attack is the civilian population,[302] the purpose of the attack—including if there is a military purpose—is immaterial.[303]

III.B. The Chamber considered evidence of any military purpose

72. In any event, the Chamber considered and reasonably weighed the evidence related to the UPC's military objectives in general[304] and the context and purpose of the six military operations in particular[305] to conclude that the UPC deliberately targeted civilians.[306] Ntaganda merely repeats his unsuccessful trial arguments,[307] and fails to show any error.

73. *First*, the Chamber considered the context and the military purpose for attacking Songolo.[308] However, it also found that once enemy fighters had left, UPC soldiers went house to house committing crimes including killing women, elderly, children and babies.[309] The Chamber acknowledged the general concerns surrounding P-0888's testimony[310] which it "considered with caution" and on a case-by-case basis.[311] In relation to the events in Songolo, it reasonably found P-0888's testimony honest, detailed and credible.[312] *Second*, the Chamber reasonably considered the context and purpose for attacking Zumbe[313] but found that UPC troops—who were ordered to "show no mercy"[314]— killed civilians and burned houses there.[315] *Third*, the Chamber reasonably assessed the evidence surrounding the context of the

[301] *Fofana et al.* AJ, para. 299 (emphasising that "what must be primary is the civilian population as a target and not the purpose or the objective of the attack," and in para. 300 warned against "confusing the target of the attack with the purpose of the attack"). *See also* *Kunarac* TJ, para. 579.
[302] *Kunarac* AJ, para. 92.
[303] *Fofana et al.* AJ, para. 300. *See* Eboe-Osuji (2008), pp.118-129 (commenting on *Fofana et al.* AJ, in his personal capacity and before his judicial appointment at the ICC: "undue pre-occupation with the modifier 'primary'" should be avoided, and "the inquiry should rather focus on establishing whether the civilian population was *intentionally* targeted in the attack, notwithstanding that they may not have been the *primary* object of the attack". The notion of "the civilian population as the *primary object* of the attack was meant as a contrast to the notion of the civilian population as the *incidental target* of the attack", and cautioning against the risk "to take a monocular view of the purpose of the attack—one in which only one purpose of the attack is recognisable notwithstanding that the attack might have been *intended* for a multiplicity of purposes. Such a view might result in the negation of other reasons for the criminality of the attack, if a legitimate reason is found for the attack").
[304] Judgment, paras. 437-442, 718-722. *Contra* Appeal-Part II, paras. 61-68.
[305] Judgment, paras. 443-658.
[306] Judgment, paras. 664-666.
[307] Appeal-Part II, paras. 61-68. *See* DCB, paras. 190, 197-219.
[308] Judgment, paras. 451-453. *Contra* Appeal-Part II, paras. 62-63.
[309] Judgment, paras. 454, 665.
[310] *Contra* Appeal-Part II, para. 63.
[311] Judgment, para. 199.
[312] Judgment, para. 452 (fn. 1277).
[313] Judgment, paras. 455-456. *Contra* Appeal-Part II, para. 64.
[314] Judgment, para. 456.
[315] Judgment, paras. 456-457, 665.

operations in Komanda,[316] but found that UPC troops killed civilians, raped women and looted goods.[317] The Chamber addressed Ntaganda's arguments in relation to P-0907 and reasonably found his account to be credible.[318] It also carefully assessed D-0017's testimony and reasonably found he lacked credibility and accordingly would not rely on him.[319] *Fourth*, the Chamber considered the evidence on the context and military purpose for the operations in Bunia in May 2003[320] but found that UPC troops were ordered to fight both Lendu soldiers and civilians and to kill anyone who remained behind, including children, which they did.[321]

74. *Finally*, the Chamber carefully considered and weighed the evidence surrounding the First Operation[322] and the Second Operation[323] including their military importance.[324] However, it found that the UPC committed numerous article 7(1) acts (including murder, rape, sexual slavery and persecution)[325] and that such acts were not random.[326] It also considered that troops were ordered to target civilians[327] and concluded that the First Operation and the Second Operation were primarily directed against the civilian population.[328] This conclusion is not contradicted by the existence of any military objective.[329]

III.C. The civilian population was the primary object of the attack

75. Ntaganda selectively reads the Judgment when he argues that the Chamber failed to determine whether the civilian population was the *primary* object of the attack.[330] *First*, the Chamber correctly set out the contextual elements of crimes against humanity under article 7(2)(a), that is (a) the existence of an attack against civilian population, (b) the widespread or systematic nature of the attack, and (c) acts committed as 'part of' the attack.[331] With respect to (a) "the existence of an attack against civilian population", the Chamber identified the

316 Judgment, para. 459.
317 Judgment, paras. 463-465, 665. *Contra* Appeal-Part II, para. 64.
318 Judgment, para. 462 (fn. 1314). *Contra* Appeal-Part II, para. 64.
319 Judgment, paras. 250-255 and fn. 644. *Contra* Appeal-Part II, para. 64.
320 Judgment, para. 654.
321 Judgment, paras. 656-657, 665.
322 Judgment, paras. 467-548. *Contra* Appeal-Part II, para. 65.
323 Judgment, paras. 549-646. *Contra* Appeal-Part II, para. 66.
324 *See* e.g. Judgment, paras. 440-441, 467-474 (First Operation), 442, 549, 568 (Second Operation). *Contra* Appeal-Part II, paras. 65-66.
325 *Contra* Appeal-Part II, *See below* paras. 136-174.
326 Judgment, paras. 664, 671.
327 *Contra* Appeal-Part II, paras. 65-66, 75-102. *See below* paras. 81-92.
328 Judgment, paras. 670-672.
329 *Contra* Appeal-Part II, paras. 65-66.
330 Appeal-Part II, para. 59.
331 Judgment, paras. 660-697.

different elements, namely, a "(i) 'course of conduct involving the multiple commission of acts' mentioned in Article 7(1); (ii) directed 'against any civilian population'; and (iii) 'pursuant to or in furtherance of a State or organizational policy to commit such attack'".[332] With respect to (ii) "directed against any civilian population", the Chamber found that "[t]h[is] requirement […] means that the civilian population must be the *primary*, as opposed to an incidental, object of the attack".[333]

76. *Second*, the Chamber correctly applied the law to the facts. With respect to (ii), it rejected the Defence claim that no "non-Hema civilians were targeted"[334] and, after recalling the relevant findings,[335] concluded that "[t]aking into account the above factors, the Chamber finds beyond reasonable doubt that the attack was directed against a civilian population".[336] The Chamber did not err; it correctly defined the law and applied it to the facts.

III.D. The Chamber correctly assessed the evidence of the military operations

77. The Chamber correctly found that there was an attack against the civilian population based on its consideration of the First and Second Operations and four other assaults.[337] By arguing that the Chamber erroneously limited its analysis to the above six operations and declined to make factual findings beyond the Prosecution's allegations, Ntaganda misunderstands the law and misapprehends the Judgment.[338]

78. *First*, the Chamber considered the evidence that Ntaganda claims it did not.[339] In assessing the operations involving the UPC, the Chamber considered Defence arguments suggesting the UPC did not target civilians. However, the Chamber rightly concluded that the evidence indicated otherwise.[340] Ntaganda merely disagrees with the Chamber's evidentiary assessments and findings but does not show error.

79. *Second*, the Chamber correctly noted that "the fact that the UPC/FPLC may have also conducted operations that were solely serving a military purpose and during which civilians were not attacked has no bearing on the validity of the factual findings of the Chamber that *during several specific assaults*, on which evidence has been presented to the Chamber,

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[332] Judgment, paras. 661-690.
[333] Judgment, para. 668.
[334] Judgment, para. 670.
[335] Judgment, para. 671 and fns. 2122-2129.
[336] Judgment, para. 672.
[337] Judgment, para. 665.
[338] Appeal-Part II, paras. 60, 69-74.
[339] *Contra* Appeal-Part II, paras. 69-74.
[340] *Compare* Appeal-Part II, paras. 69-73 (fns. 178-181, 187, 189-190 citing DCB, paras. 193-218) with Judgment, paras. 446 (fn. 1263 citing DCB, paras. 193-197), 461 (fn. 1314 citing DCB, para. 205), 464 (fn. 1324 citing DCB, paras. 198, 204).

civilians were deliberately attacked."[341] The Chamber need not have assessed *all* UPC military operations to determine that the violent acts that occurred during the six operations were part of a series or overall flow of events (and not merely random isolated acts) which primarily targeted the civilian population.[342] Rather, it sufficed to determine whether the multiple article 7(1) acts in the six operations *themselves* constituted a flow of events (and were not incidental, random and isolated acts) which primarily targeted the civilian population—and the Chamber correctly found that they undoubtedly did.[343]

80. *Finally*, Ntaganda disregards the widespread nature and *modus operandi* of these six operations, including the UPC's orders to attack all the Lendu (including civilians) and the training of their recruits, who were taught that all Lendu (including civilians) were the enemy.[344] Notably, Ntaganda does not address the number of civilian victims resulting from these operations and the UPC common plan, including Ntaganda's own acts.[345]

III.E. The UPC issued orders to attack civilians

81. Ntaganda challenges the Chamber's reliance on seven UPC orders/ instructions, including its understanding of the expression '*kupiga na kuchaji*'—which it found to mean attacking all the Lendu, including civilians, and to loot their property.[346] Ntaganda's challenge lacks merit. *First*, the Chamber correctly found that the UPC issued such orders.[347] *Second*, UPC orders to attack civilians were only one of the several factors considered by the Chamber to find that there was an attack against civilian population.[348] By largely reiterating his trial submissions, Ntaganda fails to show any error in the Chamber's conclusion.

III.E.1. 'Kupiga na kuchaji' was an instruction to attack all Lendu

82. The Chamber reasonably found that '*kupiga na kuchaji*' was an expression commonly used by UPC commanders and soldiers and was understood as an order to attack all the Lendu, including civilians, and to loot their property.[349] The "order was understood to mean also get rid of everyone and everything, referring to all the Lendu, including civilians and

[341] Judgment, para. 665 (emphasis added).
[342] *Contra* Appeal-Part II, para. 60.
[343] Judgment, paras. 662, 672.
[344] Judgment, para. 671.
[345] Judgment, paras. 665, 671.
[346] Appeal-Part II, para. 75 (fn. 193 citing Judgment, para. 671).
[347] Judgment, paras. 671, 688. *Contra*, Appeal-Part II, paras.75-103.
[348] Judgment, para. 671.
[349] Judgment, para. 415. *Contra* Appeal-Part II, paras. 75-82, 88-90.

their possessions".[350] Ntaganda's portrayal of the phrase as a legitimate military order limited to looting enemy military goods[351] is implausible given the evidence in the record, which the Chamber reasonably considered.

83. The Chamber correctly relied, among others, on three insiders (P-0963, P-0907, and P-0768) who clearly testified that '*kupiga na kuchaji*' meant attacking Lendu civilians.[352] For instance, when discussing the Second Operation, P-0963 testified that: "It was the same operation *piga na kuchaji*. And we were fighting the Lendu. The orders were clear: shoot at everyone".[353] P-0907 unambiguously explained that the phrase instructed UPC soldiers to attack civilians and to loot.[354] P-0768 corroborated this evidence.[355]

84. Ntaganda's submission that the witnesses who explained the meaning of '*kupiga na kuchaji*' simply offered their own subjective understanding of the order is implausible in light of the evidence.[356] His own arguments indeed highlight the comprehensive body of corroborated witness evidence considered by the Chamber to determine the meaning of the phrase.[357]

85. Further, there is no contradiction between any Prosecution witnesses about the intended targets of the '*kupiga na kuchaji*' order.[358] None of them testified that the order was to target only combatants. Moreover, the Chamber's findings regarding '*kupiga na kuchaji*' were not made in isolation. The Chamber made multiple findings throughout the Judgment that the UPC leadership designated the Lendu ethnic group (civilians alike) as the enemy,[359] including through its military objectives,[360] the instruction given to its recruits,[361] the consistent orders given before and during battle,[362] and UPC crimes committed against Lendu civilians[363] that

[350] Judgment, para. 415 (fn. 1188).
[351] Appeal-Part II, paras. 76-90.
[352] Judgment, para. 415 (fn. 1188). *Contra*, Appeal-Part II, paras. 80-82, 88-90.
[353] P-0963: T-79,47:7-8.
[354] P-0907: T-90, 8. *See* also P-0907: T-90, 9:1-7.
[355] Judgment, para. 415 (fn. 1188 citing P-0768: T-33, 64-65).
[356] For example, the Chamber relied on P-0768's evidence that *kuchaji* meant to attack civilians and loot civilian good, and this terminology was used by everybody, including Ntaganda: Judgment, para. 415 (fn. 1188 citing P-0768: T-33, 64-65). *Contra* Appeal-Part II, paras. 80-81, 99, 102.
[357] *Contra* Appeal-Part II, paras. 80-81, 99, 102.
[358] *Contra* Appeal-Part II, para. 76.
[359] *See e.g.* Judgment, para. 558, citing P-0017 ("all individuals belonging to the Lendu ethnic group, whether a child, a woman or a man, were considered by the UPC as their enemy"). *See* also paras. 684, 799, 800. *See* also P-0898, T-154-Conf, 21:4-7: "[REDACTED]"; P-0055: T-70,74:16-75:2.
[360] Judgment, para. 293.
[361] Judgment, paras. 373 (fn. 1053, citing P-0907, P-0888, P-0758, P-0963, P-0769 and P-0116) and 416.
[362] Judgment, para. 452 (relying on P-0888 "Mr Ntaganda personally addressed a group of soldiers, telling them that they were going to Songolo, and instructing them to drive off the 'enemy', whom P-0888 understood to be the Lendu and the Ngiti"). *See also* paras. 493, 499, 536, 656. *See* further P-0901: T-29,17:9-11.
[363] Judgment, part V-C-24 (findings on the crimes charged).

went unpunished.[364] This clear and consistent evidence formed the lens through which the Trial Chamber reasonably assessed the '*kupiga na kuchaji*' order. Isolating it from its proper context would be artificial and incorrect.[365] Further, the Chamber correctly noted that several other insiders also testified that the phrase was an order to attack and pillage civilian property.[366] Testimony from Defence witnesses, on the other hand, was inconsistent on this point.[367] Ntaganda overlooks D-0251,[368] who confirmed that the order '*kupiga na kuchaji*' *included* an instruction to pillage.[369] Ntaganda also misrepresents P-0055's testimony,[370] who testified that in the UPC the phrase meant to pillage everything from the local inhabitants.[371]

86. Ntaganda further disagrees with the Chamber's finding that P-0017 and P-0963 were at the same meeting prior to the First Operation when they were ordered to '*kupiga na kuchaji*'.[372] The Chamber found "a large number of similarities" in the witnesses' description of the gathering including its location, format, attendance, purpose and presence of Hema supporters.[373] Both witnesses testified that they were briefed about the objectives and the strategy of the operation and recalled the use of the phrase '*kupiga na kuchaji*'.[374] The Chamber addressed the inconsistencies between their testimonies on Ntaganda's presence in favour of the Defence by not making adverse findings on this point, and then further and reasonably assessed the impact of this conclusion on P-0963's credibility.[375]

87. In any event, whether P-0963 and P-0017 attended the same meeting in or near Mabanga, or two different meetings, does not impact the reliability of their testimony and the Chamber's findings that the '*kupiga na kuchaji*' order was given to troops prior to the First Operation. Both witnesses agree on this point and on how the order was understood.[376]

III.E.2. Orders were issued to attack civilians

88. The Chamber reasonably assessed the evidence surrounding the seven orders, and reasonably found that UPC commanders (including Ntaganda) issued orders to attack

[364] *See e.g.* Judgement, para. 800.
[365] Judgment, para. 415 (fns. 1186-1187).
[366] Judgment, para. 415 (fns. 1186-1187). *Contra* Appeal-Part II, para. 88.
[367] *Contra* Appeal-Part II, paras. 77-78. Ntaganda testified that the phrase meant running after the enemy *after* it had fled and take their weapons (*see* Judgment, para. 415, fn. 1189 referring to D-0300: T-213, 9). D-0038 testified that it referred to attacking an enemy *camp* and taking their weapons (T-249-Conf, 18:22-19:4).
[368] *See* Appeal-Part II, para. 78 (fn.198 referring only to D-0300 and D-0038).
[369] Judgment, para. 415 (fn. 1186 citing D-0251: T-260, 99-100).
[370] *Contra* Appeal-Part II, para. 79.
[371] Judgment, para. 415 (fn. 1187 referring to P-0055: T-72, 10-12).
[372] Appeal-Part II, paras. 82-87.
[373] Judgment, para. 488 (fns. 1400-1403).
[374] Judgment, para. 488 (fns. 1403).
[375] Judgment, para. 488 (fn. 1401).
[376] Judgment, para. 488 (fn. 1405 citing P-0017: T-58, 54 and P-0963: T-78, 75). *Contra* Appeal-Part II para. 87.

civilians.[377] By mostly repeating his trial arguments, Ntaganda merely disagrees with the Chamber's assessment of the evidence and fails to show any error.[378]

89. *First*, the Chamber's reliance on the seven orders was not "infected" by an erroneous assessment of the evidence.[379] Specifically, the Chamber's finding that some Lendu combatants were difficult to identify because they were not uniformly dressed[380] does not undermine its conclusion that UPC soldiers were ordered to attack all Lendu, including civilians.[381] Any purported difficulty in distinguishing between combatants and non-combatants does not justify ignoring the principle of distinction and targeting *all* Lendu.[382] *Second*, that UPC commanders issued orders to target military objectives does not negate that they also issued orders to attack civilians.[383] *Third*, in addition to ordering UPC soldiers to attack civilians in the First Operation,[384] the Chamber reasonably found that Ntaganda ordered his soldiers to attack Lendu including civilians in Camp Goli[385] and to fire a grenade launcher at fleeing civilians in Sayo.[386] Ntaganda's suggestion that there was no attack against civilians because had there been such an attack "many such orders to fire on civilians would have been issued" cannot stand.[387]

90. *Fourth*, the Chamber reasonably assessed P-0963's insider evidence that prior to the Second Operation—during Kisembo's briefing in Mongbwalu—UPC soldiers were ordered to drive out Lendu civilians:[388] Lendu civilians "would either leave or they would be killed".[389] The Chamber carefully assessed the reliability of P-0963's testimony in relation to this event, noting his "solid basis of knowledge" and "detailed testimony".[390] Moreover, Kisembo's order to "drive out all the Lendu"[391] does not on its face reveal a legitimate

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[377] Judgment, paras. 671, 688.
[378] Appeal-Part II, paras. 91-102.
[379] *Contra* Appeal-Part II, paras. 91-92.
[380] Judgment, para. 472.
[381] Judgment, para. 671. *Contra* Appeal-Part II para. 91.
[382] *Contra* Appeal-Part II paras. 91 (i), 98. In case of doubt whether a person is a civilian, that person should be considered to be a civilian, *see* art. 50 (1) AP I.
[383] *Contra* Appeal-Part II para. 91 (ii).
[384] Judgment, paras. 484, 488, 671. *Contra* Appeal-Part II, paras. 93-94 *See below* paras. 245-268.
[385] Judgment, paras. 493, 671. *Contra* Appeal-Part II, para. 95. *See below* paras. 245-268.
[386] Judgment, paras. 508, 671. *Contra* Appeal-Part II, para. 96. *See below* paras. 136-174.
[387] *Contra* Appeal-Part II, para. 96. Not only logic, but also evidence contradicts this proposition: multiple orders to attack civilians during the First Operation were issued: P-0010, P-0963, P-0768 and P-0017.
[388] Judgment, paras. 560 (fn. 1703 citing P-0963: T-79, 43), 671. *Contra* Appeal-Part II, paras. 97-98.
[389] Judgment , para. 560, (fn. 1703 citing P-0963: T-79, 43).
[390] Judgment, para. 560 (fn. 1701). *Contra* Appeal-Part II, para. 98. P-0963 is a UPC insider, a direct witness who participated in this gathering, saw and heard Kisembo giving these orders, and then carried out these orders during the Second Operation, having already implemented the same type of orders during the First Operation.
[391] P-0963: T-79, 46:18-23.

military objective.[392] Further, Ntaganda's interpretation that Kisembo meant all Lendu *combatants*[393] is not supported by the evidence. His references to the testimony of UPC insiders (that they fought some combatants)[394] does not undermine the Chamber's finding that Kisembo ordered his troops to attack *all* Lendu,[395] and that crimes were indeed committed against civilians as a result.[396]

91. *Fifth*, the Chamber reasonably relied on P-0017 to conclude that prior to the Second Operation, Mulenda ordered the UPC troops to attack civilians.[397] P-0017 attended the briefing in Kilo where Mulenda ordered him and other soldiers to "destroy that triangle which was a pocket of resistance to the UPC"[398] and explained that "'[w]hen they were part of the ethnic group called Lendu it was considered as an enemy of the UPC, including children".[399] P-0017 also confirmed that no orders to treat civilians differently were issued.[400] The fact that P-0017 began his answer from his own perspective,[401] and later testified that the UPC understood that all Lendu were enemies,[402] does not diminish the reliability of his testimony.[403] Ntaganda's reiteration of his trial arguments shows no error in the Chamber's careful assessment of P-0017's testimony.[404]

92. *Finally*, the Chamber correctly found that Mulenda ordered UPC troops to attack civilians in Kilo on or about 18 February 2003.[405] It properly relied on the unambiguous testimony of insider witness P-0963, who was present at the briefing.[406] Ntaganda reiterates his arguments[407] and merely disagrees with the Chamber's interpretation of the evidence.

93. For all the reasons above, Ground 5 should be dismissed.

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[392] *Contra* Appeal-Part II, para. 98.
[393] *Contra* Appeal-Part II, para. 98.
[394] Appeal-Part II, para. 98 (fn. 260).
[395] Judgment, para. 560.
[396] Judgment, para. 671.
[397] Judgment, paras. 671, 558. *Contra* Appeal-Part II, paras. 99-102. *See* DCB, paras. 320, 835-841.
[398] Judgment, para. 558.
[399] P-0017: T-59, 62:24-25. *See* Judgment, para. 558.
[400] P-0017: T-59, 63:1-3.
[401] P-0017: T-59, 62:24-25.
[402] Judgment, para. 558.
[403] *Contra* Appeal-Part II, paras. 99, 101. *See above* paras. 82-87. Regarding P-0017's "accomplice status" *see below* paras. 137-139.
[404] *Contra* Appeal-Part II, para. 100. *See* also DCB, paras. 320, 835-841.
[405] Judgment, paras. 561, 671. *Contra* Appeal-Part II para.102.
[406] Judgment, para. 561 (fn. 1705: P-0963: T-79, 47:1-8: "Did Salumu say what, if anything, you were to do when you encountered the civilian population? A. It was the same operation piga na kuchaji. And we were fighting the Lendu. The orders were clear: Shoot at everyone.")
[407] Appeal-Part II, para. 102. *See* DCB, paras. 346-347. Regarding P-0963's alleged subjective understanding of *Kupiga na kucjaji see above* paras. 82-87; regarding P-0963's "accomplice status" *see below* paras. 137-139.

IV. THE ATTACK WAS COMMITTED PURSUANT TO AN ORGANISATIONAL POLICY (GROUND 4)

94. The Chamber correctly found that "the crimes committed against the civilians were not the result of an uncoordinated and spontaneous decision of individual perpetrators acting in isolation, but were the intended outcome of the implementation of a policy"[408] to attack and chase away the Lendu and perceived non-Iturian civilians.[409] In so concluding, the Chamber correctly defined the law[410] and assessed the evidence,[411] including: that one of the stated objectives of the emerging UPC was to drive out the non-natives;[412] that UPC recruits were taught that the Lendu as such were the enemy;[413] that UPC troops followed the same *modus operandi* (including a *ratissage* aimed at eliminating survivors, including civilians, after the initial assault);[414] that '*kupiga na kuchaji*' orders to target Lendu, including civilians, were commonly given (including before the First Operation and Second Operation) and that troops behaved as instructed.[415] Ntaganda fails to show any error.[416]

IV.A. The Chamber correctly applied the law

95. The Chamber reasonably found that evidence of efforts to promote peace was not incompatible with the existence of a *parallel* goal to chase away RCD-K/ML, Lendu civilians as well as those perceived as non-Iturians.[417] Ntaganda's contrary argument[418] incorrectly understands the policy requirement for crimes against humanity.

96. The requirement for a "State or organisational policy" only ensures that an attack against the civilian population has a 'collective' dimension. The policy need not necessarily reflect the overall State or organisational political plans or goals; in fact a policy need not implicate the highest levels of the State or organisation concerned,[419] nor must it be

[408] Judgment, para. 689. *Contra* Appeal-Part II, paras. 104-128.
[409] Judgment, para. 689.
[410] Judgment, paras. 673-674.
[411] Judgment, paras. 675-689.
[412] Judgment, para. 684.
[413] Judgment, para. 687.
[414] Judgment, para. 688.
[415] Judgment, para. 688.
[416] *Contra* Appeal-Part II, paras. 104-128.
[417] Judgment, paras. 686.
[418] While Ntaganda does not expressly dispute the Chamber's articulation of the law, his arguments appear based on a misunderstanding of it. *See* Appeal-Part II, paras 108-109, 113, 115-116, 120, 125. Ntaganda also misquotes the Judgment by submitting that the Chamber required "[t]he demonstration of a link between *crimes* committed and a policy" (*see* Appeal-Part II, para. 105. Emphasis added) whereas the Chamber properly stated that a link must be established "between the *attack* and the policy" (*see* Judgment, para. 673. Emphasis added).
[419] Robinson (2014), p. 112; Robinson (2015), p. 709; *Gbagbo* Amicus Submission, para. 24. *See also* Judge Ozaki's Opinion, para. 30.

formalised or expressly declared—it can be inferred from the circumstances of the attack.[420] The policy requirement—a diplomatic compromise[421]—has only a "modest purpose", to "screen out 'ordinary crime', that is, unconnected crimes committed by diverse individuals".[422] As Pre-Trial Chamber I recently found: "*l'élément de politique retenu à l'article 7-2-a du Statut vise essentiellement à démontrer l'existence d'un lien entre les crimes commis, sans lequel ces crimes demeureraient des actes isolés constituant des crimes de droit commun*".[423] This accords with *dicta* in *Tadić*,[424] which was the basis of the Canadian proposal leading to the drafting of article 7(2)(a),[425] and is extensively supported in academic commentary.[426] A "modest" policy requirement also follows from the ordinary meaning, context, and object and purpose of article 7. Since the term "policy" is ambiguous,[427] contextual and teleological approaches are key for its interpretation: an elevated definition of "policy" which would eliminate the disjunction between widespread *or* systematic attacks,[428] or which would arbitrarily curtail the Court's jurisdiction over crimes against humanity,[429] should be avoided.

97. It follows that the policy requirement under article 7(2)(a) can coexist with evidence of a parallel legitimate goal, such as making attempts to achieve a favourable peace.[430] It need

[420] Judgment, para. 674. *See also* *Katanga* TJ, para. 1110; *Gbagbo* Amicus Submission, para. 4; *Gbagbo* CD, para. 215; and *Mbarushimana* CD, para. 263.
[421] *See e.g.* Sadat, p. 353; Hunt, pp. 64-65; Robinson (1999), pp. 47-48; Hwang, pp. 492-501; Van Schaack, p. 844; deGuzman (2000), p. 372; Von Hebel and Robinson, pp. 96-97. *See also* Judge Ozaki's Opinion, para. 31.
[422] Robinson (2014), p. 111. *See also* pp. 107, 112, 117-122, 133; Robinson (2015), pp. 703, 710.
[423] *Al Hassan* CD, para. 181.
[424] *Tadić* TJ, para. 653.
[425] Hwang, p. 503; *see also* p. 497; Von Hebel and Robinson, p. 95; Robinson (2015), pp. 708-709; *Gbagbo* Amicus Submission, para. 22. *See also* Van Schaack, p. 840.
[426] *See e.g.* Jalloh, pp. 431-432; Sadat, pp. 353-354, 371, 376-377; deGuzman (2000), p. 374; Chesterman, pp. 316-317; Cryer *et al*., pp. 197-198; Von Hebel and Robinson, p. 96; *Gbagbo* Amicus Submission, para. 22, 28. Such an approach follows from the *collective* nature of crimes against humanity: Robinson (2001), p. 64; Robinson (2014), p. 114; Robinson (2015), pp. 710-711, 723. *See further* Luban, pp. 90, 97-98, 108.
[427] *See* Robinson (2015), pp. 710, 721; Hunt, p. 65; Werle and Burghardt, p. 1155; Hansen, p. 1; Jalloh, p. 436; Mettraux, pp. 143, 149-150.
[428] *Gbagbo* CD, para. 216. *See* Sadat, p. 353; Halling, pp. 836-837; Robinson (1999), pp. 50-51; Hwang, p. 503; deGuzman (2000), pp. 372, 374; Cryer *et al*., p. 196; Robinson (2014), pp. 114-117, 132; Robinson (2015), pp. 706, 713-714, 721; Chaitidou, pp. 67, 72-73; *Gbagbo* Amicus Submission, para. 35.
[429] Sadat, pp. 335-336 (warning of "unduly restrictive interpretations of Article 7" based on "limitations […] not found in, or required by, the Statute, the Elements of Crimes, or customary international law"), 355, 370-371; Robinson (2015), pp. 703 ("it is vitally important" to correct the trend towards elevating the policy requirement "[i]f the ICC is to be a viable forum"), 722-723; *Gbagbo* Amicus Submission, paras. 14, 34, 36; Werle and Burghardt, pp. 1153, 1159-1160, 1165-1170; Halling, pp. 844-845; Mettraux, pp. 152-153. This is not a question of "uncritically 'victim-focused teleological interpretation'" but what the drafters of the Statute *actually* intended: Kress (2010), p. 861; Jalloh, pp. 409, 413-415, 419; Robinson (2014), p. 113. By analogy *see* *Katanga* TJ, para. 1122.
[430] *Contra* Appeal-Part II, paras. 109, 116-117.

not be bureaucratic, formalised, or precise; and may be implicit[431] and may be manifest in relevant *action* or, as appropriate, in *deliberate inaction*.[432] In general, it may be inferred from the manner in which relevant acts occur.[433] The reference in the Elements of Crimes to the need for the State or organisation to "actively promote or encourage" the attack merely expresses the notion that the "policy cannot be inferred solely from the *absence* of governmental or organizational action".[434] This interpretation is necessary to allow for the possibility that an attack might only be charged as widespread and *not* systematic.[435]

98. In any event, given the evidence in this case—including positive orders to target civilians[436]—a stricter interpretation of the policy requirement would still lead to the same inescapable conclusion: that the Chamber was reasonable to conclude that the sporadic attempts to "promote peace" did not undermine its conclusion that the UPC "actively promoted" a policy to attack a civilian population.

IV.B. The Chamber made reasonable factual findings

99. The Chamber thoroughly assessed the evidence[437] and correctly concluded that the UPC constituted an organisation[438] that actively promoted a policy to attack civilians,[439] irrespective of any limited evidence of promoting peace.[440] Ntaganda merely repeats his trial submissions and complains that the Chamber did not consider certain evidence,[441] or disagreed with his interpretation of it.[442] Either way, Ntaganda's alleged seven errors fail to

[431] Robinson (2014), pp. 112, 122-130; Robinson (2015), pp. 709, 717-720; Werle and Burghardt, p. 1155; Robinson (1999), p. 51; Robinson (2001), p. 77; Hwang, p. 503; Cryer *et al*., p. 198; Guilfoyle, p. 247; Ambos (2014), p. 70; Hall and Ambos, p. 245, mn. 109; *Gbagbo* Amicus Submission, paras. 21, 24-26, 29, 32, 36. *See e.g. Bemba* CD, para. 81; *Katanga* CD, para. 396; *Gbagbo* CD, para. 215; *Katanga* TJ, para. 1108 (no "formal design"), 1110 (the policy may "become clear […] only in the course of its implementation, such that the definition of the overall policy is possible only *in retrospect*", emphasis supplied).
[432] Robinson (2014), pp. 112, 130-132; Cryer *et al*., p. 198; Guilfoyle, p. 247; Ambos (2014), pp. 70-72; Robinson (2015), p. 709.
[433] Robinson (2014), pp. 112, 122-126, 128; Cryer *et al*., p. 198; Robinson (2001), p. 77; Robinson (2015), pp. 706, 709, 717-720, 723-724; *Gbagbo* Amicus Submission, paras. 24-26, 30-31, 33, 36; *Katanga* TJ, para. 1109; *Bemba* TJ, para. 160 (fn. 361). In *Bemba*, Judges Van den Wyngaert and Morrison agreed that "the organisational policy does not need to be formalised and that it can be inferred from the manner in which the attack occurs" but observed that this "does not mean that the policy does not need to be described or identified" (*See Bemba* AJ Separate Opinion, para. 69). *But see Bemba* AJ Minority Opinion, paras. 496, 552.
[434] *See* Elements of Crimes, art. 7, Introduction, para. 3, and fn. 6. *See also* deGuzman (2000), p. 374, fn. 182 (expressing concern that this language, on its face, is too restrictive).
[435] *See e.g.* Robinson (2014), p. 107; Ambos (2014), p. 71; Ambos (2011), p. 286.
[436] *See* Judgment, para. 688.
[437] *See* Judgment paras. 675-680 (referring to evidence assessment, including paras. 286-295, 298, 300-302,313-314, 316, 319-320, 324-325, 326, 341-345 and sections IV.A.2.d; IV.A.2.f, IV.A.3.a and IV.3.(b)(i)).
[438] Judgment, paras. 681.
[439] Judgment, para. 689.
[440] Judgment, para. 686.
[441] Appeal-Part II, paras. 116-119.
[442] Appeal-Part II, paras. 109-112, 114-115, 120-126.

show that the Chamber's conclusion was unreasonable or incorrect.

