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TRIAL CHAMBER VI

Before: **Judge Robert Fremr, Presiding Judge**
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. BOSCO NTAGANDA

Public
With Public Annexes A, B and C

Public redacted version of "Prosecution's Response to the Defence Closing Brief", 17 July 2018, ICC-01/04-02/06-2306-Conf

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I. Introduction

1. The Prosecution responds to the Defence Closing Brief,[1] which now concedes: (a) that **NTAGANDA** "*participated in the creation of the FPLC*";[2] (b) that "*the former mutineers loyal to Lubanga decided to train recruits in Mandro*";[3] (c) that recruits included those who trained in Tchankwanzi in 2001, with the aim "*to create one organisation*";[4] (d) that "*the origin of the FPLC finds its roots in April 2002*";[5] and (e) that before September 2002, "*members of the FPLC were organised in a military structure with a defined chain of command, modelled on organisations its senior leaders previously belonged to*".[6]

2. Other important concessions include: (a) that **NTAGANDA** held a very important position in the FPLC[7] as a high level commander[8] and exerted considerable influence over the FPLC forces;[9] (b) that FPLC leaders aimed to exercise command and control as quickly as possible and ensure cohesion of the troops through the most efficient communication means and procedures;[10] (c) that LUBANGA issued untrue official statements as propaganda when it suited his purpose,[11] as the Prosecution argues was the case for the demobilisation documents, peace pronouncements, and the Mandro video; (d) that recruitment for the Mandro camp was for young people, Hema for the majority;[12] (e) that **NTAGANDA** knew "*it was necessary to organize all those able and willing*" into the

[1] ICC-01/04-02/06-2298-Conf.
[2] DCB,para.2. *Contra*,**D-300**:T-233,15:23-16:8,22:18-25,24:6-25,26:14-27:4.
[3] DCB,para.154.
[4] DCB,para.568. *Contra*,**D-300**:T-232,4:9-12,41:15-19.
[5] DCB,paras.10,154. *Contra*,**D-300**:T-232,17:24-18:1-3,22:11-22,36:2-39:22,41:7-49:1.
[6] DCB,para.570. *Contra*,**D-300**:T-233,22:18-25,24:6-25.
[7] DCB,para.7.
[8] DCB,para.495.
[9] DCB,para.802.
[10] DCB,para.176.
[11] DCB,para.63. The Defence's statements on this point are not sourced to any admitted evidence. In fact, **NTAGANDA** denied any knowledge of Lubanga's 11 August 2002 declaration. *See*,T-232,78:23-79:12,82:18-25,85:13-19.
[12] DCB,para.568.

army;[13] (f) that UPC political goals were achieved through military means;[14] and (g) that **NTAGANDA** developed the FPLC ideology.[15]

3. The Defence fails to explain major inconsistencies in **NTAGANDA's** account, such as how an important, influential and high-level military leader in charge of operations and organisation[16] could issue orders to the troops and could discipline them[17] but lacked effective command and control over them.[18] Nor does the Defence explain the glaring contradiction that, on the one hand, **NTAGANDA** had good relations with LUBANGA and KISEMBO,[19] he was a military tactician,[20] he performed his job without any difficulty in 2002-2003,[21] he had to know what was happening within his troops,[22] he ensured discipline,[23] but inexplicably lacked knowledge of major UPC operations in 2002-2003,[24] and the commission of crimes by UPC forces.[25] This is particularly implausible given that **NTAGANDA** testified about how information flowed after battles, including at the headquarters, as the intelligence staff "*would inform us that such-and-such a commander did such-and such a thing and then we will be in a position to know what was happening in each battalion*".[26]

4. The Defence relies almost exclusively on **NTAGANDA**'s testimony to rebut the Prosecution's case; this evidence must be treated with extreme caution and in

[13] DCB,para.569.
[14] DCB,paras.87 and 158.
[15] DCB,para.608.
[16] DCB,paras.7,495,802.
[17] DCB,paras.175,fn.405,paras.235,495,796,810.
[18] Para.802.
[19] **D-300**:T-225,51:22-52:10.
[20] **D-300**:T-225,49:7-12: "I was a tactician, I certainly accept that. I commanded a very disciplined army and we had a reputation for discipline."
[21] **D-300**:T-225,82:14-83:16: "Judge Chung: Thank you. Mr Ntaganda, so you testified today that you had no problem with Mr Kisembo by December 2003. Then was there any problem or obstacles that interrupted your role as deputy chief of staff between September 2002 and December 2003? […] Judge Chung: No, no, no. Again, sorry for I couldn't make it clear. So I don't talk about relation with Kisembo, Mr Kisembo. Just yourself and FPLC. Was there any problem in exercising your role? The Witness: No."
[22] PCB,para.1079,**D-300**:T-222,67:25-68:3; **D**-300:T-227,3:17-4:12; T-227,5:18-6:2; *See also*,**D-300**:T-213,26:21-12:22.
[23] PCB,paras.940-941,948; **D-300**:T-255,49:7-12.
[24] DCB,paras.491,494,498,p.326,(B)(I).
[25] DCB,paras.649,775,821,1127,1154,1159,1515,1524.
[26] **D-300:**T-213,12:16-22.

large part disregarded. There is a large volume of consistent and credible evidence that contradicts **NTAGANDA**'s self-serving account.

5. The Prosecution makes two additional observations. First, the Chamber should carefully scrutinise the assertions made in the DCB. As exposed herein, the DCB is rife with inaccuracies, assertions unsupported by the evidence, misleading statements of the evidence and the law, and attempts to introduce new evidence. Assertions by Counsel are not evidence;[27] factual statements not supported by evidence should be disregarded, along with attempts to introduce new evidence. The Prosecution is constrained by the page limit to list every Defence misstatement or faulty argument. To the extent that the Prosecution does not address specific arguments, it relies on the Prosecution Closing Brief[28] and the totality of the evidence in the trial record.

6. Secondly, the Defence focuses on pieces of evidence in isolation, ignoring the totality of the evidence. The fact finder, however, finds facts and evaluates witness credibility based on all relevant evidence admitted at trial.[29] When the evidence in this trial is reviewed in its totality, the inescapable conclusion must be that **NTAGANDA** is guilty beyond reasonable doubt.

II. Confidentiality

7. This filing is "Confidential" under regulation 23*bis*(1) of the Regulations of the Court as it refers to confidential witness testimony and evidence.

[27] *E.g.* DCB,para.306,fn.787; para.448,fn.1338.
[28] ICC-01/04-02/06-2277-Conf.
[29] *See* *Lubanga* TJ,para.94; *Lubanga* AJ,para.22; *Ngudjolo* TJ,para.45; *Bemba et al.* TJ,para.188; *Bemba et al.* AJ,paras.912,1540. See also ICTY and ICTR: *Kupreškić* AJ,para.334; *Rutaganda* AJ,para.207; *Sesay* Ruling to Exclude Evidence,para.4; *Fofana* Appeal Bail Decision,paras.22-24; *Tadić* Contempt AJ,para.92; *Musema* AJ,para.134; *Ntagerura AJ*,para.171.

III. Prosecution's Submissions

The Defence misstates the Scope of the Charges

8. Citing the majority in *Bemba*,[30] the Defence suggests that a conviction can be entered for "*individual crimes*" only to the extent specified in the UDCC,[31] but fails to explain how this relates to the charges in this case. They merely assert that certain acts are "*not charged*" or that "*no specific allegation*" was made in the UDCC.[32] This is legally and factually incorrect.

(i) The Bemba Majority findings are specific to the charging in that case

9. The *Bemba* Majority found the charges in that case to be too broad temporally and geographically, referring to crimes throughout the Central African Republic over 4.5 months.[33] It held that: **"***in the present case the Prosecutor had formulated the charges at a level of detail sufficient for the purposes of [article 74(2)]* ***only*** *in respect of the criminal acts*" (that had been specifically mentioned in the confirmation decision).[34] However, the expressly case-specific nature of this finding plainly indicates that, as a general matter, the charges do *not* necessarily need to define every specific underlying criminal act—provided the scope of the charges is articulated with sufficient temporal and geographical detail so as to provide a 'meaningful description' under article 74(2) of the Statute.[35] The Majority further clarified the case-specific nature of its finding when adding:

> […] the Appeals Chamber wishes to underline that this is not to say that adding specific criminal acts after confirmation would in all circumstances

[30] DCB,paras.22-23.
[31] DCB,para.23, citing *Bemba* AJ,para.115. The Defence ignores that the Confirmation Decision, CD, defines the parameters of the charges, along with the UDCC. ICC-01/04-02/06-450,paras.17-20.
[32] *See*,DCB,paras.618,622,653,655-656,670,687,731,738,747,751,908,939,941,1541,1542,1557.
[33] *Bemba* AJ,para.109: "*listing the categories of crimes with which a person is to be charged or stating, in broad general terms, the temporal and geographical parameters of the charge is not sufficient to comply with the requirements of regulation 52 (b) of the Regulations of the Court and does not allow for a meaningful application of article 74 (2) of the Statute*." Two judges dissented on this point: *Bemba* AJ Dissenting Opinion,paras.14-32.
[34] *Bemba* AJ,para.115; *see also* paras.110-111 (emphasis added).
[35] Reg.52(b); *Bemba* AJ,paras.103,110.