100. *First*, Ntaganda's submission that the Chamber erred in concluding that the UPC was an organisation before 9 August 2002[443] is undeveloped and should be dismissed.[444] In any event, Ntaganda concedes that the UPC was an organisation at the relevant time, as of 9 August 2002.[445]

101. *Second*, the Chamber's findings on policy were based on its careful assessment of direct and positive evidence of "a preconceived strategy"[446] including: (i) documents by the political leaders of the emerging UPC criticising the RCD-K/ML for representing the "Kivu citizens"/"negative forces" over the interests of Iturians;[447] (ii) witnesses' accounts that political-military leaders of the emerging UPC (including Ntaganda) met in Uganda in April 2002 with the aim of seeking the departure of the RCD-K/ML from Ituri;[448] (iii) witnesses' accounts that political leaders of the emerging UPC stated in meetings in June 2002 that one objective was to drive out the non-natives, targeting first the Nande then the Lendu;[449] (iv) political leaders' documents from June 2002 stating that Ituri must be saved, including by shedding "our blood";[450] (v) political leaders' documents assimilating the RCD-K/ML with Nande people and the APC with the Lendu combatants;[451] (vi) witnesses' accounts and political leaders' documents that they were preparing to take control of Bunia militarily, and intended to occupy key areas in Ituri;[452] (vii) witnesses' accounts that in the UPC non-Hema members had no real power or influence;[453] (viii) UPC insiders' evidence that the expression '*kupiga na kuchaji*' was commonly used and understood to mean attacking all Lendu, including civilians, and to loot their property;[454] (ix) witnesses' evidence that the UPC operations generally followed a certain *modus operandi* characterised by a *ratissage* aimed at

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[443] Appeal-Part II, para. 107.
[444] *See above* para. 21-22.
[445] Appeal-Part II, para. 107. *See also* DCB, para. 34.
[446] Judgment, para. 689. *See* also paras. 682-688 (referring to evidence assessment, including paras. 21, 287-294, 296, 302-303, 319, 373, 415, 437-442, 484, 488, 561, and section V.C.4). *Contra* Appeal-Part II, paras. 108-110.
[447] Judgment, para. 683 (cross-referencing to paras. 287 and 291 and fns. 727-735, 744).
[448] Judgment, para. 288 (fn. 737 citing P-0041).
[449] Judgment, para. 684 (cross-referring to evidence discussed at para. 293, including the direct witness accounts of P-0041 and P-0014 who participated in the June 2002 Kampala meeting).
[450] Judgment, para. 683 (cross-referencing para. 292 and two handwritten documents drafted by meeting delegates, including Lubanga, during the June 2002 Kampala meetings: DRC-OTP-0066-0031 at 0037 and DRC-OTP-0066-0039 at 0046).
[451] Judgment, para. 684 (cross-referencing assessments of evidence in paragraphs 287-293).
[452] Judgment, para. 682 (cross-referencing assessments of evidence in paragraphs 287-294, 438-442).The Chamber considered DCB para. 197: *see* Judgment, para. 438 (fn. 1243).
[453] Judgment, para. 685 (cross-referencing factual findings in paras. 302, 319).
[454] Judgment, para. 688 (cross-referencing its findings in para. 415). *See above* paras. 82-87.

eliminating any survivors, including civilians, as well as looting.[455]

102. Ntaganda takes UPC documents allegedly "promoting peace" out of context.[456] The Chamber expressly considered these arguments and found "that the internal communications and documents as well as military actions undertaken by the UPC show that *in parallel* its goal was to actively chase away the RCD-K/ML and those who were perceived as non-Iturians".[457] The Chamber further found that the UPC's "stated ambition" to defend the whole population "was directly contradicted by the planning and unfolding of the group's military operations".[458]

103. *Third*, the Chamber found P-0014's testimony to be "*a* primary source"[459] and not "*the* primary source"[460] of information about the emerging UPC's policy at the June 2002 Kampala meeting.[461] The Chamber also relied upon P-0041 about the goal to take control of Ituri discussed at the meeting.[462] The Chamber carefully assessed the reliability of both P-0041's and P-0014's testimonies and found them "to have a strong basis of knowledge for the events of the meeting, noting also that their testimony on this issue was rich in details".[463] P-0014's evidence was not hearsay[464] as he was present for the discussions and his alleged inconsistencies are no more than a repetition of Ntaganda's arguments rejected at trial.[465]

104. *Fourth*, the Chamber considered Ntaganda's argument that non-Iturians and non-Hema were also members of the UPC,[466] reviewed numerous UPC documents[467] and acknowledged that the UPC "presented itself as an organisation not based on ethnicity".[468] It also considered P-0005's testimony,[469] but reasonably found "most non-Hema members were without real or

[455] Judgment, para. 688 (cross-referencing findings in paras. 484, 488, 561 and section V.C.4). The Chamber assessed the witness's credibility on these points in detail, considered Ntaganda's arguments in the DCB and DCR, and explained its reasoning (*see* fns. 1387, 1401, 1402, 1705).
[456] Appeal-Part II, paras. 109-110. Ntaganda repeats trial submissions: *compare* Appeal-Part II, para. 109; DCB, paras. 53-94. *See also* paras. 154-175.
[457] Judgment, para. 686 (emphasis added).
[458] Judgment, para. 687.
[459] Judgment, para. 293 (fn. 753, emphasis added).
[460] Appeal-Part II, para. 111 (emphasis added).
[461] Appeal-Part II, para. 111.
[462] The Chamber also cites P-0041 who was present during the same meeting (*see* Judgment, para. 293).
[463] Judgment, para. 290 (fn. 741).
[464] *Contra* Appeal-Part II, para. 111 (fn. 289). Ntaganda points to P-0014's whereabouts at an entirely different time (after 20 August 2002), which is irrelevant.
[465] DCB, paras. 1461-1466.
[466] Appeal-Part II, para. 112.
[467] Judgment, paras. 285-308.
[468] Judgment, paras. 295 (fns. 761-762), 296.
[469] Judgment, para. 302. *Contra* Appeal-Part II, para. 112. Ntaganda further omits that P-0005 testified to the limited influence of the few Lendu and other ethnicities within the UPC Executive: *see* T-185, 25:21-26:25.

substantive influence"[470] and that "important positions in both the political and military branches were held by Hema"[471] while "individuals were excluded from certain discussions and meetings on an ethnic basis".[472] Ntaganda fails to show how the Chamber's ultimate conclusion that the UPC worked on an ethnic basis[473] was unreasonable.

105. *Fifth*, Ntaganda repeats his arguments in Ground 5, addressed above,[474] but fails to show any error. Moreover, the Chamber did not find that the UPC's parallel goal was solely to chase away "the RCD-K/ML" but also included "those who were perceived as non-Iturians".[475] Ntaganda also overlooks the Chamber's finding that the UPC's targets "were defined as first, the Nande and then, the Lendu".[476]

106. *Sixth*, the Chamber considered evidence and Ntaganda's trial arguments about the UPC's alleged peace initiatives, multi-ethnicity and policy to defend the population as a whole.[477] However, in light of the totality of the evidence—including evidence of the crimes committed—it concluded that while UPC "peace initiatives" existed on paper, a parallel criminal policy existed as well.[478] The Chamber dismissed Ntaganda's arguments that non-Hema civilians were not targeted during the First Operation and Second Operation.[479]

107. *Seventh*, the Chamber's conclusion that the UPC promoted a policy to attack civilians was not solely based on Ntaganda's own orders.[480] Further, the Chamber considered Ntaganda's testimony about Chief Kahwa's speech,[481] but declined to rely on it because of its findings on how the UPC operations actually unfolded, including the looting and rapes which occurred without punishment.[482] Nor has Ntaganda shown that the Chamber was

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[470] Judgment, para. 302 (fn. 777, considering—but dismissing—Ntaganda's testimony). *See also* paras. 305, 683-686 (comprehensive assessments whether different ethnic groups in the UPC/FPLC had any real power).
[471] Judgment, para. 685.
[472] Judgment, paras. 302, 685.
[473] Judgment, para. 685.
[474] Appeal-Part II, paras. 113-115. *See* above, paras. 71-74, 77-92.
[475] Judgment, para. 686. *Contra* Appeal-Part II, para. 115.
[476] Judgment, para. 293.
[477] Judgment, paras. 302, 304-305, 309, 319. *Contra* Appeal-Part II, paras. 116-120. *See* DCB, paras. 78, 80-107.
[478] Judgment, para. 686. The Chamber considered Ntaganda's testimony about peace initiatives but found his evidence lacked reliability: Judgment, para. 288 (fn. 737).
[479] Judgment, para. 670.
[480] *See* Judgment, paras. 682-690 (referring to paras. 21, 287-294, 296, 302-303, 319, 373, 415, 437-442, 484, 488, 591 and section V.C.4). *Contra* Appeal-Part II, para. 121.
[481] Judgment, paras. 305 (fn. 790), 332. *Contra* Appeal-Part II, paras. 123-124. *See* DCB, paras. 40-94, 154-175.
[482] The Chamber cited the evidence of insider witnesses P-0768, P-0017, P-0963, P-0907, P-0888, and of P-0365 to find that "the speech did not impact sexual violence towards women by UPC/FPLC soldiers": Judgment, para. 332 (fns. 892-894). The Chamber also considered evidence from Ntaganda of his purported discipline for sexual violence (Judgment, para. 332, fn. 895) and accepted evidence that recruits were taught songs inciting them to attack and kill the Lendu and expressions were used during deployment to mean attacking all the Lendu, including civilians, and to loot their property: Judgment, paras. 373, 415, 671, 688-689. The Chamber was not

unreasonable in rejecting his trial submissions[483] and in finding that the evidence was insufficient to determine the exact timing of the speech or that it was given to the troops involved in the First Operation.[484] Nor was it unreasonable for the Chamber to reject Ntaganda's trial arguments that the UPC had a policy to protect the whole population based on evidence of a purported disciplinary system.[485] The Chamber fully canvassed evidence about disciplinary measures and found that while discipline existed for certain military infractions, UPC soldiers "did not consider that rape, the killing of a Lendu, or the looting of Lendu property, were punishable offences".[486] There was no reversal of the burden of proof.[487] The Chamber considered Ntaganda's few examples of punishments for crimes against civilians and assessed it in light of direct evidence that there was no systematic discipline for crimes against the Lendu.[488]

108. For all the reasons above, Ground 4 should be dismissed.

V. NTAGANDA WAS PROPERLY CONVICTED OF ORDERING DISPLACEMENT AS A WAR CRIME (GROUND 6)

109. Ntaganda seeks to reverse his conviction for ordering displacement as a war crime, under article 8(2)(e)(viii), claiming that the Prosecution must prove that the UPC had 'territorial control' over the locations from where victims were displaced.[489] This is incorrect. The question whether the perpetrators could actually satisfy the *actus reus* is a question of fact, to which the nature and degree of the perpetrators' control over victims is relevant. In this case, the Chamber reasonably concluded that the elements of article 8(2)(e)(viii) were met, notwithstanding any broader (but harmless) errors it may have committed in interpreting the *actus reus*.[490] Accordingly, Ground 6 should be dismissed.

V.A. Territorial control is not a legal element of article 8(2)(e)(viii)

110. Although subject to the *chapeau* of article 8(2)(e),[491] the Elements of Crimes require, materially, that the perpetrator under article 8(2)(e)(viii) "ordered a displacement of a civilian

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required to expressly address Lubanga's speech at the Rwamapara training camp, which (for the same reasons) did not undermine the Chamber's conclusion. *Contra* Appeal-Part II, para. 125.
[483] Judgment, para. 305 (fn. 789).
[484] Judgment, para. 305 (fn. 789). *Contra* Appeal-Part II, para. 124.
[485] Appeal-Part II, para. 126. *See* DCB, paras. 175, 290-291, 685, 1560.
[486] Judgment, paras. 331-332.
[487] *Contra* Appeal-Part II, para. 126. *See below* paras. 121-122.
[488] Judgment, para. 332 (fns. 893-894).
[489] Appeal-Part II, para. 130 (quoting Acquaviva, p. 20).
[490] *See below* paras. 116-117.
[491] *See also* Jurisdiction Appeal Judgment, paras. 54-55.

population" and "was in a position to effect such a displacement by giving such order."[492] These elements ensure that the *actus reus* of this war crime does not exceed its proper scope, and that the perpetrator has the necessary capacity to justify their criminal culpability.[493]

111. Beyond these elements, there is no legal requirement to establish the degree of control exercised by a party to the conflict over a given territory. Article 17 of AP II, which inspired article 8(2)(e)(viii), imposes no special requirement for the victim to be a "protected person[]",[494] nor contains a precise analogue to the occupation regime in international armed conflict. Nor in any event is article 8(2)(e)(viii) even conditioned on the application of AP II.[495] What matters for article 8(2)(e)(viii) is simply whether the perpetrator has the capacity to commit the proscribed conduct against the victim[496]—and this is already adequately addressed by the Elements of Crimes.

V.B. Ntaganda ordered the displacement of civilians

112. The Chamber reasonably determined that Ntaganda was responsible for ordering the displacement of civilians under article 8(2)(e)(viii). Although it did not find it necessary to make express findings concerning the degree of control exercised by UPC fighters over displaced civilians, these are established by its other findings including under article 7(1)(d) (forcible transfer), and are not directly challenged by Ntaganda under Ground 6.[497] Accordingly, even if territorial control were to be a legal requirement, it was satisfied.

113. Specifically, the Chamber found that Ntaganda (First Operation) and Kisembo and Mulanda (Second Operation) ordered the UPC to attack the Lendu in particular locations and to drive them out.[498] UPC fighters displaced persons in these locations,[499] by expulsion or other coercive acts,[500] including outside the conduct of hostilities such as after the UPC had

[492] Elements of Crimes, art. 8(2)(e)(viii), elements 1 and 3.
[493] *Cf.* Appeal-Part II, para. 132.
[494] *Contra* Appeal-Part II, para. 130. *See* AP II, art. 2; Jurisdiction Appeal Judgment, paras. 46, 51 (victims of article 8(2)(e) need not necessarily be protected persons under the Geneva Conventions). *Cf.* Acquaviva, p. 20.
[495] *Compare e.g.* Statute, art. 8(2)(f) (not requiring territorial control), *with* AP II, art. 1 (requiring territorial control). *See also* *Tadić* Jurisdiction AD, para. 70; Sivakumaran, pp. 182-195, 210-211. For this reason, reference to territorial control in the Sandoz commentary is immaterial: *contra* Appeal-Part II, para. 131 (quoting AP Commentary, p. 1474 (mn. 4859)). Ntaganda confuses different notions of territorial control—the fact that the application of AP II is conditioned upon parties to the conflict exercising sufficient control of a part of the territory of the State(s) where the conflict takes place does not mean that their treaty obligations apply only when operating in territory which they control. Moreover, the quoted passage relates to article 17(2) of AP II, which refers to the concept of *the civilians'* "own territory".
[496] By analogy, *see e.g.* *Naletilić et al.* TJ, paras. 220, 222. *Cf.* Acquaviva, p. 20.
[497] *See* Appeal-Part II, paras. 129-135.
[498] Judgment, paras. 1088 (First Operation), 1094 (Second Operation). Kisembo's and Mulenda's orders could be attributed to Ntaganda for these purposes: *see* Judgment, paras. 808-810, 825, 834, 837-838, 852-853, 855-857.
[499] Judgment, paras. 1052-1055.
[500] Judgment, paras. 1056-1067.

"tak[en] over Mongbwalu",[501] "during the UPC/FPLC control of Lipri",[502] "during the *ratissage* operation which followed the takeover [of Kobu]",[503] and "in the immediate aftermath of the assault [on Bambu]".[504] These acts were directly contemplated in the orders by Ntaganda, Kisembo, and Mulenda.[505]

114. Not only were Ntaganda, Kisembo and Mulenda able to effect civilian displacements through their orders, by virtue of their positions of control within the UPC,[506] but the UPC fighters carrying out these orders also had sufficient control of civilian victims at the material times so that they could actually expel them. It is immaterial whether this capacity existed when the orders were issued, since the conditional nature of an order makes it no less potentially unlawful.[507] Even if the Appeals Chamber considers that some threshold of control is implicit within the elements of article 8(2)(e)(viii), it should refrain from attempting to specify an abstract standard. Rather, this is a fact-sensitive matter, best evaluated in the circumstances of each concrete case. In this case, where UPC fighters had the capacity to kill and rape civilians who remained, and pillage their property, there can be no doubt that they had any requisite degree of control.

115. More generally, Ntaganda challenges the Chamber's factual findings under article 8(2)(e)(viii) by reference to arguments elsewhere in his brief.[508] These should be dismissed on the same basis.[509]

V.C. The Chamber's harmless errors in interpreting the *actus reus* of article 8(2)(e)(viii)

116. Without prejudice to the foregoing, the Prosecution observes that the Chamber nonetheless technically (but harmlessly) erred in law by concluding that, under article 8(2)(e)(viii), the perpetrator must "instruct *another person* in any form" either to displace "a civilian population" or to carry out an act or omission leading to that result[510]—as opposed to merely "order[ing] a displacement" *including* by means of instructing (expressly or by

[501] Judgment, para. 1058. While paragraph 1060 refers generally to UPC/FPLC conduct "during the assault on Mongbwalu", this appears to be a generic formulation referring both to conduct during the course of hostilities, as described in paragraph 1057, and after hostilities, described in paragraph 1058.
[502] Judgment, para. 1062.
[503] Judgment, para. 1063.
[504] Judgment, para. 1064.
[505] *See e.g.* Judgment, paras. 1065-1066, 1088, 1094.
[506] Judgment, paras. 1095-1097.
[507] *Contra* Appeal-Part II, para. 133.
[508] Appeal-Part II, para. 134 (requesting vacation of Ntaganda's conviction under article 8(2)(e)(viii) "[f]or all the reasons set out in Grounds 5, 8, 13 and 14 in relation to the errors made by the Chamber in its assessment of the six orders"). These grounds relate to the *chapeau* of crimes against humanity, the commission of crimes during the First Operation, Ntaganda's conviction under article 25(3)(a), and Ntaganda's *mens rea*).
[509] *See above* paras. 70-93 (Ground 5); *below* paras. 136-174 (Ground 8), 216-268 (Grounds 13-14).
[510] Judgment, para. 1081 (emphasis added).

implication) one or more civilians to leave the place where they were lawfully present.[511] The Chamber's interpretation was not supported by the cited sources,[512] nor is it consistent with the established framework of international law,[513] or the context and object and purpose of the Statute.[514] Likewise, the Chamber's understanding that the term "a civilian population" in article 8(2)(e)(viii) means at least "a certain number of individuals", assessed on a case by case basis, is also doubtful.[515] Consistent with the above principles, a correct interpretation would show that the enforced displacement of even one or more civilians, with a nexus to a non-international armed conflict, is a war crime, which may be tried by this Court in admissible cases.[516]

117. The Prosecution did not appeal these technical errors because they did not materially affect the Judgment. Even if the Chamber had not erred in these respects and thus correctly interpreted article 8(2)(e)(viii), the very same factual findings already entered under articles 7(2)(d) and 8(2)(e)(viii) would, cumulatively, still establish Ntaganda's liability under article 8(2)(e)(viii). Since these errors likewise have no bearing on the narrow points taken up by

[511] *Cf.* Judgment, para. 1081 (observing without further explanation that "the order does not need to be made to the civilian population"). *But see* Elements of Crimes, art. 8(2)(e)(viii), element 1; Confirmation Decision, para. 64; *Yekatom and Ngaissona CD*, para. 94. *See also* Zimmermann and Geiß, p. 566 (mns. 952, 954).

[512] *See* Judgment, para. 1081 (fn. 3032, citing Piotrowicz; Willms). *But compare* Piotrowicz, p. 347 (while 'ordering' a displacement and carrying out the displacement appear to be two different things, "the two appear to be treated as synonymous"); Willms, pp. 562 ("order within the chain of command is *also* sufficient", emphasis added, as an *alternative* to an order to leave directly made to a "civilian population", and noting that it "remains to be seen" whether the Court will indeed "require[] an order"), 564 (arguing that article 17(1) of AP II "not only prohibits orders of forced displacement, but *also the [direct] coercion of civilians* to leave an area", emphasis added, and recalling that under AP II "many States Parties […] have dropped the term 'ordered'"). It is a different source that in fact supports the Chamber's interpretation, based on his view of the drafters' intentions: Dörmann, p. 472.

[513] *See e.g.* AP II, art. 17; La Haye, p. 215. Notably, while the wording of article 17(1) prohibits "order[ing]" the displacement of the civilian population "unless the security of the citizens involved or imperative military reasons so demand", article 17(2) prohibits "compel[ing]" civilians "to leave their own territory for reasons connected with the conflict", no matter the justification. *See further* AP Commentary, pp. 1472 (mn. 4853), 1474 (mn. 4864. On the proper interpretation of article 17(1), and subsequent practice by States, *see further e.g.* Willms, pp. 551-559, 564. *See also* CIHL Study, rule 129, pp. 459, 460 (fn. 21, citing the practice of the UN Security Council, UN General Assembly, and UN Commission on Human Rights in condemning "instances of forced displacement […] in non-international armed conflicts").

[514] In particular, the Chamber's interpretation would suggest that there is no criminal prohibition under the Statute of directly carrying out the displacement of one or more civilians in non-international armed conflict, unless a subordinate is somehow an accessory to their superior's crime under article 25(3), or otherwise under common article 3 under article 8(2)(c). *Compare* Schabas, pp. 271-275 (treating the war crimes in articles 8(2)(a)(vii), 8(2)(b)(viii), and 8(2)(e)(viii) as substantially similar). On common article 3, *see* 2017 Commentary to GCII, pp. 249-255 (mns. 730-738: common article 3 at least includes an obligation of *non-refoulement*).

[515] Judgment, para. 1083 (citing Dörmann, p. 473; AP Commentary, p. 1472, mn. 4852). *But see* Dörmann, pp. 472-473 (noting that the formulation "one or more civilians" was not used in article 8(2)(e)(viii) due to concerns that this "would not rise to the level of this crime" but that there was no discussion of what *would* constitute an appropriate threshold); AP Commentary, p. 1472, mn. 4852 (observing that article 17(1) of AP II "covers displacements of the civilian population *as individuals or in groups*", emphasis added). *See also* Zimmermann and Geiß, p. 566 (mn. 954).

[516] *See especially* Statute, art. 17(1)(d).

Ntaganda in Ground 6, the Prosecution therefore submits that the Appeals Chamber should consequently decline to rule on this issue in its judgment, in the interest of judicial economy, and neither endorse nor criticise the Chamber's analysis. Alternatively, if the Appeals Chamber does wish to rule, it could request further (concise) submissions from the Parties and participants on this matter to develop their positions.

VI. THE CHAMBER PROPERLY ASSESSED THE EVIDENCE (GROUND 7)

118. The Chamber correctly assessed the evidence presented in this case.[517] It first set out its careful approach on the core evidentiary considerations:[518] this was the lens through which it viewed and assessed the evidence. The Chamber then defined its approach to assessing witness credibility and reliability[519] and conducted a detailed review of specific witnesses on this basis—both separately and when making relevant factual findings.[520] The Chamber's overall approach is correct and reflects existing law and practice.[521]

119. Ntaganda's challenge under Ground 7—limited to three discrete issues—must fail.[522] Since he fails to acknowledge the record and to substantiate his argument, his arguments should be dismissed summarily. Notwithstanding, there is no error. *First*, the Chamber carefully and correctly assessed Ntaganda's own testimony.[523] *Second*, the Chamber correctly found that D-0017 (a former UPC member and Ntaganda's bodyguard) lacked credibility and did not rely on his evidence.[524] *Third*, the Chamber correctly relied on the prior recorded testimony admitted under rule 68(2)(c), including of P-0022 and P-0027.[525]

VI.A. The Chamber properly assessed Ntaganda's testimony

120. Although an accused who chooses to testify in his own defence cannot be systematically

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[517] *See* Judgment, paras. 44-76 (general evidentiary considerations) and paras. 77-284 (specific issues of witness credibility). *Contra* Appeal-Part II, paras. 136-150.
[518] Judgment, paras. 44-76 (addressing burden of proof, facts requiring no evidence and principles governing the evaluation of evidence (including *viva voce* testimony, non *viva voce* testimony such as rule 68 testimony and logbooks, hearsay, circumstantial and identification evidence, corroboration)).
[519] Judgment, paras. 77-88 (addressing credibility, reliability, factors such as age, time, trauma, inconsistencies and delayed reporting of rape).
[520] Judgment, paras. 89-284 (P-0010, P-0017, P-0055, P-0190, P-0290, P-0758, P-0768, P-0883, P-0888, P-0898, P-0901, P-0907, P-0911, P-0963, D-0017, Ntaganda (D-0300) and allegations of collusion), 285-658.
[521] *See e.g.* *Lubanga* AJ, paras. 218, 238-241; *Ngudjolo* AJ, paras. 109-117, 123-125, 148, 168, 170; *Bemba et al.* AJ, paras. 868-870, 874, 912, 957, 1018-1023, 1081, 1095, 1166, 1386, 1540, 1619-1620.
[522] Appeal-Part II, paras. 136-150.
[523] *See e.g.* Judgment, paras. 256-262 (and other sections, where the Chamber assessed Ntaganda's testimony on a case-by-case basis). *Contra* Appeal-Part II, paras. 136-141.
[524] Judgment, paras. 250-255; *Contra* Appeal-Part II, paras. 142-147.
[525] Judgment, paras. 58 (general approach), 545-546, 873-874, 878, 894, 940-942, 1017 (P-0022), 605, 915 (P-0027).

equated to any other witness,[526] once an accused voluntarily testifies under oath (as Ntaganda did), his testimony is assessed (according to the same approach) at par with any other witness.[527] In other words, notwithstanding the different rules that may have applied when Ntaganda testified, the Chamber had to apply the same approach to assess his evidence as with other witnesses. The Chamber did this correctly.

121. Although Ntaganda was composed throughout his testimony and prudent in giving evidence, he seemed more at ease and spontaneous when testifying about opposing armed groups.[528] His testimony was "detailed and comprehensive" and, considering its length and complexity, was "internally consistent". There were "a limited number of discrepancies on discrete issues".[529] As with other witnesses, the Chamber relied on some aspects of Ntaganda's testimony, while rejecting other aspects.[530] The Chamber found Ntaganda's testimony on "his suffering from the experience during the Rwandan genocide" and "his experience of the objective discrimination against the Tutsis during his youth" credible. However, it did not find his testimony that he had always fought and acted to liberate the civilian population in Ituri and that this "revolutionary ideology" governed the UPC's functioning credible.[531] The Chamber analysed the salient features of Ntaganda's testimony separately and in context with other evidence, taken in its totality.[532]

VI.A.1. The Chamber applied the correct standards in law and in fact

122. The Chamber did not err: it did not assess Ntaganda's testimony differently from that of Prosecution witnesses.[533] *First*, by alleging that the Chamber had additionally—and impermissibly—considered if Ntaganda "might lie in order to be acquitted" when assessing

[526] *Katanga* and *Ngudjolo* Accused Testimony Decision, paras. 5-7 (noting the accused's right to silence and protection from self-incrimination) and 12 (noting the accused's right to make an unsworn statement); *Kvočka et al.* AJ, paras. 125, 127 (noting the accused's different position *vis-à-vis* other witnesses, that testimonial rules did not apply to the accused in the same way, and that "an accused who chooses to testify as a witness is not to be treated *qua* witness but as an accused testifying *qua* witness."); *Galić* AJ, para. 17; *Prlić et al.* Accused Contact AD, para. 11 (rules governing any other witness do not "reflexively apply" to an accused).
[527] *Katanga* TJ, paras. 104-105 (assessing the accused's testimony similar to other witnesses); *Karera* AJ, para. 19 ("While '[t]here is a fundamental difference between being an accused, who might testify as a witness if he so chooses, and a witness', this does not imply that the rules applied to assess the testimony of an accused are different from those applied with respect to the testimony of an 'ordinary witness'"); *Musema* AJ, para. 50 ("the sole fact that evidence is proffered by the accused is no reason to find that it is, *ipso facto*, less reliable").
[528] Judgment, para. 257 (fn. 649).
[529] Judgment, para. 258.
[530] Judgment, para. 80; *see also* *Ngudjolo* AJ, para. 168 ("a Trial Chamber may indeed rely on certain aspects of a witness's evidence and consider other aspects unreliable.[…]"); PCB, paras. 80-104.
[531] Judgment, para. 261.
[532] Judgment, paras. 256-262 (and other relevant sections).
[533] *Contra* Appeal-Part II, para. 137.

his credibility, Ntaganda misstates the Judgment.[534] Rather, as the Judgment's plain text shows, the Chamber considered, on a case-by-case basis and where appropriate, if Ntaganda "had an incentive to provide exculpatory evidence",[535] and not whether he "might lie" to be acquitted. As the very cases that Ntaganda cites show,[536] a chamber may consider "the accused's interest in being acquitted" as one proper factor in weighing his testimony. A chamber may not, however, assume that the accused would lie to secure his acquittal and prematurely presume his guilt.[537] Accordingly, the Chamber properly assessed that Ntaganda had an interest in the outcome of the case and reasons to exculpate himself. The Chamber did not, however, assume that Ntaganda would lie to secure an acquittal. In any event, as long as the Chamber did not assume that Ntaganda had lied (which it did not), it could well have considered all his motives/incentives to testify, similar to other witnesses.[538]

123. *Second,* Ntaganda frequently—and incorrectly—characterises the Chamber's proper assessment as adopting an "either/or" approach to fact finding or shifting the burden of proof.[539] He fails to show an error in law or in fact. Significantly, Ntaganda's submissions merely parse out the established process of fact-finding that the Chamber followed (*i.e.*, whether the Prosecution evidence should be accepted as establishing beyond reasonable doubt the facts alleged, notwithstanding the accused's evidence and that of other Defence witnesses),[540] and misinterpret case law.[541]

124. In alleging that the Chamber adopted an "either/or" approach" to assessing evidence—

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[534] Appeal-Part II, para. 137.
[535] Judgment, para. 262.
[536] *R. v. B.*, p. 798 (a trier of fact may take into account, in considering credibility, the "common sense consideration" that witnesses may have, to different degrees, an interest in the outcome of the proceedings; that "the accused has an obvious direct interest in the outcome"; and that "the degree" to which the presence of an interest in the outcome may affect the assessment of witness credibility varies with […] each case).
[537] *R. v. B.*, p. 799 ("The impugned passage […] goes beyond the *permissible* consideration of the accused's interest in being acquitted […] It falls into the impermissible assumption that the accused would lie to secure his acquittal simply because, as an accused, his interest in the outcome dictates that course of action."), citing *R v. Wood* (an accused's interest in the outcome of the trial can be properly considered in weighing his testimony) and distinguishing *Robinson v. R.* (where the trial judge had directed a jury to scrutinise the accused's testimony because of his interest)).
[538] *See* *Bemba et al.* AJ, paras. 1020-1023; *Bemba et al.* TJ, para. 202; *Taylor* TJ, paras. 184-198; Judgment, paras. 163-167.
[539] Appeal-Part II, paras. 3, 138-139, 146, 154-155, 158, 169-170, 179, 197-198, 229-230, 352. *See* Gans (2000), p. 223 (defining the "either/or" approach as "*any* fact-finding approach that, if used to resolve a conflict between witnesses may lead the jury to convict the accused without *necessarily* being satisfied of the accused's guilt beyond reasonable doubt.").
[540] *See e.g.* *Taylor* TJ, para. 181; *Brima et al.* TJ, para. 117; *Sesay et al.* TJ, para. 477; *Bemba* Judge Eboe-Osuji Sep. Op, para. 41 (on the need to address evidence contradicting the Prosecution's theory of the accused's guilt).
[541] *See e.g.* Appeal-Part II, fn. 369, citing *Katanga* Minority Opinion, paras. 168-169, but without noting that Judge Van den Wyngaert's concern on the improper use of Katanga's testimony related to (i) the change from articles 25(3)(a) to 25(3)(d)(ii) as the mode of liability (para. 167); (ii) the facts specific to that case (para. 168 (fn. 219)); (iii) the Majority's alleged misrepresentation of the accused's evidence.

by apparently first finding the Prosecution evidence credible and then dismissing Ntaganda's testimony *on that basis alone*[542]—Ntaganda misreads the case law he refers to. Many of the domestic common law cases that he cites (as support for the "either/or" approach) are anchored in the different context of trial by juries, or laypersons. Thus, they are inapposite to the present case, tried by three professional judges in an international context.[543] Moreover, while Ntaganda overlooks it, chambers in domestic jurisdictions who have cautioned juries from taking the "either/or" approach in fact-finding have been criticised for being overly rigid and misguided.[544] Following this inflexible approach to fact-finding would be particularly unwarranted, when professional judges—such as the Trial Chamber VI Judges—are primarily responsible for determining if a witness is credible and which witness testimony to prefer, and providing a reasoned opinion.[545]

125. Even so, the Chamber did not adopt an "either/or" approach. Nor can any sensible comparison be made to the common law cases cited. In those cases, the judge had erred by directing the jury to acquit the accused *only* if they believed his evidence over that of the complainant's—thus disregarding the possibility that a jury may still have reasonable doubt even if they do not believe the accused's testimony.[546] There is no indication that the Chamber had any doubt when it convicted Ntaganda, or that it shifted the burden of proof. When a trial chamber sets out the standard and onus of proof correctly (as this Chamber did),[547] the Appeals Chamber "must [assume] that the words used […] accurately describe the approach adopted […]").[548] Moreover, the use of inappropriate language in parts is not necessarily fatal, if the chamber otherwise refers appropriately to the standard and onus of proof.[549] Likewise, arguments alleging burden-shifting must consider the larger context.[550]

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[542] Appeal-Part II, para. 138.
[543] *See* *Bemba et al.* AJ, paras. 434 (discouraging the "import" of domestic principles), 574 (domestic systems are influenced by their own underlying legal culture and differ greatly from the international procedural model).
[544] *See* *R. v. Dinardo*, para. 23; Gans (2000), pp. 226-227 (arguing against adopting a "bright-line" rule and for a case-specific context-specific approach); Gans (Part I), pp. 220-242 and Gans (Part II), pp. 345-374 (underscoring the limitations of the "either/or" approach, including that it mandated only one form of fact-finding and encouraged the systematic search of doubt).
[545] *Bemba et al.* AJ, paras. 93-94 ("the Appeals Chamber "must *a priori* lend some credibility to the Trial Chamber's assessment of the evidence proffered at trial"); *see above* paras. 14-18 (standard of review)
[546] Appeal-Part II, para. 139 (fn. 372), citing *R. v. S. (W.D.)*, pp. 522, 532-538 (finding an error on this basis), 523-524, 538-548 (dissenting opinion, finding no error as the jury had been clearly advised) ; *R v. Dinardo*, paras. 2, 7 (the judge had failed to explain how he reconciled inconsistencies, especially regarding the complainant's truthfulness), 23 (noting that there is no sacrosanct formula to assess credibility). *See also* Gans (2000) (citing *R. v. Calides*, pp. 222-223).
[547] Judgment, para. 44 ("the onus is on the Prosecution to demonstrate the guilt of the accused.").
[548] *Zigiranyirazo* AJ, para. 19 (referring to *Musema* AJ, para. 209, and noting that language suggesting, *inter alia*, that an accused must "negate" the Prosecution's evidence, "exonerate" himself, or "refute the possibility" are indications that the burden had been incorrectly shifted); *see also* *Kamuhanda* AJ, para. 39.
[549] *Zigiranyirazo* AJ, para. 20; *Limaj* AJ, para. 65; *Kamuhanda* AJ, paras. 38-44.

Yet, Ntaganda disregards the plain text and context, and points neither to the use of inappropriate language nor to when the burden of proof was concretely misapplied. The one example that Ntaganda gives (P-0768's testimony on the use of landmines in Mongbwalu) is neither substantiated nor apposite.[551] Those specific findings demonstrate that the Chamber correctly found P-0768's account that the UPC used landmines to be "truthful", since other evidence (including Ntaganda's own testimony) showed that the UPC had these mines and that their communications showed that their use was contemplated.[552] On this basis, the Chamber correctly found Ntaganda's specific testimony denying that they used mines not credible.[553] This was not an "either/or" approach; it was a proper exercise in fact-finding and applying the burden of proof.