> require an amendment to the charges […] given the way in which the Prosecutor has pleaded the charges **in the case at hand**, this was the only course of action […].[36]

10. The charges in this case differ significantly from *Bemba*.[37] The specific temporal and geographic scope of the charges *is* a meaningful "description" of the charges, as required by article 74(2). The UDCC[38] and CD[39] precisely define the charges relating to the two main attacks by describing: the relevant provisions of the Rome Statute; the nature of the criminal acts allegedly taken by **NTAGANDA** and his co-perpetrators, and the relevant modes of liability; the specific towns or villages in which the crimes occurred; and, the precise periods of the charges within a two-week period. The charged acts occurred "in and around" specific discrete locations, during the entire period of each charge. The Defence consistently misstates these charges, as they are defined.[40]

11. Indeed, further to the Chamber's decision,[41] the UDCC also provides additional detail on the facts and circumstances, including more precise dates of attacks, the sequence of events, and specific criminal acts.[42] The Pre-Trial Chamber likewise indicated that its findings were "*more specifically supported*" by other facts in the CD,[43] which did not exhaustively list individual criminal acts.[44]

12. Specifically, the charges of rape in Lipri and Bambu[45] are properly defined in the UDCC,[46] and in the Pre-Trial Chamber's findings.[47] Rape in Beba[48] falls within the

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[36] *Bemba* AJ,para.115.
[37] The Prosecution notes in any event that it does not necessarily accept the correctness of the reasoning of the Majority in *Bemba*, but that such considerations are in its view not relevant for the disposition of this case, as explained.
[38] ICC-01/04-02/06-458-AnxA,pp.60-65.
[39] CD,*esp*.operative paras.12,29,31,36,97.
[40] *See*,DCB,paras.618,622,653,655-656,670,687,731,738,747,751,908,939,941,1541,1542,1557.
[41] ICC-01/04-02/06-450,paras.38,39.
[42] ICC-01/04-02/06-458-AnxA,pp.14-50.
[43] CD,paras.13,32,37,75,98.
[44] CD,para.51,*i.e.*: "*In the context of the Second Attack, members of the UPC/FPLC raped a number of civilians […]. For example, in Lipri a girl was raped by three UPC/FPLC soldiers*." *See also*,paras.67,87,117,169.
[45] DCB,para.939,941.
[46] ICC-01/04-02/06-458-AnxA,p.61,Counts 4,5.
[47] CD,paras.36,51.
[48] *Contra*,DCB,para.1991.

charges "in or around Mongbwalu". Further, the murder of 5 persons in Sayo committed by **NTAGANDA** are properly charged under: (i) direct perpetration of counts 1 and 2 "in or around Mongbwalu", (ii) direct perpetration of "attacks against civilians in Sayo", (iii) as an essential contribution under article 25(3)(a) to the common plan related to Count 1 (murder) in Sayo.[49] These individual criminal acts were properly added after the confirmation of charges, and notice was given through disclosure of the underlying evidence on 2 March 2015 and through the PTB.[50]

13. While the charges in counts 6, 9, and 14-16 are described more broadly, this is not only permissible but necessary given these crimes' nature. It reflects no lack of specificity. These charges describe a pattern of *ongoing* criminality against children, which was continuously (or, for rape, often) perpetrated *throughout* the charged period, and at various locations, consistent with the movements of **NTAGANDA** and the UPC troops. The charges thus conform to the facts alleged by the Prosecution and confirmed in the CD.[51] The correctness of this approach was unchallenged in *Bemba*, and indeed specifically endorsed in *Lubanga*.[52] The Appeals Chamber held that, under certain circumstances, framing the material facts as a *pattern* of child soldier offences, rather than multiple individual acts, is permissible, consistent with regulation 52(b), and adequate basis for a conviction.[53] The Defence thus incorrectly suggests that the charges in counts 6 and 9 are limited to the listed underlying acts.[54] Similar underlying acts were also contained in the DCC, in the List of Evidence,[55] and the IDAC.[56]

[49] *Contra*,DCB,paras.665,666,670.
[50] PTB,para.474.
[51] CD,para.83.
[52] *Lubanga* AJ,paras.123-136. LUBANGA was not charged with, or convicted for, committing offences against specific, identified children: *Lubanga* DCC,paras.249-267,410.
[53] *Lubanga* AJ,paras.131-132,135.
[54] DCB,para.1542.
[55] ICC-01/04-02/06-217-AnxB.
[56] ICC-01/04-02/06-217-AnxC.

14. Related to the requirements of article 74(2)—*but still legally distinct*—is the degree of detail required to protect **NTAGANDA**'s rights under article 67(1)(a) and (b) to be informed of the charges and to prepare a defence. In this regard, the *Lubanga* Appeals Chamber held that "*further details about the charges as confirmed by the Pre-Trial Chamber may* […] *be contained in other auxiliary documents*".[57] Indeed, all documents designed to inform an accused of the charges must be considered to determine whether they had sufficient information.[58] The *Bemba* Majority agreed, holding that "*adding specific criminal acts after confirmation*" does not necessarily require amending the charges.[59] In this case, further notice was given through the List of Evidence and the 1200-page IDAC. Additional details were provided in the PTB, including detailed factual allegations and more underlying criminal acts.[60]

The Defence misstates the law

(i) Article 7(1)(d): Forcible Transfer

15. **NTAGANDA** argues that civilians fled Mongbwalu "*of their own genuine volition*" and therefore were not forcibly transferred.[61] However, as the Defence concedes,[62] the requirement of 'forcible' transfer is not limited to physical force, and "*may include threat of force or coercion, such as that caused by fear of violence*."[63] The decision to flee must be viewed in its context, taking into account "*the situation and atmosphere*".[64]

[57] *Lubanga* AJ,para.124.
[58] *Lubanga* AJ,para.128,132.
[59] *Bemba* AJ,para.115.
[60] PTB,paras.361-460,469,480-485,520-525,569-575. Contrary to DCB para.1557, P-883's victimisation constitutes an underlying criminal act of rape and sexual slavery (Counts 6,9) that was properly added after the Confirmation Decision, CD. P-883's statement was disclosed on 30 January 2015 and notice of the individual criminal act was provided in the PTB,para.372.
[61] DCB,paras.712,715,1000.
[62] DCB,paras.712,999.
[63] EoC,fn.12.
[64] *Krnojelac* AJ,para.229; *Blagojević & Jokić* TJ,para.596.

16. The ICTY has consistently held that civilians have no "genuine choice" if the prevailing atmosphere is one of fear of targeted violence.[65] In such a situation, the civilian population may not have "*exercise*[ed] *a genuine choice to go, but reacted reflexively to a certainty that their survival depended on their flight*."[66]

17. Cryer, which the Defence fails to cite in full,[67] explains the line to be drawn as follows:

> *If a group flees of its own genuine volition, for example to escape a conflict zone, that would not be forced displacement. On the other hand, if a group flees to escape deliberate violence and persecution, they would not be exercising a genuine choice.*[68]

18. The fear of violence in the present case was not a general fear of lawful armed conflict. Victims had no genuine choice,[69] and left out of a well-founded fear of deliberate violence against them-integral to the UPC *modus operandi*, including pillaging, abuses against civilians and torching of houses[70] and as a direct result of targeted UPC attacks.[71] UPC soldiers assaulted and shot at them as they fled, specifically targeting Lendu civilians and chasing them away.[72]

19. The crimes of forcible transfer and displacement crystallise at the moment of transfer and displacement.[73] Even if the UPC for any self-serving reasons later

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[65] *Krnojelac* AJ,paras.229,233; *Stakić* TJ,paras.705-707; *Simić et al.* TJ,para.967.
[66] *Krstić* TJ,para.530.
[67] DCB,para.712,1000.
[68] Cryer,p.248. The ICTY has held that widespread knowledge and rumours of serious crimes committed against the civilian population by the armed forces can contribute to a situation of fear which leaves civilians no choice but to flee: *Blagojević & Jokić* TJ,paras.616-618; *Popović* TJ,para.917. This is further supported by records of the 1949 Diplomatic Conference, which show that the initial draft of article 7(1)(d) prohibited all 'deportations or transfers', and that the term 'forcible' was later included to allow states to facilitate the movement of civilians who had genuinely and freely chosen to leave the country: *Final Record of the Diplomatic Conference of Geneva,p.*759-760; Pictet,p.279.
[69] PCB,paras.313-329,515-527,617-618.
[70] PCB,para.515.
[71] PCB,para.317.
[72] PCB,paras.313,316,319,327,516-518.
[73] *See,e.g.*,*Mladić* TJ,Vol.III,paras.3118,3121 (forcible transfer involves displacement within national boundaries, and requires no intent that the victims are 'permanently' displaced); *Prlić* TJ,Vol.I,paras.47,49 (noting that, unlike deportation, forcible transfer may be "carried out entirely within the borders of a single state" and is completed at the moment that the victim is displaced from the place where they were lawfully present such "they are no longer able to enjoy" the rights, *inter alia*, "to live in their communities and in their homes and not be deprived of their property"); *Simić et al.* TJ,para.130.

decides to allow Lendu to return, this does not negate the fact that the crime of transfer took place in the first instance.[74]

(ii) Article 8(2)(e)(viii): ordering displacement

20. **NTAGANDA** argues that only acts directly aimed at removing the civilian population are prohibited under article 8(2)(e)(viii),[75] but ignores this Court's reasoning to the contrary. Relevant conduct "*is not limited to an order*" within the meaning of article 25, as this would render "*the actual circumstances of civilian displacement in the course of an armed conflict* […] *unduly restricted*".[76] The evidence shows that **NTAGANDA** did, in fact, order the displacement of the non-Hema civilian population.[77]

(iii) Military necessity is not a defence for the crime of pillage

21. **NTAGANDA** is incorrect that "*military necessity is a [d]efence for the crime of pillaging*."[78] To the contrary, military necessity only justifies an otherwise prohibited act when it is *expressly* included as an exception to that prohibition (a 'negative' element).[79] Pillage has no such element, and consequently is forbidden absolutely.[80] In this respect, among others, it differs from article 8(2)(e)(xii) (destroying or appropriating enemy property).[81] This is confirmed by footnote 62 of the EoC, which clarifies that the required proof of appropriation for private or personal use is *per se* incompatible with any claim of military necessity.[82]

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[74] DCB,para.728; *See*,PCB,para.818.
[75] DCB,para.713.
[76] CD,para.64. *Also* Dörmann,p.472(explaining that an individual may be liable under article 8(2)(e)(viii) through any mode of liability).
[77] PCB,paras.232,236,303-306,308,313,315,324,617-618.
[78] DCB,para.758.
[79] *Bemba* TJ,para.123. *See also* Dörmann,p.81: "*a rule of the law of armed conflict cannot be derogated from by invoking military necessity unless this possibility is explicitly provided for by the rule in question and to the extent it is provided for*".
[80] *See also* Lieber Code,arts.18,44; Hague Convention,arts.28,47; Geneva Convention IV,art.33,para.2.
[81] *Fofana* AJ,para.399. *Also* Lieber Code,art.44; Brussels Declaration,arts.18,13(g); Hague Regulations,arts.28,47,23(g); Geneva Convention IV,art.33,53.
[82] EoC,Art.8(2)(e)(v),2; *Bemba* TJ,para.124; *Katanga* TJ,para.906; Lieber Code,art.44; Hague Convention,arts.28,47; Geneva Convention IV,art.33.

22. In this case, the facts demonstrate that the property was indeed appropriated for private or personal use. This is shown by *inter alia*: the nature of the property (not only medical supplies, vehicles, communications equipment, and food, but also televisions, fridges, beds, cigarettes, shoes, household appliances, and money),[83] the orders given ("*to take everything*"),[84] the distribution of the property (to commanders or soldiers in lieu of salary),[85] and the ultimate use of the property (in private residences for personal use).[86]

23. **NTAGANDA**'s contention that pillage requires a "*somewhat large-scale appropriation*" is also legally incorrect.[87] The Statute and the EoC do not provide for such a test, and there is no legal requirement that acts of pillage must be "*large-scale*" themselves. Theft of individual items can suffice,[88] notwithstanding the large-scale actually shown in this case.

(iv) Attacking protected objects under article 8(2)(e)(iv) (count 17)

24. The Defence argues that the Prosecution has not established that protected objects were intentionally made the object of an 'attack', which it defines as "*one or more acts of violence* […] *during the conduct of hostilities*."[89] As such, it suggests that conduct such as alleged pillage at the Mongbwalu hospital after the takeover of Mongbwalu does not constitute an attack.[90]

25. The Prosecution agrees that an "attack" for the purpose of Additional Protocol I is defined as an "*act of violence against the adversary*."[91] On the facts of this case, the evidence shows that protected objects in Mongbwalu, Sayo, and elsewhere *were*

[83] P-10:T-47,13:3-14:15.
[84] **P-55**:T-72,11:1-17.
[85] PCB,paras,382-382,386-387.
[86] **P-901**:T-28,57:21-58:22;T-29,21:4-23;T-32,29:1-31:18; **P-963**:T-79,20:6-9; **P-907**:-T-90,33:21-32:10.
[87] DCB,para.965.
[88] *Katanga* TJ,para.896,905,908; *Jelisić* TJ,para.48; *Delalić* TJ,*para.590*.
[89] DCB,para.749. *Also* paras.747-748,997.
[90] DCB,para.750. Similar arguments about the church and health centre at Sayo not only fail in their own terms, but also in light of the evidence that physical damage was actually caused: DCB,paras.751-753.
[91] API,art.49(1). *See also* *Katanga* TJ,paras797-798(applying the same definition in non-international armed conflict); DCB,para.749.

subjected to acts of violence by UPC against the adversary, and thus fall within this definition. In particular:

- The UPC regarded non-Hema civilians as the "enemy" and targeted them as such, including in the operations at Mongbwalu and Sayo.[92]

- Acts of "violence" in the sense of the Additional Protocol I, which have been further explained as a "combat action",[93] are not confined to acts which cause a direct and immediate physical harm to the target, but also potentially include acts which achieve this end *indirectly*.[94] In this context, since medical and religious objects are constituted not only by their bricks and mortars but by the presence of equipment intrinsic to their function, it is possible to harm such objects not only by damaging their physical structure, but also by the use of force to destroy, damage, or remove such vital equipment or goods.[95] Indeed, such conduct in this case *surpassed* the requirements of article 8(2)(e)(iv), which is a crime of conduct rather than result,[96] since it did effectively damage or destroy the targeted objects.

- Although a state of occupation can arise spontaneously, when a party to the conflict has sufficient effective control, it is not the case that the ebb and flow of combat necessarily creates a permanently 'revolving door' between hostilities and occupation, precluding 'conduct of hostilities' offences at arbitrary moments. Consequently, to any extent that attacks on protected objects occurred in the immediate aftermath of the initial assault on

[92] *See e.g.* PCB,para.194. API recognises that conduct is not precluded from being an attack merely because it results in civilian harm: *see e.g.* art. 49(3) recognising that acts of land warfare—*i.e.* "attacks"—may "affect the civilian population, individual civilians or civilian objects".
[93] Sandoz,p.603,mn.1880.
[94] For example, placing a mine is recognised as an act of "violence" (Sandoz,p.603,mn.1881), as would be unleashing a dangerous force (such as opening the sluices of a dam), cutting off a vital resource (such as the water supply), and so on.
[95] *See also*,Sandoz,p.647,mn.2070(noting that "acts of hostility" against protected objects are prohibited, in the sense of "any act arising from the conflict which has or can have a substantial detrimental effect on the protected objects").
[96] *Katanga* TJ,paras.799,871.

Mongbwalu, Sayo or elsewhere, this does not allow the conclusion *ipso facto* that the conduct in question was not, legally, an 'attack'.[97]

26. In any event, and noting the "*special protection of cultural property in international law*", the *Al Mahdi* Trial Chamber held that "the element of 'direct[ing] an attack'" for the purpose of article 8(2)(e)(iv) "encompasses any acts of violence against protected objects" irrespective "whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group."[98] The conclusion that 'attack' in article 8(2)(e)(iv) thus has a special meaning is supported by its context,[99] and the Statute's object and purpose, as well as the established framework of international law.[100] Specifically, article 8(2)(e)(iv) gives effect not only to the 1907 Hague Regulations but also the 1954 Hague Convention, which protect cultural objects in armed conflict both within and outside the conduct of hostilities.[101]

(v) Evidence of a similar pattern of conduct

27. The Prosecution has not charged **NTAGANDA** with the commission of crimes that occurred before the period of the charges. The Defence errs in claiming that, in proving **NTAGANDA**'s *mens rea*, evidence of crimes outside the events charged is "misplaced, misguided and should be disregarded".[102] The Defence appears at times to misunderstand the evidentiary relevance of such conduct,[103]

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[97] Indeed, acts of violence by an occupying power, on occupied territory, may still in appropriate circumstances be regarded as acts "against the adversary", and thus regarded as "attacks": *see e.g.*,Sandoz,p.604-605,mns.1888,1890-1891.
[98] *Al Mahdi* TJ,paras.14-15(emphasis added).
[99] In particular, it is relevant that article 8(2)(e)(iv) is the only provision applicable in non-international armed conflict which provides special protection for cultural objects.
[100] *Also* ICC-01/04-02/06-1962,paras.53,55.
[101] *See e.g.* Hague Regulations,arts.27,56; Hague Convention (1954); *Summary of the Proceedings of the Preparatory Committee during the period of 25 March-12 April 1996*,para.41; *Report of the Preparatory Committee on the Establishment of an International Criminal Court*,para.81; Dörmann,p.216-217,418,458-459; Pfirter,p.162; Bothe,p.409.
[102] *Contra*,DCB,para.562.
[103] *Contra*,DCB,paras.1525-1526(concerning child soldiers),para.1555(concerning **NTAGANDA**'s perpetration of crimes). The Prosecution does not agree, however, that [REDACTED] does not fall within the scope of the charges: *see* PCB,para742.