126. *Third,* although Ntaganda claims that the Chamber set up a "credibility contest" between the Prosecution evidence and Ntaganda's testimony,[554] the Chamber's proper and reasonable assessment shows otherwise. Merely because the Judgment juxtaposed or compared the various relevant testimonies on specific issues does not imply that the Chamber "systematically dismissed" Ntaganda's testimony when it "contradicted" the Prosecution evidence.[555] As Ntaganda acknowledges, there are approximately 90 instances in the Judgment when the Chamber accepted his evidence: this shows that it was not "systematically" dismissed.[556] Further, the Chamber did not "pre-ordain" Prosecution evidence as credible but, rather, properly reasoned its decision to rely on such testimony over Ntaganda's, having considered the totality of the evidence.[557] The Chamber was not required to systematically justify why it rejected each aspect of Ntaganda's evidence.[558]

127. *Fourth,* on the timing of Ntaganda's testimony, the Chamber expressly noted that he was the "second witness" to appear for the Defence.[559] Ntaganda incorrectly states that the Chamber did not consider the timing of Ntaganda's testimony appropriately.[560] A chamber

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[550] *Muhimana* AJ, para. 19; *Zigiranyirazo* AJ, para. 20; *Limaj* AJ, para. 65; *Kamuhanda* AJ, paras. 38-44.
[551] *Contra* Appeal-Part II, para. 138 (on P-0768's testimony on planting landmines), addressed below (Ground 8), paras. 156-158.
[552] Judgment, paras. 171 (fn. 413), 334 (fn. 906).
[553] Judgment, para. 171 (fn. 413); T-218, 41:1-4; T-226, 85:21-86:14, 87:14-88:1, 90:5-19.
[554] *E.g.*, Appeal-Part II, paras. 139, 155.
[555] *Contra* Appeal-Part II, para. 139, fns. 374-375. *See* Gans (Part II), p. 365 ("It would be fallacious to argue that every argument that merely juxtaposes two opposing evidential points amounts to or raises a substantial risk of an 'either/or' error").
[556] Appeal-Part II, para. 139 (fn. 375).
[557] *See* Appeal-Part II, paras. 138-139 (fns. 374-375).
[558] *Prlić et al.* AJ, para. 221; *Karera* AJ, paras. 20-21; *Katanga* Minority Opinion, para. 169, fn. 221 (finding it appropriate to dismiss witness denials when they are not credible)
[559] Judgment, para. 257; *contra* Appeal-Part II, para. 140.
[560] Appeal-Part II, para. 140.

has the discretion to decide *when* an accused may testify (provided it does not unreasonably interfere with his right to testify),[561] but equally to decide what weight to assign to the timing of his testimony.[562] Merely because some chambers, in a different context to this case, assigned an accused's decision to testify *before* any other witness particular weight does not mean that *this* Chamber had to accord Ntaganda's testimony the *same* weight.[563]

VI.B. The Chamber properly assessed D-0017's evidence

128. As the Appeals Chamber has found, the credibility of some witnesses may be impugned to such an extent that they cannot be relied upon, even if other evidence may corroborate aspects of their testimony.[564] D-0017 was one such witness. Given the nature of D-0017's testimony—including that he considered Ntaganda as his "elder brother", who had assisted D-0017 and his family financially—the Chamber reasonably decided not to rely on it.[565] While inaccurately portraying the Chamber's reasonable rejection of D-0017's testimony as the result of a flawed "either/or" approach, Ntaganda also ignores that the Chamber similarly rejected the evidence of two Prosecution witnesses (P-0190 and P-0911) in their entirety.[566]

129. In finding that D-0017 lacked credibility, the Chamber was reasonable and gave thorough reasoning. On several issues, D-0017 was evasive and, at times, he was uncooperative in cross-examination.[567] On some crucial matters (including P-0010's presence in Mongbwalu), his answers were not straightforward or consistent.[568] He generally tended to negate his knowledge of potentially incriminating facts, and the Chamber reasonably found that he did not wish to incriminate Ntaganda.[569] Likewise, D-0017 generally denied that the UPC had committed crimes, or that he knew of such crimes.[570] Moreover, the Chamber

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[561] *Galić* AJ, paras. 20-22.
[562] *Katanga* TJ, para. 104.
[563] Appeal-Part II, para. 140 (citing *Limaj* TJ, para. 22 and *Vasiljević* TJ, para. 13).
[564] *Ngudjolo* AJ, para. 168.
[565] Judgment, paras. 250-255; T-255-Conf, 39:1-22.
[566] Appeal-Part II, paras. 142-147; Judgment, paras. 127-143 (P-0190), 225-235 (P-0911), 250-255 (D-0017).
[567] *See e.g.* Judgment, para. 251 (fn. 629); T-254, 13:6-23 ("If you ask me questions, what basis, on what basis can I answer questions? […] I'll repeat what I said. What I said is that I can only talk about things that I have seen or know. Where it concerns the document, I didn't handle documents and I can't speak about documents that I don't know. [JUDGE FREMR]: Mr Witness, don't, you know, don't oppose to put questions if you know—don't know what questions would be about, but please just to say—my question was easy—to answer, to say yes or no"); T-254-Conf, 29:24-30:21 ("I think there's some confusion in this question. […] Ask me a question that concerns me and I will answer that question. [JUDGE FREMR]: Mr Witness, don't do that. Don't do that. You are not person (*sic*) who will say to any counsel what question they should put to you. […] So please stop with this style, saying that you will not respond to any question").
[568] Judgment, para. 251 (fns. 630-631).
[569] Judgment, para. 252 (fns. 632-639). *See e.g.* T-254-Conf, 35:23-39:15.
[570] Judgment, para. 254.

reasonably found that several aspects of his evidence were implausible,[571] including that the minimum age for recruits was 18, and that he had seen no recruits under 18 at Mandro.[572]

130. Rather than acknowledging the Chamber's detailed analysis and findings, Ntaganda cherry-picks from among them, often without context. The Chamber correctly found that D-0017 generally denied UPC crimes.[573] The two isolated examples only partially reflect the record.[574] In challenging the Chamber's reluctance to rely on D-0017's description of the living conditions in the Mandro training camp, Ntaganda overlooks the details of his evidence[575] and the totality of the evidence about those conditions.[576] Likewise, the Chamber correctly found that D-0017's testimony that the UPC was told to protect civilians regardless of their ethnicity contrasted the consistent and credible evidence from several other witnesses.[577] In claiming that P-0017 and P-0769 corroborated D-0017's evidence, Ntaganda mis-states the record.[578] Likewise, Chief Kahwa's speech (filmed as propaganda for the international community) and Ntaganda's own self-serving testimony did not reliably support D-0017's evidence.[579] Thus, the Chamber reasonably rejected D-0017's evidence.

VI.C. The Chamber correctly relied on P-0022 and P-0027

131. The Chamber properly admitted the statements of P-0022 and P-0027 under rule

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[571] Judgment, para. 253.
[572] T-252, 53:2-55:24 ("Q: […] During your training there, taking into account not only of your group, but of all the recruits in Mandro, did you see any recruits who you believe would have been aged under 18 ? A ; No. As far as I know, I never saw any recruits under 18."); T-253-Conf, 81:12-83:20. *Contra* Appeal-Part II, para. 144.
[573] *Contra* Appeal-Part II, para. 144. On denials, *see* T-252, 58:8-22 (no one in UPC was below 18); T-252, 60:23-61:2 (UPC was not allowed to fire at civilians); T-252, 69:2-5 (no rape during his training); T-252, 77:3-7 (no destruction of property during Komanda operation); T-253-Conf, 61:5-6 (Ntaganda did not rape his escorts); T-254, 7:8-21 (no harsh punishments in Mandro); T-254-Conf, 35:7-39:14 (no rape and assault); T-254-Conf, 62:7-64:9 (no civilians were killed in Mongbwalu and Sayo); T-254, 64:10-15 (no rapes in Mongbwalu and Sayo); T-254, 72:14-73:11 (no killings or rape in Zumbe); T-254-Conf, 96:11-17 (Ntaganda did not receive information from the field or during operations).
[574] Appeal-Part II, para. 144 (on pillaging and looting). *But see* T-253-Conf, 45:3-6 ("[…] During that operation, did you know of cases of pillaging by your forces? A: I can answer briefly saying that there was a group that had gone before us. And whenever there was an attack, generally there's pillaging. *But when we arrived in the town centre, personally, I didn't see any pillaging that had been carried out*."); 57:4-11 ("[…] Of course there were some who looted, *but we didn't loot, we had already gone.* Q: If you didn't carry out the looting, who did, who carried it out? A: In our group there were some soldiers who looted, *although it was some of the population who looted*. […] *And these people also looted*."). (Emphasis added throughout.)
[575] Appeal-Part II, para. 155. *See* T-252, 63:19-22 ("[…] So there was absolutely no problem with regards to any shortage of food); 64:4:7 ("[…] And [Ntaganda] was actually eating the same food as we would eat"); 64:13-17 ("[…] And I would say that the sanitary conditions were very good); T-254-Conf, 7:20-21 ("I told the Defence team that the recruits were not beaten.").
[576] *See e.g.* PCB, paras. 643-666. Judgment, para. 254.
[577] *See e.g.* PCB, paras. 194-199. *See above* para. 73 (Ground 5).
[578] P-0017: T-63-Conf, 47:16-48:4 ("[REDACTED], emphasis added); P-0769**:** T-120, 30:25-33:10 (on songs targeting the Lendu).
[579] *See* PCB, paras. 913-916; Judgment, para. 305 (fn. 790); *see above* para. 107 (Ground 4)

68(2)(c), and correctly set out its approach to assess them.[580] Ntaganda does not challenge this.[581] Moreover, his claim—alleging that the Chamber incorrectly relied on this "untested and uncorroborated" evidence to convict him—is fundamentally flawed.[582] The Chamber did not rely "solely" on these two statements to convict Ntaganda for attempted murder, murder, rape, persecution and intentionally attacking civilians.[583] Ntaganda fails to view the evidence as a whole and misunderstands the notion of corroboration. He also overlooks that, in any event, neither statement was relied on for Ntaganda's own acts and conduct, but rather for the UPC's actions more generally.

132. *First*, the Chamber properly relied on the rule 68(2)(c) statements of P-0022 and P-0027 to enter discrete factual findings. For instance, relying on P-0022's evidence, the Chamber found that after the Kilo attack, a UPC soldier stopped P-0022 and one other Lendu woman and detained them in a pit in the ground. One of the soldiers hit P-0022 and when she was in the pit, the soldiers ordered the male detainees to have sex with the female detainees. The following day, one of the soldiers cut P-0022's neck and threw her into another pit. She survived at the time, but the soldiers killed an Ngiti man and the pregnant Lendu woman who had been detained with her.[584] This evidence, *along with other overwhelmingly consistent evidence*, supported the Chamber's factual findings that UPC soldiers committed various underlying acts of murder, attempted murder, rape and persecution.[585] Likewise, relying on P-0027's evidence, the Chamber found that the UPC killed one person in the surrounding bush during the Buli assault.[586] This, *together with other consistent evidence*, supported the Chamber's factual findings relating to the war crime of intentionally attacking civilians.[587] In neither case was the rule 68(2)(c) statement the "sole" basis for Ntaganda's convictions. Rather, it was *one* item of evidence supporting *one* discrete factual finding—which together with multiple *other* factual findings (based on *different* evidence)—composed the factual matrix upon which Ntaganda's convictions rest.

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[580] Judgment, para. 58 (assessing probative value and reliability, considering, in particular, whether it relates to direct or hearsay evidence or the acts or conduct of the accused, and whether corroborated). *See* P-0022 rule 68 Decision, paras. 16-28 (admitting P-0022's statement); P-0027 rule 68 Decision, paras. 3-24. *See also* *Bemba* Admissibility AD, para. 77; *Bemba et al.* AJ, para. 305 (noting that rule 68 sets out exceptions to the principle of orality); *Ruto* rule 68 AD, paras. 86, 90 (rule 68(2)(c), allowing introducing prior recorded testimony for unavailable witnesses, must be observed); *Gbagbo* rule 68 AD , para. 65 (fn. 165).
[581] *See also* P-0022 rule 68 Decision, para. 11 (noting that the Defence did not contest, in principle, that rule 68(2)(c) applied to this case). The Defence did not seek leave to appeal this or the P-0027 rule 68 Decision.
[582] Appeal-Part II, paras. 148-150.
[583] Judgment, pp. 535-539.
[584] Judgment, paras. 545-546.
[585] Judgment, paras. 873-882, 894 (murder/attempted murder), 940, 942 (rape), 990-999, 1020 (persecution).
[586] Judgment, para. 605.
[587] Judgment, paras. 906-915.

133. *Second*, in claiming that the Chamber relied on "uncorroborated" evidence, Ntaganda mischaracterises the notion of "corroboration" and the Judgment.[588] For the Chamber to enter its overall factual findings that the UPC committed multiple crimes (for which Ntaganda was ultimately responsible), it did not need to find each underlying discrete factual finding (including the ones Ntaganda challenges) to be corroborated.[589] And even if corroboration were required, the underlying factual findings need not "mirror" one another. Put simply, another witness need not testify *identically* to P-0022 (*i.e.*, have the *same* experience as P-0022) for P-0022's account to be considered corroborated. It is sufficient that testimonies are compatible, even if not identical.[590] In this sense, both P-0022's and P-0027's accounts were corroborated. They were compatible and consistent with other witness accounts that described the UPC's actions in the First and Second Operations. Together, they established the pattern of the UPC's criminal conduct.[591]

134. *Third*, Ntaganda overlooks that the prior recorded testimony at issue does not even relate to his own acts and conduct. As the Chamber correctly found in its decisions admitting the two statements,[592] they did not address the "acts and conduct of the accused" or matters "so proximate" to the accused so as to exclude them. In principle (and consistent with *ad hoc* tribunal case law), "acts and conduct" of the accused refers to Ntaganda's acts as charged to establish his responsibility over the actions of the UPC, and *not* the UPC's actions to commit crimes for which Ntaganda is allegedly responsible.[593] Further, even if some of the UPC's actions were deemed to be "proximate" enough to Ntaganda to require the witnesses to be cross-examined, in this case, both P-0022 and P-0027 describe events when Ntaganda was

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[588] Appeal-Part II, paras. 148-149. *See below* paras. 140-143 (corroboration).
[589] Rule 63(4). *See* P-0027 rule 68 Decision, para. 21 ("the fact that certain portions of the prior recorded testimony are uncorroborated would not necessarily render use of Rule 68 inappropriate, the degree of corroboration is one factor which a chamber may consider.").
[590] *See below* paras.140-143 (corroboration).
[591] *See e.g. Đorđević* AJ, paras. 808-809 (approving the use of prior recorded testimony under rule 92*quater* to demonstrate a pattern of criminal conduct).
[592] P-0022 rule 68 Decision, para. 26 ("[…] P-0022 mainly testifies to the attack on the Banyali-Kilo *collectivité* and the commission of crimes by UPC soldiers."); P-0027 rule 68 Decision, paras. 20-21 ("P-0027 mainly testifies to the background of the conflict in Ituri, […] the UPC attack on Buli, Sangi and Kobu, and the commission of crimes by UPC soldiers in that context […]"), noting that P-0022's and P-0027's accounts did not go to the "acts and conduct of the accused" or address matters "so proximate" to the accused.
[593] *Galić* rule 92*bis* AD, paras. 9-12 (noting a clear distinction between (a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others, only the latter is excluded from consideration); *Ayyash et al.* 20 October 2017 Decision, para. 80 ("The phrase "acts and conduct of the accused" signifies the core object of proof in the case comprised by the elements of the crimes charged […] a plain expression which should be given its ordinary meaning […] and should not be expanded to include all the information that goes to a critical issue in the case"); *Bagosora et al.* rule 92 *bis* Decision, paras. 15, 20-25.

not even present.[594] They did not describe actions "proximate" to Ntaganda. Nor has Ntaganda convincingly argued that their evidence was "pivotal" to his convictions. Moreover, even if the prior recorded testimony had addressed Ntaganda's own acts and conduct (which they did not), the Chamber would not have been precluded from considering them, as rule 68(2)(c)'s plain text shows, but may weigh them accordingly. The Chamber's careful approach is consistent with the cited cases.[595] Ultimately, Ntaganda merely disagrees with the Chamber's assessment. There is no error.

135. For the reasons above, Ground 7 should be dismissed.

VII. THE UPC AND HEMA CIVILIANS COMMITTED CRIMES DURING THE FIRST OPERATION (GROUND 8)

136. The Chamber reasonably found that the UPC committed various crimes during the First Operation.[596] The *six* discrete issues that Ntaganda raises to impugn the Chamber's findings on the First Operation demonstrate no error individually or cumulatively, or suggest that the Chamber was unreasonable. Moreover, several evidentiary errors that Ntaganda alleges in Ground 8 and elsewhere in this appeal demonstrate his recurring misapprehension of some fundamental evidentiary principles—including on accomplice evidence and corroboration. The Prosecution will address these evidentiary themes before responding to the specific factual errors alleged.

VII.A. Ntaganda misunderstands evidentiary principles

VII.A.1. Assessing accomplice evidence

137. In this ground,[597] and elsewhere,[598] Ntaganda undiscerningly characterises several Prosecution witnesses as "accomplices" and incorrectly argues that the Chamber did not assess their evidence cautiously. Yet, the Chamber did not characterise these witnesses as

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[594] *Galić* rule 92*bis* AD, para. 13 (noting that actions of others may be proximate, when the accused is present).
[595] Appeal-Part II, para. 148 (fn. 402). *See* *Popović et al.* AJ, para. 96 ("[…] a conviction may not rest solely, or in a decisive manner, on the evidence of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial. This principle applies "to any fact which is indispensable for a conviction", meaning "the findings that a trier of fact has to reach beyond reasonable doubt"), 1218-1226 (finding that Deronjić's rule 92 *quater* statement containing the order to "kill all" was corroborated and could be relied upon); *Prlić et al.* AJ, para. 137 (noting that the Trial Chamber's finding—allegedly solely based on the extracts of the Mladić Diaries—was based "*on various other findings* […] which in turn were based on extensive evidence, and not solely on extracts of the Mladić Diaries"); *Karadžić* AJ, paras. 449, 462-475 (*contra* Appeal-Part II, para. 148 (fn. 402), mis-citing to *Karadžić* TJ); *Martić* AJ, para. 192 (fn. 486) (on rule 92*bis*—a different provision from rule 92*quater* for unavailable witnesses).
[596] Judgment, paras. 467-548.
[597] Appeal-Part II, paras. 159, 172, 181, 202, 205, 210, 226-227 (P-0768, P-0963, P-0017).
[598] Appeal-Part II, paras. 2, 101-102, 344 and 349.

"accomplices", nor was it required to do so. Notwithstanding, the Chamber demonstrated the proper caution in assessing their testimonies, as the Judgment demonstrates, and which Ntaganda disregards.

138. *First,* Ntaganda speculates that certain witnesses are "accomplices", but fails to substantiate his claim. As the ICTR/Y Appeals Chamber has held, the ordinary meaning of the term "accomplice" is "an association in guilt, partner in crime".[599] In fact, it is *this* "association in guilt" that triggers the need to assess accomplice evidence cautiously. Especially when witnesses are charged with the *same criminal acts* as the accused, they may be motivated or incentivised to implicate the accused to benefit their own case or sentence.[600] On this common-sense rationale, ICTR/Y chambers generally did not consider witnesses who were *not* "direct accomplices" of the accused, in the sense that they were *not charged* with the *same crimes* as the accused, as "accomplices" when assessing their evidence.[601] The SCSL adopted a slightly broader definition, whereby to qualify as an "accomplice", a witness need not have been charged with a specific offence.[602] Accordingly, the SCSL found that accomplice witnesses also included those who had received immunity from prosecution for testifying, and those who had openly and voluntarily admitted to committing the same offences as the accused.[603] This Court has not yet defined who may qualify as an "accomplice witness"—but the Appeals Chamber has categorically held, in considering "accomplice evidence", that a trial chamber is *not* precluded from relying on the testimony of certain categories of witnesses (including those who may have previously testified falsely). No witness evidence is *per se* unreliable.[604]

139. In any event, case law from this Court and the *ad hoc* tribunals shows that "accomplice witnesses"—however characterised—may be relied upon. Their evidence need not be corroborated—but a chamber must assess it with caution, and on a case-by-case basis.[605] The Chamber correctly did this. Of the three witnesses that Ntaganda categorises as "accomplices", both P-0017 and P-0963 were UPC soldiers who served in Salumu Mulenda's brigade and participated in the First and Second Operations and P-0768 was a UPC insider

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[599] *Karemera* AJ, para. 42; *Muvunyi* TJ, para. 14; *Munyakazi* AJ, para. 93; *Ntagerura et al.* AJ, para. 203; *Karadžić* AJ, paras. 529-530 (footnotes included); *Krajišnik* AJ, para. 146.
[600] *Karemera* AJ, para. 42; *Karemera* TJ, para. 106.
[601] *Karemera* AJ, para. 42; *Muvunyi* TJ, paras. 14-16, 42; *Munyakazi* AJ, paras. 90-96; *Ntagerura et al.* AJ, paras. 235-236.
[602] *Taylor* TJ, para. 182; *Sesay et al.* TJ, para. 497; *Brima et al.* AJ, para. 127.
[603] *Taylor* TJ, paras. 182, 264, 269-270, 289; *Brima et al.* AJ, para. 127.
[604] *Bemba et al.* AJ, para. 1019.
[605] *Bemba et al.* AJ, para. 1019; *Karemera* AJ, para. 42; *Nchamihigo* AJ, para. 48; *Muvunyi* First AJ, para. 128.

who testified *inter alia* to the UPC's organisational structure and his participation in the First Operation.[606] None are charged with the same offences as Ntaganda or are identified as co-perpetrators. Still, the Chamber correctly assessed their evidence carefully, considering all Defence challenges to their credibility and reliability, including whether they had motives to implicate Ntaganda.[607] Notwithstanding Ntaganda's speculation, the Judgment gives no indication that the Chamber did not exercise such caution.

VII.A.2. Assessing corroboration

140. In claiming that Prosecution witnesses are "uncorroborated", Ntaganda repeatedly adopts an inflexible, narrow and incorrect concept of "corroboration".[608]

141. *First*, corroboration is not required, as a matter of law, at this Court.[609] The *ad hoc* tribunals (ICTR, ICTY, SCSL, ECCC, STL) have moreover, taken a flexible approach to corroboration and recognised the fact-sensitive nature of this assessment, which must accommodate other relevant factors in deciding whether corroboration is needed and if so, what that constitutes.[610] While there may not be one rule to define corroboration in the abstract, these tribunals have discouraged inflexible and rigid interpretations. In particular, ICTR Chambers have found that testimonies corroborate one another when one *prima facie* credible testimony is compatible with another *prima facie* credible testimony, regarding the same fact or a sequence of linked facts. They need not be identical nor describe the same fact in the same way.[611]

142. *Second*, even when a chamber seeks corroboration, witnesses need not testify identically

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[606] Judgment, paras. 106, 161, 236.
[607] Judgment, paras. 106-117, 161-173, 236-249.
[608] *See e.g.* Appeal-Part II, paras. 2, 148-149, 151-152, 159, 162, 164, 167, 178, 181, 193-194, 202, 205, 210, 223, 226-228.
[609] Rule 63(4), Rules. *See* Judgment, para. 75-76; *Bemba* TJ, paras. 245-246; *Ngudjolo* AJ, para. 148 (whether corroboration is needed forms part of the Trial Chamber's discretion); *Bemba et al.* AJ, para. 1084.
[610] *See e.g.*, *Karadžić* AJ, paras. 363, 530; *Popović et al.* AJ, paras. 137, 1228; *Karemera* AJ, paras. 179, 467-468; *Nizeyimana* AJ, para. 174; *Nzabonimana* AJ, para. 319; *Đorđević* AJ, paras. 395, 422, 797; *Ndahimana* AJ, para. 93; *Lukić & Lukić* AJ, paras. 135, 234; *Hategekimana* AJ, paras. 82, 190; *Munyakazi* AJ, paras. 51, 71, 103; *Setako* AJ, para. 31; *Renzaho* AJ, paras. 269, 355; *Kalimanzira* AJ, para. 105; *Rukundo* AJ, paras. 86, 207; *Haradinaj et al.* AJ, para. 129; *Muvunyi* Second AJ, para. 44; *Seromba* AJ, para. 116; *Simba* AJ, para. 103; *Muhimana* AJ, paras. 58, 135; *Kajelijeli* AJ, para. 96; *Kvočka et al.* AJ, para. 23; *Rutaganda* AJ, para. 443; *Bagilishema* AJ, para. 78; *Musema* AJ, para. 89; *Kupreškić et al.* AJ, para. 156; *Čelebići* AJ, paras. 497-498; *Taylor* AJ, paras. 75-78 (noting that there are no rules specifying the form or substance that such support/corroboration must take); *Case 002/02* TJ, para. 53; *Case 002/01* AJ, paras. 268, 302, 314, 424, 428.
[611] *See e.g. Gatete* AJ, para. 125; *Karemera* AJ, para. 467; *Nzabonimana* AJ, paras. 184, 344; *Bizimungu* AJ, paras. 241, 327; *Ndahimana* AJ, para. 93; *Kanyarukiga* AJ, paras. 177, 220; *Hategekimana* AJ, para. 82; *Ntabakuze* AJ, para. 150; *Ntawukulilyayo* AJ, paras. 24, 121; *Munyakazi* AJ, paras. 71, 103; *Setako* AJ, para. 31; *Rukundo* AJ, para. 201; *Bikindi* AJ, para. 81; *Karera* AJ, paras. 173, 192; *Nahimana et al.* AJ, para. 428. *See further New TV S.A.L. et al.* AJ, para. 56(fn. 167), para. 130 fn. 377

for them to be considered corroborated.[612] Witnesses cannot testify identically: each witness will necessarily do so from their own vantage point and experience of the events, or according to how they understand events recounted by others.[613] In general, "even when some details differ between testimonies", thematic consistencies among testimonies are sufficient to amount to corroboration;[614] mirror images of testimony are unnecessary and unrealistic.

143. *Third*, many of Ntaganda's arguments alleging that the Chamber did not seek corroboration merely parse the Chamber's findings out of context.[615] Yet, as the Appeals Chamber has found, a trial chamber must holistically evaluate and weigh all the evidence taken together for a fact at issue.[616] While the Chamber correctly did this, Ntaganda selectively reads the Judgment and ignores relevant evidence.

VII.B. The UPC committed crimes during its attack on Nzebi

144. The Chamber reasonably found that the UPC attacked Nzebi and committed crimes.[617] Ntaganda repeats his failed arguments and merely disagrees with the findings.[618]

VII.B.1. The Chamber correctly found that P-0768 was credible

145. The Chamber correctly relied on P-0768's account of the First Operation.[619] It sufficiently explained why it found P-0768 a "credible witness".[620] The Chamber properly considered the Defence's challenges to P-0768's credibility—whether based on his alleged motivations to testify or on his alleged false testimony on his presence in Mongbwalu—and reasonably rejected them. Ntaganda merely repeats his arguments, without showing error.[621]

146. *First*, although Ntaganda claims that P-0768 held a grudge against him and was motivated to incriminate him,[622] Ntaganda was—as the Chamber correctly found[623]—the only one to testify on this point. In claiming that the screening note describing P-0768's contacts with other individuals (including OTP investigators), the logbook entries, and the Mongbwalu

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[612] *Contra* Appeal-Part II, paras. 148-149, 151-152, 159, 167, 174, 178, 193-194, 224, 226-228 (among others).
[613] *Gatete* AJ, para. 205; *Ntawukulilyayo* AJ, para. 24 (citations omitted).
[614] *Bemba et al.* AJ, para. 1084; *Gatete* AJ, para. 205; *Hategekimana* AJ, para. 82; *Nahimana et al.* AJ, para. 428; *Munyakazi* AJ, para. 71.
[615] *Contra* Appeal-Part II, paras. 148-149, 151-152, 224-225 (among others).
[616] *Bemba et al.* AJ, para. 1540 quoting *Lubanga* AJ, para. 22.
[617] Judgment, paras. 509-510.
[618] Appeal-Part II, 152-166; DCB, paras. 282-283, 552, 668, 724.
[619] Judgment, paras. 161-173; *contra* Appeal-Part II, paras. 160-165.
[620] Judgment, paras. 162, 173 (he generally provided detailed evidence, explained the basis of his knowledge, and his testimony was generally corroborated and consistent with other evidence on the record).
[621] Appeal-Part II, paras. 160-165. *See also* DCB, paras. 252, 268-285; DCR, paras. 61-69, 82.
[622] Appeal-Part II, paras. 160-161, 343 (Ground 14).
[623] Judgment, paras. 163-167.

video corroborate Ntaganda's testimony,[624] Ntaganda merely speculates. Significantly, the Defence did not cross-examine P-0768 on some allegations, leaving Ntaganda to solely address them when he testified.[625] In fact, regarding the screening note, the Defence did not explore this issue exhaustively with P-0768 at trial.[626] Moreover, although Ntaganda claims that P-0768 was imprisoned in Rwanda *because* Ntaganda had informed them that he was a deserter, P-0768 "convincingly denied" this was why he was imprisoned.[627] In these circumstances, even though P-0768 may have expressed an interest in testifying, this in itself does not show bias, much less that "P-0768 hated [Ntaganda]."[628]

147. *Second*, while Ntaganda argues that P-0768 arrived in Mongbwalu after the First Operation and had "falsely inserted himself into [the] story", the Chamber properly dismissed this claim.[629] As the Chamber found, P-0768 gave "a detailed account" of his participation in the Mongbwalu operation and his interactions with Ntaganda. When cross-examined, he gave more details: he described Mongbwalu geographically, including relevant locations, corrected inaccuracies regarding the route taken to Mongbwalu, recognised himself in a video filmed when Mongbwalu was captured, and identified a number of individuals and scenes shown.[630] Other evidence on the record from P-0907, P-0055, P-0901 and P-0041 corroborated P-0768's participation in the Mongbwalu operation.[631]

148. Ntaganda's claim that P-0768 "was lying" about participating in the Mongbwalu battle is incorrect, as the evidence shows.[632] Not only was P-0768's account of his role and presence during the attack consistent, but other evidence corroborated P-0768's presence.[633] In arguing that P-0768 was in Aru rather than Mongbwalu,[634] Ntaganda misstates the record. P-0017, a soldier who fought in Mulenda's brigade (and was, accordingly, not with P-0768[REDACTED]), only testified that he *saw* P-0768 for the first time on the second day of

[624] *Contra* Appeal-Part II, paras. 160-161.
[625] Judgment, para. 163 (fn. 384, on certain logbook entries not supporting Ntaganda's testimony); (fn. 385, where P-0768 was not cross-examined on whether Ntaganda had chastised/ side-lined him for arriving late).
[626] Judgment, para. 165 ("It is unclear to the Chamber whether the witness sufficiently understood the scope of the Defence's questioning […]"); *contra* Appeal-Part II, paras. 160-161; T-36-Conf, 41:7-22.
[627] Judgment, para. 163; T-35-Conf, 17:6-18:1.
[628] Judgment, paras. 164, 167
[629] Judgment, paras. 168-169; *contra* Appeal-Part II, paras. 161-165.
[630] Judgment, para. 168; T-34-Conf, 33:10-43:21, 45:4-47:24.
[631] Judgment, para. 169. *See* T-90-Conf, 7:3-20, 11:13-16, 23:2-12; T-92-Conf, 48:20-49:23 (P-0907) ; T-70-Conf, 93:1-94:21 (P-0055); T-28-Conf, 40:13-41:4, 42:1-22; T-32-Conf, 10:12-11:14 (P-0901); DRC-OTP-0147-0002, 0015-0016, para. 80 (P-0041).
[632] *Contra* Appeal-Part II, para. 163.
[633] Judgment, para. 487 (fn. 1396).
[634] Appeal-Part II, para. 164.

the attack.[635] As for Ntaganda's allegations regarding the UPC logbook and the Mongbwalu video, they rest only on his own interpretation of these two items of evidence,[636] which the Chamber correctly rejected.[637] In any event, the Chamber was not required to specifically address every aspect of the evidence, as long as its reasoning was clear—which it was.[638]

149. *Finally*, in claiming that the Chamber failed to adjudicate the "live issue" of the sequence of pages in the UPC logbook (allegedly documenting his movements in the First Operation), Ntaganda misapprehends the Judgment.[639] P-0290 (a military insider who testified on communication within the UPC) was not questioned on the issue. Not only did the Defence not cross-examine P-0290 on this point, but Ntaganda only raised the sequence of the logbook pages in his testimony (much after P-0290's). When the Chamber considered recalling P-0290 at the end of the Defence case, Ntaganda opposed it.[640] Notwithstanding, the Chamber correctly found that it did not need to resolve the question of the correct sequence of UPC logbook DRC-OTP-0017-0003, since it had "considered the item carefully in relation to each question of fact for which it [was] relevant" in light of the Parties' submissions and Ntaganda's testimony, particularly on the sequencing issue.[641] The Chamber's approach was correct.[642]

VII.B.2. The Chamber correctly relied on P-0768's evidence on the Nzebi attack

150. In relying on P-0768's testimony on the Nzebi attack, the Chamber neither adopted an "either/or" approach to assessing evidence nor shifted the burden of proof onto Ntaganda.[643] Rather, the Chamber found P-0768's evidence regarding this attack to be "credible and reliable",[644] establishing the facts alleged beyond reasonable doubt, notwithstanding Ntaganda's claims that they did not occur.[645]

151. Ntaganda's claim of "burden-shifting" takes specific findings out of context. For instance, the Chamber reasonably rejected Ntaganda's argument that the Nzebi attack did not

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[635] T-59, 13:7-14:8. *Contra* Appeal-Part II, para. 164 ("It also ignores P-0017's evidence that P-0768 arrived after Mongbwalu had been taken").
[636] DCB, paras. 278-281 and DCR, paras. 61-69.
[637] Judgment, para. 168.
[638] *Contra* Appeal-Part II, para. 161 (fn. 451); para. 164 (fns. 460-462); *Lubanga* AJ, para. 22; *Kvočka et al.* AJ, para. 23; *Čelebići* AJ, para. 498; *Kupreškić et al.* AJ, para. 39; *Kordić and Čerkez* AJ, para. 382.
[639] Appeal-Part II, para. 165.
[640] Judgment, para. 65 (fn. 147 and 340). *See above* paras. 64-67 (Ground 2).
[641] DCB, paras. 268, 277, 278-281; DCR, paras. 60-69; PCB, paras. 64, 283-296.
[642] *See e.g. Bemba et al.* TJ, paras. 226-227 and *Bemba et al.* AJ, paras. 1003-1008 (relying on specific portions of Detention Centre recordings, despite technical irregularities).
[643] *See above* paras. 123-125 (either/or approach). *Contra* Appeal-Part II, paras. 154-155, 158.
[644] Judgment, paras. 169, 509-510 (fns. 1499-1507).
[645] Judgment, para. 509 (fns. 1504-1505).

occur because the logbooks or specific video segments on Mongbwalu did not mention "Nzebi". The Chamber's careful reasoning does not show otherwise.[646] Likewise, although Ntaganda argues (for the first time on appeal and purportedly based on P-0963's evidence) that P-0768 incorrectly stated that civilians in Nzebi were killed by UPC shelling because all grenade launchers had been redeployed away from the frontline, Ntaganda is himself incorrect on P-0963's evidence.[647] While P-0963 testified that "[REDACTED]", he also clarified that this was "[REDACTED]", that is after the entire First Operation[648]—which included the attack on Nzebi. Moreover, P-0017, a UPC soldier [REDACTED],[649] testified that shots were fired in the direction of an unnamed settlement on the other side of Sayo.[650] P-0877's evidence that the UPC attacked Nzebi[651] and P-0886's testimony that the UPC later occupied Nzebi[652] further corroborate P-0768's account. Ntaganda's submissions should be dismissed.

VII.C. Ntaganda murdered *Abbé* Boniface Bwanalonga

152. The Chamber carefully assessed the evidence regarding the circumstances of *Abbé* Bwanalonga's (Bwanalonga) death in Mongbwalu[653] and reasonably concluded that it was Ntaganda who murdered him.[654] For every aspect of this incident—from Bwanalonga's capture to the disposal of his body—the Chamber considered all relevant evidence.[655] The Chamber comprehensively explained why it found P-0768's account credible and reliable[656] and Ntaganda's denial of this murder "implausible", "obviously evasive"[657] and, ultimately, not credible.[658] It also relied on the corroborative evidence of other Prosecution witnesses and

[646] Judgment, fn. 1505. *Contra* Appeal-Part II, paras. 156-158.
[647] Appeal-Part II, para. 156 (fns. 425-428).
[648] T-79-Conf, 23:6-13.
[649] T-61-Conf, 69:22-70:1.
[650] T-61-Conf, 107:5-12. *See e.g.* DRC-OTP-2062-0244, para. 9; T-52, 19:3-8; DRC-OTP-2058-0664-R02; DRC-OTP-2069-2095; DRC-OTP-2076-0212 (Nzebi is located about one kilometre northeast of Sayo).
[651] DRC-OTP-2077-0118, para. 20. *See also* T-51, 24:20-24.
[652] T-40-Conf, 49:14-50:3.
[653] Judgment, paras. 529-534 (fns. 1580-1599).
[654] Judgment, para. 533.
[655] *See* Judgment, paras. 529 (fns. 1580-1581, on Bwanalonga's background); para. 530 (fns. 1582-1586, on Bwanalonga's capture, including where he was captured, who captured him, who else was taken, and whether Ntaganda himself was present), 532 (fns. 1588-1589, on Bwanalonga's interrogation), 533 (fns. 1590-1597, on Bwanalonga's murder), 534 (fns. 1598-1599, on three nuns captured at the same time as Bwanalonga).
[656] Judgment, para. 533 (fns. 1592-1593: while P-0768 was the only alleged eyewitness to this event, his account was strong, he gave a consistent, detailed, step-by-step account).
[657] Judgment, para. 533 (fn. 1596).
[658] Judgment, para. 533 (fns. 1594-1596).

evidence[659] and on Ntaganda's own testimony, and his admissions.[660] That the Chamber did not rely on all aspects of P-0768's testimony underscores its reasonable approach;[661] nor did it discard the entirety of Ntaganda's version of events,[662] despite findings that the core of his testimony on this point was not credible,[663] and that his account was partly based on "demonstrably false information".[664] Ntaganda fails to show that the Chamber erred and his submissions should be dismissed. To the extent he repeats arguments advanced elsewhere in his brief, the Prosecution relies on its responses thereto.[665]

153. *First*, in challenging P-0768's evidence, Ntaganda suggests for the first time[666] that his bodyguards, who were present when he murdered Bwanalonga, testified at his trial and did not mention this crime.[667] Yet, this misstates the record. As the Chamber found, Ntaganda had several dozens of bodyguards.[668] That two among them (P-0010 and P-0888)—who were *not* even present at Bwanalonga's murder—did not see the murder is unsurprising. Moreover, while P-0768 testified that an unspecified number of "troops" from Ntaganda's "guard" were present when he murdered Bwanalonga, and later threw his body into the bush,[669] he did not identify these bodyguards, nor was he asked those details.[670] The record does not suggest that any of the bodyguards present at the murder testified at trial.

154. *Second*, in claiming that the Chamber incorrectly relied on three other Prosecution witnesses to "partly corroborate" P-0768's account,[671] Ntaganda misstates both the Judgment and the evidence. In referring to this evidence, the Chamber expressly noted that they partly corroborated P-0768's account "*on aspects other than Mr Ntaganda's direct involvement in*

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[659] *See* Judgment, paras. 529-534 (fns. 1580-1599, referring to P-0017, P-0041, P-0315, P-0800, P-0859, P-0894, P-0901 and P-0963 as well as documentary evidence, including video evidence showing Floribert Kisembo's meeting with members of the clergy in Mongbwalu (DRC-OTP-2058-0251)).
[660] *See* Judgment, para. 530 (fns. 1582, 1583, 1584, 1586, 1589, 1594-1596, fns. 1598-1599,).
[661] *See e.g.* Judgment, para. 530 (fns. 1586, preferring Ntaganda's account, corroborated by hearsay evidence from two Prosecution witnesses, over P-0768's hearsay evidence on Ntaganda's presence when Bwanalonga was captured; and fn. 1599, considering P-0768's hearsay evidence regarding the rape of the three nuns insufficient).
[662] *See e.g.* Judgment, para. 530 (fns. 1582, referring to Ntaganda's account that Bwanalonga's capture occurred on 25 November 2002 for its finding that Bwanalonga was captured *after* the takeover of Mongbwalu; 1584, referring to Ntaganda's testimony that the three nuns were taken to the *Appartements*; 1599, noting Ntaganda's denial that the three nuns were raped at the *Appartements*).
[663] Judgment, para. 533 (fns. 1594-1596).
[664] Judgment, para. 530 (fn. 1583).
[665] *See above* paras.123-125 (on "either/or" approach, *contra* Appeal-Part II, paras. 169-171), paras. 145-148 (on P-0768's presence in Nzebi, *contra* Appeal-Part II, para. 167).
[666] *See* DCB, paras. 637-651.
[667] Appeal-Part II, para. 173 and para. 349 (Ground 14).
[668] Judgment, paras. 381-397.
[669] T-33-Conf, 56:2-3, 21-25; T-35-Conf, 63:17-18.
[670] *See* T-35-Conf, 60:24-62:25, 64:2-68:15 (cross-examination).
[671] Appeal-Part II, para. 174.

the interrogation and killing".[672]

155. The thrust of Ntaganda's argument contradicts his trial position and is incredible.[673] Ntaganda argues that, had he truly been involved in Bwanalonga's "notorious" murder, everyone (including every witness who testified) would have known not only about the murder itself, but also who was responsible.[674] While the evidence shows that the UPC killed Bwanalonga, it is not necessary that that *same* evidence also show that Ntaganda himself committed the murder for it to be considered "corroborative". Evidence that the UPC killed Bwanalonga is compatible with P-0768's testimony that Ntaganda (as the UPC head) killed Bwanalonga. The Chamber correctly found them corroborative.[675] Ntaganda's arguments should be dismissed.

VII.D. Ntaganda ordered the use of anti-personnel mines in Mongbwalu

156. The Chamber reasonably found that "Ntaganda ordered anti-personnel mines to be placed at the entry and exit points of the town that were not guarded by the UPC soldiers".[676] Ntaganda misconstrues the record when he claims that the Chamber reversed the burden of proof[677] and that P-0768's account was not credible and uncorroborated.[678]

157. *First*, the Chamber correctly applied the burden of proof. It first determined that it could rely on P-0768's account on this issue, since he remained consistent when cross-examined and had satisfactorily explained why he had not mentioned the issue in his first statement.[679] It also found that other evidence corroborated his account, showing that anti-personnel mines were part of the UPC's inventory and that "at a minimum" their use in Mongbwalu was contemplated.[680] As the evidence showed, Ntaganda had himself enquired "about the type of mines needed" when asked about their placement.[681] The Chamber then turned to Ntaganda's general denial that the UPC used mines in Mongbwalu, but reasonably found that, given other

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[672] Judgment, para. 533 (fn. 1593, emphasis added, referring to P-0963, P-901, P-0315 and the hearsay evidence of P-0859, P-0901 and P-0041). *Contra* Appeal-Part II, para. 175.
[673] T-223, 3:4-25 (arguing that he had only heard of the priest's death in 2003) T-223, 6:9-7:5; T-237, 7:23-8:1 (arguing that he had not discussed the priest's death within the FPLC). *See* also PCB, paras. 357-360; Judgment, paras. 533 (fns. 1592-1596, dismissing Ntaganda's arguments).
[674] Appeal-Part II, paras. 175-176.
[675] *See above* paras. 140-143(corroboration).
[676] Judgment, paras. 524 (finding that Ntaganda ordered anti-personnel mines to be placed at the entry and exit points of Mongbwalu) and 864 (making no finding that deaths resulted from the use of those mines). *Contra* Appeal-Part II, paras. 178-184.
[677] Appeal-Part II, paras. 179-180.
[678] Appeal-Part II, paras. 178, 181-184.
[679] Judgment, para. 171 (fns. 409-410).
[680] Judgment, para. 171 (fns. 411-412), 524 (fn. 1558), 538 (fns 1611-1612).
[681] DRC-OTP-0017-0033, 0041, 0209 and translation DRC-OTP-2102-3854, 3863, 4031; T-33-Conf, 59:7-21, 65:11-67:10; T-35-Conf, 71:14-76:25.

evidence, it was "not credible.[682] Rather than shifting the burden of proof, the Chamber engaged in proper fact-finding. By arguing that the Chamber should have accepted Ntaganda's explanation over all else, Ntaganda disregards the totality of the evidence (indicating otherwise) and merely disagrees with the findings.[683]

158. *Second,* in attempting to impugn P-0768's account, Ntaganda misunderstands the concepts of accomplice evidence and corroboration.[684] In particular, what Ntaganda perceives as "corroboration" is both incorrect and illogical. For P-0768's account to be corroborated, "all residents" or "all UPC soldiers"—a necessarily generic population—need not have been aware that land-mines were used. Nor did every witness have to testify in identical detail.[685] Further, even if P-0768 had expressed an intention to testify, he was not required to recall every detail in his first statement. The Chamber correctly considered P-0768's testimony in light of his own experience as an eyewitness,[686] and not what Ntaganda inappropriately suggests should have been "key" to P-0768's experience.[687] Ntaganda's arguments should be dismissed.

VII.E. The UPC attacked the Mongbwalu civilian population

159. In properly finding that the UPC soldiers fired at everyone in Mongbwalu, including civilians, the Chamber also reasonably found that "many persons were present in the town as the assault unfolded", before they fled Mongbwalu.[688] It correctly relied on P-0963's credible evidence that their "mission in Mongbwalu was to shoot at anything that moved" and that they "fired at everyone and then […] would come across bodies" of civilians,[689] further corroborated by witnesses who saw bodies of victims in Mongbwalu,[690] by a witness who treated victims fleeing from the town,[691] and by Ntaganda himself.[692] To establish that

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[682] Judgment, para. 171 (fn. 413).
[683] Appeal-Part II, 180.
[684] *See above* paras. 137-139 (accomplice evidence) and 140-143 (corroboration).
[684] Judgment, para. 171 (fn. 413).
[685] *Contra* Appeal-Part II, paras. 181 (requiring "all residents" and "all UPC soldiers" to be aware), 182 (requiring P-0769, P-0963 and P-0907 to testify identically).
[686] *Bemba et al.* TJ, para. 204.
[687] *Contra* Appeal-Part II, paras. 183-184 (speculating that the use of landmines should have been key to P-0768's experience).
[688] Judgment, paras. 497-498. *Contra* Appeal-Part II, paras. 185-193.
[689] T-78-Conf, 80:22-81:22, 84:7-85:14.
[690] P-0768 (T-33-Conf, 58:22-59:4 and DRC-OTP-2058-0664-R02), P-0887 (T-93, 14:3-15), P-0892 (T-85-Conf, 16:24-17:14), P-0055 (T-70-Conf, 95:1-98:19; T-74-Conf, 91:3-92:23). *See also* V-2 (T-202, 18:10-19:1, 31:12-25) and P-886 (T-37-Conf, 7:2-19).
[691] T-68-Conf, 22:4-7, 24:10-17, 26:13-28:17.
[692] DRC-OTP-2058-0251, 00:46:00-00:48:20 (translation at DRC-OTP-2102-3766, 3786:666-3787:698), where, referring to a line of women and children, NTAGANDA can be heard saying: "*[c]elui qui n'a pas trouvé la mort en ce moment-là, il a pris la fuite en débandade*".

civilians were still present in Mongbwalu during the attack, the Chamber relied on eye-witness accounts of persons who had themselves fled Mongbwalu—to find that while some people had fled upon hearing the sounds of fighting (before the fighting had reached Mongbwalu), others had fled once the UPC entered the town.[693]

160. Ntaganda's argument hinges on his incorrect assumption that Mongbwalu's population *instantaneously vanished* upon hearing the first sounds of battle.[694] This is both implausible and unsupported by the evidence. The Chamber reasonably found that the witnesses referred to by Ntaganda did not specify the exact time they left Mongbwalu[695] and, from their limited individual vantage points, could not testify about what the entire population of Mongbwalu did,[696] or simply did not give "evidence in relation to how others reacted".[697] Moreover, the evidence that Ntaganda presents as corroborative does not support his claim that Mongbwalu was empty by the time the UPC started its assault. Significantly, many of the additional civilian[698] or military[699] witnesses that he relies on were not even in Mongbwalu during the attack and do not support his claim that Mongbwalu was empty by the time the UPC started its assault. In these circumstances (particularly when the evidence is irrelevant), the Chamber is presumed to evaluate all the evidence before it and need not expressly address all evidence or arguments as long as its decision is clear.[700] Ntaganda's arguments should be dismissed.

VII.F. Ntaganda ordered firing at persons wearing civilian clothing

161. The Chamber, based on P-0017's credible and reliable evidence, reasonably found that Ntaganda ordered [REDACTED] to fire a grenade launcher on a group of people in civilian clothing in Sayo.[701] The Chamber's careful approach contrasts with Ntaganda's undiscerning appeal on this issue—misstating the record and raising irrelevant issues.

162. *First*, Ntaganda's effort to impugn P-0017's credibility must fail.[702] Whether or not P-0017 may be correctly characterised an "accomplice", the Chamber exercised all proper

[693] Judgment, para. 498 (fn. 1448).
[694] DCB, para. 598.
[695] Judgment, fn. 1448. *Contra* Appeal-Part II, paras. 187, 189, 192.
[696] Judgment, fn. 1448 (referring to P-0017's evidence at T-61-Conf, 51:2-13).
[697] Judgment, fn. 1448 (referring to P-0859's evidence at T-51-Conf, 16, 22-24 and T-52, 17-20, 33).
[698] *Contra* Appeal-Part II, para. 190, referring to the evidence of P-0039 (DRC-OTP-0104-0015, 0019), P-0805 (T-25Bis, 3:6-21), P-0868 (T-178-Conf, 9:3-6), P-0887 (T-93, 14:19-15:1), P-0863 (T-180, 11:21-12:1), and P-0792 (T-150, 45:23-47:3), para. 351 (Ground 14).
[699] *Contra* Appeal-Part II, para. 191, referring to the evidence of P-0768 and P-0010. *See* T-34-Conf-FRA, 14:19-25 (where P-0768 testified "[REDACTED]" in the original French,); T-50-Conf, 62:15-22 (where P-0010 stated "[REDACTED]").
[700] *Bemba et al.* AJ, para. 105.
[701] Judgment, paras. 106-117, 508. *Contra* Appeal-Part II, paras. 194-208.
[702] Appeal-Part II, paras. 202-205.

caution in assessing his testimony.[703] It correctly relied on P-0017: not only was his testimony "rich in detail", he explained the basis of his knowledge and readily admitted when he was not able to answer a question, while also making reasonable inferences.[704]

163. Although Ntaganda claims that there were "many discrepancies" between P-0017's 2006 statement and his testimony, he articulates only one such alleged "discrepancy". On that one issue, finding that P-0017 could not satisfactorily explain the difference in his accounts of who was killed in the Sayo church, the Chamber declined to rely on this specific aspect of his evidence.[705] Yet, the Chamber was still entitled to rely on other aspects of his evidence.[706] Moreover, merely because the Chamber decided not to rely on one limited aspect of P-0017's evidence does not imply that the witness "[retracted] a key aspect of his story".[707] P-0017 stood by his testimony.[708] Further, Ntaganda's claim on P-0017's "apparent willingness to lie" about Ntaganda's orders, along with his other claims, is unsubstantiated.[709] Lastly, in this context, although Ntaganda claims there were "no limits" to the Prosecution's pre-trial preparation of witnesses, he neither substantiates his remark nor explains its relevance, given that the Defence had similar preparation at trial.[710] He fails to show error.

164. *Second,* Ntaganda merely speculates that the Chamber shifted the burden of proof or engaged in an "either/or" approach to credibility.[711] While noting the Defence's challenges to P-0017's account,[712] the Chamber appropriately first assessed his evidence on this event and found it "detailed, consistent throughout his testimony, and plausible",[713] after which it expressly addressed and reasonably dismissed Ntaganda's challenges to this account,[714] including his evidence that he did not see a grenade launcher in Sayo.[715] Ntaganda merely disagrees with the Chamber's conclusions that P-0017's evidence on this event was "credible

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[703] Judgment, paras. 106-117; *see above* paras. 137-139 (accomplice evidence); *contra* Appeal-Part II, para. 202.
[704] Judgment, para. 107.
[705] Judgment, para. 115 (testifying that Ntaganda's bodyguards killed an unarmed Lendu man in front of the church in Ntaganda's presence, while stating in 2006 that when he arrived at the church, women and children were shot dead on Ntaganda's order). *Contra* Appeal-Part II, para. 203.
[706] *See e.g. Bemba et al.* TJ, paras. 202-204.
[707] *Contra* Appeal-Part II, paras. 203-204. *See* T-61-Conf, 108:7-109:13, referring to DRC-OTP-0150-0163, p. 0173, a "screening" note, which was not read-back to P-0017 at the time of its preparation and which the witness did not sign, and not a "statement" (*contra* Appeal-Part II, para. 203).
[708] T-61-Conf, 108:24-109:15 (standing by his testimony); T-61-Conf, 109:7-15 (where he was not given a proper opportunity to explain the difference between the screening note and testimony); T-61-CONF-FRA, 110:27-111:13.
[709] Appeal-Part II, para. 205.
[710] *Contra* Appeal-Part II, para. 204.
[711] Appeal-Part II, paras. 196-198; *See above* paras. 123-125 (on either/or approach)
[712] Judgment, para. 112 (fn. 279, referring to DCB, paras. 314-318, 321, 323-326).
[713] Judgment, para. 112 (fn. 280). *See* also, paras. 507-508 (fns. 1485-1492).
[714] Judgment, para. 508 (fns. 1493-1498).
[715] *Contra* Appeal-Part II, para. 198 (fns. 545-546).

and reliable"[716] and that Ntaganda's denial was not credible.[717] He fails to show that the Chamber erred in reaching this conclusion. Nor was the Chamber necessarily required to find corroboration for P-0017's account.[718] Nor is Ntaganda's reference to P-0963, P-0886, P-0880 relevant: P-0963 participated in the Sayo attack "from behind" [READACTED],[719] whereas P-0800 and P-0886 both fled Sayo when the UPC launched its attack and did not return until well after the end of the assault.[720] None of these witnesses could have witnessed Ntaganda's order to [REDACTED].

165. *Third*, what Ntaganda identifies as the "central problem at the heart of P-0017's allegation" is irrelevant to the issue.[721] For instance, his exposition on whether a grenade could have caused injuries or not at a "200 metre" distance or whether [REDACTED] could have "missed the target" *does not directly relate* to the Chamber's finding that he challenges, namely that Ntaganda ordered that attack. Likewise, he speculates that the findings in relation to the grenade launcher attack should be reversed, since, similar to *Gotovina*, a "200 metre" distance separated the launcher and the column of people and since, in his view, firing from this distance "would have resulted in carnage". But he fails to grasp the nuances of *Gotovina* (where the ICTY Appeals Chamber considered a different issue, *i.e.*, whether, in law, a "200 metre" rule could be used to determine whether a target for an artillery attack was legitimate or not)[722] and this case; the comparison is wholly inapposite. Ntaganda merely substitutes his view for the Chamber's careful finding;[723] there is no error.

166. *Finally*, Ntaganda's claim that the Chamber's finding on the use of heavy weapons was "incompatible" with the evidence misstates the record.[724] Both P-0963 and P-0017 contradicted Ntaganda.[725] Likewise, Ntaganda's latest unsubstantiated claim on appeal—that he could not have "circumvented" the military hierarchy by giving a direct order to a [REDACTED] commander such as [REDACTED] [726]—contradicts the clear record of this

[716] Judgment, para. 508 (last sentence).
[717] Judgment, para. 508 (fn. 1494).
[718] *Contra* Appeal-Part II, para. 194.
[719] T-78-Conf, 79:5-9; T-79-Conf, 11:10-15:9; T-82-Conf, 37:1-39:7.
[720] T-68-Conf, 31:7-36:24 T-68-Conf, 51:15-20. T-36, 70:17-71:7; T-37-Conf, 7:14; T-40, 8:7-21. *Contra* Appeal-Part II, para. 194 (fn. 540).
[721] Appeal-Part II, paras. 199-201.
[722] *Gotovina et al.* AJ, paras. 51-61.
[723] Judgment, para. 508 (fn. 1498).
[724] *Contra* Appeal-Part II, para. 207.
[725] T-81-Conf, 71:20-72:3 (testifying that, although several persons were needed to transport a grenade launcher, [REDACTED]); T-61-Conf, 52:12-23, 67:1-68:13, 69:12-70:11 (stating that certain heavy weapons were operated from the *Appartements*, well behind the frontline, while [REDACTED] advanced to Sayo with a grenade launcher at the same time and "just behind" the infantry).
[726] Appeal-Part II, para. 207.

case,[727] considering the evidence that he was present on the ground and personally commanded the Sayo attack.[728] Ntaganda's arguments should be dismissed.

VII.G. Ntaganda ordered the killing of two persons detained at the *Appartements*

167. The Chamber reasonably found that the UPC detained several persons at the *Appartements* camp in Mongbwalu during the First Operation and that Ntaganda ordered UPC soldiers to beat and kill two of those detained persons.[729] Ntaganda's arguments disregard the record and cherry-pick findings out of context. There is no error.

168. *First*, as shown earlier, the Chamber correctly relied on P-0017.[730] P-0017 was uniquely placed, as [REDACTED],[731] to testify about what happened. P-0017 further testified that the prisoners were taken away discreetly during the night;[732] Ntaganda had woken him up to order him to open the prison.[733] Moreover, the evidence shows that this was not an isolated incident.[734] In these circumstances, P-0017's account need not be corroborated.[735] Yet it was. Other witnesses (P-0907, P-0963, P-0887, and P-0898)[736] reliably and consistently testified about the murder of prisoners at the *Appartements*.[737] They were also consistent on other details regarding the *Appartements* prison, such as whether it was underground or not,[738] the identity of the prisoners,[739] whether they were interrogated or not,[740] as well as the use of other prisons in Mongbwalu.[741] While these witnesses testified in more or less detail depending on their individual vantage points, Ntaganda fails to explain how their evidence is inconsistent, let alone that the Chamber erred.

169. *Second*, Ntaganda—claiming that P-0017's credibility was impugned since he apparently did not recognise the *Appartements* camp area and two UPC leaders in a video

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[727] Judgment, para. 322.
[728] Judgment, para. 500 (fn. 1453, referring to Ntaganda's admission at T-235, 58:3-7).
[729] Judgment, para. 528 (fns. 1578-1579). *Contra* Appeal-Part II, paras. 209-225.
[730] *Contra* Appeal-Part II, paras. 209-210 and 224; *see above* paras. 161-166 (on P-0017's credibility).
[731] T-59-Conf, 21:16-21, 25:2-3.
[732] T-59-Conf, 23:3-8.
[733] T-59-Conf, 23:15-24:8.
[734] *See e.g.* T-59-Conf, 22:18-23:8; T-79-Conf, 21:19-22:19; T-154, 18:18-25, 20:14-19; T-90-Conf, 34:11-25 (on other prisoners being killed at the *Appartements*).
[735] *See above* paras. 140-143 (on corroboration).
[736] Judgment, fns. 1574 and 1577.
[737] *See* Judgment, fn. 1576.
[738] *Contra* Appeal-Part II, para. 222 (fns. 603-605). *See* T-93, 33:11-16, T-79-Conf, 24:15-19, T-154-Conf, 20:4-7, T-59-Conf, 21:18-21 (location of the prison); T-160-Conf, 83:2-3, T-161-Conf, 52:4-13 (the meaning of the Swahili term "Mahabusu"). *See also* Judgment, paras. 376, 943, 1120 (use of underground prisons by the UPC).
[739] *Contra* Appeal-Part II, para. 222 (fns. 607-610). *See* T-59-Conf, 24:9-11; T-93, 33:1-3, 34:5-11; T-79-Conf, 21:19-22:15; and T-154-Conf, 19:1-4.
[740] *Contra* Appeal-Part II, para. 222 and fns. 611-615. *See* T-154, 18:18-21; T-93, 33:8-10; T-79-Conf, 15:22-16:2, 22:20-23:13, 23:23-24:4, 25:14-15; T-90-Conf, 34:20-25.
[741] *Contra* Appeal-Part II, para. 222 (fn. 606). T-90-Conf, 34:12-19; T-59-Conf, 35:15-36:22; T-154, 18:13-17.

recording—fails to engage with the Chamber's findings.[742] He merely disagrees.

170. *Third*, the Chamber properly assessed the evidence of P-0017's and Ntaganda's simultaneous presence at the *Appartements* in Mongbwalu.[743] The Chamber found P-0017's account to be "detailed and logical" and that certain details were consistent with the testimony of other witnesses,[744] and appropriately considered Ntaganda's challenges.[745]

171. The Chamber correctly rejected Ntaganda's testimony that he left Mongbwalu on 28 November 2002, deciding instead that, while it was satisfied that "he remained in the town for at a minimum one week after the UPC/FPLC took over Mongbwalu", the exact date of his departure could not be established.[746] In incorrectly suggesting that other witnesses (P-0002, P-0768, P-0901 and P-0963) "reinforced" his account that he left Mongbwalu on 28 November 2002, Ntaganda conflates two issues—the apparent date of his departure from Mongbwalu and the duration of his stay in Mongbwalu. Since P-0002 ([REDACTED]) specifically contradicted it, the Chamber did not accept Ntaganda's statement that he left on 28 November 2002 by plane.[747] On the separate issue of how long Ntaganda stayed in Mongbwalu, the Chamber correctly found that he remained "at a minimum one week", a finding which is supported by the evidence of three witnesses who all testified that Ntaganda stayed in Mongbwalu longer than a week.[748] Contrary to Ntaganda's suggestion,[749] P-0963 did not "concede" under cross-examination that Ntaganda stayed less than a week.[750] Ntaganda incorrectly relies on the Prosecution's good faith suggestion to Ntaganda in cross-examination that he left "on 29 November 2002, or sometime after, but not the 28th".[751] This is not evidence, and the Chamber was correct not to rely upon it.[752]

172. Likewise, Ntaganda's challenge regarding the timing of P-0017's arrival at the *Appartements* should also be dismissed. At trial, Ntaganda claimed that P-0017 was *never* at the *Appartements*, on the basis of arguments[753] that the Chamber expressly and appropriately rejected.[754] In now arguing that the Chamber ought to have considered P-0017's alleged

[742] Judgment, para. 109 and fns. 264-272; Appeal-Part II, para. 210.
[743] *Contra* Appeal-Part II, paras. 211-217.
[744] Judgment, para. 108 (fn. 263).
[745] Judgment, paras. 109-110.
[746] Judgment, fn. 1412.
[747] Judgment, fn. 1412. *Contra* Appeal-Part II, para. 212.
[748] T-34-Conf, 7:9-12; T-28-Conf, 57:19-22; T-79-Conf, 25:25-26:3; T-82-Conf, 40:9-16.
[749] Appeal-Part II, para. 212.
[750] *See* T-79-Conf, 25:25-26:3; T-82-Conf, 40:9-16. *See* also T-82-CONF-FRA, 43:15-22.
[751] T-237, 11:10-14.
[752] *Contra* Appeal-Part II, para. 213.
[753] DCB, paras. 302-308; DCR, paras. 88-95.
[754] Judgment, para. 111.

"(repeated) testimony that he only arrived at the *Appartements* more or less one week after the taking of Mongbwalu",[755] Ntaganda mischaracterises the evidence. As the record shows, while P-0017 was repeatedly *asked* about the timing of this event, his answer was not emphatic.[756] In any event, based on P-0017's detailed and credible account, the Chamber reasonably found that Ntaganda and P-0017 were both present there long enough for P-0017 to have observed Ntaganda's actions.

173. *Fourth*, the Chamber correctly found that "UPC/FPLC troops detained several persons, including Lendu, at the *Appartements* during the First Operation.[757] Although Ntaganda claims that the Chamber incorrectly read his evidence to find a contradiction,[758] it is Ntaganda who misreads both the evidence and the Judgment. The Chamber correctly found a contradiction between his testimony that "there weren't any" prisoners taken during the attack on Mongbwalu[759] and his admission that *Abbé* Bwanalonga was captured and interrogated at the *Appartements*.[760] Likewise, it correctly found Ntaganda's testimony to contradict his own contemporaneous "statement shortly after the takeover of Mongbwalu that many people were captured and that a significant number of them were killed".[761] Ntaganda's claim that the Chamber found the two groups of people he referred to—those who were captured and those who were killed—to be the same people misreads the Judgment.[762] His arguments should be dismissed.

174. For the reasons above, Ground 8 should be dismissed.

VIII. CHILDREN UNDER THE AGE OF 15 YEARS WERE IN NTAGANDA'S ESCORT (GROUND 9)

175. The Chamber correctly found that three of Ntaganda's escorts were under the age of 15 based on witnesses' testimony and their identification of children they personally knew in video images, as corroborated by the Chamber's own assessment. Ntaganda mischaracterises the evidence and misapprehends the Judgment. He repeats his trial arguments and merely disagrees with the Chamber's reasonable (and correct) assessment of evidence, without articulating how the Chamber erred.

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[755] Appeal-Part II, para. 215 (fn. 586, referring to T-62-Conf, 56:10-18).
[756] T-59-Conf, 17:11-13; T-62-Conf, 44:18-45:3, 56:10-15. *See also* T-59-Conf, 17:7:10; T-62-CONF-FRA, 45:6-19, 56:10-19.
[757] Judgment, para. 528. *Contra* Appeal-Part II, paras. 218-221.
[758] Appeal-Part II, para. 218.
[759] T-235, 84:17-85:1.
[760] Judgment, fns. 1574, 1589.
[761] Judgment, fn. 1574.
[762] Judgment, fn. 1574. *See also* fn. 1434.

VIII.A. The Chamber properly relied on several types of corroborating evidence

176. The Chamber's findings must be viewed in their proper context.[763] Although it could have determined the victims' ages based solely on the video evidence,[764] the Chamber also relied on the following corroborating evidence:[765] (i) direct testimonial evidence of P-0010 and P-0888, themselves members of Ntaganda's escort;[766] of P-0898, a boy under 15 years old when recruited by the UPC, who personally knew three of Ntaganda's escorts who were also under 15 years old;[767] and of witnesses who had been in regular contact with, or had sufficient opportunities to observe, those serving in Ntaganda's escort, including children under 15 years of age:[768] namely, six UPC military insiders,[769] one UPC [REDACTED],[770] one witness who was in a position to observe UPC soldiers,[771] and, to a lesser extent, one UPC political insider;[772] and (ii) the Chamber's own assessment of four video extracts in which P-0010 and P-0898 identified three individuals in Ntaganda's escort as under the age of 15.[773] The Chamber agreed with this testimony based on its own assessment of the video images, concluding that, notwithstanding a "large margin of error" and "wide margin of error" the children were "manifestly under the age of 15" when the video extract was recorded.[774]

177. It is thus clear from this that the Chamber did not rely solely on video images.[775]

VIII.B. The Chamber properly relied on video images

178. Ntaganda incorrectly claims that the Chamber did not explain its approach to age assessments based on visual images[776] and disputes the Chamber's age assessment of three

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[763] *Contra* Appeal-Part II, para. 231, 237-240 (suggesting that the Chamber only relied on video images; but later conceding that it also relied on testimonial evidence: Appeal-Part II, paras. 232-233, 243, 246).
[764] *Lubanga* AJ, paras. 216-223; *see in particular* para. 218 ("[…] the Appeals Chamber finds that there is no strict legal requirement that the video excerpts had to be corroborated by other evidence in order for the Trial Chamber to be able to rely on them") and 221 ("[…] this jurisprudence demonstrates that the question of whether video evidence can be relied upon to establish the element of age is a question of fact").
[765] Judgment, paras. 386-391. In *Lubanga*, Trial Chamber I followed the same approach: *Lubanga* AJ, para. 188.
[766] Judgment, para. 386. The Chamber found that the testimony of the two witnesses cannot alone support a finding that Ntaganda's escort included individuals under 15. *Contra* Appeal-Part II, paras. 243, 247.
[767] Judgment, paras. 388, 391.
[768] Judgment, para. 389.
[769] P-0290, P-0017, P-0016, P-0768, P-0055, P-0901.
[770] [REDACTED].
[771] P-0014.
[772] P-0041.
[773] Judgment, paras. 387-388.
[774] Judgment, paras. 387-388.
[775] It is inaccurate that there were only "two pillars" for the Chamber's finding that Ntaganda knew that the UPC would recruit, train and deploy individuals under 15 years old. *See below* paras. 212-215.
[776] Appeal-Part II, para. 237.

individuals depicted in the "Rwampara" video.[777] However, the Chamber's findings were reasoned and based on: (i) the size and physical features of one individual;[778] (ii) the size of another individual who was "significantly smaller than the soldiers around him and barely taller than the wheel of the vehicle on which he can be seen loading his weapon";[779] and (iii) facial features of another individual.[780] In doing so, the Chamber allowed for "a large margin of error"[781] and "a wide margin of error".[782]

179. The Chamber was competent to assess the age of individuals appearing in the video images.[783] This was part of the Chamber's routine function of assessing and evaluating the credibility and reliability of evidence. It is well established that "it is feasible for non-expert witnesses to differentiate between a child who is undoubtedly less than 15 year old and who is undoubtedly over 15".[784] The *Lubanga* Trial Chamber made age determinations based on assessing visual material,[785] as has been done in domestic jurisdictions.[786] Ntaganda relies on inapposite authorities.[787] That some fact-finders have been unable to determine the age of someone based on certain visual images[788] does not mean fact-finders in other cases have likewise been unable to make such determinations.[789] Indeed, the Appeals Chamber in

[777] DRC-OTP-0120-0293. *See* Appeal-Part II, paras. 238-240.
[778] Judgment, para. 387 (fn. 1099).
[779] Judgment, para. 387 (fn. 1100).
[780] Judgment, para. 388. *See also* Judgment, para. 203 (P-0898's age estimates were "generally reliable", based "on the size and other physical features of the relevant individuals" and "relate to individuals who were in the same age range as the witness") and fn 1102 ("Claude, Rambo and Tipe […] were around his age because of their size").
[781] Judgment, para. 387. *Contra* Appeal-Part II, paras. 232, 240.
[782] Judgment, para. 388.
[783] *Contra* Appeal-Part II, paras. 237, 240 (Ntaganda questions a chamber's ability to make age determinations based on photographs or video stills).
[784] *Lubanga* TJ, para. 643.
[785] *Lubanga* AJ, para. 188 and fn 312. *See also* para. 220 (citing *Taylor* TJ, para. 1431, where the SCSL Trial Chamber considered the witness's appearance while testifying).
[786] *Lubanga* AJ, para. 221 (citing domestic cases indicating that some triers of fact have made age assessments based on visual images alone (in particular for pre-pubescent children) while in other cases they have asked for corroboration or expert evidence). *See also* *U.S. v. Riccardi*, 405 F.3d 852, paras. 80-81 (10th Cir. 2005) (confirming a judge's age determinations made on the basis of photographs); *U.S. v. Charriez-Rolón*, 923 F.3d 45, p. 52 (1st Cir. 2019) (confirming that "a rational jury could find, beyond reasonable doubt, that the images admitted into evidence contained minors); *U.S. v. Dewitt*, 943 F.3d 1092, p. 1097 (7th Cir. 2019) (confirming the capability of jurors to make age assessments based on "the totality of life experiences").
[787] Appeal-Part II, fns. 637, 643 (citing V. Feltz and V. De Sanctis *et al.*: concerning age assessments of teeth and bones by medical tests based on individuals of another age range) and fn. 641 (citing *Katz*: concerning the use of black and white photos which were not of sufficient clarity to determine age; the case was about *post-pubescent* individuals who were believed to be below 18 years, and not about *pre-pubescent* children).
[788] Appeal-Part II, fns. 637, 642 (citing *Loring*, para. 15: segments of a video of two persons found inadmissible because the judge could not, due to lack of expertise in age estimation and evidence as to their age, determine their 'apparent age' to compare with the two complainants also depicted).
[789] *See e.g.* Appeal-Part II, fn. 641 (citing *Katz*, para. 21: finding that "[t]he threshold question—whether the age of a model in a child pornography prosecution can be determined by a lay jury without the assistance of expert

Lubanga confirmed that "the question of whether video evidence can be relied upon to establish the element of age is a question of fact".[790]

180. Further, the Chamber exercised due caution[791] and was aware of the limitations in determining age based on physical appearance,[792] as shown by its application of a large and wide margin of error[793] and its making findings only where the children were "manifestly" under the age of 15 years.[794] Moreover, the Chamber indicated when it was unable to determine whether individuals in some videos were manifestly under the age of 15,[795] and made findings only with respect to certain video extracts and a limited number of children, as Ntaganda himself concedes.[796] Nor did Ntaganda challenge the authenticity or contemporaneous recording of the Rwampara video when it was admitted at trial, or now on appeal.[797] In his closing submissions, Ntaganda described the video as "the least subjective evidence available to the Chamber" which "provide[s] strong evidence".[798]

181. Finally, the Chamber considered Defence arguments, including P-0017's testimony, that there was "no evidence to the effect that this person is the same person as the person identified by P-0010 as Lamama".[799] The photographs of the asylum seekers that Ntaganda appends to his Appeal were not in evidence, relate to a different age range (18 year-olds) and cannot "be usefully compared" to the video extracts in this case.[800] Thus, Ntaganda's arguments challenging the Chamber's approach to age determination based on their assessment of the video material must be dismissed.