and to introduce other legal concepts which are themselves irrelevant.[104] Evidence of **NTAGANDA**'s involvement in non-charged attacks that preceded or followed the charges indicates a continuing pattern of conduct relevant to the charged conduct and crimes.[105] It is akin to circumstantial or indirect evidence relevant to prove, *inter alia*: (a) **NTAGANDA**'s intent and knowledge at the time of the charged attacks; (b) the contextual elements of crimes against humanity[106] and war crimes;[107] and (c) the context in which the charged conduct and crimes took place.[108] **NTAGANDA**'s consistent pattern of conduct in other attacks can be relevant, for instance, in showing a similar *modus operandi* adopted during attacks, similar crimes, and targeting of the civilian population. The recruitment and use of children below 15 years at Tchankwanzi is relevant to **NTAGANDA**'s intent and knowledge and to the historical origins of the common plan to take over Ituri and oust the non-Hema, by criminal means, including the recruitment and use of children.[109]

28. This Court has consistently endorsed such an approach. Thus, in *Katanga*, it was held that evidence of prior and subsequent attacks *'is not only helpful to […]understanding […]the evidence supporting the charges but is also highly relevant and probative in respect of the contextual elements of the crimes under articles 7 and 8 of the*

[104] *Contra*,DCB,paras.1525-1526(referring to "*nullem crimen sine lege*").
[105] UDCC,para.140. In *Krnojelac* TJ,*para.67* the ICTY Trial Chamber found that evidence of a consistent pattern of conduct is similar to circumstantial evidence, namely "*a number of different circumstances, which taken in combination, point to the existence of a particular fact upon which the guilt of the accused person depends because they would usually exist in combination only because a particular fact did exist*"; *Also* *Kunarac* TJ,para.589, where the ICTY Trial Chamber considered a non-charged incident of rape to show the Accused's "*knowledge of and willing participation in the attack upon the Muslim civilians*."
[106] Evidence of a continuous course of conduct may be relevant to prove, under article 7(2) of the Statute ''a course of conduct involving the multiple commission of acts'' and the organisational policy to commit the attack.
[107] Article 8(1) provides that the Court exercises jurisdiction over war crimes in the Statute ''in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes''.
[108] *See* *Ndindiliyamana Decision on Motion to Exclude WitnessTestimony*,para.25. The Trial Chamber found admissible like evidence to be relevant to the background and historical context of the charges against the accused. *Also* *Nahimana AJ*,para.315.
[109] DCB,para.1524. The Defence cites either no evidence or unreliable evidence in support of its contentions. *Also* PCB,paras.849-850.

Statute''.[110] Likewise, in *Lubanga*, evidence of conduct beyond the indictment was admissible where it "*relates to the matters that are properly to be considered by the Chamber in its investigations of the charges against the accused*'';[111] or where it concerned ''*issues and events (or information) that are of sufficient proximity to the charges the accused faces to be, prima facie, of potential assistance in this trial*".[112] Moreover, this Chamber has already dismissed similar arguments raised by **NTAGANDA** finding that although it is undisputed that **NTAGANDA** "has not been charged as direct perpetrator" with certain crimes "there is a connection between this type of evidence and the charges."[113] Similarly, dismissed requests to exclude evidence outside the temporal scope of the charges.[114]

29. Other international tribunals have rules similarly, recognising the relevance of evidence showing a ''consistent pattern of conduct'', *inter alia*: (a) in the interests of justice;[115] (b) to prove the accused's state of mind in connection to acts charged in the indictment;[116] (c) to show a systematic pattern of conduct;[117] and, (d) to place events in context or to clarify the general atmosphere in which charged

[110] *Katanga* DCC,paras.225-228; *Also* PTC1 and Trial Chamber in Lubanga. Although dealing with the situation only of prior acts, the reasoning is of relevance. PTCI (ICC-01/04-01/06-796-Conf, para.152) held that: "nothing prevents the Prosecution from mentioning any event which occurred before or during the commission of the acts or omissions with which the suspect is charged, especially if that would be helpful in better understanding the context in which the conduct charged occurred."
[111] ICC-01/04-01/06-1399-Corr,para.27.
[112] ICC-01/04-01/06-1981,Anx 8,9,36,39,48,82.
[113] ICC-01/04-02/06-968,para.13.
[114] ICC-01/04-02/06-1181,paras.14,21-24.
[115] The ICTY, ICTR and SCSL RPE, rule 93, provide that: "[e]vidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law […] may be admissible in the interests of justice." Similar act evidence was also admitted to show propensity to commit a crime in the trials following the second world war. *See* May and Wierda, citing e.g. *Eberhard Schorath et al*.,p.84-85 where the Prosecutor was allowed to ask one of the accused questions regarding the shooting of six innocent men on a date and place other than those mentioned in the charge, a crime very similar to that charged. The Prosecution did not seek to obtain a conviction on the uncharged facts but "to establish a systematic course of conduct in which he participated, so that he cannot be so innocent as he is trying to make the Court think today." In common law jurisdictions such as Canada, post-offence conduct is also considered potentially probative as circumstantial evidence of an individual's guilt. *See* Watt,p.55-56.
[116] *Strugar* AdmissiblityEvidence,p.3; *Kunarac* TJ,para.589 *Kupreškić* AJ,para.322,the Appeals Chamber held that "evidence of Josipovic's participation in an additional attack of a similar nature to the attack charged, occurring in the same vicinity and during the same time period… can be considered relevant to the question for Josipovic's guilt for the crime charged in the Amended Indictment."
[117] *See* *Bagasora* Admissibility of WitnessTestimony,para.13 (citing *Nahimana* InterlocutoryAppeals (Separate Opinion of Judge Shahabuddeen,paras.20-21).

crimes took place.[118] When admitted to clarify context,[119] such evidence has been used to infer "intent or other elements of the crimes alleged to have been committed within the temporal jurisdiction."[120]

(vi) Enlistment and Conscription of children under the age of 15

30. With reference to the video evidence of **NTAGANDA**'s visit to Rwampara on 12 February 2003,[121] and children who "tagged along" with KISEMBO's forces when re-taking control of Bunia, the Defence incorrectly seeks to add a legal element for enlistment and conscription, proof that children under the age of 15 graduated from training and were 'formally accepted' into the UPC.[122] This must be completely disregarded, both legally and factually.

31. To the contrary, the *Lubanga* AC agreed that "enlistment" is merely "to enrol on the list of a military body" and "conscription" is "to enlist compulsorily."[123] These offences "are committed at the moment a child under the age of 15 is enrolled into or joins an armed force or group."[124] Consequently, there is no requirement that the child commences or finishes training or does anything more than simply join the armed group.[125]

32. Any such requirement would contradict the very purpose of article 8(2)(e)(vii), which is to protect children under the age of 15 from recruitment into armed forces or groups at all,[126] and thus to protect them from armed conflict and to secure their well-being.[127] The importance of the absolute nature of this obligation

[118] *Nahimana AJ*,para.315.
[119] *Ibid*.
[120] *Simba* Temporal Jurisdication,p.3.
[121] DCB,paras.1294,1302,1303,1332. The Defence later concedes that KISEMBO's unit of children may have indeed participated in fighting: DCB,para.1501-1502.
[122] DCB,paras.1161,1293,1294,1302,1303. *Also*: DCB,para.1307.
[123] *Lubanga* AJ,para.267. *Also*,DCB,para.1539.
[124] *Lubanga* TJ,para.618(emphasis added). Further, Trial Chamber I found that while the purpose behind conscription and enlistment may be to use children in hostilities, this is not a requirement of the Statute,para.609.
[125] *Fofana* AJ,paras.140-144. This Chamber also emphasises that enlistment cannot be narrowly defined as a formal process where the armed group is not a "conventional military operation" (para.144).
[126] *Lubanga* AJ,para.277.
[127] *Lubanga* TJ,para.605.

is illustrated by the irrelevance of the child's willingness to join,[128] or any "benevolent motivations" of the soldiers.[129]

33. The Defence is also mistaken on the facts. They rely on **NTAGANDA** and D-80 to argue that the presence of young children seen in the Rwampara video is not evidence of recruitment.[130] Yet, when seen in context, with the totality of the evidence, it cannot seriously be argued that these children had not been recruited. **NTAGANDA**'s isolated and self-serving reading of this video evidence should be rejected,[131] as everyone at the Rwampara training camp was either a soldier or a recruit. **NTAGANDA** testified to that effect,[132] as did Prosecution witnesses.[133] Moreover, LUBANGA begins his speech to everyone who is assembled just metres in front of him as "soldiers" and then specifies exactly who he is speaking to: *"soldiers... Even those who have weapons... even those who have pieces of wood, even those with empty... hands... soldiers"*.[134]

34. The Defence's strained categorisation of people at Rwampara—relying on placement around a "rectangle" and whether or not they are holding batons[135]—does not account, for example, for the small, uniformed soldier who is barely able to hoist his weapon into the back of **NTAGANDA**'s pickup.[136]

(vii) Counts 6 and 9: the nexus requirement is met

35. The Defence is incorrect that the rapes perpetrated against P-758 are insufficiently connected to the armed conflict to constitute a war crime.[137] Rather, it merely

[128] *Lubanga* AJ,paras.300,301; *Lubanga* TJ,para.617.
[129] *Contra*,DCB,para.1539.
[130] DCB,paras.1302-1305,1332,1537,1538.
[131] DCB,paras.1302,1303,1507,1513.
[132] PCB,para.683. *Also:* **D-300**:T-213,61:14-21;T-214,20:6-14;T-238,74:6-75:20.
[133] *For example:* PCB,para.679; **P-30**:DRC-OTP-2054-2951,p.2979:24-2981:20;DRC-OTP-2054-3469,p.3482:17-3483:2.
[134] **DRC-OTP-0120-0293**(00:08:19);**DRC-OTP-2101-2791**,p.2798:129-130.
[135] DCB,paras.1284,1294-1299,1302,1303,1305.
[136] **DRC-OTP-0120-0293**(00:37:25-00 :37:43); **P-10**:T-48,15:2-25.
[137] DCB,para.1546. The Defence also argues that the rape of P-883 does not reveal a nexus to the armed conflict,para.1557.

attempts to re-litigate its failed jurisdictional challenge over counts 6 and 9 by framing these acts of sexual violence as 'ordinary crimes', largely on the basis that they did not occur during specific operations.[138] To the contrary, however, the evidence shows that all instances of rape or sexual slavery against children under the age of 15 occurred in the context of and were associated with an armed conflict.

36. When the Appeals Chamber confirmed jurisdiction over counts 6 and 9, it held that the "nexus requirement" sufficiently and appropriately delineates war crimes from ordinary crimes.[139] The Appeals Chamber cited with approval the Chamber's reference to the leading test set out in *Kunarac et al*, that:

> *...the armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed*.[140]

37. This is the test to be applied, based on the facts, to determine whether the required nexus has been established. While the Appeals Chamber did emphasise the nexus requirement as distinguishing war crimes,[141] it did *not* identify any factor as exhaustive or mandatory. It recognised that a Trial Chamber *may* have regard to the "*Kunarac et al* factors", but did not suggest that these factors *must* be established.[142]

38. It is unquestionable that the victims of these acts of UPC sexual violence have a nexus to the armed conflict, [143] as the victims were recruited by the UPC for the

[138] DCB,paras.1547.
[139] ICC-01/04-02/06-1962,para.68.
[140] *Ibid*, referring to ICC-01/04-02/06-1707,fn.130. *Also*,*Bemba*_TJ,para.142 citing *Katanga*_TJ,para.1176: "The armed conflict alone need not be considered to be the root of the conduct and the conduct need not have taken place in the midst of battle. Nonetheless, the armed conflict must play a major part in the perpetrator's decision, in his or her ability to commit the crime or the manner in which the crime was ultimately committed."
[141] DCB,para.1546.
[142] DCB,para.1546; ICC-01/04-02/06-1962,para.68 referring to *Kunarac* AJ,para.59.
[143] *Contra*,DCB,para.1547.

purpose of that conflict and then, consequently, subject to sexual abuse.[144] Further, crimes need not occur in the midst of battle to constitute war crimes.[145] The Defence argument that the nexus is not met simply because P-758 said she was raped after (rather than before or during) battle[146] distorts the nexus requirement to the point of absurdity.

(viii) Attacks against the civilian population

39. For civilians to be the primary object of the attack[147] they need not be its *exclusive* target. Moreover, targeting civilians need not be the primary "*purpose or objective of the attack*",[148] in the sense the attack may be motivated by other factors—including of a military nature. These considerations are simply relevant, among other factors, in assessing if an attack was indeed directed against the civilian population, so that civilians were an intentional and not merely incidental target.[149] In this case, like *Katanga*, civilians were clearly the object of the attack—which featured intentional targeting of civilians in house-to-house searches immediately following combat, and as they tried to flee;[150] and where the nature of the crimes which were part and parcel of the attack demonstrated that its object was the civilian population. General motives behind an attack—including whether the perpetrators also aimed to achieve some military advantage—are irrelevant.[151]

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[144] ICC-01/04-02/06-1962,paras.2,63; ICC-01/04-02/06-1707,paras.52-54.
[145] PCB,para.138(citing *Bemba* TJ,para.142; *Katanga* TJ,para.1176); *Also*,*Kunarac* AJ,para.57: "A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place."
[146] DCB,para.1547.
[147] *Bemba* TJ,para.154; *Katanga* TJ,paras.802,1104.
[148] The SCSL Appeals Chamber held that: the Trial Chamber in *Fofana* appeared to have "misdirected itself by …confusing the target of the attack with the purpose of the attack […] when the target of an attack is the civilian population, the purpose of that attack is immaterial";para.299: "What must be primary is the civilian population as a target and not the purpose or the objective of the attack"; *Kunarac* AJ.para.579:It is irrelevant that the Serb aggression also pursued military goals and the objective of territorial gain, because the criteria of 'armed conflict' and 'attack upon a civilian population' are not synonymous. […].
[149] PCB,para.192,fns.490-491. *See also* *Mbarushimana* DCC,para.152; *Kunarac* AJ,paras.91-92.
[150] PCB,para.599-602. *See e.g.* **P-113**:T-118,48:3-50:1;**P-17**:T-60,17:17-18:17; **P-100**:T-131,22:25-23:5.
[151] PCB,para.192,fn.491. *Also:* DCB,para.605. In Katanga, the attackers also had a motive to open up the roads (*Katanga* TJ,para.565). *See* DCB,paras.583-584,1008-1009.

40. Civilians may never be the object of an attack.[152] Accordingly, civilians are protected from acts that amount to an attack, whether it is carried out in the conduct of hostilities or after they fall under the control of the armed group.[153] For example, in *Katanga*, the Trial Chamber found that acts relevant to an attack on the civilian population *included* those in the immediate aftermath of the assault on Bogoro, including rapes and sexual slavery.[154] Moreover, the absolute protection afforded to civilians is seamless. Any intentional violence against civilians in NIAC is punishable either as an 'unlawful attack' or as a common article 3 violation.

Flaws in the Defence Analysis of Witness Testimony and Prosecution Evidence

41. The Defence weakly argues that nearly every Prosecution witness lacks credibility, is unreliable, lied or is biased without any plausible explanation or evidence.[155] In so doing, the Defence offers an incomplete portrayal of the facts, omits relevant evidence and makes unsupported arguments. The Defence also fails to address Prosecution evidence in its totality, as to do so would reveal the coherence and corroboration of Prosecution evidence. In contrast, the Defence advances **NTAGANDA**'s entire account even when he is (regularly) the sole source for his version of events.

42. Paradoxically, the Defence relies on the very same Prosecution witnesses that it seeks aggressively to discredit, without explaining this inherent contradiction in its position.[156] The Defence argues that all witnesses who provided incriminating evidence on the First Attack are liars, and "*consequently all incriminating evidence*

[152] PCB,para.192. *See further*,*Martić* R61,para.11; *above*,para.39.
[153] DCB,para.584.
[154] *Katanga* TJ,paras.828,833,871-879.
[155] DCB,paras.32,57,248-454,492,512,574,795.
[156] The Defence relies, amongst other Prosecution witnesses, on P-0055,P-0017,P-0963,P-190,P-0768,P-800,P-0886,P-0894,P-0898,P-41,P-0907. *See*,*e.g.*paras.52,55,166,168,169,175,238,383,512,587,1506,1508 and fns.1492,1565,1631,1659,1661,1675,1705, 1717-1720,1724,1729-1732,1742,1778 and 1779 (note the reference to P-895 should be P-894. P-895 did not testify),1865,etc. The Defence argues simply that no incriminating evidence from these witnesses can be relied upon (*see*,DCB,paras.248,329,418,581).

they provided cannot be relied upon".[157] Without more, the Defence states that all Defence evidence "*must be accorded full probative value.*"[158]

43. The Defence's repeated suggestion that in-court protective measures and rule 74 assurances diminish the reliability of a witness's account[159] is legally incorrect. The Chamber granted these measures upon a full review of relevant, objective considerations. The *Musema* Appeals Chamber expressly rejected arguments that a Trial Chamber must exercise "special caution" in assessing the evidence of a protected witness solely on the basis of the granted in-court protective measures.[160] In any event, nearly every Defence witness testified with the same protective measures.[161] Nor does relocation in a protection program[162] undermine credibility.[163]