VIII.C. The Chamber properly relied on age determinations made by witnesses

182. The Chamber reasonably assessed the credibility and reliability of the witnesses it relied

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testimony—must be determined on a case by case basis. […] it is sometimes possible for the fact finder to decide the issue of age in a child pornography case without hearing any expert testimony").
[790] *Lubanga* AJ, para. 221.
[791] *Lubanga* AJ, para. 221 ("one factor relevant to reviewing whether a Trial Chamber's factual finding was reasonable is whether it appropriately exercised caution when assessing [age] on the basis of video images").
[792] *Lubanga* AJ, paras. 221-222. *See also* on identification evidence: Judgment, paras. 71-72.
[793] Judgment, paras. 387-388.
[794] Judgment, paras. 387-388.
[795] Judgment, para. 390 (fn 1109).
[796] Appeal-Part II, para. 242. These are the only three findings of children manifestly under the age of 15 made by the Chamber based on video evidence, even though the Prosecution had argued that children under 15 years were present in a number of additional videos and one photograph: *see* PCB, paras. 678, 684 and fn. 2042. The Chamber did not make any findings that the children in photograph DRC-OTP-2058-0667-R02 were under 15 years, despite P-0768's testimony: Judgment, para. 170 (fn. 406).
[797] The video was admitted during the testimony of P-0010 (T-50, 71:11-23). Ntaganda had objected to its admission because he argued that P-0010 did not appear in it (T-50, 67:1-7). [REDACTED].
[798] DCB, para. 1513.
[799] Judgment, para. 387 (fn. 1099, where the Chamber considers the evidence of Defence witnesses D-0017 and D-0251, Ntaganda's testimony and DCB, paras. 1306, 1327, 1529).
[800] Appeal-Part II, paras. 238-239. The Defence attached the same pictures to its closing brief: Annex F to DCB.

upon.[801] Ntaganda does not show an error.[802]

VIII.C.1.The Chamber reasonably assessed P-0898's credibility

183. The Chamber reasonably found Witness P-0898 (a child soldier) to be "a credible witness who provided first-hand evidence that can be fully relied upon".[803] Ntaganda repeats his failed challenges to P-0898's credibility[804] and merely disagrees with the Chamber's careful assessment of his testimony.[805] His argument that it is necessary to corroborate P-0898's testimony that the child's name was "Tipe" is unfounded.[806] Corroboration is not required,[807] and Ntaganda identifies no legal basis requiring the Prosecutor to put specific questions to witnesses.[808] In any event, P-0898's testimony that Ntaganda had escorts under 15 years old was corroborated.[809]

184. Further, Ntaganda's reference to *Čelebići*[810] omits fundamental distinctions between the two cases: that appeal dealt with the Prosecution's reliance on testimony that was unclear as to the accused's presence at a crime scene without the Prosecution having clarified that ambiguity with the witness during his testimony at trial. In contrast, P-0898 gave clear, unambiguous evidence about his own age and his recruitment, training and use by the UPC and about the age, name and functions of Ntaganda's underage escorts named Claude, Rambo and Tipe, who P-0898 knew personally.[811] There was nothing ambiguous.

VIII.C.2.The Chamber reasonably assessed P-0010's credibility

185. Likewise, the Chamber reasonably assessed P-0010's testimony and relied on certain aspects of her testimony while not relying on other aspects.[812]

186. *First*, the Chamber correctly defined the concepts of credibility (of witnesses) and

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[801] Judgment, paras. 89-105 (P-0010), 106-117 (P-0017), 118-126 (P-0055), 144-147 (P-0290), 161-173 (P-0768), 189-199 (P-0888), 200-208 (P-0898), 209-215 (P-0901), 391 and fn. 1113 (P-0016), 390 and fn. 1105 (P-0014), 390 and fn. 1107 (P-0030), 390 and fn. 1112 (P-0041).
[802] *Contra* Appeal-Part II, paras. 242-243, 245-248.
[803] Judgment, para. 208.
[804] DCB, paras. 1231-1260, 1328-1329. The Chamber considered the Defence arguments regarding P-0898's credibility: Judgment, paras. 204-205, 207, fns. 486, 489, 491-492, 494, 496, 498, 502-504.
[805] Appeal-Part II, para. 246.
[806] *Contra* Appeal-Part II, para. 247.
[807] Rules, rule 63(4); *Lubanga* AJ, para. 218. *See also* Judgment paras. 75-76 (although corroboration is not required under the Statute, the Chamber required several items of evidence to reach some findings beyond reasonable doubt).
[808] *Lubanga* AJ, para. 209.
[809] Judgment, paras. 387, 389-391.
[810] Appeal-Part II, para. 247 (citing *Čelebići* AJ, para. 452).
[811] P-0898 testified about Tipe's functions guarding Ntaganda's cows and the filming of the video in which he and Tipe appear, its date, their clothes and weapons: Judgment, paras. 207, 388 and fns. 1102-1104, 1114.
[812] Judgment, paras. 89-105. *Contra* Appeal-Part II, para. 243 (P-0010's testimony cannot be accorded "any corroborative weight […] regarding the age of anyone"). Ntaganda repeats trial arguments: DCB, para. 1306.

reliability (of their testimony)[813] and explained the relevant factors that it considered.[814] The Chamber correctly noted that "[i]nconsistencies, contradictions, and inaccuracies do not automatically render a witness's account unreliable in its entirety, as witnesses, depending on their personal circumstances, may experience, and therefore remember, past events in different ways".[815] The Chamber further recognised that "[i]t is possible for a witness to be accurate and truthful, or provide reliable evidence, on some issues, and inaccurate and/or untruthful, or provide unreliable evidence, on others".[816] Thus, it is not an error of law *per se* to rely on evidence that is inconsistent with a prior statement or other evidence adduced at trial,[817] and a witness (notwithstanding certain contradictions) may be deemed credible and reliable in light of the overall evidence.[818] The Chamber nevertheless underscored that "when [it] rejected part of a witness's testimony, it invariably considered the impact of that rejection on the reliability of the remainder of the testimony"[819] and meticulously reasoned its credibility and reliability assessments.[820] This approach is consistent with the jurisprudence of other international tribunals[821] and is accepted by Ntaganda.[822]

187. *Second*, the Chamber correctly applied these principles to P-0010. In particular the Chamber: (i) assessed P-0010's credibility and observed that her demeanour and the level of detail she provided was the same in examination-in-chief and cross-examination, and explicitly rejected Ntaganda's claim that P-0010 "was a combative, biased and uncooperative witness";[823] (ii) conducted a holistic assessment of P-0010's evidence in light of the entire

[813] Judgment, para. 53 ("Credibility relates to whether a witness is testifying truthfully, while the reliability of the facts testified to by the witness may be confirmed or put in doubt by other evidence or the surrounding circumstances. Therefore, although a witness may be credible, the evidence he or she gives may nonetheless be unreliable"); *see also* *Lubanga* AJ, para. 239. This terminology is consistent with rule 140(2)(b). *See also* *Kunarac* Decision on Motion for Acquittal, para. 7 ("in limited circumstances, there is a distinction which has to be drawn between the credibility of a witness and the reliability of that witness's evidence. Credibility depends upon whether the witness should be believed. Reliability assumes that the witness is speaking the truth, but depends upon whether the evidence, if accepted, proves the fact to which it is directed").
[814] Judgment, paras. 77-80.
[815] Judgment, para. 80. *See also* *Brđanin* TJ, para. 25; *Kupreškić et al.* AJ, para. 332.
[816] Judgment, para. 80. Whether a Chamber requires corroboration falls within its discretion: *see* *Ngudjolo* AJ, para. 148; *Lubanga* TJ, paras. 104, 110 (not necessarily requiring corroboration); *see also* *Simba* AJ, para. 24.
[817] *See* *Popović et al.* AJ, paras. 136-137 (where inconsistencies exist the Trial Chamber must evaluate the explanation given for these inconsistencies and provide reasons to its decision to rely on such evidence); *Taylor* TJ, paras. 1564, 1591 (finding a witness credible despite inconsistencies, and noting his young age and traumatic experiences during the events). *Contra* Appeal-Part II, para. 328.
[818] *Popović et al.* AJ, para. 137; *Muvunyi* First AJ, para. 144. Under rule 63(2), the Chamber has the authority to "assess freely all evidence submitted in order to determine its relevance […] in accordance with article 69".
[819] Judgment, para. 80 (citing *inter alia* *Lubanga* TJ, para. 104; *Bemba et al.* TJ, paras. 202, 204).
[820] Judgment, paras. 89-262.
[821] *Ngudjolo* AJ, para. 168; *see also* *Kupreškić et al.* AJ, para; 333; *Renzaho* AJ, para. 425; *Haradinaj et al.* AJ, paras. 201, 226 (a Chamber may reasonably rely on parts of a testimony and consider other aspects as unreliable)
[822] Appeal-Part II, para. 328.
[823] Judgment, paras. 90-91.

record;[824] (iii) explained why it could rely on certain aspects of P-0010's testimony (her experiences in Ntaganda's escort, including sexual violence, and her visit to the Rwampara camp with Ntaganda)[825] but not on other aspects (being under 15 and her initial recruitment and subsequent training by the UPC);[826] and (iv) cautiously decided to "determine on a case-by-case basis which other aspects of her testimony can be relied upon with or without corroboration".[827] The Chamber did not find that P-0010 had lied.[828] The Chamber's approach was reasonable and correct, and accorded with other international tribunals.[829]

188. Further, Ntaganda misapprehends the evidence and the Judgment.[830] The Chamber reviewed P-0010's evidence that the 'kadogo'[831] in the Rwampara video (who was barely able to reach the top of Ntaganda's truck to throw his weapon into the back) was, like P-0010 herself, part of Ntaganda's escort, and was younger than P-0010.[832] The Chamber also considered the Defence's argument that the individual was 20 years old at the relevant time, but noted that P-0010 did not agree with the Defence's suggestion and that no evidence was adduced to support it.[833] The Chamber itself considered the video images and, comparing the size of the individual "who was significantly smaller than the soldiers around him and barely taller than the wheel of the vehicle on which he can be seen loading his weapon" was satisfied that he was "manifestly under 15 at the time of events".[834] Likewise, the Chamber reasonably assessed P-0010's consistent testimony that a girl named "Lamama" in

[824] *See e.g.* Judgment, paras. 93, 95 (referring to documentary evidence), 103 (considering Defence witnesses), 104 (video evidence), 105 (finding that the witness was not biased against Ntaganda).
[825] Judgment, paras. 99-104.
[826] Judgment, paras. 92-98. *See also* Judgment, paras. 102 (fn. 241) and 88 (on delayed reporting of rape). *Contra* Appeal-Part II, para. 243 (erroneously stating that the Chamber did not provide reasons).
[827] Judgment, para. 105. P-0010 is not a case of a "witness[] whose credibility is impugned to such an extent that he or she cannot be relied upon even if other evidence appears to corroborate parts of his or her testimony": *Ngudjolo* AJ, para. 168.
[828] *See below* para. 248. *Contra* Appeal-Part II, para. 243.
[829] *See e.g.* *Bagosora et al.* AJ, paras. 243-247 (upholding the Trial Chamber's decision to rely on parts of a witness' testimony even though rejecting others, and noting that the Trial Chamber had differentiated the different parts and provided reasons for its decision); *Kupreškić et al.* AJ, paras. 331-337 (confirming the Trial Chamber's assessment of witness EE whose testimony was found reliable in parts and mistaken in others, after considering holistically the record of the case); *Ndahimana* AJ, paras. 182-183 (quashing the Trial Chamber's reliance on witness ND17's to conclude that Ndahimana was targeted (and under threat) when it found that ND17's evidence of Ndahimana being hidden at a convent was unreliable; the two aspects of ND17's testimony were inextricably linked since the existence of threats served to explain why Ndahimana was hiding).
[830] *Contra* Appeal-Part II, paras. 244-245.
[831] The Chamber found that the term 'kadogo' was used "to refer to the youngest soldiers, by their appearance, including individuals under 15": Judgment, para. 359 and fns. 994-995 (setting out the evidence of military insider witnesses who refer to 'kadogo' as children under the age of 15). *Contra* Appeal-Part II, para. 245.
[832] Judgment, para. 387 (fn. 1100).
[833] Judgment, para. 387 (fn. 1100). The Chamber addressed the Defence arguments regarding P-0010's credibility: *see* Judgment, paras. 89-105 (see in particular fns. 202, 211, 218, 242-243, 246, 260-261).
[834] Judgment, para. 387 (fn. 1100).

Ntaganda's escort was younger than her, and considered contrary Defence arguments.[835]

VIII.C.3.The Chamber reasonably relied on age assessments made by other witnesses

189. The Chamber reasonably relied on other testimony, predominantly military insider witnesses, who testified that Ntaganda had children under the age of 15 in his escort.[836] Ntaganda rehashes closing arguments,[837] does not accurately present the evidence,[838] and insists on proof of factors (such as the name[839] or exact age[840] of the victims) that are not required. The Chamber considered the basis upon which the witnesses made their age determinations (size, facial features and behaviour of the children), as well as their experience with children and the proximity of the witnesses to the individuals whose age they assessed, among other factors.[841] The Appeals Chamber in *Lubanga* confirmed this approach.[842]

190. For all the reasons above, Ground 9 must be dismissed.

IX. P-0883 AND P-0898 WERE UNDER 15 YEARS OF AGE (GROUND 10)

191. The Chamber reasonably found that P-0883 and P-0898, who were enlisted in the UPC and actively participated in hostilities, were under the age of 15 years at the relevant time.[843] Ntaganda merely disagrees with the Chamber's evidentiary assessments but identifies no error.

IX.A. P-0883 was under 15 years of age

192. The Chamber correctly assessed P-0883's testimony.[844] *First*, the Chamber reasonably

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[835] Judgment, para. 387 (fn. 1099).
[836] Judgment, paras. 389-391, and fns 1105-1115.
[837] DCB, paras. 1290, 1309, 1317. The Chamber considered Defence witness testimony and arguments: Judgment, paras. 390-391, fns. 1105, 1106, 1107, 1109, 1111, 1112, 1113.
[838] Appeal-Part II, para. 248 (fn. 672: only citing P-0290). P-0290 testified that among the individuals guarding Ntaganda's compound, there were "children" and that the youngest "may have been 13 years old": *see* Judgment, para. 390 (fn. 1108).
[839] Appeal-Part II, para. 248. *See* *Lubanga* AJ, paras. 131-137 (dismissing a ground of appeal based on lack of details for victims such as names). *See also* paras. 197 ("the Trial Chamber found individuals to be under the age of fifteen years without knowing their names and in the absence of any other identifying information. Nevertheless, the Appeals Chamber finds that it is not *per se* impermissible to make a finding on the age element of the crimes in circumstances where the identity of the victim is unknown"), 198, 208. C*ontra* Appeal-Part II, paras. 244, 247, 248.
[840] *Lubanga* AJ, para. 198 (the Chamber is not required to determine the exact age of a victim but that the victim is under 15 years old). *Contra* Appeal-Part II, para. 248 (arguing that "the estimates often [straddle] the 15-year threshold" but providing no transcript references to support its proposition). The fact that witnesses testified that there were escorts within an age range including under 15 years old still supports the Chamber's finding that Ntaganda had escorts under 15 years old (P-0014, 36:13-14: "between 13 and 18 years old").
[841] Judgment, paras. 99 (fn. 224), 146, 170 (fn. 407), 203 (fns. 483-485), 389-391 (fns. 1105-115); *see also* para. 72 (on assessment of identification evidence). *Contra* Appeal-Part II, para. 248.
[842] *See* *Lubanga* AJ, paras. 189, 191, 198, 218, 222. *Contra* Appeal-Part II, para. 244.
[843] Judgment, paras. 174-179 (P-0883) and para. 202 (P-0898). *Contra* Appeal-Part II, paras. 250-257.
[844] Judgment, paras. 174-188. *Contra* Appeal-Part II, paras. 251-252. *See* DCB, paras. 1193-1195.

found that P-0883's testimony regarding her age was reliable,[845] even though it did not rely on the witness's account concerning her abduction by the UPC and the period immediately following.[846] The Chamber squarely addressed the inconsistencies regarding the identity of her abductors arising from her different accounts.[847] The Chamber considered Defence arguments[848] and P-0883's explanations[849] and decided not to rely on this aspect of her testimony.[850] However, the Chamber reasonably found that the inconsistencies on this issue were insufficient to cast doubt on P-0883's overall credibility, and determined on a case-by-case basis which aspects of her testimony could be relied upon, while paying particular attention to the timeframe of the events.[851]

193. This conclusion was reasonable given the "limited evidentiary value of information included in victim application forms"[852] and considering the witness testimony as a whole and in light of all the evidentiary record. Notably, P-0883 "provided clear accounts which were rich in detail",[853] her narrative was consistent throughout examination-in-chief and cross-examination,[854] and she refrained from general comments or approximations.[855] Moreover, the aspects of her testimony accepted by the Chamber were consistent with the experience of UPC recruits in other camps,[856] and her testimony regarding the steps undertaken to obtain relevant documents was likewise detailed and consistent.[857]

194. *Second*, the Chamber did not err, nor did it apply an erroneous standard of proof,[858] in

[845] Judgment, paras. 176-179.
[846] Judgment, paras. 180-185.
[847] Judgment, paras. 180 (contrasting P-0883's testimony and two victim application forms), 181 (noting the consistency between P-0883's testimony, her 2014 statement, and the additional information form; and contrasting with the victim application forms). As the Chamber noted, P-0883's testimony, statement to the Prosecution, and additional information form, consistently referred to the UPC as the group that initially abducted her, while the two victim participation forms identify the group as the APC.
[848] Judgment, para. 180 (fn. 435), citing DCB, paras. 1193-1195.
[849] Judgment, paras. 181 ("the witness suggested that the persons who prepared her victim application forms may have made mistakes, and submitted that her forms were not read back to her"), 182 (finding that the inclusion of these specific details on multiple occasions "cannot be easily attributed to mistakes or misunderstandings of the persons who assisted the witness" to complete the victim application forms).
[850] Judgment, para. 185 ("it was not uncommon for members, including young women, of the APC to subsequently be integrated into the UPC/FPLC, including in the Mahagi territory" but deciding not to rely on "the witness's accounts concerning her abduction and the period immediately following the abduction"). This however does not mean that the witness lied, as suggested by Ntaganda: Appeal-Part II, para. 251. *See above* fn. 815. *See also* *Sesay et al.* AJ, paras. 259, 265 (finding that witnesses who lied on certain matters are not necessarily unreliable in the totality of their testimony).
[851] Judgment, para. 188.
[852] Judgment, paras. 85, 185.
[853] Judgment, para. 175.
[854] Judgment, para. 175 and fn. 419 (the Chamber was alerted to no discrepancies with her 2014 statement).
[855] Judgment, para. 175.
[856] Judgment, paras. 175, 186.
[857] Judgment, para. 179 (fn. 434).
[858] *Contra* Appeal-Part II, para. 252.

finding that no conclusions could be drawn from the two versions of P-0883's school record.[859] Both the original and modified versions of the record were provided directly to the Prosecution by the relevant Congolese authorities.[860] Moreover, P-0883 was forthcoming about [REDACTED] to obtain a copy of the record,[861] and [REDACTED] empty-handed.[862]

IX.B. P-0898 was under 15 years of age

195. The Chamber reasonably concluded that P-0898 was under 15 years of age when he was enlisted in the UPC, based on several pieces of corroborating evidence: school records, an electoral card, a citizenship certificate and a birth certificate.[863] [REDACTED] (P-0918) also corroborated P-0898's age.[864] The Chamber provided detailed reasons for assessing P-0898 to be credible and his testimony reliable, both generally and in relation to specific Defence challenges.[865] Ntaganda (who did not dispute P-0898's age at trial)[866] shows no error in the Chamber's approach.

196. *First*, the Chamber's conclusion that P-0898 "plausibly explained why his school transcripts for the relevant timeframe [when he was enlisted with the UPC/FPLC] include marks for each term" is entirely reasonable.[867] Ntaganda misunderstands the standard of proof[868] and the Chamber's obligation to assess the evidence holistically.[869] The Chamber considered P-0898's evidence against the evidence of other witnesses and concluded that P-0898's explanation "is not affected by the testimony of P-0551, D-0201 or P-0918".[870] Its

[859] Judgment, para. 178.
[860] Judgment, para. 178 (fn. 433), referring to DRC-OTP-2097-0540. For DRC-OTP-2082-0368, *see* P-0883: T-167, 79:4-83:10.
[861] Judgment, para. 179 (fn. 434). *Contra* Appeal-Part II, para. 252 and fn. 682.
[862] P-0883: T-168-Conf, 54:4-55:8.
[863] Judgment, para. 202 and fn. 482. *See also* T-153-Conf, 36:5-49:15 ([REDACTED]).
[864] T-155-Conf, 76:21-77:2, 77:21-78:1, 90:13-91:4; T-156-Conf, 15:20-25.
[865] *See e.g.* Judgment, para. 201. For specific Defence challenges compare: (i) DCB, paras. 1232, 1235-1244; Judgment, para. 206 and fns. 496-499; (ii) DCB, paras. 1233-1234, 1245-1251, 1257-1259; Judgment, paras. 204 and 207 and fns. 486-491, 500-504; and (iii) DCB, paras. 1252-1256; Judgment, para. 205 and fns. 492-495. *See also* paras. 229-232 (assessment of P-0911's evidence regarding the Mandro lists), 234 (comparing P-0898's testimony with P-0911's).
[866] Ntaganda did not challenge P-0898's date of birth, but that P-0898 was ever in the UPC, while conceding that "it cannot be excluded that he may have gone to Mandro for some short period". *See* Judgment, para. 202 ("absent any specific challenge concerning the witness's date of birth"); DCB, para. 1260.
[867] Appeal-Part II, paras. 254-255; Judgment, para. 206 and fns. 496-499.
[868] *Bemba et al.* AJ, para. 912 ("while individual items of evidence, when seen in isolation, may be reasonably open to different interpretations, including interpretations favourable to the accused, this does not necessarily mean that a trial chamber's interpretation of an item of evidence that is unfavourable to the accused is unreasonable in light of all the relevant evidence"). *See also* para. 923.
[869] *Bemba et al.* AJ, para. 1540 (recalling that "a trial chamber is obliged to carry out a 'holistic evaluation and weighing of all the evidence taken together in relation to the fact at issue'", quoting *Lubanga* AJ, para. 22).
[870] Judgment, para. 206 and fns. 496-498. P-0551 admitted that falsification of school records became increasingly common (P-0551: DRC-OTP-1054-0031-R01 at 0038-0039, paras. 43-46) and that schools were not

reasoning was not "strained";[871] rather, the Chamber provided detailed, clear explanations for its conclusions.[872]

197. Further, Ntaganda mischaracterises D-0201's evidence.[873] D-0201, a teacher, testified that students could continue to go through the school year after a justified absence.[874] Moreover, in 2002/2003 schools in Bunia were not functioning properly.[875] As such, the Chamber correctly found that D-0201's evidence was very general and did not exclude modifications to the school records on an individual basis.[876] D-0201 did not have an independent memory of the children in his class or which children may have fled, as D-0201 did himself,[877] during the conflict.[878] Based on this evidence, the Chamber reasonably found that D-0201 was not able to confirm whether P-0898 attended school in the relevant period.[879]

198. *Second*, Ntaganda misrepresents the Chamber's findings by stating that "P-0898's reliability was enhanced by his purported recognition of the registration document".[880] The Chamber said nothing of the sort. It simply found that "the witness was consistent in his description of the registration process".[881] Ntaganda omits that even his own Defence witnesses confirmed that there was a process of registration of recruits at Mandro.[882] The fact that another witness provided a list of registered recruits at Mandro, which was not relied upon by the Chamber (and that P-0898 had never seen before coming to The Hague),[883] cannot automatically make the process of registration generally untrue. Nor did the Chamber make contradictory findings, lack awareness of its findings or disregard relevant evidence.[884] The Chamber explained why P-0898's credibility was unaffected by its conclusions on the authenticity of that list[885] and its reasons for rejecting Defence arguments about undue influence on P-0898's testimony.[886]

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functioning normally (P-0551: DRC-OTP-1054-0031-R01, at 0033, para. 13). Further, P-0551 testified that the process for re-joining school depended on the head teacher, and that [REDACTED] (T-197-Conf, 71:20-25).
[871] Appeal-Part II, para. 255.
[872] Judgment, para. 206 (fn. 498).
[873] Appeal-Part II, para. 254.
[874] T-246-Conf, 73:9-13. The head of the school – not D-0201 – could assess whether being forcibly recruited into an armed group would be considered a justifiable reason (T-246-Conf, 74:2-7 and 89:21-90:6).
[875] T-246-Conf, 51:11-12 and 78:19-21.
[876] Judgment, para. 206 (fn. 498).
[877] T-246-Conf, 83:5-84:25.
[878] T-246-Conf, 78:4-15, 86:24-87:19.
[879] Judgment, para. 206 (fn. 498).
[880] Appeal-Part II, para. 256; Judgment, para. 205 and fns. 492-495.
[881] Judgment, para. 205 and fn. 493 (citing P-0898's evidence about the registration process).
[882] D-0017: T-253, 65:16-23; D-0038: T-249-Conf, 65:2-8, 65:21-68:5.
[883] Judgment, para. 205 (fn. 495; T-155, 11:13-15).
[884] Appeal-Part II, para. 256.
[885] Judgment, para. 205 and fns. 494-495.
[886] Judgment, para. 205, fns. 492 and 494.

199. For all the reasons above, Ground 10 should be dismissed.

X. CHILD SOLDIERS WERE RAPED AND ENSLAVED (GROUND 11)

200. The Chamber reasonably found that three child soldiers under 15 years of age were raped and two were sexually enslaved. This assessment was reasonable and correct.[887]

X.A. The nine year old girl named Nadège was raped

201. The Chamber correctly relied on P-0758's testimony to find that Nadège, a girl who was around nine years old at the time, was raped at Lingo camp.[888] Ntaganda repeats his trial arguments without demonstrating that the Chamber erred.[889]

202. *First*, the Chamber thoroughly reviewed P-0758's credibility and the reliability of her testimony[890] and considered Defence arguments.[891] The Chamber considered relevant factors to determine P-0758's credibility; for example, P-0758 "clearly indicated when she was not able to answer a question and mainly testified about what she had personally experienced, without making any general or personal comments or approximations".[892] Moreover, her narrative was "generally consistent" during examination-in-chief and cross-examination.[893] *Second*, the Chamber assessed P-0758's testimony as a whole and in light of the totality of the trial record,[894] including Prosecution and Defence witnesses,[895] and documentary material.[896] *Third*, the Chamber clearly explained why it found some aspects of her testimony unreliable (namely, that she was under 15 years old when she joined the UPC),[897] while finding other aspects reliable (namely, regarding the time she spent within the UPC).[898] Notwithstanding the impact that her increased vulnerability may have had on her ability to remember specific dates and timeframes, the Chamber did not rely on P-0758's status as a child soldier: it could not establish beyond reasonable doubt that she "was under 15 years old

[887] *Contra* Appeal-Part II, paras. 258-271. The Chamber found that three child soldiers were raped (Nadège, P-0883, Mave) and two sexually enslaved (P-0883, Mave). *See* Judgment, paras. 409-411, 970-986, fn. 1135.
[888] Appeal-Part II, paras. 262-266. Judgment, para. 410.
[889] *Compare* Appeal-Part II, paras. 263-264 with DCB, paras. 1166-1176, 1178 and DCR, para. 341.
[890] Judgment, paras. 148-160; *see also* para. 407 (fn. 1157), para. 410 and fn. 1170, and para. 655 (fn. 2089). *Contra* Appeal-Part II, paras. 258-259, 262-268.
[891] Judgment, paras. 150, 156 and fn. 370; paras. 157 (fns. 375, 377), 159 and fns. 378, 380-381.
[892] Judgment, para. 149.
[893] Judgment, para. 149.
[894] Judgment, paras. 150-160.
[895] Judgment, paras. 152-155, para. 156 (fn. 373), and para. 157 (fns. 375-377 citing D-0300, P-0761, P-0773).
[896] *See e.g.* Judgment, para. 150 (referring to an NGO interview and three different victim application forms) and para. 149 (fn. 346: referring to her Prosecution statement).
[897] Judgment, paras. 151-158, 160, 970. *Contra* Appeal-Part II, para. 265.
[898] Judgment, para. 159 (explaining that "the witness's testimony concerning the time she allegedly spent within the UPC/FPLC was generally coherent, spontaneous, detailed on certain issues, and largely consistent with the testimony of other witnesses who had comparable experiences").

when she joined the UPC/FPLC" due to inconsistencies in the timing and circumstances of her abduction.[899] The Chamber noted that certain details of P-0758's narrative suggested that the events that she described may have taken place in 2003.[900] Moreover, the Chamber considered P-0761's testimony[901] and did not find that P-0758 had lied about P-0761's role and intervention with regard to the steps undertaken to be recognised as a victim.[902]

203. *Fourth*, the Chamber noted that while it had rejected part of P-0758's testimony it would "determine on a case-by-case basis which remaining aspects of P-0758's testimony can be relied upon and, in the circumstances, it will pay particular attention to assessing the timeframe of the relevant events".[903] On this basis the Chamber found that P-0758's testimony about aspects of her time within the UPC was reliable,[904] including on her participation in fighting in Bunia in May 2003[905] and her presence at Lingo camp,[906] where she witnessed sexual violence perpetrated against other girls including Nadège.[907] P-0758's evidence regarding Nadège's rape in Lingo was consistent with other evidence regarding conditions in the camps,[908] where female UPC soldiers (including but not limited to girls under 15 years old) were regularly raped and sexually assaulted.[909] Conversely, the Chamber did not rely on P-0758's testimony on the use of 'kadogos' in patrolling or to work at roadblocks, when it could not determine the timing of those aspects of her testimony.[910] Moreover, having found that it would not rely on P-0758's evidence that she was under 15 years at the relevant time, the Chamber did not rely on her evidence about the sexual violence

[899] Judgment, paras. 151-158 and 160.
[900] Judgment, para. 156.
[901] Judgment, para. 155 (noting "with concern" aspects of P-0761's testimony regarding his presence when P-0758 filled in a victim application form). *Contra* Appeal-Part II, para. 263.
[902] Judgment, para. 155 ("P-0758 appeared evasive, notably with regard to the role and intervention of P-0761 in this process"); *see* T-162, 19:18-19 ("I no longer remember"). *Contra* Appeal-Part II, para. 264.
[903] Judgment, para. 160.
[904] Judgment, para. 159 (fn. 379). *See also* Judgment, paras. 333 (fn. 897), 363 (fn. 1002), 406 (fn. 1152), 412 (fn. 1177), 413 (fn. 1178), 416 (fn. 1194).
[905] Judgment, paras. 655 (fn. 2089), 656-657 (fns. 2091-2095).
[906] Judgment, paras. 159 (fn. 379), 370 (fn. 1026), 371 (fns. 1029, 1031, 1034, 1037), 373 (fns. 1047, 1053), 377 (fn. 1067), 378 (fn. 1074) and 379 (fn. 1076). Both Ntaganda and D-0080 testified about a UPC/FPLC training camp at Lingo (Judgment, para. 370, fn. 1026). P-0758 testified about the name of a commander at Lingo (Judgment, para. 407, fn. 1157: T-161: 6, 20, 34) [REDACTED].
[907] Judgment, paras. 159 (fn. 379) and 410 (fn. 1170). *See also* Judgment, para. 407 (fn. 1157). P-0758 testified that the training in Lingo lasted for three months (T-161-Conf, 31).
[908] *Contra* Appeal-Part II, paras. 258, 265. *See above* paras. 141-142.
[909] Judgment, paras. 408 (fn. 1161: specifically, the evidence of: P-0017 (T-58, 51-52), P-0031 (T-174-Conf, 27-29; DRC-OTP-2054-3760 at 3778-3782; DRC-OTP-2054-3939 at 3947-3948; DRC-OTP-2054-4308 at 4317-4318) and P-0046 (T-101, 68-69)), 407 (fn. 1157: P-0963 (T-80, 32-33)) 412 (fn. 1177: P-0768 (T-34, 55-56)). *See also* Sentencing Decision, para. 108 (fn. 293).
[910] *See* Judgment, paras. 403 (fn. 1147) and 405 (fn. 1151).

she personally suffered.[911] This was not because the Chamber "deemed [it] [un]worthy of discussion",[912] but because counts 6 and 9 solely encompassed victims under 15 years.[913]

X.B. P-0883 was raped and sexually enslaved

204. The Chamber reasonably assessed P-0883's credibility and the reliability of her testimony.[914] Although the Chamber did not rely on P-0883's evidence about her abduction by the UPC because of inconsistencies between her testimony and two victim application forms (which were squarely addressed by the Chamber), it found her testimony reliable regarding other distinguishable aspects, such as her training in Bule camp (which lasted several months) and the continuous rapes and sexual enslavement that she suffered there.[915] This conclusion was supported by the evidence and clearly explained by the Chamber, which reasonably considered "delayed reporting of rape [as] a comprehensible consequence of the victims' experience, especially in conflict areas,"[916] and rejected Defence arguments.[917]

205. Notably, P-0883 provided detailed descriptions of her transfer to and stay at the Bule training camp for several months, where she was repeatedly raped by many soldiers (stressing that "anyone who wanted to do so could rape you")[918] and where she witnessed the rape of other girls in the UPC.[919] P-0883 gave a detailed account of the conditions at Bule camp where she was kept captive under threat and in a state of extreme vulnerability.[920] She described how she was subjected to sexual violence on a near-continuous basis, being raped by "many soldiers" and "at any time."[921] Although P-0883 was the only witness who specifically testified about her personal experiences at this camp, other evidence supports the existence of UPC military training in Bule during the relevant time frame,[922] including

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[911] Judgment, paras. 160, 970.
[912] Appeal-Part II, paras. 259, 265. Ntaganda's submissions in fn. 698 about Judgment, fn. 1156 are vague. The evidence referred to in this footnote relates to sexual violence perpetrated at Mandro camp against UPC female members, not only those under 15 years. The Chamber relied upon the evidence of P-0758 to find that "sexual violence against PMFs […] was left largely unpunished" (Judgment, para. 412, fn. 1177).
[913] The Chamber addressed P-0010's evidence regarding her own rape in the same manner (Judgment, para. 971). *See also* Sentencing Judgment, para. 108.
[914] *See above* para. 192.
[915] Judgment, paras. 174-188. *Contra* Appeal-Part II, paras. 267-268. *See similarly* DCR, para. 346.
[916] Judgment, para. 187.
[917] Judgment, para. 187 and fns. 452, 454, 459.
[918] Judgment, para. 409.
[919] Judgment, para. 407 (fn. 1157).
[920] Judgment, paras. 376 (fn. 1064: T-168, 25-26), 409, 976-978.
[921] Judgment, paras. 409, paras. 976-978.
[922] Judgment, para. 183 (fn. 442, citing P-0017: T-58, 36, T-60, 36; P-0901: T-29, 50; and P-0963: T-80, 37; *see also* UN report DRC-OTP-0074-0422 at 0464, para. 153 and logbook DRC-OTP-2102-3854 at 3905). *See also* paras. 362 (fn. 1000), 370 (fn. 1026).