44. The Prosecution's assurance to the Chamber under rule 74 that it will not use a witness's testimonial evidence in any prosecution against him provided he tells the truth is not a guarantee of non-prosecution for any alleged crimes or offences.[164] Nor, on a plain reading of the "statement of limited use", is there any "guarantee that [a witness] would not be prosecuted".[165] The Chamber ordered that all witnesses can review prior statements before testimony; the time for review depends on the volume of materials.[166]

(a) P-768

45. The Defence's claim that P-768 "*holds a malignant grudge*" against **NTAGANDA**, because he would allegedly have aggrieved him on no less than four different

[157] DCB,paras.248,418.
[158] DCB,para.464.
[159] DCB,para.250,299,330,380.
[160] *Musema* AJ,para.71.
[161] D-54, D-57, D-201, D-211, D-38, D-17, D-243, D-251, D-207.
[162] *Brima* TJ,p.57,para.124-125. *Contra*,DCB,paras.299,421.
[163] *Lubanga* TJ,p.162-163,para.347; *Bemba* TJ,p.149,para.334.
[164] *Contra*,DCB,para.330.
[165] DCB,para.330.
[166] DCB,para.299.

occasions,[167] should be dismissed. P-768 denied the three allegations that were put to him, and the Defence failed to suggest to him that [REDACTED]. All four allegations are based solely on **NTAGANDA**'s testimony.

46. P-768 was able to identify the road he took to Mongbwalu. There is hardly any disagreement between the maps annotated by P-768 and **NTAGANDA** regarding the axis that the UPC troops [REDACTED] followed to Mongbwalu.[168] During cross-examination, the Defence unhelpfully presented P-768 with a partial map of Djugu territory not including [REDACTED]. The Defence's assertion that P-768 "*had been caught*",[169] based on this unfair manner of cross-examination, is, at the very least, misleading.

47. The Defence's new attempt[170] to interpret the words [REDACTED] for its claim that P-768 [REDACTED] should be rejected. The Defence did not suggest this during cross-examination. There is no indication [REDACTED].[171] [REDACTED].[172] [REDACTED].[173]

48. As even the Defence concedes, witnesses to the takeover of Mongbwalu give different estimates of the duration of the fighting.[174] This means nothing.

49. The Defence advances an uncited[175] claim[176] that P-768 [REDACTED]. [REDACTED].[177]

50. The Defence unconvincingly claims that P-768 lied about the planting of antipersonnel mines in Mongbwalu[178] because (1) he did not mention this during

[167] DCB,para.252.
[168] [REDACTED].
[169] DCB,para.274.
[170] DCB,para.280.
[171] [REDACTED].
[172] [REDACTED].
[173] [REDACTED].
[174] DCB,para.279.
[175] FN.661 only refers to **NTAGANDA**'s evidence that the operation was video-recorded.
[176] DCB,para.279,last sentence.
[177] [REDACTED].

his interview with the Prosecution,[179] (2) he did not remember certain details,[180] and (3) **NTAGANDA** denied using antipersonnel mines in Mongbwalu.[181] This challenge is baseless. P-768 was interviewed on the 2002-2003 events on a single occasion more than 10 years after the fact.[182] It is perfectly normal for him only to have remembered certain facts during his witness preparation session. Likewise, it is entirely acceptable for him *not* to remember certain details, such as the name and call sign of the officer in charge of the mines, [REDACTED]. As for **NTAGANDA**'s self-serving denial,[183] it is contradicted by one of his own logbook messages, dated 5 December 2002, in which he offers to send mines – either anti-personnel or anti-tank – to Mongbwalu.[184]

51. The Defence's suggestion that P-768 denied knowledge of SALONGO being promoted to "*Commander of the South-East Operational Sector*"[185] misrepresents the evidence. In fact, P-768 merely denied knowledge of the Defence's suggestion that "*Commander Salongo was appointed as the person in charge of the town of Mongbwalu*", explaining that "*in the UPC, we didn't have a structure such that there were commanders of particular towns or cities. There was the chief of general staff, the deputy, the zone ops commander, and there was the brigade and all the way down. There were no commanders of a particular town*".[186] The Defence did not pursue the topic[187] and never asked P-768 about the specific function of Commander of the South-East Operational Sector.

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[178] DCB,paras.254-258.
[179] DCB,para.254.
[180] DCB,para.257.
[181] DCB,para.258.
[182] *Contra*,DCB,para.254.
[183] DCB,para.258,fn.556, referring to **D-0300**:T-218,41:1-4.
[184] PCB,para.342.
[185] DCB,para.262.
[186] **P-768**:T-35,46:2-16.
[187] **P-768**:T-35,46:17-18.

52. The Defence incorrectly asserts that [REDACTED],[188] [REDACTED].[189] [REDACTED][190] [REDACTED].[191]

53. The Defence claims that "*P-768 fabricated personal knowledge of events that purportedly took place in Kobu*" because he was in [REDACTED]. P-768 did not claim to have "personal knowledge" of the Second Attack; he testified to the information he obtained from several sources.[192] The source of P-768's information was MULENDA, a commander involved in the Second Attack[193] [REDACTED].[194] The Defence's assertion that P-768 could not have heard commanders discuss the attack on the radio is also meritless. **NTAGANDA** himself claimed to have learnt about the assassination of Governor Eneko in Mahagi just hours after it took place, although he was in Bunia at the time.[195] Moreover, several witnesses in Bunia and Mongbwalu could listen to radio conversations during this attack.[196]

(b) P-17

54. Again, the Defence relies almost exclusively on **NTAGANDA**'s own testimony to challenge P-17.[197] The Defence provides no reasons to support its assertion that P-17 is ''biased''.[198] Critically, the Defence contradicts its own claim that P-17 was not a ''truthful witness''[199] by referring to his testimony 92 times to support its own contentions – 61 times as the sole source.[200] The Defence argues that his sole

[188] [REDACTED].
[189] [REDACTED].
[190] [REDACTED].
[191] [REDACTED].
[192] **P-768**:T-34,60:7-61:13.
[193] **P-768**:T-34,60:11-13.
[194] [REDACTED].
[195] **D-300**:T-235,24:1-8.
[196] **P-901**:T-29,12:13-13:3; **P-907**:T-90,59:4-62:15.
[197] *See e.g.* DCB,paras.305(fns.779,782),308(fns.795,797),310(fn.802),311(fn.810),312(fns.811,816),313(fn.817),316(fns.821,823-826),319(fn.836,839),320(fn.840),324(fn.873),326(fns.878,880-881,883).
[198] DCB,*e.g.*para.824.
[199] DCB,para.300.
[200] *See, e.g.* DCB,paras.347(fns.989,**991**),348(fns.**992**,**993**,994,**995**,**996**),351(fn.1004),352(fns.**1007**,1011),353(fn.1014),369(fn.1056),407(fn.1196),410(fn.**1214**),415(fn.1230),439(fn.1309),503(fn.1455),552(fn.1631),571(fn.1659),587(fn.**1691**),593(fns.**1717-1720**),597(fns.**1726-1727**),623(fn.**1780**),624(fns.**1781-1782**),629

evidence about investigations of a rape complaint ''*must be attributed full probative value*'';[201] and cites him together with P-901 as providing ''*well-substantiated evidence*'' on **NTAGANDA**'s whereabouts,[202] and "reliable evidence regarding **NTAGANDA**'s command of, and SEYI's involvement in, the Sayo operation.[203]

55. P-17: (a) was present [REDACTED] when crimes were committed by, or in, **NTAGANDA**'s presence,[204] (b) gave truthful testimony about **NTAGANDA**'s arrival by car in Mongbwalu [REDACTED];[205] (c) truthfully testified about his participation in the Sayo operation;[206] (d) gave accurate evidence about Motorola radio conversations and events he witnessed during the Second Attack;[207] and, (e) gave accurate evidence about the presence of children below 15 years in the UPC.[208]

56. The Defence's contrary assertions ring hollow, as it accepts, by relying on his evidence, that: P-17 participated in the First[209] and Second Attacks[210] as [REDACTED],[211] and was in a reliable position to comment on **NTAGANDA**'s whereabouts and actions,[212] on children within the UPC[213] and on **NTAGANDA**'s bodyguards.[214]

(fn.1805),670(fn.1943),689(fn.**1996**),700(fn.**2027-2028**),732(fn.**2086**,**2088**),733(fn.**2092-2096**),734,735, 762,824,825(fn.2305),826(fns.**2307-2308**),827(fns.**2312**,2318,2320),835(fn.**2337**),836(fn.**2338-2339**),837 (fn.**2343**),839(fn.**2347**),842(fn.**2356**),842(fn.**2359**),846(fn.2371),848(fn.**2374**),877(fn.2482),909(fns.**2578-2579**),915(fns.**2603-2612**),923(fn.**2637**),924(fns.**2642-2643**),934(fn.2689),1004(fns.**2892-2893**),1006(fn.**2895**), 1206(fn.3400),1221(fn.3464),1243(fn.3533),1342(fn.3804,**3808-3809**,**3811**),1343(**3814**),1452(fn.**4129**), 1478(fn.4197), 1560(fn.4394). In bold entries, P-17 is the sole source.