Ntaganda's visit to the camp,[923] as P-0883 testified.[924] Further, P-0883 explained in detail the consequences to her health[925] and her resulting pregnancy and that she did not know "who was responsible for that pregnancy."[926]

X.C. Mave was raped and sexually enslaved

206. The Chamber reasonably found that Mave was under 15 years old when she was raped and sexually enslaved. Ntaganda misapprehends the Judgment and the evidence.[927]

207. *First*, the Chamber correctly relied on P-0907's and P-0887's clear and consistent evidence to conclude that Mave was under 15 years of age when she was a UPC child soldier who was raped and sexually enslaved.[928] Both P-0907 and P-0887 had "a good opportunity to observe Mave" since they lived together at the *Appartements* in Mongbwalu and in Mamedi.[929] P-0907 testified that Kisembo had an escort named Mave and that she was a *Personnel Militaire Féminin* ("PMF") of about 12 years.[930] He knew that Mave was very young because of the way she played with other children and from the look of her face. He testified that he was present when Kisembo gave a speech to a group of soldiers in which Kisembo prohibited any further rape of Mave and referred to her as "a child", "no more than 12 years old", and "not even a teenage girl".[931] Likewise, P-0887 testified that among the child soldiers that she saw at the *Appartements*, there was one girl, who "was still very young" and that "her breasts hadn't even started to develop."[932] The Chamber further recalled that P-0901 identified Mave as one of Kisembo's bodyguards but did not rely on P-0901's testimony to determine Mave's age.[933]

208. *Second*, Ntaganda erroneously attributes P-0901's testimony to P-0907,[934] and misrepresents P-0901's evidence. P-0901 testified about two "Maves": one who was

[923] Judgment, paras. 370 (fn. 1027, citing P-0963: T-80: 36-37), 652 (fn. 2081, citing D-0013 and Ntaganda).
[924] Judgment, para. 186 (fn. 450).
[925] Judgment, paras. 187 (fn. 461). *See* T-167-Conf, 96:4-10, T-168-Conf, 13:1-14:11, 34:6-35:2, 35:17-37:4, 63:21-65:7.
[926] Judgment, paras. 187 (fn. 461), 409 (fn. 1169). *See* T-168-Conf, 34:18-35:2, 42:12-44:8, 63:21-65:7.
[927] Appeal-Part II, paras. 269-270.
[928] Judgment, para. 399 (fn. 1135).
[929] T-93-Conf, 34:21-35:8 (they stayed 6 months at the *Appartements* and 2 months in Mamedi), 39:23-40:14.
[930] Judgment, para. 399 (fn. 1135: T-89-Conf, 52, 55).
[931] Judgment, para. 399 (fn. 1135: T-89-Conf, 57).
[932] Judgment, para. 399 (fn. 1135: T-93-Conf, 39-40).
[933] Judgment, para. 399 (fn. 1135: "P-0901 also identified Mave as one of Floribert Kisembo's bodyguards (P-0901: T-29, 58).
[934] *See* Appeal-Part II, paras. 261 (incorrectly attributing the testimony of P-0901 (T-29, 57:5-6) to P-0907, although the witness codes are correctly cited in footnotes 701 and 702), 269 (fn. 719, erroneously citing the evidence of P-0901 twice (T-29, 57:5-6, 58:11-12), while omitting the relevant evidence of P-0907).

Ntaganda's escort (who "might have been between 15 and 16 years of age" in 2002-2003)[935] and another who was Kisembo's PMF (for whom P-0901 did not give an age).[936] The Chamber referred to the latter.[937] P-0901 plainly testified that "[REDACTED]."[938]

209. *Third*, although elsewhere in his Appeal Ntaganda criticises the Chamber for relying on video images,[939] he now complains that the Chamber did not do so to determine Mave's age.[940] The Chamber did not err in its approach; as set out above, determining a person's age is fact-sensitive and does not require particular expertise.[941] In relation to Mave, the Chamber relied on direct and reliable testimonial evidence, and did not fail to address "conflicting evidence" about her age. [942]

210. Finally, Ntaganda's general (and unsupported) challenge to the Chamber's finding regarding his *mens rea* for the crimes of rapes and sexual violence within the UPC ranks misapprehends the evidence and misunderstands the law.[943] The Chamber found that Mave had been raped by many different soldiers on a regular basis both while she was living at the *Appartements* camp in Mongbwalu (with P-0887 and P-0907, shortly after the First Operation),[944] and in March 2003 when, after her repeated rapes and sexual violations had caused a fistula, Kisembo instructed the assembled UPC soldiers (including P-0907) to stop raping her due to her injury.[945] Moreover, Ntaganda and Kisembo were senior authorities within the UPC, and co-perpetrators.[946] The UPC continued to exist and operate after being dislodged from Bunia on 6 March 2003[947] and it was not until 8 December 2003 that Kisembo was removed as Chief of Staff[948] and replaced by Ntaganda.[949] As explained below, Ntaganda's *mens rea* for these crimes depended on multiple corroborating evidence, and goes

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[935] *See* T-29-Conf, 57:1-6.
[936] *See* T-29-Conf, 58:9-15.
[937] Judgment, para. 399 (fn: 1135: "P-0901 also identified Mave as one of Floribert Kisembo's boydguards (P-0901: T-29, 58).
[938] *See* T-29-Conf, 59: 8-17.
[939] *See above* [ground 9].
[940] *Contra* Appeal-Part II, para. 261.
[941] *See above* para. 179.
[942] *Contra* Appeal-Part II, para. 269.
[943] Appeal-Part II, para. 270.
[944] Judgment, para. 411 (fn. 1172). P-0887 testified about moving to the *Appartements* shortly after the First Operation (Judgment, paras. 527 (fn. 1568), 528 (fn. 1573) and 535 (fn. 1600); *also* T-93-Conf, 25:25-26:1 and 29:4-30:10). While at the *Appartements*, P-0887 saw some UPC/FPLC soldiers who were under the age of 15, including Mave (T-93-Conf, 37:3-38:18 and 39:23-40:14), who was taken as a "wife" by many soldiers.
[945] Judgment, para. 411.
[946] Judgment, paras. 316-317, 321 and 814. Moreover, Ntaganda and Kisembo both directly participated in the 6 March 2003 assault on Bunia (Judgment, paras. 648-649) and Mave was one of Kisembo's bodyguards in Bunia at this time (Judgment, para. 649 (fn. 2073), specifically P-0907: T-89-Conf, 55:8-19).
[947] Judgment, para. 307.
[948] Judgment, para. 316.
[949] Judgment, para. 321 and fn. 847.

beyond the horrendous crimes suffered by Mave.[950]

211. For the reasons above, Ground 11 should be dismissed.

XI. NTAGANDA HAD THE REQUISITE *MENS REA* FOR THE CRIMES AGAINST CHILD SOLDIERS UNDER 15 (GROUND 12)

212. The Chamber reasonably found that Ntaganda "necessarily knew that the UPC/FPLC would recruit, train, and deploy children under 15 years of age"[951] and that "rapes and sexual violence were occurring within the UPC/FPLC ranks, and that female recruits and soldiers under the age of 15 were not excluded from this practice".[952] Ntaganda's arguments lack merit: he disregards the evidence and misconstrues the Judgment.

213. *First*, the Chamber's conclusion that Ntaganda knew, as an indirect co-perpetrator, about the crimes committed against child soldiers was based on a substantial body of evidence.[953] The Chamber relied on: (i) Ntaganda's proximity and daily contact with his own escorts (who guarded him, accompanied him, were trained at his residence and participated in combat with him);[954] (ii) his participation in recruitment initiatives, calling to enrol persons of all ages, gender and size and asking parents to give their children;[955] (iii) the consistent inhuman treatment of all UPC soldiers (including child soldiers under the age of 15);[956] (iv) the sexual violence and regular rape of female members of the UPC (including child soldiers under the age of 15) by male UPC soldiers and commanders,[957] including by Ntaganda,[958] and his own chief escort;[959] and (v) the fact that these crimes were left largely unpunished by Ntaganda or Kisembo,[960] and that instead Ntaganda took advantage of the vulnerability of these children and the coercive environment in which the UPC operated.[961]

214. *Second*, Ntaganda underplays his crucial role in recruitment rallies[962] where he called on "all of the families [to] give young people to bolster the UPC"[963] and on "*les enfants, les*

[950] *See below* para. 213.
[951] Judgment, para. 1194. *Contra* Appeal-Part II, para. 272. *See also* para. 234.
[952] Judgment, para. 1197. *See also* para. 811 ("in the circumstances prevailing in Ituri at the time, the occurrence of these crimes was not simply a risk that they accepted, but crimes they foresaw with virtual certainty"). *Contra* Appeal-Part II, para. 270.
[953] *Contra* Appeal-Part II, paras. 234, 270, 272.
[954] Judgment, paras. 371 (fn. 1040), 385 (fn. 1096), 387, 388, 390, 392-394, 396, 1126, 1191, 1192.
[955] Judgment, paras. 355 (fns. 987, 988), 357-359, 1193. *See also* paras. 1117-1132 (on child soldiers).
[956] Judgment, paras. 376-377, 1195. *See also* para. 790.
[957] Judgment, paras. 407-411, 792, 1196.
[958] Judgment, para. 407, 1196.
[959] Judgment, para. 407, 1196.
[960] Judgment, paras. 792, 1196. *See also* paras. 411-412.
[961] Judgment, para. 1195.
[962] Appeal-Part II, para. 275.
[963] Judgment, para. 358 (fns. 990-992: P-0769: T-120-Conf, 15-16).

jeunes, les kadogo" to join the UPC.[964] He ignores his primary responsibility in training UPC recruits,[965] his regular visits to training centres,[966] his own personal training of recruits[967] and his role in deciding on the deployment of soldiers[968] as Deputy Chief of Staff in Charge of Operations and Organisation.[969] Moreover, the Chamber considered and rejected Ntaganda's arguments, such as his supposed non-participation in recruitment rallies,[970] that the term 'kadogo' related to the size of the person,[971] and that the so-called "physical maturity test" that UPC recruits allegedly underwent was either intended to or in fact prevented the recruitment of children under the age of 15.[972]

215. For all these reasons, Ground 12 should be dismissed.

XII. THE CHAMBER CORRECTLY CONVICTED NTAGANDA AS AN INDIRECT CO-PERPETRATOR (GROUND 13)

XII.A. The common plan as found accorded with the charges

216. Ntaganda incorrectly argues that he was convicted for being part of a common plan "for the annihilation of an ethnic group" that exceeded the scope of the common plan charged.[973] Ntaganda misunderstands the Chamber's findings. In convicting Ntaganda, the Chamber found that he and others shared a common plan "to drive out all the Lendu from the localities targeted during the course of their military campaign against the RCD-K/ML".[974] According to the Chamber, "the co-perpetrators, by virtue of *this* agreement to drive out all the Lendu

[964] Judgment, para. 359 (fn. 993, specifically: P-0010: T-47, 51:6).
[965] Judgment, paras. 323, 360, 365 and fn. 1012 (regarding Mugisa Muleke, a training camp supervisor, reporting to Ntaganda), and para. 371 (fn. 1028, referring to Ntaganda's testimony about determining the training at Mandro camp (D-0300: T-213, 64 and T-214, 11).
[966] Judgment, paras. 365, 369, 370. Ntaganda's 12 February 2003 visit to Rwampara training centre was filmed and in the video-recording (DRC-OTP-0120-0293: Rwampara video), Ntaganda is introduced to the new recruits by Lubanga (Judgment, para. 369, fn. 1025).
[967] Judgment, para. 372 and fn. 1044 (referring to D-0300, T-214, 4-5).
[968] Judgment, para. 378. Relatedly, the Chamber found Ntaganda was "effectively in charge of deployment and operations of the FPLC" (Judgment, para. 322). *See also* Judgment, paras. 830-833.
[969] Judgment, paras. 321-322.
[970] Ntaganda was involved in the recruitment process and asked community leaders for assistance: Judgment, para. 355. The Chamber relied on witnesses P-0014, P-0041, P-0055, P-0031 and P-0901—that is, witnesses other than those relied upon to demonstrate Ntaganda's participation in the three specific recruitment rallies.
[971] The Chamber found that, "in light of the consistent testimony of witnesses[,] the term kadogo was used to refer to 'children' or very young soldiers [or] the youngest soldiers, by their appearance, including individuals under 15": Judgment, para. 359 and fn. 994.
[972] The Chamber found that "recruits were screened based on their physical ability, and age as such was not a bar to them receiving training." *See* Judgment, para. 361 (and fn. 998: noting inconsistencies in Ntaganda's explanation of a "screening process", addressing D-0210's testimony and considering DCB, paras. 1503-1513). *See also* para. 1120. *Contra* Appeal-Part II, para. 276.
[973] Appeal-Part II, paras. 278-282.
[974] Judgment, para. 811.

from the localities that they attacked, meant [for the crimes charged to be committed]."[975]

217. This description of the common plan is also reflected in the Sentencing Judgment.[976] It is also consistent with the manner in which the common plan was charged. The Confirmation Decision[977] set out the common plan between Ntaganda and other UPC members "to […] expel the non-Hema civilian population, particularly the Lendu, from Ituri. […] [T]he common plan contained an element of criminality, as evidenced by the crimes [charged]".[978]

218. That the Chamber further held that "the co-perpetrators meant the destruction and disintegration of the Lendu community"[979] does not mean that it "exceed[ed] the scope of the common plan".[980] It means that the common plan included the element of criminality, as charged.[981] By referring to the co-perpetrator's intent to destroy and disintegrate the Lendu community, the Chamber merely pointed to key evidence—namely the co-perpetrators' use of the expression '*[ku]piga na kuchaji*'—from which it inferred, together with other evidence on the record, that the common plan "inherently involved the targeting of civilian individuals by way of [committing the crimes charged]".[982]

XII.B. The common plan was properly established on the evidence

219. The Chamber correctly assessed the evidence in its totality to find that there was a common plan to drive out the Lendu from the localities targeted during the course of the UPC military campaign against the RCD-K/ML.[983] Ntaganda's challenge to the Chamber's finding on the common plan fails due to: (i) his misapprehension of the nature of the evidence in this case and his erroneous assertion that the common plan in his case must be proved by *direct* evidence, and of a particular type;[984] (ii) his atomistic view of the evidence, by which he selectively focuses on certain specific findings of the Chamber to the exclusion of all other relevant findings;[985] and (iii) his erroneous view that the Chamber should have expressly ruled out all hypothetical alternative explanations in order to make an inference beyond

[975] Judgment, paras. 810-811 (emphasis added).
[976] Sentencing Judgment, para. 59.
[977] The Confirmation Decision defines the factual parameters of the case at trial: *Lubanga* AJ, para. 124; *Lubanga* Victims Participation AJ, para. 63.
[978] Confirmation Decision, para. 105. The Chamber correctly referred to this as the charged common plan (*see* Judgment, para. 765). Throughout the proceedings, the Prosecution consistently alleged this as the "common plan". *See e.g.* UDCC, para. 1; PTB, para. 492; PCB, para. 831.
[979] Judgment, para. 809.
[980] *Contra* Appeal-Part II, para. 280.
[981] Judgment, para. 809 ("as notably evidenced by"). *See also* paras. 805-806.
[982] Judgment, para. 809.
[983] Judgment, paras. 808-811; *contra* Appeal-Part II, paras. 283-300.
[984] Appeal-Part II, para. 284.
[985] Appeal-Part II, paras. 285-286, 293.

reasonable doubt.[986]

XII.B.1. The Chamber's findings were properly based on direct and circumstantial evidence

220. Ntaganda's claim that the Chamber was presented with no direct evidence of the common plan is incorrect.[987] The Chamber relied upon, *inter alia*, evidence of the express orders given by senior UPC commanders, including Ntaganda, to attack and take certain locations while also attacking and killing the Lendu at those locations.[988] Sometimes commanders used the phrase '*kupiga na kuchaji*' which, as set out above,[989] meant to get rid of everyone and everything that was Lendu.[990] These orders were consistent with the training that UPC recruits received, in which they were taught that the Lendu were the enemy and that they should be killed.[991]

221. These orders amount to direct evidence of the implementation, at the operational level, of the common plan to drive out the Lendu from the localities targeted during the course of the UPC military campaign against the RCD-K/ML. And the orders were carried out—as evidenced by the Chamber's findings that the UPC systematically perpetrated crimes against Lendu civilians.[992] But in any event, whether the evidence of the orders is characterised as direct or circumstantial is not determinative. It is uncontroversial that in the absence of direct evidence, the existence of a common plan may be inferred from the facts, including from events on the ground.[993] What matters, as the Chamber rightly found, is that the totality of the evidence supports the relevant finding beyond reasonable doubt.[994] Ntaganda's attempt to obscure this finding by focusing on the characterisation of the evidence, rather than its probative value and weight, is unpersuasive.

XII.B.2. The Chamber correctly considered the totality of the evidence

222. The Chamber undertook a holistic evaluation and weighing of all evidence, direct and circumstantial, that was relevant to the existence of the common plan, and provided adequate reasoning.[995] The Chamber's approach was correct and accorded with the jurisprudence of

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[986] Appeal-Part II, paras. 288, 291-292.
[987] *Contra* Appeal-Part II, para. 284.
[988] Judgment, paras. 801, 415, citing P-0907 (T-90, 8), P-0963 (T-78, 72-73), P-0768 (T-33, 64-65).
[989] *See above*, paras. 82-87.
[990] Judgment, paras. 801, 415.
[991] Judgment, para. 373. *See also* para. 800.
[992] Judgment, paras. 797, 804, 806.
[993] *Šainović et al.* AJ, para. 611; *Martić* TJ, paras. 442-445 (affirmed by *Martić* AJ, paras. 92-116); *Krajišnik* TJ, para. 1097 (affirmed by *Krajišnik* AJ, paras. 192, 605-647); *Šainović et al.* TJ [Vol. 1], para. 102.
[994] *See below* paras. 224-235.
[995] *Bemba* AJ, paras. 43-44; *Bemba et al.* AJ, paras. 97-98 (quoting the ECCC's *Case 002/01* AJ, para. 90).

this Court[996] and the *ad hoc* tribunals.[997]

XII.B.2.a.The case law cited by Ntaganda is inapposite

223. Contrary to Ntaganda's assertion, no useful comparison can be made between this and other cases before the *ad hoc* tribunals to identify what *type* of evidence is necessary to prove the existence of a common plan.[998]

- *First*, none of the cited cases support Ntaganda's proposition that direct evidence is necessary to prove the existence of a common plan, let alone the particular types of direct evidence that Ntaganda highlights.[999]
- *Second*, the evidence from which to conclude the existence of a common plan will naturally be specific to the circumstances of each case.[1000] The cases Ntaganda cites are factually distinct from, or irrelevant to, Ntaganda's case and are therefore inapposite.[1001]
- *Third*, nothing in the cited cases demonstrates that this Trial Chamber erred in the factors it took into account in finding the existence of the common plan.

XII.B.2.b.The Chamber relied on a range of appropriate factors

224. The Chamber expressly relied on a wide range of factors to reach its finding on the common plan.[1002] Ntaganda does not meaningfully engage with the Chamber's reasoning

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[996] *Lubanga* AJ, para. 22.
[997] *See e.g. Šljivančanin* AJ, para. 217.
[998] Appeal-Part II, para. 284 (fns. 748-751).
[999] *See Stakić* TJ, paras. 472-477, 483-484 (taking into account a range of evidence to prove the common goal of the joint criminal enterprise, which was to take control in Prijedor Municipality, including evidence of only one meeting that took place before the takeover was achieved, and other *post facto* evidence of the coordinated cooperation to achieve the goal); *Krajišnik* TJ, paras. 894-1124 (taking account of the speech cited by Ntaganda as but one part of a range of evidence discussed in over 90 pages of the judgment); *Bizimungu et al.* TJ, paras. 1260-1266, 1940, 1978-1982 (interpreting the speech cited by Ntaganda as containing a subtext of violence, even though it did not contain explicit reference to the common plan).
[1000] *See Bemba et al.* AJ, para. 1306 (declining to compare the facts of the case with those of ICTY cases given the factually specific nature of findings regarding the common plan).
[1001] Ntaganda's citation to paragraph 25 of the *Karera* TJ appears to be erroneous, as it is irrelevant that the Trial Chamber heard evidence from witnesses present at meetings at which the common plan was agreed. In the cited paragraphs of the *Zigiranyirazo* case, the Trial Chamber dealt with an extremely limited factual scenario concerning a speech delivered by the accused to a crowd which immediately went on to carry out a massacre of Tutsis at a particular location. In such circumstances, the evidence of the words and conduct of the accused at the meeting was critical to proving his participation in the joint criminal enterprise to kill Tutsi at that location: *Zigiranyirazo* TJ, paras. 253-301, 406-410. In the similarly limited circumstances of *Gatete*, the evidence of a meeting at which the accused spoke and instructed the attendees to kill Tutsis in Rwankuba sector was the *only* evidence that the Chamber relied upon to find a common criminal purpose: *Gatete* TJ, paras. 585-590. It is unclear how the paragraphs Ntaganda cites from the *Prlić et al.* TJ support Ntaganda's propositions. The cases of *Karadžić* and *Mladić* vastly differ from the nature and scale of allegations against Ntaganda, in particular since they address evidence of a common plan through the activities of formal legislative and administrative structures and organs which do not exist in this case, and which would naturally entail formal meetings and written records: *see Karadžić* TJ, paras. 3434-3447; *Mladić* TJ [Vol. IV], paras. 3578-3665.
[1002] Judgment, paras. 807-810.

apart from challenging the evidence of the June 2002 Kampala meetings and the orders given by UPC commanders (addressed below).[1003] Ntaganda only broadly asserts that the Chamber 'repeats' or 'recites' its previous findings without explaining whether the "evidence demonstrate[s] that the identified co-perpetrators were acting in concert such that a common plan could be inferred from their actions".[1004] Ntaganda fails to identify any error.

225. *First*, the factors recalled by the Chamber demonstrate that, not only did the Chamber base its finding on direct evidence of orders implementing the common plan at the operational level, it also relied on evidence of the founding motives of the UPC, of how UPC soldiers were trained and how they conducted themselves during the First and Second Operations, and how the UPC leadership reacted to this conduct.[1005] There was no bar to the Trial Chamber inferring from this conduct the prior existence of the common plan.[1006] Moreover, given the Chamber's findings that the UPC was a disciplined, efficient and well-functioning armed force,[1007] the conduct of the UPC soldiers during the First and Second Operations provided a highly relevant and sound basis from which to infer the knowledge, intentions and actions of its leaders, including Ntaganda. When considering the evidence in its totality, the Chamber did not err in requiring no further evidence of explicit expressions of the common plan by the co-perpetrators.

226. *Second*, the Chamber took into account the conduct of UPC soldiers and commanders who participated in the First and Second Operations, not just "*any* acts of *any* of the potentially thousands" of members of the UPC.[1008] This was reasonable and correct, given that Ntaganda was found to be one of the UPC's highest-ranking military figures who played a central and active role as an operational commander in the UPC,[1009] and given that the First and Second Operations were carried out by UPC soldiers pursuant to the military tactics that he devised, planned and oversaw.[1010]

227. *Third*, the Chamber set out a sufficiently clear basis for its finding regarding the common plan by identifying the facts it found to be relevant in reaching its conclusion.[1011]

[1003] *See below* paras. 229-233.
[1004] Appeal-Part II, paras. 288-291.
[1005] Judgment, paras. 782-807.
[1006] *Bemba et al.* AJ, para. 1306.
[1007] Judgment, paras. 783-785, 833.
[1008] *Contra* Appeal-Part II, para. 291.
[1009] Judgment, paras. 852-853, 856-857.
[1010] Judgment, paras. 834-846.
[1011] *Lubanga* First Redactions AD, para. 20; *Lubanga* Second Redactions AD, para. 30; *Bemba et al.* AJ, para. 103.

'Repetition' or 'recital' of previous findings shows no lack of reasoning, nor any error.[1012]

228. *Fourth*, the Chamber did not err in relying upon Salumu Mulenda's conduct in reaching its finding on the existence of the common plan.[1013] He was a commander in the UPC's formal hierarchy and Ntaganda's subordinate who commanded a brigade in the First and Second Operations pursuant to orders from UPC military leaders, who were members of the common plan.[1014] His conduct was thus attributable to the co-perpetrators, as a member of the UPC over which the co-perpetrators exercised control.[1015] Moreover, while the Prosecution did not specifically advance Mulenda as a member of the common plan,[1016] the Chamber did not err in not expressly stating whether it found him to be one. The Chamber found the members of the common plan to be the UPC military leaders (non-exhaustively identified as Ntaganda, Thomas Lubanga, Floribert Kisembo, Thomas Kasangaki, Paul Bagonza, Nduru Tchaligonza and Rafiki Saba).[1017] This was sufficiently specific, and consistent with the jurisprudence of the *ad hoc* tribunals, which has held that the plurality of persons involved in the common plan may be identified by reference to a limited group or category of persons, even if all persons are not identified by name.[1018]

229. *Finally*, Ntaganda's challenge to the Chamber's interpretation of the orders he and Floribert Kisembo gave using the terms '*kupiga na kuchaji*', and to attack "the Lendu" rather than "Lendu combatants", must be rejected for the reasons set out above.[1019]

XII.B.2.c.The Chamber correctly assessed the June 2002 meetings in Kampala

230. The Chamber reasonably relied, among other things, upon the evidence of Witnesses P-0014 and P-0041 to find that there was an ethnic motivation underlying the formation of the UPC—a factor relevant to its overall finding regarding the common plan.[1020] Ntaganda's argument that the evidence of these two witnesses is contradictory and insufficient to sustain such a finding[1021] misunderstands evidentiary principles regarding corroboration.

231. While P-0014 and P-0041 do not give *identical* evidence of the Kampala meetings, this

[1012] *Contra* Appeal-Part II, para. 290.
[1013] *Contra* Appeal-Part II, para. 292 (referring to Judgment, paras. 802-803).
[1014] *See e.g.* Judgment, paras. 475, 478, 487, 491, 493, 551-552, 557. *See also* PTB, paras. 160, 476, 533, 535, 537 (referring to Mulenda as Ntaganda's subordinate). *See further* Confirmation Decision, paras. 115, 172 (referring to Mulenda as Ntaganda's subordinate).
[1015] Judgment, para. 819.
[1016] PCB, para. 833.
[1017] Judgment, paras. 782-811.
[1018] *Krajišnik* AJ, paras. 156-157; *Brđanin* AJ, para. 430; *Đorđević* AJ, para. 141; *Karadžić* TJ, para. 562; *Limaj* AJ, para. 104; *Munyakazi* AJ, paras. 161-162; *Nizeyimana* AJ, para. 325.
[1019] *See above* paras. 82-92.
[1020] Judgment, paras. 290-293.
[1021] *Contra* Appeal-Part II, para. 285 (fn. 753).

was not required.[1022] That their evidence differs in some respects reflects their individual vantage points during the meetings.[1023] P-0014 had greater access to Lubanga's delegation than P-0041, as P-0014 was [REDACTED].[1024] He therefore attended smaller side meetings which were not accessible to P-0041.[1025]

232. Importantly, P-0014 and P-0041 were consistent in their evidence of fundamental details regarding the meetings, including the place of the meeting,[1026] the date,[1027] the attendees,[1028] that the delegation was headed by Lubanga,[1029] that the delegation was under the name "FRP",[1030] that they discussed getting rid of the RCD-K/ML and putting the Lubanga delegation in power,[1031] and that they discussed selecting persons to occupy key functions in the eventual administration.[1032] The differences that Ntaganda identifies in the witnesses' evidence do not amount to contradictions or inconsistencies, but rather reflect their individual experiences of the meetings.[1033] Specifically: (i) P-0014 stated that the aim of the meeting was to discuss how to drive out the Nande and then the Lendu from Ituri. Consistently, P-0041 confirmed that the purpose of the meeting was to secure the management of Ituri by Iturians, and to expel from Ituri the RCD-K/ML (known to be a group composed largely of persons of Nande ethnicity and thus 'non-Iturian'[1034]);[1035] (ii) P-0041 stated that the group selected Eneko (a non-Hema) to be governor of Ituri, consistent with P-0014's evidence that the group asked Eneko to be a formal member of the group when

[1022] *See above* paras. 141-142.
[1023] *See* Judgment, para. 80.
[1024] DRC-OTP-2054-0429, p. 0469, ll. 21-24.
[1025] *See e.g.* DRC-OTP-0066-0002, paras. 56-57 (naming members of the delegation, including P-0041, but then states that he had a conversation with a smaller group (comprising of Lubanga and others) which did not include P-0041 in which the group explained to P-0014 that they sought to create a political party aimed at replacing the RCD/K-ML and asked P-0014 to join the movement); DRC-OTP-2054-0429, page 0470, ll. 4-16 (describing another meeting with a number of individuals in Thomas Lubanga's hotel room, where he met Lubanga for the first time, and where P-0041 is not included). *See also* DRC-OTP-0147-0002, paras. 52-56 (noting that over the two-week period in Kampala there were several official meetings with the Ugandans at the beginning and end of the two week period, and several meetings in between with members of the Lubanga delegation to discuss choosing the future Governor of Ituri, or other persons who would take up key positions in Ituri).
[1026] P-0041: DRC-OTP-147-0002, paras. 50, 52; P-0014: DRC-OTP-0066-0002, paras. 55-56.
[1027] P-0041: DRC-OTP-0147-0002, para. 50; P-0014: DRC-OTP-0066-0002, para. 55.
[1028] P-0041: DRC-OTP-0147-0002, para. 51 (the attendees were [REDACTED]), Thomas Lubanga, Richard Lonema, [REDACTED], Tinanzabo, Avochi, [REDACTED]; P-0014: DRC-OTP-0066-0002, para. 56 (in addition to the attendees named by P-0041, witness P-0014 names [REDACTED]).
[1029] P-0041: DRC-OTP-0147-0002, para. 51; P-0014: DRC-OTP-0066-0002 at para. 58.
[1030] P-0041: DRC-OTP-0147-0002, para. 41; *see also* para. 50 (in relation to the Kasese meeting, and the invitation for this same delegation to go to Kampala; P-0014: T-137-Conf, 21:1-4.
[1031] P-0041: DRC-OTP-0147-0002, para. 42; P-0014: DRC-OTP-0066-0002, para. 57.
[1032] P-0041: DRC-OTP-0147-0002, para. 55; P-0014: DRC-OTP-0066-0002, para. 57.
[1033] *Contra* Appeal-Part II, para. 285 (fn. 753).
[1034] DRC-OTP-2054-0429, p. 0480, l. 6, to p. 0481, l. 6.
[1035] DRC-OTP-0147-0002, para. 42; DRC-OTP-2054-5030, p. 5110, ll. 17-19; DRC-OTP_2054-5199, p. 5204.

they take over Ituri;[1036] (iii) while P-0041 did not give evidence of Lubanga's delegation discussing the use of rape as a means of waging war, this is likely because he was not privy to the side discussion in which this point was raised. P-0041's lack of evidence on this point therefore does not render P-0014's evidence on this discussion unreliable. Indeed, P-0014 explained that the side discussion took place among trusted members of the Lubanga delegation.[1037] While he did not identify which people from Lubanga's delegation were present, he was not asked to identify them. Nor does the fact that P-0014 did not identify the other participants render his evidence unreliable;[1038] (iv) P-0041's reference to Lubanga's delegation as "FRP" is not an error – P-0014 refers to the delegation as the FRP as well.[1039] The Chamber noted that this was the name of an early incarnation of the emerging UPC.[1040]

233. The witnesses thus corroborated one another's evidence of the Kampala meetings. Similarly corroborative are the two contemporaneous documents that P-0014 obtained from the meetings, which the Chamber cites.[1041] While the documents do not explicitly refer to a plan to drive out the Lendu, the Chamber rightly noted that they nonetheless indicated that the RCD-K/ML was to be chased out of Ituri by force.[1042]

XII.B.3. The existence of the common plan was also supported by other factual findings

234. Ntaganda overstates the record in alleging that there existed a "wall of contrary evidence" regarding the charged common plan.[1043] The Chamber accepted that some of the documents of the UPC expressed the group's desire for peace and the protection of the civilian population, but correctly found that this was in parallel to its goal to actively chase away the RCD-K/ML and those perceived as non-Iturians.[1044] The alternative explanations for the UPC's conduct proffered by Ntaganda were implausible on the evidence. The Chamber was not required to rule out all other possible explanations (unsupported by the evidence) for the UPC's conduct;[1045] it was only required to determine whether its conclusion was the only *reasonable* one on the evidence before it. Ntaganda shows no error in this.