[201] *Contra*,DCB,para.700,fn.2029.

[202] *Contra*,DCB,para.1221,fn.3464.

[203] DCB,para.351,fn.1004.

[204] *Contra*,DCB,paras.300,302-308.

[205] *Contra*,DCB,paras.309-313.

[206] *Contra*,DCB,paras.314-326.

[207] *Contra*,DCB,paras.327-329.

[208] *Contra*,DCB.para301.

[209] DCB,paras.347(fns.989,991),348(fns.992-996),351(fn.1004),352(fns.1007,1011),353(fn.1014),407(fn.1196), 439(fn.1309),503(fn.1455),552(fn.1631),587(fn.1691),593(fn.1719-1720),597(fns.1726-1727),623(fn.1780), 624(fns.1781-1782),629(fn.1805),631(fn.1813),732(fns.2086,2088),733(fns.2092-2096),735.

[210] DCB,paras.824,825 (fn.2305),826(fns.2307-2308),827(fns.2312,2318,2320),835(fn.2337), 836(fn.2338), 837(fn.2343),839(fn.2347),842(fn.2359),848(fn.2374),877(fn.2482),909(fns.2578-2579),915 (fns.2603-2612), 923(fn.2637),924(fns.2642-2643),934(fn.2689),1004(fns.2892-2893),1006(fn.2895), 1206(fn.3400).

[211] DCB,paras.732(fns.2086,2088),733(fns.2092-2095).

[212] DCB,paras.347(fn.991),351(fn.1004),410(fn.1214),439(fn.1309),593(fn.1717-1718),1221(fn.3464),

57. P-17's inability to recognise his brigade commander [REDACTED][215] or Commander KASANGAKI[216] is irrelevant as the Defence never challenged him – and appear to accept – that he was in [REDACTED],[217] and that he fought with the UPC in the First and Second Attacks. P-17 explained that he did not recognise either commander because of the poor quality of the images and because the events occurred several years ago and he tried "*to forget some of these things*".[218] P-933 described the trauma suffered by soldiers and how trauma can impact the way memories are recalled.[219]

58. P-17 explained[220] that he did not recognise the apartments in Mongbwalu where the officers stayed because [REDACTED].[221] The Defence wrongly asserts that P-17 could not have been ordered to [REDACTED] when SALONGO was appointed Sector commander, as this was not formally announced until 10 December 2002.[222] However, P-901[223] supports P-17's testimony that SALONGO was already *de facto* appointed as Sector commander before that date. P-17 gave detailed evidence on the crimes committed by, or in **NTAGANDA**'s presence, at **NTAGANDA**'s camp. Other witnesses described the same crimes.[224]

59. The Defence is wrong that Motorola communications between Mongbwalu and Kobu were not possible.[225] Moreover, there is no inconsistency in P-17's account [REDACTED].[226] [REDACTED].[227]

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[213] DCB,paras.1243(fn.3533).1300(fn.3753),1327(fn.3783),1452(fn.4129).
[214] DCB,para.1478(fn.4197).
[215] **P-17**:T-62,52:1-18.
[216] DCB,para.302.
[217] DCB,paras.347(fn.989),348(fns.992-996),352(fn.1007),407(fn.1196),410(fn.1214),593(fns.1717-1720),689(fn.1996),732(fns.2086,2088),733(fn.2092-2096),915(fns.2603-2611).
[218] **P-17**:T-62:52:1-18;T-63,60:4-20.
[219] **P-933**:T-84,13:15-14:3;18:2-19:25;21:2-24:7;**P-938**:T-114,22:2-9.
[220] **P-17**:T-58,63:18-65:7;69:20-25;81:14-82:4;T-59,14:19-17:4(*esp*.16:23-17:4].
[221] **P-17**:T-62,50:12-25.
[222] DCB,para.305.
[223] DCB,para.409,fn.1205.**P-901**:T-29,9:13-14.
[224] [REDACTED].
[225] PCB,paras.463,970,1007.
[226] DCB,para.328.
[227] DCB,para.328.*Cf*,**P-17**:T-60,7:23-10:16.

(b) P-963

60. The Defence's attacks on P-963's [REDACTED][228] rest on an incomplete presentation of the facts and P-963 steadfastly rejected them:[229]

(a) There is no evidence in this case that [REDACTED];[230]

(b) P-963 did not sign his screening note,[231] and he corrected it at the first opportunity.[232] Indeed, it is noted that it "*remains to be confirmed*",[233] or "*was provided hastily and needs to be reviewed with the interviewee*";[234]

(c) the French version of P-963's testimony on his [REDACTED][235] dispels any doubt about coaching.[236] P-963 testified unequivocally that he drafted the notes prior to his interview in [REDACTED] without input from [REDACTED],[237] and there is no evidence to the contrary; and

(d) other suggestions of coaching[238] – often uncited to evidence[239] – must be disregarded. *First,* there is nothing "*revealing*" about the mention of BWANALONGA in P-963's handwritten notes.[240] P-963 is one of several

[228] DCB,paras.331-332.
[229] **P-963**:T-82,64:10-16,67:3-17,68:12-15,73:6-10,75:19-24,78:25-79-11[T-82-FR,85:20-26],81:3-7.
[230] [REDACTED]'s testimony is not in evidence. *Contra*,DCB,para.1405.
[231] DCB,para.334.
[232] **P-963**:T-82,85:8-12,70:9-15,71:4-8; DRC-OTP-2092-0055,pp.0061,0063,0065. P-963's re-direct examination (T-82,85:8-12) cites DRC-OTP-0233-0032, an updated copy of the screening note referred to in the DCB, DRC-OTP-0147-0566. The Chamber did not admit DRC-OTP-0233-0032, finding its content already on the record. ICC-01/04-02/06-1400-Conf,para.8; **P-963**:T-82,77:1-2,91:6-8.
[233] **P-963**:DRC-OTP-0147-0556,para.14 (about his having written down "*these accounts*" contemporaneously).
[234] **P-963**:DRC-OTP-0147-0556,para.8 (concerning P-963's participation fighting in [REDACTED], his flight to [REDACTED], and [REDACTED] – "The information in this section was provided hastily and **needs to be reviewed with the interviewee**" (emphasis added)). *See* DCB,para.335.
[235] DCB,para.337,fn.930. Defence cites solely to the lish version.
[236] **P-963**:T-82,78:4-79:11[T-82-FR,82:9-83:23].
[237] **P-963**:T-82,80:20-81:7.
[238] DCB,paras.333-337, titled "*P-0963 was coached by [REDACTED]*".
[239] DCB,paras.350 and 355, final sentences.
[240] *Contra*,DCB,para.337. **P-963**:DRC-OTP-0149-0049,p.0049.

witnesses who testified about BWANALONGA's murder.[241] *Second*, although P-963's testimony that "TAIGA ONE" was one of the commanders who led the fighting along the Mbidjo road is consistent[242] with his handwritten notes,[243] his belief in that commander's role does not suggest coaching, or undermine P-963's credibility,[244] because he was [REDACTED].[245]

61. [REDACTED].[246]

62. [REDACTED][247] [REDACTED],[248] [REDACTED];[249] [REDACTED],[250] [REDACTED].[251] P-963 clarified [REDACTED].[252]

63. [REDACTED][253] [REDACTED] (i) [REDACTED]; (ii) [REDACTED]; (iii) [REDACTED].

64. [REDACTED][254], [REDACTED]. [REDACTED]. The Defence´s conclusion that P-963 [REDACTED][255] is therefore not supported by the available [REDACTED].

65. [REDACTED].[256] [REDACTED].[257] P-0963 consistently stated that the training centre was at some distance from the town of Mandro.[258]

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[241] **P-963**:T-79,22:20-24:14.
[242] *Contra*,DCB,para.336.
[243] **P-963**:DRC-OTP-0147-0333;T-82,78:11-19.
[244] *Contra*,DCB,para.336.
[245] **P-963**:T-78,75:16-76:4.
[246] [REDACTED].
[247] *Contra*,DCB,para.340.
[248] **P-963**:T-81,37:18-20,38:19-22,39:19-23.
[249] **P-963**:T-80,64:1-12,64:21-25;T-81,38:23-24.
[250] **P-963**:T-81,40:18-21[T-81-FR,43:11-13].
[251] **P-963**:T-81,37:24-38:1[T-81-FR,40:7-10],40:1-5,18-21,46:2-5,48:7-21.
[252] **P-963**:T-81,38:8-22,39:10-23,43:22-44:17, [REDACTED].
[253] [REDACTED].
[254] **P-963**:T-81,47:8.
[255] DCB,para.340. T-81,46:6-47:8.
[256] DCB,para.341, citing to **P-963**:T-80,84:18-85:3.
[257] [REDACTED].
[258] [REDACTED]; **P-963**:T-81,16:9-16.