[1036] DRC-OTP-2054-0429, p. 0471, ll. 12-19.
[1037] T-138, 101-102.
[1038] *Contra* Appeal-Part II, para. 285.
[1039] P:0014: T-137, 21:1-4; P:0041: DRC-OTP-0147-0002, p. 0009, para. 41.
[1040] Judgment, para. 288 (fn. 737).
[1041] *Contra* Appeal-Part II, para. 285.
[1042] Judgment, para. 292 (fns. 747-748).
[1043] Appeal-Part II, paras. 296-300.
[1044] Judgment, para. 686.
[1045] *Ngudjolo* AJ, para. 109 (citing *Rutaganda* AJ, para. 188: "The reasonable doubt standard in criminal law cannot consist in imaginary or frivolous doubt based on empathy or prejudice. It must be based on logic and common sense, and have a rational link to the evidence, lack of evidence or inconsistencies in the evidence"). *Contra* Appeal-Part II, para. 300.

235. That the Chamber's conclusion regarding the existence of the common plan was the only reasonable one available on the evidence is further supported by its findings concerning the context and manner in which the UPC operated, and in which violent acts were perpetrated against the Lendu. These findings include: (i) incidents of killing of Lendu civilians, including with Ntaganda's involvement or approval;[1046] (ii) the exclusion of non-Hema members of the UPC General Staff or Executive from substantive or operational discussions;[1047] (iii) the UPC favouring the Hema civilians and mobilising them for the military operations;[1048] (iv) the capture and detention of Lendu people in Kobu where the Lendu women were forced to cook for the UPC troops;[1049] (v) the non-recruitment of child soldiers from Lendu villages and communities;[1050] (vi) the non-return of Lendu to their homes in Mongbwalu and Sayo after the First Operation, which occurred because the UPC had been trained to regard the Lendu as their enemy such that any Lendu person would be killed if they returned;[1051] and (vii) the instructions by UPC commanders to their troops to attack and kill the Lendu, including civilians, in later incidents.[1052]

XII.C. The common plan entailed the charged crimes

236. Ntaganda argues that by merely concluding that there was a common plan,[1053] "the Chamber felt entitled to hang any crime underneath", instead of explaining how the commission of each crime was either intended or a virtually certain consequence of the implementation of the common plan.[1054] This argument must be rejected because it fails to appreciate that the Chamber's conclusion was based on a detailed analysis of the co-perpetrators' plan for a military campaign including a series of assaults involving the commission of crimes against the Lendu community.[1055] This analysis included an assessment that the co-perpetrators agreed for the common plan to include each of the types of crimes

[1046] Judgment, paras. 510 (Ntaganda ordered his bodyguards to shoot and kill two Lendu persons captured in Nzebi); 333 (Ntaganda's killing of *Abbé* Bwanalonga, a Lendu priest), 543 (the killing of Lendu in Kilo, during the *ratissage*), 104-105 (the killing in Kobu of approximately 50 Lendu civilians who had been tricked into attending a "pacification meeting" in Sangi), 638-639, 797 (Ntaganda's approval of the Kobu killings).
[1047] Judgment, paras. 302, 319.
[1048] Judgment, para. 333.
[1049] Judgment, paras. 621-622.
[1050] Judgment, para. 348.
[1051] Judgment, para. 536.
[1052] Judgment, para. 656.
[1053] Ntaganda incorrectly refers to the common plan regarding "the destruction and disintegration of the Lendu community" (Appeal-Part II, para. 303). As shown in response to Ntaganda's sub-ground 13.I above, this does not correctly reflect the Chamber's conclusion with respect to the common plan (*see above* paras. 216-218).
[1054] Appeal-Part II, para. 303.
[1055] Judgment, paras. 793-807.

charged in counts 1-5, 7-8, 10-13 and 17-18, namely: murder;[1056] directing attacks against civilians;[1057] property offences, including against protected objects;[1058] rape and sexual slavery;[1059] forced displacement;[1060] and persecution.[1061] In addition, the Chamber analysed how UPC military leaders arranged for the recruitment and use of persons under 15 (including female recruits).[1062] These arrangements made it virtually certain that the enlistment, conscription and use, and rape and sexual slavery of child soldiers would be committed as a result of the implementation of the common plan.[1063] Ntaganda's repeated contention that the Chamber's findings regarding the common plan are unsupported by the evidence[1064] is answered in the previous sub-section of this brief.[1065]

XII.D. The enlistment, conscription and use of child soldiers, and their rape and sexual slavery were virtually certain to occur

237. Ntaganda mischaracterises the Chamber's reasoning in alleging that the Chamber found crimes against child soldiers to be a virtual certainty simply due to "the circumstances prevailing in Ituri at the time".[1066] The Chamber used this phrase as shorthand for its specific findings throughout the Judgment providing the factual context relevant to demonstrating that crimes against child soldiers were foreseeable to the perpetrators as a virtual certainty of implementing the common plan.[1067] These included findings such as: that the UPC expressed at an early stage its plan to mobilise youth, including children under 15 years, for its military effort in Ituri; that children accompanied UPC commanders to the front; that female child recruits were subjected to regular rape and sexual violence, which went unpunished and were not allowed to leave the camps; and that no effective measures were taken to prevent such crimes, nor did UPC leaders create the necessary conditions to ensure their safe environment.[1068] This was not erroneous.

[1056] *See e.g.* Judgment, paras. 790, 797, 800, 804, 805.
[1057] *See e.g.* Judgment, paras. 801, 803, 804, 807.
[1058] *See e.g.* Judgment, paras. 801, 802, 807 ("UPC/FPLC troops were instructed to attack everyone and everything without distinction […] to target Lendu civilians and their property specifically").
[1059] *See e.g.* Judgment, paras. 799, 805-806.
[1060] *See e.g.* Judgment, paras. 803.
[1061] *See e.g.* Judgment, paras. 801, 803-805, 807.
[1062] Judgment, paras. 787-792.
[1063] Judgment, para. 811.
[1064] Appeal-Part II, para. 304.
[1065] *See above* paras. 219-235.
[1066] Appeal-Part II, para. 306 (citing Judgment, para. 811).
[1067] Judgment, para. 811.
[1068] Judgment, paras. 787-792.

238. Moreover, in examining Ntaganda's *mens rea* for crimes against child soldiers, the Chamber considered factors such as Ntaganda's use of children under the age of 15 as his personal escorts, some of whom participated in combat operations with him; the large scale recruitment drives he was personally involved in; the uniform training that all recruits were subjected to regardless of age; that Ntaganda raped his own female bodyguards; the lack of any protections in place for vulnerable girls, and that such crimes went unpunished.[1069] Relevantly, these are the same factors that Ntaganda identifies from ICTY and ICTR case law as relevant to a finding that co-perpetrators could foresee crimes occurring as a virtually certain consequence of implementing a common plan, but which he erroneously claims the Chamber did not consider.[1070] Ntaganda thus fails to identify any error.

XII.E. Ntaganda is responsible for the crimes of the Hema civilians

239. The Chamber correctly attributed the crimes committed by the Hema civilians in Mongbwalu during the *ratissage* operation to Ntaganda, pursuant to the mode of liability of indirect co-perpetration under article 25(3)(a) of the Statute.[1071]

240. Indirect co-perpetrators may commit a crime through one or more persons, or by acting through an organised and hierarchical apparatus of power.[1072] The Chamber convicted Ntaganda for the crimes committed by the Hema civilians in Mongbwalu because the co-perpetrators acted through those Hema civilians.[1073] The Chamber clearly distinguished between the co-perpetrators' control of the Hema civilians and their control over the UPC soldiers,[1074] and held that "the Hema civilians functioned as a tool in the hand of the co-perpetrators, controlled through soldiers of the UPC/FPLC, an organization which was itself a tool in the hands of the co-perpetrators".[1075] The underlying assumption for attributing liability of a crime committed "through another person" is that "the accused makes use of another person, who actually carries out the incriminated conduct, by virtue of the accused's control over that person".[1076] The perpetrator behind the perpetrator is responsible because he

[1069] Judgment, paras. 1190-1198. *Contra* Appeal-Part II, para. 307, fns. 809, 810, citing *Lubanga* TJ, paras. 1274-1348. *See also above* paras. 212-214.
[1070] Appeal-Part II, para. 308.
[1071] Judgment, paras. 512, 820-824; *Contra* Appeal-Part II, paras. 310, 316.
[1072] *Blé Goudé* CD, para. 136; *Ongwen* CD, para. 39; *Katanga* CD, paras.488,495-498, 500-510; *Katanga* TJ, paras.1403-1405, 1407, 1412.
[1073] *Contra* Appeal-Part II, para. 316.
[1074] Judgment, para. 825.
[1075] Judgment, para. 824.
[1076] *Lubanga AJ*, para. 465. *See also* Jessberger and Geneuss, pp. 854-855.

or she "controls the will of the direct perpetrators".[1077] This does not require that the former has sole control over the crime or that the latter's responsibility is necessarily excluded.[1078]

241. Whether a person (or the co-perpetrators) controlled the will of a direct perpetrator "requires a normative assessment of the relationship between the person actually carrying out the incriminated conduct and the person in the background, as well as of the latter person's relationship to the crime".[1079] This is what the Chamber did. It held that the Hema civilians who committed the crimes acted "in the context of the general coercive circumstances resulting from the presence of armed UPC/FPLC soldiers, who were themselves committing crimes in Mongbwalu"[1080] and that they "followed orders of the UPC/FPLC leadership",[1081] which was controlled by the co-perpetrators.[1082]

242. Ntaganda disagrees with the Chamber's factual assessment, but fails to show that its findings were unreasonable. The conclusion that there were generally coercive circumstances at the time was based on the evidence.[1083] The Mongbwalu *ratissage* operation by Hema civilians was carried out in the immediate aftermath of the takeover of Mongbwalu—which occurred as part of the First Operation.[1084] Accordingly, the Chamber's conclusion that the Hema civilians were impacted by those circumstances must be read in light of its findings regarding the First Operation. That operation involved assaults, including attacks with heavy weapons, murder, rape, pillage and other crimes, on a number of villages and towns in the Banyali-Kilo *collectivité*.[1085] In addition, contrary to Ntaganda's claim,[1086] the Chamber's conclusion that Hema civilians followed orders from the UPC leadership is based on multiple sources of evidence.[1087] That some of this evidence is indirect does not detract from its reliability and probative value.

243. Ntaganda misrepresents the Chamber's conclusions. The Chamber did not attribute to Ntaganda the crimes committed by the Hema civilians through an organised structure of power.[1088] The Chamber held that the co-perpetrators used the Hema civilians as a tool that

[1077] *Katanga* CD, para.497. *See also* Judgment, para. 777; *Blé Goudé* CD, para. 136; *Ongwen* CD, para. 39.
[1078] *Lubanga AJ*, para. 465. *See also* *Katanga* CD, para.497; *Contra* Appeal-Part II, para. 315.
[1079] *Lubanga AJ*, para. 465.
[1080] Judgment, para. 822.
[1081] Judgment, paras. 512, 822.
[1082] Judgment, para. 822.
[1083] *Contra* Appeal-Part II, para. 313
[1084] Judgment, paras. 512, 467.
[1085] Judgment, paras. 467-548, 737-763. Banyali-Kilo *collectivité* includes Mongbwalu: Judgment, para. 467.
[1086] Appeal-Part II, para. 313.
[1087] *See* Judgment, para. 536 (fn. 1513).
[1088] Appeal-Part II, para. 316.

they controlled through the UPC.[1089] However, the Chamber did not find that the Hema civilians were part of the UPC or that they were themselves an organised structure of power. Accordingly it did not need to enter findings that would have been required for co-perpetration through an organised structure of power.[1090] Factual findings in other cases where co-perpetrators were alleged to control an organised structure of power do not demonstrate that the Chamber erred.[1091]

244. For the reasons set out above, Ground 13 should be dismissed.

XIII. NTAGANDA HAD THE REQUISITE *MENS REA* FOR CRIMES COMMITED DURING THE FIRST OPERATION (GROUND 14)

XIII.A. The Chamber correctly assessed Ntaganda's *mens rea*

245. The Chamber relied on a range of factors to conclude that Ntaganda had the requisite *mens rea* as an indirect co-perpetrator for the crimes of UPC soldiers during the First and Second Operations.[1092] In doing so, the Chamber did not conduct a separate *mens rea* analysis for each operation, but instead assessed Ntaganda's conduct and relevant circumstances of the case as a whole over both operations. This *in globo* approach was appropriate in this case,[1093] where the Chamber found the First and Second Operations to be "part of the same military campaign and constituted a logical succession of events", such that the UPC acts during both operations formed "one and the same course of conduct".[1094]

246. The Chamber did not err in concluding that Ntaganda possessed the requisite *mens rea* for the two operations, relying upon factors including: his role in the agreement and implementation of the common plan;[1095] his senior status in the UPC and his commanding position—particularly during the Mongbwalu assault;[1096] the reporting of information to him;[1097] and his presence, actions and directives during the First and Second Operations.[1098]

[1089] Judgment, paras. 822, 824. *See above* para. 240.
[1090] Because of the manner in which the Chamber imputed the conduct of the Hema civilians to Ntaganda, it was not necessary to find a system of automatic compliance by the Hema civilians with orders to commit crimes: *contra* Appeal-Part II, paras 311-312. Similarly, the Chamber was not required to find that the Hema civilians formed part of the UPC or that the Hema civilians were interchangeable and replaceable or that an organisation subjugated their will, or that the co-perpetrators used an apparatus of power to steer the Hema civilians: *contra* Appeal-Part II, para. 316. Ntaganda misrepresents the Chamber's findings: *see* Judgment, paras. 821-824.
[1091] Appeal-Part II, para. 314.
[1092] *Contra* Appeal-Part II, paras. 317-359. *See* Judgment, paras. 1177-1187.
[1093] Ntaganda challenges this approach in Ground 15: Appeal-Part II, paras. 362-363. *See below* paras. 278-286.
[1094] Judgment, paras. 664, 793, 1187.
[1095] Judgment, para. 1177.
[1096] Judgment, para. 1179.
[1097] Judgment, para. 1179.
[1098] Judgment, para. 1180.

Ntaganda focuses his argument on the Chamber's approach to two orders which he claims were central to the Chamber's findings: his order to UPC soldiers the night before he left Bunia for Mongbwalu in the First Operation (using the term '*kupiga na kuchaji*') and his order to UPC soldiers in Mongbwalu to "attack the Lendu" without distinction.[1099]

XIII.B. The Chamber reasonably relied on P-0010's evidence on Ntaganda's '*kupiga na kuchaji*' order

247. The Chamber did not err in interpreting the phrase '*kupiga na kuchaji*'.[1100] Nor did the Chamber err in relying upon P-0010's evidence that Ntaganda gave an order to UPC soldiers the night before the Mongbwalu assault using the phrase '*kupiga na kuchaji*'.[1101] Ntaganda's sweeping claim that P-0010 repeatedly lied, and that her evidence regarding his order of '*kupiga na kuchaji*' is unreliable, must be rejected.

248. *First*, Ntaganda misrepresents the Judgment in stating that the Chamber found P-0010 to have "repeatedly lied on central and incriminating issues", "lied under oath", and "misrepresented the truth".[1102] To the contrary, the Chamber found P-0010 credible,[1103] and did not affirmatively find that P-0010 lied.[1104] Rather, the Chamber stated that it "cannot exclude the possibility that P-0010 misrepresented the truth" when giving evidence regarding her age and her abduction by the UPC and subsequent training.[1105] While Ntaganda treats this as confirmation by the Chamber that P-0010 lied,[1106] in fact the Chamber only acknowledged—to give the benefit of the doubt to the accused—the *possibility* that she may have lied on those issues. In doing so, the Chamber did *not* affirmatively find that she lied. In particular, the Chamber found her evidence on other issues to be reliable.[1107]

249. *Second*, as set out above, the Chamber did not err legally in relying on certain aspects of P-0010's testimony while rejecting others, even if, *arguendo*, it had found P-0010 to be untruthful in certain aspects of her testimony.[1108]

250. *Third*, the Chamber did not err in relying on P-0010's evidence of Ntaganda's '*kupiga*

[1099] Appeal-Part II, paras. 320-321, citing Judgment, paras. 484, 493, 1181, 1186.
[1100] *See above* paras. 82-87.
[1101] Judgment, para. 484 and fn. 1387; *contra* Appeal-Part II, paras. 321-339, 347.
[1102] Appeal-Part II, paras. 3, 328, 329.
[1103] Judgment, paras. 77-88 (general principles of credibility assessments), 89-105 (specific assessment of P-0010's credibility). *See above* paras. 185-188.
[1104] *Contra* Appeal-Part II, para. 328.
[1105] Judgment, para. 98.
[1106] Appeal-Part II, para. 329.
[1107] *See e.g.* Judgment, paras. 101 (re her experiences in Ntaganda's escort), 102 (re her experiences of sexual violence), 104 (re her self-identification on a video showing the training camp at Rwampara).
[1108] *Contra* Appeal-Part II, para. 328. *See above* para. 185.

na kuchaji' order. Having found the witness to be credible,[1109] the Chamber assessed the reliability of her evidence on certain topics and stated that it would determine on a case-by-case basis which other aspects of her testimony it could rely on, with or without corroboration.[1110] This nuanced approach clearly does not amount to a "*carte blanche*" acceptance of the witness's testimony without reasons.[1111] In relation to her testimony regarding Ntaganda's order using the words '*kupiga na kuchaji*', the Chamber gave sufficient reasons as to why it found P-0010's evidence on that issue reliable, including that the evidence was spontaneously given.[1112] The witness was not "led [] step by step" to give this evidence.[1113] She gave information regarding Ntaganda's order after she has been asked whether she was familiar with the phrase '*kupiga na kuchaji*', where she heard it being used, and which commanders used it, including Ntaganda.[1114] P-0010 was not asked impermissibly leading questions during this testimony, nor did Defence counsel object during this portion of the witness's testimony, whether on the basis of purportedly leading questions, or for any other reason.[1115]

251. *Fourth,* Ntaganda repeats his arguments in the Defence Closing Brief regarding P-0010's credibility and reliability,[1116] and which the Chamber comprehensively addressed in its Judgment.[1117] None of Ntaganda's resurrected arguments identify an error in the Chamber's credibility assessment of P-0010, or in its reliance upon her evidence of Ntaganda's '*kupiga na kuchaji'* order. In particular:

- Ntaganda repeats his arguments regarding P-0010's evidence of her age, date and place of birth.[1118] The Chamber concluded that it could not determine her age beyond reasonable doubt, but this was not based on any finding that the witness lied under oath.[1119] This was reasonable, since the witness was candid in accepting that there had been prior discrepancies with details of her date and place of birth[1120] and provided explanations where she was able

[1109] Judgment, para. 105.
[1110] Judgment, paras. 99, 102, 105 and fn. 1158.
[1111] *Contra* Appeal-Part II, para. 328.
[1112] Judgment, para. 484 (fn. 1387).
[1113] *Contra* Appeal-Part II, para. 334.
[1114] T-47, 14:16-15:16.
[1115] P-0010: T-47, 14:16-15:16.
[1116] *Compare* Appeal-Part II, paras. 323-339 with DCB, paras. 1261-1282.
[1117] Judgment, paras. 89-105.
[1118] Appeal-Part II, para. 325; DCB, paras. 1267-1271.
[1119] Judgment, paras. 92-94.
[1120] *See e.g.* P-0010: T-50-Conf, 28:2-5.

to do so.[1121] The Chamber correctly considered some explanations for certain discrepancies, while noting that other discrepancies remained unanswered.[1122]

- Ntaganda repeats his arguments regarding P-0010's evidence of the circumstances of her abduction and training by the UPC, but again fails to accurately capture the Chamber's findings.[1123] The Chamber did *not* find that the witness had misrepresented the truth.[1124]
- Ntaganda again alleges that the witness falsified her evidence that [REDACTED],[1125] primarily because of a purported inconsistency in her evidence about the timing of the rape ([REDACTED]).[1126] This purported inconsistency is irrelevant, given the witness's evidence that this was only the *first* time that she had been raped [REDACTED], and [REDACTED] raped her repeatedly after this occasion.[1127] In any event, the Chamber did not err in finding that her inability to recall the precise timing of the rape did not meaningfully affect the credibility or reliability of her account.[1128] Nor did the witness's delayed reporting of her rape undermine its credibility or reliability since other witnesses gave evidence that UPC commanders raped the escorts, and victims of rape, especially in a conflict or post-conflict area like Ituri, may not always report their experiences.[1129]
- Ntaganda repeats his allegation that the witness falsified details of the military operations in which she participated,[1130] but erroneously reads the evidence and overemphasises the relevance of certain details to this witness. P-0010 correctly stated that the UPC did not manage to take Mongbwalu[1131]—she was discussing the failed Mongbwalu operation in June 2003, after the UPC battle in Bunia with the UPDF,[1132] which is corroborated by Ntaganda's own testimony.[1133] The other details that Ntaganda challenges[1134] were not

[1121] *See e.g.* P-0010: T-46-Conf, 28:15-18 (she stated that she was born in Bunia on [REDACTED] August 1989); T-50-Conf, 31:23-33:10, 56:10-15, 57:2-7 (she stated that her voter's card records her as being older, because she had to increase her age in order to obtain an electoral card for security reasons); 28:16-22 (she had told OTP investigators that she was born in [REDACTED] as this was her mother's place of birth, which she had mistakenly given).
[1122] Judgment, para. 93.
[1123] Appeal-Part II, paras. 325-327, 330-331; DCB, paras. 1262-1266.
[1124] *Contra* Appeal-Part II, para. 328. *See above* para. 248.
[1125] Appeal-Part II, paras. 335-338; DCB, paras. 1272-1276.
[1126] Appeal-Part II, paras. 335-336; DCB, paras. 1272, 1276.
[1127] P-0010: T-47-Conf, 32:19-24.
[1128] *Contra* Appeal-Part II, para. 336. *See* Judgment, paras. 102 (fn. 242), 407 (fn. 1158).
[1129] Judgment, paras. 88, 102. *Contra* Appeal-Part II, paras. 337-338.
[1130] Appeal-Part II, para. 333; DCB, paras. 1278-1279.
[1131] *Contra* Appeal-Part II, para. 333.
[1132] P-0010: T-47, 16:6-16.
[1133] D-0300: T-225, 48:16-49:6.
[1134] Appeal-Part II, para. 333 (*i.e.* that the UPC forces took the "Kobu Road" to reach Mongbwalu when the Chamber did not make such a finding; that the witness did not state that Ntaganda went to Sayo, when he in fact did; that Kisembo was present during the attack, when actually he came afterwards).

"false claims", but merely discrepancies regarding certain details of the military operations in which she participated some 13 years earlier. The witness was otherwise able to provide detailed and corroborated evidence regarding her participation in military operations, including the First Operation.[1135] In this context, discrepancies such as those highlighted by Ntaganda do not render her evidence regarding the First Operation wholly unreliable.[1136]

252. *Finally,* the Chamber was correct not to require corroboration of P-0010's evidence regarding the '*kupiga na kuchaji*' order, given its reasoned finding that her evidence on the issue was reliable.[1137] That another former escort of Ntaganda, P-0888, said he could not remember the orders does not render P-0010's evidence incompatible, nor diminish its reliability and probative value.[1138] In any event, other evidence of Ntaganda and other commanders giving orders to UPC troops to "attack the Lendu", or using the phrase *'kupiga na kuchaji*' corroborates P-0010's testimony on this matter.[1139] The burden of proof did not require that an adverse inference be drawn in respect of this evidence.[1140]

253. Ntaganda's repeated invocation that P-0010 lied or gave false testimony does not detract from the fact that the Chamber carefully assessed her credibility and reliability. The reasonableness of the Chamber's findings regarding her evidence is underscored by the witness's frank testimony, and her ability to give evidence without hesitation and to admit discrepancies in her evidence. The Chamber—which heard P-0010's testimony live in the courtroom, and which was intimately familiar with the entirety of the record—was best placed to assess the credibility and reliability of her testimony and *a priori* should be accorded appropriate deference.[1141] Ntaganda's repeated attempts to discredit P-0010 should be rejected.

XIII.C. The Chamber reasonably relied upon P-0768's evidence on Ntaganda's order

254. The Chamber relied on the evidence of Witness P-0768 to find that Ntaganda ordered UPC soldiers on the evening of the first day of the Mongbwalu assault to "attack the Lendu".[1142] The Chamber did not err in relying on the evidence of a single witness for this

[1135] *Contra* Appeal-Part II, para. 333. *See* Judgment, paras. 99-100.
[1136] *Contra* Appeal-Part II, para. 333.
[1137] *Contra* Appeal-Part II, para. 332. *See above* para. 250.
[1138] P-0888: T-105-Conf, 84:20-24.
[1139] Judgment, paras. 415 (citing P-0907 (T-90, 8), P-0963 (T-78, 72-73), P-0768 (T-33, 64-65)), 801.
[1140] *Contra* Appeal-Part II, para. 332. *See above* paras. 123-126. *See also Bemba et al.* AJ, paras. 94-95; *Ngudjolo* AJ, para. 24; *Lubanga* AJ, para. 25.
[1141] *Popović et al.* AJ, para. 131; *Muvunyi* Second AJ, para. 26; *Simba* AJ, para. 9.
[1142] Judgment, paras. 1181, 493 and fn. 1429, citing P-0768 (T-33-Conf, 37).

particular order,[1143] nor was he necessarily an 'accomplice'.[1144] In any event, other evidence that Ntaganda and other commanders ordered UPC troops to "attack the Lendu", or used the phrase *'kupiga na kuchaji*', corroborates P-0768's evidence.[1145]

255. The Chamber did not err in finding P-0768's evidence reliable. The witness stated that, "the order was to attack all the RCD-K/ML soldiers who were in Mongbwalu and the Lendu militia. They told us—they spoke about the Lendu. They didn't speak about the militia, they just said Lendu".[1146] He clarified that Ntaganda "didn't make a difference between civilians—Lendu civilians and the militia. He spoke about Lendus, only Lendus, and everybody had to assess that in their own way".[1147]

256. *First*, P-0768 did not equivocate—let alone in any material way—when he clarified in his first answer that Ntaganda spoke of attacking "the Lendu" and not "the militia".[1148] *Second*, his evidence does not support Ntaganda's claim that it was generally difficult to distinguish Lendu fighters from Lendu civilians not taking active part in the hostilities and that the conduct of UPC soldiers and commanders had to be interpreted in this context.[1149] P-0768 stated that Lendu fighters could be readily identified as they carried weapons—firearms, machetes, spears and arrows.[1150] Accordingly, the Chamber found that "[t]he fact that they were not uniformly dressed made some of the Lendu fighters difficult to identify".[1151]

257. Moreover, Ntaganda claims that when UPC commanders gave orders regarding "the Lendu", it was not necessary for them to specify "Lendu *combatants*" in order to be understood as referring only to combatants and civilians taking active part in the hostilities.[1152] But the evidence of the numerous crimes that were found to have been committed against Lendu civilians in Mongbwalu undermines this claim.[1153] The meaning of Ntaganda's words can only be interpreted in the context of, and with reference to, the evidence *in this case*, where ethnicity was found to be a relevant dimension to the conflict.[1154]

[1143] Appeal-Part II, para. 344.
[1144] *See above* paras. 137-139.
[1145] Judgment, paras. 415, citing P-0907 (T-90, 8), P-0963 (T-78, 72-73), 484, citing P-0010 (T-47, 14-15). *See also* Judgment, para. 801
[1146] T-33-Conf, 37:5-7.
[1147] T-33-Conf, 37:14-16.
[1148] *Contra* Appeal-Part II, para. 342.
[1149] *Contra* Appeal-Part II, para. 342.
[1150] T-33-Conf, 36:24-37:1.
[1151] Judgment, paras. 472-473 (emphasis added).
[1152] Appeal-Part II, paras. 345-346.
[1153] *See* Judgment, paras. 494, 512-524.
[1154] *See e.g.* Judgment, paras. 21, 683.

Ntaganda fails to do this,[1155] instead drawing an irrelevant comparison between Ntaganda's order to "attack the Lendu" and the terminology employed by Winston Churchill and Dwight D. Eisenhower during the Second World War in their speeches (referring to "the Germans", rather than "German combatants").[1156]

258. Ntaganda's further claim that the Chamber erred in relying upon P-0768's evidence of this order, on the basis that neither P-0768 nor Ntaganda were in Mongbwalu on the evening of the first day of the assault,[1157] must be rejected for the reasons set out above.[1158]

XIII.D. The Chamber correctly assessed relevant factors to find Ntaganda's *mens rea*

259. P-0010 and P-0768's evidence of Ntaganda's orders must be viewed in light of the totality of the evidence in the record.[1159] The Chamber's *mens rea* finding was reasonable and correct.[1160] Ntaganda's attempt to take the evidence of these two witnesses out of the wider context must fail.

260. *First*, Ntaganda's argument that the Trial Chamber unreasonably found that he was not involved in the murder of the *Abbé* is unsustainable, as set out above.[1161]

261. *Second*, Ntaganda identifies no error in disputing the basis on which the Chamber found that women were raped at the *Appartements* camp.[1162] While he argues that the Chamber does not explicitly mention the *rape* of women in paragraph 535 of the Judgment, only that soldiers and commanders had sexual intercourse with civilian women at the camp,[1163] it is clear from the Chamber's discussion of the evidence that it found civilian women were raped at the *Appartements* camp.[1164] Moreover, the Chamber made findings elsewhere in the Judgment that women were raped at the *Appartements* camp and that Ntaganda was aware of it.[1165]

262. *Third*, Ntaganda's orders to fire heavy weapons and to target specific objects are directly relevant to proof of his criminal intent, given that civilians were illegally targeted by the UPC,[1166] as epitomised in his own deliberate order to fire a grenade launcher at a column

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[1155] *See above* paras. 88-92.
[1156] *Contra* Appeal-Part II, para. 345.
[1157] Appeal-Part II, para. 343.
[1158] *See above* paras. 145-149.
[1159] *See above* para. 219.
[1160] Judgment, paras. 1177-1187.
[1161] Appeal-Part II, para. 349. *See above* paras. 152-155.
[1162] Appeal-Part II, para. 350, citing Judgment, paras. 1184, 535.
[1163] Appeal-Part II, para. 350, citing Judgment, paras. 1184, 535.
[1164] Judgment, para. 535 and fn. 1601. *See also* PCB, paras. 424, 426.
[1165] *See e.g.* Judgment, paras. 1186.
[1166] *Contra* Appeal-Part II, para. 351.

of fleeing civilians in Sayo.[1167] The Chamber sufficiently addressed Ntaganda's argument[1168] and he identifies no error simply by repeating it on appeal.[1169]

263. *Finally*, the Chamber did not err in finding that looted goods from Mongbwalu were brought to Ntaganda's residence in Bunia.[1170] The Chamber considered the credibility of the witnesses cited, and the reliability of their evidence, and addressed Ntaganda's challenge to the evidence in the Defence Closing Brief.[1171] Ntaganda's claim that the Chamber erred by impermissibly shifting the burden of proof has no basis, as set out above.[1172]

XIII.E. Ntaganda's *mens rea* was the only reasonable conclusion on the evidence

264. Ntaganda misapplies the principles he cites regarding the drawing of inferences.[1173] To establish a material fact beyond reasonable doubt based on circumstantial evidence, any inference must be more than merely hypothetical or speculative, and must be the only reasonable inference that can be drawn, based on the evidence.[1174] Moreover, Ntaganda misstates the level of reasoning that a Chamber is required to demonstrate in its Judgment. For a decision to be reasoned a Chamber need not mention every item of evidence or each argument of the parties, but must identify with sufficient clarity the basis of its decision.[1175] In these circumstances, as observed by other international courts "it is to be presumed that the Trial Chamber evaluated all the evidence before it, as long as there is no indication that [it] completely disregarded any particular piece of evidence".[1176] This presumption may be rebutted "when evidence which is *clearly relevant* to the findings is not addressed by the Trial Chamber's reasoning".[1177] This approach is also consistent with human rights jurisprudence.[1178] The evidence referred to by Ntaganda, which he says was overlooked, was

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[1167] Judgment, para. 508.
[1168] Judgment, paras. 508 and fns. 1494-1498, 940-948.
[1169] *See above* paras. 161-166.
[1170] *Contra* Appeal-Part II, para. 352.
[1171] Judgment, para. 516 and fn. 1530.
[1172] *See above* paras. 123-126.
[1173] *Contra* Appeal-Part II, paras. 353-358.
[1174] *Bemba et al.* AJ, para. 868; *Bemba* TJ, paras. 192, 239; *Lubanga* TJ, para. 107. *See also* *Mbarushimana* Interim Release AJ, para. 52.
[1175] *See above* fn. 1011. *See also* Triffterer and Kiss, p. 1850, mn. 65 ("what is required is that reasons are fully and transparently provided to clearly show how the evidence evaluated by the judges supports all the findings of the Chamber underpinning the decision").]
[1176] *Bemba et al.* AJ, para. 105, citing *Halilović* AJ, paras. 121, 188. *See* *Čelibići.* AJ, para. 498; *Kvočka et al.* AJ, para. 23; *Kalimanzira* AJ, para. 195; *Simba* AJ, para. 152; *Case 002/01* AJ, para. 304.
[1177] *Bemba et al.* AJ, para. 105 (emphasis added), citing *Kvočka et al.* AJ, para. 23 and *Kalimanzira* AJ, para. 195. *See also* *Perišić* AJ, para. 90; *Case 002/01* AJ, para. 304. This approach does not appear dissimilar to that advocated in *Bemba* Judge Eboe-Osuji Sep. Op., para. 40.
[1178] The ECtHR has held that while courts are not required to give detailed answers to all arguments raised (*Van de Hurk v. Netherlands* Judgment, para. 61), "relevant" submissions that require express reply (*Ruiz Torija v.*

not ignored by the Chamber in reaching its findings on his *mens rea*. His claim that the Chamber erred by ignoring evidence of attempts to further the goal of an inclusive peace in Ituri is not supported by the Chamber's reasoning.[1179]

265. *First*, the Chamber did not ignore the evidence that Ntaganda refers to, but correctly assessed it in light of the totality of the evidence on record.[1180] Nor did the Chamber err by not relying upon the few logbook messages which record Ntaganda issuing sanctions for misconduct.[1181] The Chamber rightly found that there were limitations to the conclusions that could be drawn from these records.[1182] Further, the messages refer only vaguely to disciplinary sanctions, the reasons for which are not stated, other than in a handful of cases referring to insubordination, theft, and trading in an area under UPC control; none of the messages refer to sanctions/disciplinary action for rape, murder, pillage or destruction of property against Lendu civilians.[1183]

266. The Chamber took a similar approach to Chief Kahwa's speech in which he stated that the UPC sought to protect all civilians without discrimination and prohibited looting and rape.[1184] The Chamber found that the speech did not reflect the reality of the UPC disciplinary system, given evidence of, *inter alia*, the lootings and rapes that occurred in the UPC's operations, and the evidence of Witness P-0365, who testified that Chief Kahwa's speech did not impact the sexual violence that UPC perpetrated against women.[1185] This was not circular reasoning[1186]—it was a further instance of the Chamber correctly assessing the evidence in its totality.[1187]

267. *Second*, the Chamber was correct not to accord weight to the occasional peaceful gesture purportedly shown by Ntaganda towards the Lendu.[1188] Specifically, Ntaganda's own testimony of giving weapons to Lendu fighters in Libi, to ally with them in driving out the

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Spain Judgment, para. 30; *Hiro Balani v. Spain* Judgment, para. 28), or "crucial" evidence related to the "crux" of a party's complaint must be addressed (*Kuznetsov and others v. Russia* Judgment, para. 84; *see also Ajdaric v. Croatia* Judgment, paras. 36-53). Likewise, the IACtHR has held that the duty to provide a reasoned decision "does not require giving a detailed answer to each and every one of the parties' arguments, but to the main and essential arguments related to the crux of the issue so as to ensure that the parties have been heard" (*Caso Flor Freire vs. Ecuador* Sentencia, para. 186 (own translation); *see also Caso Apitz Barbera y otros v. Venezuela* Sentencia, para. 90).

[1179] *Contra* Appeal-Part II, paras. 354-357.
[1180] *Contra* Appeal-Part II, para. 354.
[1181] *Contra* Appeal-Part II, para. 354.
[1182] *See below* para. 292; Judgment, paras. 59-66.
[1183] *See* Appeal-Part II, para. 354 (fn. 936).
[1184] Appeal-Part II, para. 355.
[1185] Judgment, para. 305 (fn. 790), citing P-0365 (T-148, 17-18).
[1186] *Contra* Appeal-Part II, para. 355.
[1187] *See also above* para. 222.
[1188] *Contra* Appeal-Part II, paras. 356-358.

UPDF, shows no more than a one-off tactical alliance which does not detract from the crimes committed against Lendu civilians in the localities relevant to the charges.[1189] Similarly, while Ntaganda may have been filmed being greeted by a "Maman Lendu" after the Mongbwalu assault, assuring her that the UPC did not have any intention to kill civilians,[1190] this brief exchange stands in stark contrast to the evidence of his actions and those of the UPC soldiers during and after the Mongbwalu assault. The exchange is no more than mere propaganda, filmed by journalists at the invitation of the UPC.[1191]

268. For all the reasons above, Ground 14 should be dismissed.

XIV. NTAGANDA HAD THE REQUISITE *MENS REA* FOR THE CRIMES COMMITED DURING THE SECOND OPERATION (GROUND 15)

XIV.A. The Chamber correctly applied the law on indirect co-perpetration

269. Ntaganda argues that the Chamber erred in law by finding that his contributions to the First Operation gave him control over the crimes committed during the Second Operation. He also argues that the Chamber erred in law in concluding that Ntaganda's awareness that he controlled the crimes committed during the First Operation is relevant to his awareness that he controlled the crimes committed during the Second Operation.[1192] According to Ntaganda, the fact that the two operations were a "logical succession of events" and "part of one and the same course of conduct"[1193] does not suffice to meet the legal threshold for contribution, control or *mens rea* required for the Second Operation.[1194] Ntaganda's arguments are unsupported and must be rejected.

270. According to the Court's jurisprudence on indirect co-perpetration, the Prosecution must establish, among other things, that the accused was aware of the factual circumstances that enabled him or her, together with other co-perpetrators, to *jointly* exercise functional control over the crime.[1195] In a case like the present one where the Prosecution alleges that the co-perpetrators for the most part committed the crimes through an organised structure of

[1189] *Contra* Appeal-Part II, para. 356.
[1190] Appeal-Part II, para. 357.
[1191] *See* Judgment, para. 657 (fn. 2095) (accepting as credible the evidence of P-0030, who stated in respect of a video in May 2003 of UPC/FPLC commanders telling people to stop pillaging that this was a "masquerade", and that the video was recorded to suggest things which were not in fact accurate). *See also* PCB, para. 915.
[1192] Appeal-Part II, paras. 363, 366.
[1193] Judgment, paras. 664, 793.
[1194] Appeal-Part II, paras. 362-363.
[1195] *Lubanga* TJ, paras. 994, 1008, 1018; *Lubanga* CD, para. 366; *Katanga* CD, para. 538; *Katanga* TJ, paras. 1399, 1414-1415.

power (the UPC),[1196] this element is established by showing that the accused was aware of his or her critical role in the implementation of the common plan and his or her ability to control, jointly with others, the organised structure of power.[1197]

271. The Chamber correctly followed this approach. It first established the objective requirements of indirect co-perpetration, holding that:

- "Ntaganda and other military leaders of the UPC/FPLC agreed to a common plan to drive out all the Lendu from the localities targeted during the course of their military campaign against the RCD-K/ML",[1198] including the commission of the crimes charged.[1199]
- "UPC/FPLC soldiers […] were under the control of the co-perpetrators and used to execute the objective elements of the crimes";[1200] Ntaganda was among those who "held the positions of highest authority within the UPC/FPLC";[1201] the "First and Second Operation was executed in line with the orders issued [by Ntaganda and others]";[1202] and the "UPC/FPLC as a whole functioned as a tool in the hand of the co-perpetrators, through which they were able to realise, without any structural constraints, the crimes".[1203]
- Ntaganda "had the power to frustrate the commission of the crimes and [his] acts and contributions, taken cumulatively, constitute an essential contribution";[1204] and "Ntaganda exercised control over the crimes committed by UPC/FPLC troops pursuant to the common plan […] during the course of the First and Second Operation".[1205]

272. On this basis, the Chamber turned to the subjective elements and made all the necessary findings, including on the "mental elements for indirect co-perpetration".[1206] These findings include the Chamber's conclusions on Ntaganda's intent in relation to his personal conduct[1207] and Ntaganda's intent for the crimes committed in the First and Second Operations.[1208]

273. The Chamber did not expressly articulate its conclusion that Ntaganda was aware of the factual circumstances that enabled him, together with the other co-perpetrators, to exercise

[1196] Confirmation Decision, paras. 102, 104, 135; Judgment, para. 769.
[1197] *Katanga* TJ, paras. 1413-1415; *Lubanga* TJ, para. 1013; *Lubanga* CD, para. 367; *Katanga* CD, para. 539.
[1198] Judgment, para. 808.
[1199] Judgment, paras. 810-811.
[1200] Judgment, para. 825.
[1201] Judgment, para. 814.
[1202] Judgment, para. 816.
[1203] Judgment, para. 819.
[1204] Judgment, para. 856.
[1205] Judgment, para. 857.
[1206] *See* sub-section V.C.5 of the Judgment (paras. 1169-1198).
[1207] Judgment, paras. 1174-1175.
[1208] Judgment, paras. 1177-1189.

functional control over the crime. However, it held that Ntaganda met all the *mens rea* requirements for indirect co-perpetration and was thus responsible for the crimes pursuant to article 25(3)(a), based on its prior factual findings.[1209] These factual findings include the same conclusions from which the Pre-Trial Chamber in its Confirmation Decision inferred that Ntaganda was aware of the factual circumstances that enabled him, together with the other co-perpetrators, to exercise functional control over the crime. These are that Ntaganda: (i) adopted the common plan; (ii) provided an essential contribution to the crimes through the common plan; (iii) acted with the requisite *mens rea* for the crimes by which the common plan was to be achieved; and (iv) held a high ranking and dominant position in the UPC.[1210] Accordingly, the Chamber made all the necessary factual findings to support its conclusion that Ntaganda met all the *mens rea* requirements for indirect co-perpetration.

274. Ntaganda likewise demonstrates no legal error in the Chamber's conclusion that he had control over the crimes committed in the course of the Second Operation or in its findings that he was aware of the factual circumstances that enabled him, together with the other co-perpetrators, to jointly exercise functional control over those crimes.[1211] That the Chamber based its conclusions on the Second Operation, among other things, on findings relevant to the First Operation, does not establish an error of law.[1212]

275. Whether evidence related to the First Operation is relevant to the Second Operation is entirely a matter of fact.[1213] Ntaganda's challenges to the Chamber's factual findings are addressed below.[1214] In addition, his argument that there is an alleged "ambiguity" as to whether the accused is required to essentially contribute to the common plan or to the crime, with the related power to frustrate the crime, shows no legal error.[1215]

276. *First*, there is no ambiguity in the law. The Appeals Chamber has held that the accused must make an essential contribution to the implementation of the common plan[1216] or "within

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[1209] Judgment, paras. 1188-1189, 1198, 1199.
[1210] *See* Confirmation Decision, para. 135 ("Lastly, the Chamber finds that the evidence establishes that the following two subjective elements for indirect co-perpetration have also been met: […] As established previously, Mr. Ntaganda: (i) adopted the common plan together with other UPC/FPLC members; (ii) regularly met those persons in the course of the implementation of the common plan; and (iii) acted with the requisite *mens rea* for the crimes by which the common plan was to be achieved to the extent specified above. Moreover, based on Mr. Ntaganda's high-ranking position in the UPC/FPLC and his dominant role as set out previously, he was also aware of the factual circumstances enabling him to exercise joint control over the commission of the crimes through other persons.")
[1211] Appeal-Part II, paras. 361, 363, 372, 373, 398.
[1212] Appeal-Part II, paras. 363.
[1213] Appeal-Part II, paras. 361; *see also* jurisprudence cited to in paras. 369-371 (fns. 957-968).
[1214] *See below* paras. 278-301.
[1215] *Contra* Appeal-Part II, paras. 369-370.
[1216] *Bemba et al.* AJ, paras. 812, 824-825, 1307.

the framework" of the common plan.[1217] The Appeals Chamber clarified that this does *not* require proof that the accused made an intentional contribution to each of the specific crimes or criminal incidents that were committed on the basis of the common plan.[1218] By making an intentional essential contribution to the common plan, the accused co-perpetrator is liable for all the crimes that occur within the framework of the common plan, *i.e*. as a result of its implementation.[1219] This does not mean that a causal link between the accused's conduct and the crime is not required. Causation is a core principle of liability under article 25 of the Statute. However, for co-perpetration, this causal link can be shown by establishing that the accused provided an essential contribution to the common criminal plan, the implementation of which resulted in the commission of the agreed crimes. As the Appeals Chamber has said, assessing whether an accused's contribution is "essential to the implementation of a common plan"[1220] requires normative assessments of the accused's *role* in the implementation of the common plan, taking into account the division of tasks[1221] and his or her individual contributions to the implementation of the plan.[1222] The decisive consideration is whether the accused's contribution within the framework of the common plan was such that without it "the crime would not have been committed or would have been committed in a significantly different way".[1223]

277. *Second*, and in any event, the Chamber held that Ntaganda had the power to frustrate the commission of the crimes and provided an essential contribution to the crimes.[1224] Accordingly, it found that there was a direct causal link between Ntaganda's conduct and the commission of the crimes; and that Ntaganda's contribution to the crimes (as opposed to the common plan) was essential. Ntaganda's challenges to the Chamber's application of the law under article 25(3)(a) should therefore be rejected.

XIV.B. Ntaganda contributed to, and had the requisite *mens rea* for, the crimes of the Second Operation

278. Ntaganda incorrectly separates the Chamber's analysis of his *mens rea* for the First

[1217] *Bemba et al.* AJ, paras. 818-820; *Lubanga* AJ, paras. 445, 469.
[1218] *Bemba et al.* AJ, paras. 812, 821.
[1219] *Bemba et al.* AJ, paras. 1307, 1029; *Bemba et al. TJ*, para. 62. According to the Appeals Chamber the common plan or agreement ties the co-perpetrators together and justifies the reciprocal imputation of their respective acts: *Lubanga* AJ, para. 445; *Bemba et al.* AJ, paras. 818, 824, 1307; *Lubanga* TJ, paras. 1000, 1004.
[1220] *Bemba et al.* AJ, paras. 812, 824.
[1221] *Lubanga* AJ, para. 473; *Bemba et al.* AJ, para. 820; *Bemba et al. TJ*, para. 69; *Katanga* CD, para. 525.
[1222] *Bemba et al.* AJ, para. 1029.
[1223] *Bemba et al.* AJ, paras. 820, 825; *Blé Goudé* CD, para.135. As to the assessment of the essential nature of a contribution to the common plan, *see* *Bemba et al.* AJ, paras. 812, 824, 1029; *Lubanga* TJ, paras. 1000-1001.
[1224] Judgment, para. 856.

Operation (which he challenges in Ground 14) from his *mens rea* for the Second Operation (which he challenges in Ground 15).[1225] The Chamber made no such distinction.[1226] In this section, the Prosecution first addresses the correctness of the Chamber's approach in assessing *mens rea* across both operations, *in globo*. It then responds to his remaining erroneous assertions. While the title of this ground refers to the Chamber's findings on his *mens rea*, Ntaganda also challenges the Chamber's findings on objective elements of his individual criminal liability, *i.e.*, his contributions. The Chamber's findings regarding both his contributions and *mens rea* will be addressed where relevant.

XIV.B.1.The Chamber properly assessed Ntaganda's contributions and mens rea

279. Ntaganda argues that, in finding that he had the requisite *mens rea* for the crimes of the Second Operation, the Chamber took into account his "direct" contributions to the Second Operation, as well as his "indirect" contributions (*i.e.* those made in the context of the First Operation).[1227] He relies on this delineation to argue that the Chamber erred in its *mens rea* finding, because his direct contributions to the Second Operation were "*de minimis*", and because it was an error to find that his First Operation contributions were attributable to the Second Operation.[1228] This reading of the Judgment is both artificial and incorrect. As the Chamber rightly found, the First and Second Operations were "part of the same military campaign and constituted a logical succession of events", such that the acts of the UPC during both operations were "part of one and the same course of conduct".[1229] The operations were separate only in terms of place and time.[1230] Ntaganda fails to identify any error in the Chamber's approach to assessing his contributions to, and *mens rea* for, the crimes of the First and Second Operations.

280. *First,* the Chamber correctly emphasised the significance of the military objective which *both* operations were collectively intended to achieve, namely, "to occupy key positions in Ituri, notably Mongbwalu, and secure important roads leading to and from Bunia", including, *inter alia*, the Bunia-Mongbwalu axis.[1231] The Bunia-Mongbwalu axis involved at least three roads connecting Mongbwalu to Bunia—one being the main road through Kobu and Bambu ("Main Road"). The UPC wanted to open the Main Road, and the Chamber found that it was

[1225] *See above* para. 245.
[1226] Judgment, paras. 1169-1188.
[1227] Appeal-Part II, paras. 362, 372, 389-397.
[1228] Appeal-Part II, paras. 361, 388-389, 392.
[1229] Judgment, paras. 664, 793, 1187.
[1230] Judgment, para. 664.
[1231] Judgment, para. 438.

in this context that the Second Operation was launched, involving a series of assaults on the Walendu-Djatsi *collectivité*.[1232]

281. The UPC's objective of securing the Main Road thus envisaged control over towns and villages located in the Banyali-Kilo *collectivité* (such as Mongbwalu) and the Walendu-Djatsi *collectivité* (such as Kobu and Bambu), which were the two *collectivités* targeted in the First and Second Operations respectively.[1233] The two operations were thus essential to the UPC in achieving its overall objective, and formed part of its preconceived strategy.[1234] In that regard, it is relevant that the preparation for the Second Operation commenced only two months after towns in the Banyali-Kilo *collectivité* had been secured in the First Operation,[1235] and the Second Operation itself was launched one week after that.[1236]

282. *Second*, the reasonableness of the Chamber's unitary view of both operations is underscored by its finding that the taking of Mongbwalu was essential to the success of both operations. Specifically, the Chamber found that it was only once the UPC was in control of Mongbwalu and its airstrip that it could supply troops with weapons and ammunition for the Second Operation; effectively launch assaults on the villages in the Walendu-Djatsi *collectivité*; seize the Main Road; and drive out the targeted group from the area.[1237] The Chamber stated, "[a]s such, the success of the UPC/FPLC assault on Mongbwalu allowed the organisation to continue, pursuant to the common plan, the commission of crimes against the targeted groups during both the First and Second Operation".[1238] The Chamber thus assessed Ntaganda's role comprehensively, taking into account the totality of his actions in the context of both operations.[1239]

283. In this context, the Chamber correctly held that Ntaganda had devised the military tactic which allowed the UPC to successfully take over Mongbwalu, which then enabled the UPC to implement the plan to drive out the Lendu civilians from the towns and villages it targeted

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[1232] Judgment, para. 442. *See also* para. 550.
[1233] Judgment, paras. 467, 549. *See generally* Judgment, Section IV.B.7. First Operation: Assaults on a number of villages in the Banyali-Kilo *collectivité* in November/December 2002, Section IV.B.8. Second Operation: Assaults on a number of villages in the Walendu-Djatsi *collectivité* in February 2003.
[1234] Judgment, para. 689.
[1235] *Compare* Appeal-Part II, para. 395 (claiming that the Second Operation commenced almost three months after the end of the First Operation), *with* Judgment, paras. 539, 543 (the First Operation assault on Kilo continued until 9 December 2002), 554 (Ntaganda issued instructions in respect of the Second Operations as early as 12 February 2003).
[1236] Judgment, para. 566 (the assault on Lipri commenced on 17 February 2003).
[1237] Judgment, para. 838.
[1238] Judgment, para. 838.
[1239] Judgment, para. 838.

in the two operations.[1240]

284. *Third*, the two operations bore the same characteristics.[1241] The Chamber found that the UPC troops followed the same *modus operandi*, characterised by an initial assault and taking control over the town or village, followed by a *ratissage* operation undertaken for several days, aimed at eliminating survivors (including civilians) and looting.[1242] The same '*kupiga na kuchaji*' orders were given before both operations.[1243] UPC soldiers behaved as instructed in both operations.[1244] The nature of crimes committed were also the same across the two operations, apart from sexual slavery of civilians, which the Chamber found only occurred in the context of the Second Operation.[1245]

285. *Fourth*, Ntaganda ignores the Chamber's findings that he was one of the UPC's highest-ranking military figures who played a central and active role as an operational commander;[1246] that he was the Deputy Chief of Staff of Operations and was "effectively in charge of deployment and operations of the FPLC";[1247] that he was pivotal in enabling the UPC to increase its size and capabilities to be able to implement the common plan;[1248] and that the First and Second Operations were carried out pursuant to the military tactics that he devised, planned and oversaw.[1249] These findings were fundamental to the Chamber's assessment of Ntaganda's broader contribution to the crimes committed in both operations, in addition to the evidence of his presence, actions and directives specific to each operation.[1250] These findings are also consistent with the Court's jurisprudence that a co-perpetrator may make an essential contribution to the common plan at any stage, including the execution stage of the crime, the planning and preparation stage, and the stage when the common plan is conceived.[1251]

286. Against this background, the Chamber did not err in finding that the two operations were part of the same military campaign. And having made this finding, it was not necessary for the Chamber to conduct a separate analysis of Ntaganda's contributions for the First and Second Operations to determine whether his individual criminal liability was established in

[1240] *See* Judgment, Section V.C.3.c(2). *See also* Judgment, para. 836.
[1241] *Contra* Appeal-Part II, para. 395.
[1242] Judgment, paras. 688, 695, 1178.
[1243] Judgment, para. 688.
[1244] Judgment, para. 688.
[1245] Judgment, Section VII. Disposition.
[1246] Judgment, paras. 827-828, 852-853.
[1247] Judgment, paras. 321-322.
[1248] Judgment, paras. 830-833.
[1249] Judgment, paras. 834-846.
[1250] *Contra* Appeal-Part II, para. 396-398.
[1251] *Bemba et al.* AJ, paras.819, 810; *Lubanga* AJ, paras.469, 473; *Bemba et al. TJ*, para.69.

respect of each.[1252] Accordingly, that the Chamber found Ntaganda's own presence, actions and directives to be more prominent in the First Operation than the Second,[1253] does not automatically diminish his contributions to the crimes as a whole.[1254]

287. *Finally*, a Chamber's assessment of how an accused can make an essential contribution with the requisite *mens rea*, in light of underlying events, is necessarily fact-specific, based on the evidence in each case. Ntaganda's reference to the assessment undertaken in other cases before the Court is therefore inapposite.[1255] Moreover, that the Pre-Trial Chamber separated its analysis of Ntaganda's contributions to the First and Second Operations in the Confirmation Decision did not prevent the Trial Chamber from finding that the evidence supported a unitary approach.[1256]

XIV.B.2. Ntaganda contributed to and had the requisite mens rea *for the Second Operation*

288. The Chamber set out its analysis of Ntaganda's contribution to, and his *mens rea* for, the crimes in the First and Second Operations in two separate sections of the Judgment.[1257] In challenging the Chamber's findings on the Second Operation, Ntaganda isolates a handful of the Chamber's findings regarding his "direct contributions" to the Second Operation, arguing that these were insufficient to prove his degree of control over the crimes of the Second Operation and his *mens rea*.[1258] Ntaganda's challenge to the Chamber's findings fails both in its methodology and in substance.

289. *First*, Ntaganda's arguments assume it is necessary that each finding *on its own* must be capable of demonstrating Ntaganda's control over the crimes and his intent and knowledge.[1259] But there is no requirement that each factual finding relevant to his contribution and *mens rea* must itself be sufficient to prove those elements. Rather, such an assessment must be undertaken holistically,[1260] as the Chamber rightly did in this case. The Appeals Chamber has held that the essential nature of a co-perpetrator's contribution to a common plan is based on a cumulative assessment of all relevant contributions to the

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[1252] *Contra* Appeal-Part II, paras. 390-391, 396-397.
[1253] Judgment, para. 1180 ("The Chamber considers that Mr Ntaganda's presence, actions, and directives illustrates how he intended the troops to behave in the field, notably in the context of the First Operation").
[1254] *Contra* Appeal-Part II, para. 392.
[1255] Appeal-Part II, paras. 394, 396.
[1256] *Contra* Appeal-Part II, para. 393.
[1257] *See* Judgment, Sections V.C.3.c) and V.C.5.d).
[1258] Appeal-Part II, para. 373.
[1259] Appeal-Part II, paras. 374-375, 377, 379.
[1260] *Lubanga* AJ, paras. 22, 488; *Šljivančanin* AJ, para. 217; *Halilović* AJ, para. 128.

common plan, and not on an isolated assessment of individual acts.[1261] In this regard, the Chamber also made findings on Ntaganda's broader contributions to the crimes.[1262] Those findings must be read together with the Chamber's findings on Ntaganda's specific presence, actions and directives specific to each operation. Ntaganda disregards the Chamber's correct approach in favour of his own flawed one.

290. *Second*, the Chamber found that Ntaganda was involved in the preparation for the Second Operation.[1263] Ntaganda's attempt to challenge this finding is unconvincing given the Chamber's findings that he instructed commanders in the days leading up to the Second Operation to, *inter alia*: "handle the Lipri Road" in the Operation; "determine how the fighting would be conducted along the Bambu Road"; collect ammunition from Centrale and deliver it to the troops in Bambu;[1264] implement a new operational structure which included UPC commanders who would be involved in the Second Operation;[1265] and ensure that the chain of command was followed so that the forces deployed would carry out the operation as planned.[1266] These were not "generic" instructions, but instructions relevant to organising and supplying the UPC forces involved in the Second Operation and ensuring that the Second Operation would be effectively carried out.[1267]

291. *Third*, Ntaganda mischaracterises the Chamber's findings regarding his radio communications leading up to and during the Second Operation.[1268] The Chamber identified these communications as being relevant to demonstrating that Ntaganda was in contact with commanders in the field; that he monitored the unfolding of the Second Operation; and that he reasserted discipline in the ranks to ensure that the Second Operation was properly executed.[1269] The Chamber did not rely on these findings alone to conclude that Ntaganda made an essential contribution and had the necessary *mens rea* for the Second Operation crimes.[1270] The Chamber's conclusion regarding Ntaganda's contribution and *mens rea* relied upon a wide range of factors, only one of which was his awareness and monitoring of the

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[1261] *Bemba et al.* AJ, para.812.
[1262] *See above* para. 285.
[1263] Judgment, paras. 550-561.
[1264] Judgment, paras. 550-552.
[1265] Judgment, paras. 554, 1179, 327 (finding that the UPC/FPLC was operating in the southeast and northeast sectors of Ituri).
[1266] Judgment, paras. 554, 846.
[1267] *Contra* Appeal-Part II, para. 375.
[1268] Appeal-Part II, para. 377-378.
[1269] Judgment, paras. 565, 846.
[1270] *Contra* Appeal-Part II, para. 377.

unfolding of the Second Operation.[1271]

292. *Fourth*, that Ntaganda's logbook records only 2% of his communications as relating to the Second Operation has no bearing on the Chamber's findings regarding his contribution and *mens rea*.[1272] As the Deputy Chief of Staff of Operations and Organisation, it is unsurprising that Ntaganda's communications related to matters other than the Second Operation.[1273] Even if there had been only a single or no recorded messages at all relating to the Second Operation, this would not undermine the contributions the Chamber found Ntaganda to have made to the crimes. In any event, the Chamber rightly found that there were limitations as to the conclusions that could be drawn from the logbooks:[1274] (i) the logbooks recorded only *one* of the several means of communication employed by UPC commanders (the other means of communication being short-range Motorola radios, Thuraya satellite telephones, and mobile telephones);[1275] (ii) Ntaganda's *radiophonie* communications were not recorded by him, but by a signaller assigned to him;[1276] and (iii) the logbook only recorded formal *radiophonie* communications, whereas the *radiophonie* could also be used to speak informally.[1277] Ntaganda himself confirmed that he did not always use *radiophonie* to communicate with Floribert Kisembo, but would contact him by Thuraya or other means.[1278] Finally, Ntaganda's logbook only covered the period 19 November 2002 to 22 February 2003, therefore the records end shortly after the commencement of the Second Operation.[1279]

293. *Fifth*, the Chamber did not err in relying upon the evidence of P-0055 and P-0901 in concluding that Ntaganda was monitoring the unfolding of the Second Operation through radio communications.[1280] P-0901 was definitive in his evidence that it was Ntaganda's practice to call commanders using the Motorola to closely monitor developments in the operations, and issue orders.[1281] P-0901's evidence was given in the context of being questioned about the Second Operation and was based on his first-hand experience as the person in charge of Motorolas, who could hear the communications between commanders over the Motorolas and could follow the events of the Second Operation from his Motorola

[1271] Judgment, paras. 834-846, 1174-1187.
[1272] *Contra* Appeal-Part II, paras. 377-378
[1273] Judgment, para. 321.
[1274] Judgment, paras. 59-66.
[1275] Judgment, paras. 341-346, 564-565.
[1276] Judgment, para. 66.
[1277] Judgment, para. 342.
[1278] T-226, 88:15-89:12.
[1279] DRC-OTP-0017-0033 at 0173 and 0213 (translation DRC-OTP-2102-3854 at 3995 and 4035); Judgment, para. 485 (fn. 1388).
[1280] *Contra* Appeal-Part II, paras. 381-383, 387. *See* Judgment, para. 565, fourth bullet point.
[1281] T-29, 13:12-16.

fixed base.[1282] P-0055 corroborated P-0901's evidence, stating that Ntaganda was in communication with the commanders in the Second Operation, and had to be kept informed of the unfolding events, through the Motorola or the *radiophonie*.[1283] Ntaganda merely disagrees with the Chamber's assessment of the witnesses' evidence.

294. *Finally*, the Chamber did not err in finding that Ntaganda was able to follow and supervise the Second Operation, regardless of his whereabouts during the Operation.[1284] Ntaganda himself acknowledged that he had communication devices that permitted him to communicate with UPC commanders over varying distances, *i.e.* through the Motorola (short-range), *radiophonie* (long-range) and Thuraya (which could communicate across continents); that he had his Thuraya with him throughout the period, including during the days that he claimed to be in Rwanda; and that he used the Thuraya during and in the aftermath of the Second Operation.[1285] Ntaganda was found to have followed and supervised the Second Operation remotely. But in any event, that Ntaganda was not physically present during the Second Operation does not diminish his contribution for the crimes committed during that operation.[1286]

295. The Chamber provided sufficient reasons to support its finding that Ntaganda made an essential contribution to the crimes of both operations and that he had the requisite *mens rea*. Ntaganda's artificial delineation of the Chamber's findings into the two operations, and his inability to identify any error in the challenged underlying findings themselves warrant rejection of this ground of appeal.

XIV.B.3. The Chamber properly relied on P-0055 regarding Ntaganda's reaction to the Kobu massacre

296. In arguing that the Chamber erred in relying on P-0055's evidence regarding Ntaganda's knowledge about, and reaction to, the news of the Kobu massacre in determining his *mens rea*,[1287] Ntaganda repeats his trial arguments regarding the incompatibility of P-0055's evidence with P-0317, who was a MONUC human rights officer at the time of the events.[1288] Ntaganda merely disagrees with the Chamber's assessment of the evidence,

[1282] T-29, 11:8-17 (explaining how he came to know of the Second Operation), 12:8-12 (naming towns/villages attacked by the UPC/FPLC in the Second Operation), 13:6 (the witness is asked where Ntaganda was during this operation), 13:18-19; T-28, 21:22-22:11.
[1283] T-71, 43:14-44:3.
[1284] *Contra* Appeal-Part II, paras. 384-385. *See* Judgment, para. 565, fourth bullet point.
[1285] T-226, 21:15-19; T-235, 59:15-17; T-238, 29:10-16; Judgment, para. 638 (fn. 2035).
[1286] *See above* para. 285.
[1287] Appeal-Part II, para. 399.
[1288] DCB, paras. 821, 1128, 1132-1139.

without identifying any error.

297. The Chamber relied on P-0055's evidence after having conducted an in-depth credibility assessment of this witness, in which it found him to be credible and that his testimony could be relied upon.[1289] Ntaganda does not engage with any of the Chamber's reasoning regarding P-0055's credibility.[1290] [REDACTED].[1291] Having found P-0055 to be credible and reliable, the Chamber was entitled to rely upon his evidence regarding the Kobu massacre, even if it was the only direct evidence of Ntaganda's knowledge of, and reaction to the event.[1292]

298. P-0055 stated that some time before 6 March 2003, Thomas Lubanga received a visit from MONUC staff who asked him about the alleged killings in Kobu, which had taken place on or about 25 or 26 February 2003.[1293] [REDACTED] Ntaganda who confirmed that he was already aware of the incident, and that he was "glad with how things had turned out".[1294] Contrary to Ntaganda's assertion, P-0317 did not contradict P-0055's evidence regarding how and when he learned of the Kobu massacre.[1295] P-0317 stated only that: she and her team arrived in Bunia on 24 March 2003, prior to which they were in Kinshasa;[1296] they only learned about the massacre once they arrived in Bunia, on or after 24 March 2003;[1297] there were six military observers who had been in Bunia at the time of the massacre but they had been afraid to leave the town; the observers "had some vague information regarding attacks on the villages but no direct information"; she believes the observers did not tell her that they had information about a massacre in Kobu.[1298]

299. P-0317's evidence does not contradict P-0055's evidence that Lubanga had been approached by MONUC staff regarding the Kobu massacre before 6 March 2003.[1299] The Chamber was correct in finding that P-0317's testimony demonstrated that *she did not reliably know* what information was or was not available to MONUC before 6 March 2003.[1300] Indeed, the reasonableness of the Chamber's finding is supported by the general tenor of P-0317's testimony. While the witness was generally able to provide information

[1289] Judgment, paras. 118-126.
[1290] *See* Appeal-Part II, paras. 400-410.
[1291] [REDACTED].
[1292] Judgment, paras. 118-126. *See above* para. 141.
[1293] Judgment, paras. 637, p. 299 (Section IV.B.8.(10) Events in Kobu on or about 25 or 26 February 2003).
[1294] Judgment, paras. 637-638.
[1295] *Contra* Appeal-Part II, paras. 403-406.
[1296] Judgment, para. 637 (fn. 2029), citing P-0317 (DRC-OTP-0152-0286, p. 0286); T-192, 44:16-23.
[1297] T-192, 44:20-23; 45:12-46:13.
[1298] T-192, 45:12-46:13.
[1299] *Contra* Appeal-Part II, para. 405.
[1300] Judgment, para. 637 (fn. 2029).

throughout her testimony about the broader topics on which she was questioned, she often failed to recall details of her work from that period, including details of how her team came to receive information about alleged human rights violations in that period.[1301] Ntaganda's contention that this information "would at least probably have been reported to P-0317" thus finds no support in P-0317's own evidence.[1302]

300. Ntaganda's remaining arguments regarding the evidence of P-0055 also do not raise any doubt as to the correctness of the Chamber's reliance upon P-0055. Minor discrepancies in P-0055's evidence as to the date of Ntaganda's arrival in Bunia do not undermine his evidence generally.[1303] It is also abundantly clear from the witness's evidence, and the Chamber's discussion of it, that when he stated that Ntaganda was "already aware of the incident", this was in the context of the Kobu massacre.[1304] In raising such negligible aspects of the witness's evidence, Ntaganda clutches at straws.

301. Ntaganda's claim that P-0055's evidence was the only factor on which the Chamber relied to demonstrate his *mens rea* for the Second Operation, in particular the Kobu massacre, again misreads the Judgment. P-0055's evidence was consistent with that of P-0768 and other witnesses on whom the Chamber relied to find that the Kobu massacre was discussed amongst the UPC.[1305] Ntaganda's argument also misconstrues the law of indirect co-perpetration. An individual's essential contribution need not be made throughout the events and to each individual crime.[1306] The Chamber therefore did not err in relying upon, *inter alia*, P-0055's evidence of Ntaganda's knowledge of, and reaction to the Kobu massacre, to find that Ntaganda intended his troops to continue the Second Operation with the same criminal conduct (including the attacking of Lendu civilians and their property) as they had in the First Operation.[1307]

302. For the reasons set out above, Ground 15 should be dismissed.

[1301] *See e.g.* T-191, 38:17-21, 40:2-6, 24-25, 41:11-15, 50:4-10, 51:8-19, 64:15-20, 75:12-19, 81:7-13, 82:12-17; T-192, 9:19-10:4, 27:4-7, 28:15-18, 29:4-13.
[1302] Appeal-Part II, para. 406 (underline in original).
[1303] *Contra* Appeal-Part II, para. 407. *See* Judgment, para. 80.
[1304] *Contra* Appeal-Part II, para. 408.
[1305] Judgment, para. 638 (fns. 2031, 2035).
[1306] *Lubanga* AJ, paras. 22, 488; *Bemba et al.* AJ, paras. 810, 812, 821.
[1307] Judgment, paras. 1186-1187.

CONCLUSION

303. For all the reasons above, the Prosecution respectfully requests the Appeals Chamber to dismiss Ntaganda's Appeal-Part II.

Fatou Bensouda, Prosecutor

Dated this 14th day of April 2020

At The Hague, The Netherlands