66. The Defence also misstates the evidence that P-963 could not identify "*any of the people* [REDACTED]".[259] P-963 testified that he could not remember the names of any of the 13 and 14 year olds in the group.[260]

67. It is not impossible[261] that P-963 was [REDACTED]. Although P-963 confirmed he received a weapon [REDACTED][262] [REDACTED],[263] he also testified that he received a weapon[264] before [REDACTED][265] and that he was armed while working there.[266] The Defence failed to suggest to P-963 that the only weapon he could have had [REDACTED].

68. The Defence's challenge to P-963's evidence because of suggested contradictions with P-17's testimony[267] is inapt: the two witnesses were not often together.[268] [REDACTED][269], [REDACTED];[270] [REDACTED][271] [REDACTED].[272] [REDACTED].[273] [REDACTED].[274]

69. That P-963 could not accurately identify Sayo on a satellite image is insignificant.[275] His identification is reasonably close to Mongbwalu and he would not have been accustomed to view satellite images. All of his other annotations are consistent with the locations relevant to the First Attack.[276] P-963's account

[259] DCB,para.342.
[260] **P-963**:T-78,31:10-20.
[261] DCB,para.345 and fns.981(referring to T-81 instead of T-80,61:23-63:23) and 982 (T-78,53:22-24).
[262] **P-963**:T-81,13:7-8,17:13-19.
[263] **P-963**:T-81,24:12-19.
[264] **P-963**:T-79,52:12-20,55:12-15.
[265] **P-963**:T-78,53:22-24.
[266] **P-963**:T-80,57:22-58:5.
[267] DCB,paras.347,348,351-354.
[268] **P-963**:T-78,68:9-13,87:23-88:8; **P-17**:T-58,50:16-19.
[269] **P-963**:T-78,22:10-19.
[270] [REDACTED].
[271] [REDACTED].
[272] **P-963**:T-82,38 :9-15.
[273] **P-963**:T-78,69:13 [REDACTED],T-79-FR,71:12 [REDACTED]; [REDACTED].
[274] [REDACTED].
[275] *Contra*,DCB,para.349.
[276] **P-963**:DRC-REG-0001-0023.

that MULENDA ordered attacking Sayo [REDACTED][277] is not inconsistent with **NTAGANDA**'s overall command.

70. There is no evidence that P-963 [REDACTED].[278] P-963 readily admitted [REDACTED];[279] there is no evidence on the record of [REDACTED]. All the record contains is Counsel's opinion, not evidence;[280] Prosecution Counsel noted that [REDACTED].[281]

(c) P-901

71. The Defence eagerly accepts much of P-901's account,[282] then claims that he lied, "clearly made up his evidence", and that his credibility is "irreparably undermined" without explanation or motive.[283] It mischaracterises P-901 as "obstructive", citing testimony where he does not know of or cannot remember ideology training, that he cannot tell a lie, and that he has no knowledge of the burning of looted goods in Komanda,[284] an answer that it later relies upon.[285]

72. The Defence implies that P-901 and P-190 colluded[286] without any evidence on the record and without putting such a serious suggestion to P-901. P-901 was

[277] **P-963**:T-82,35:4-15.
[278] DCB,para.330.
[279] **P-963**:T-82,83:3-6.
[280] **P-963**:T-79,56:13-19.
[281] **P-963**:T-79,57:15-18.
[282] DCB,paras.381-383,384
[283] DCB,paras.383-384,392,400,412.
[284] DCB,para.383,fn.1122: (citing T-31,67:15:20:"*Q. Talking about ideology, Mr Witness, you are familiar with the FPLC ideology, is that correct? A. I no longer remember. Q. but you were trained, you were taught an ideology at the time you joined the FPLC? A. I knew that every member of the FPLC had the objective of providing security in their areas.*"; citing T-31,68:5-8: "*My question is this. You received training. Were you told that the movement that you have joined has as part of its ideology to respect the right of war, the right to war? Did you know that as a member of the FPLC? A. Personally, I do not remember. I cannot tell a lie*". Defence also cites T-32,35:16-36:13: where the witness is asked if he has any knowledge of the burning of looted goods in Komanda to which the witness asks for more precision on the location of the alleged event.
[285] DCB,para.401.
[286] DCB,para.378.

asked if he knows P-190: [REDACTED][287] [REDACTED].[288] The Defence asked no more questions.

73. [REDACTED].[289] P-901 gave reliable and detailed evidence of [REDACTED].[290] P-901 did not embellish his account; he readily accepted if he had no knowledge on a subject.[291] P-901's testimony about [REDACTED] should be preferred over [REDACTED] evidence [REDACTED].[292]

(e) P-907 and P-887

74. The Defence's suggestion that P-907 [REDACTED][293] is baseless.[294] P-907 explained that [REDACTED] did not influence him or affect his ability to tell the truth.[295] [REDACTED],[296] [REDACTED]. [REDACTED].[297]

75. P-907 testified that, [REDACTED].[298] [REDACTED][299] [REDACTED].[300] [REDACTED].[301] [REDACTED].[302] [REDACTED][303] [REDACTED].[304]

76. [REDACTED],[305] [REDACTED].

77. While describing P-907 as "*yet another insider who lied under oath and fabricated evidence*",[306] the Defence relies on P-907's evidence of the living conditions in

[287] **P-901**:T-322,37:23-38:6.
[288] **P-901**:T-322,38:8-12.
[289] **P-901**:T-27:53:24-55:9; T-28,7:1-23.
[290] [REDACTED].
[291] *See,e.g.*,**P-901**:T-28,20:5-7; 17:16-18.
[292] [REDACTED].
[293] DCB,para.356.
[294] DCB,para.362.
[295] **P-907**:T-92,70:22-71:24.
[296] **P-907**:T-92,70:7-8.
[297] [REDACTED].
[298] **P-907**:T-91,10:14-21;11:10-13;T-92,70:11-21.
[299] **P-907**:T-92,70:11-21.
[300] **P-907**:T-92,70:15-21;73:3-11.
[301] **P-907**:T-92,73:7-11.
[302] **P-907**:T-92,70:5-9.
[303] **P-907**:T-92,73:9-11.
[304] **P-907**:T-92,70:3-9.
[305] DCB,para.419.
[306] DCB,para.357.

Mongbwalu under the Lendu in 2001 and 2002, and crimes committed by the Lendu. In doing so, the Defence accepts P-907's evidence without reserve.[307]

78. The Defence's claim that P-907 "*concocted a false narrative*" about being in the First Attack[308] or that his account is "*wholly inconceivable*"[309] should be dismissed given P-907's credible, consistent and detailed evidence. The Defence incorrectly asserts that SALONGO was "*appointed Sector Commander on or about 10 December 2002, many days after the second FPLC operation in Mongbwalu*"[310] and "*long after Mr NTAGANDA's departure*".[311] That SALONGO signed a document on 10 December 2002 as "*Commandant Secteur*"[312] does not show that he was appointed on that day. In fact, the evidence shows that SALONGO was appointed Sector Commander within days of the UPC's takeover of Mongbwalu. P-901 testified that [REDACTED].[313] **NTAGANDA** testified that [REDACTED].[314] P-17 further testified that *"[a]fter the battle in Mongbwalu [SALONGO] was named sector commander*"[315] and that this appointment was made when **NTAGANDA** was still in Mongbwalu.[316] P-901 and P-17's evidence is fully consistent with P-907's testimony that "*Tiger One was appointed sector commander in Mongbwalu after Mongbwalu was captured*".[317]

79. The Defence entirely misrepresents P-887's testimony by stating that she admitted that [REDACTED].[318] While P-887 stated that her victim application, which was not read back to her,[319] incorrectly referred to [REDACTED].[320] The Defence's

[307] DCB,para.364.
[308] DCB,paras.371-374.
[309] DCB,para.373.
[310] DCB,para.374.
[311] DCB,para.305.
[312] **DRC-OTP-0092-0541**.
[313] **P-901**:T-29,9:20-10:11.
[314] [REDACTED].
[315] **P-17**:T-58,65:10-14.
[316] **P-17**:T-59,16:5-12.
[317] **P-907**:T-92,48:3-49:2.
[318] DCB,para.424.
[319] **P-887**:T-94,83:2-16.
[320] **P-887**:T-93,53:25-54:10;T-94,76:20-78:8.

suggestion that she lied about [REDACTED] in order to obtain some form of benefit from the Court is as groundless as its suggestion that she claimed that [REDACTED] "*to strengthen her alleged prejudice*"[321] or that she "[REDACTED]" for some reason not specified by the Defence.[322]

(f) P-877

80. While the Defence broadly claims that P-877's account "*was entirely [...] fabricated on the basis of information obtained* [REDACTED]",[323] it was unable, despite its access to all [REDACTED] P-877 [REDACTED], to point to a single instance where his account was influenced by [REDACTED]. The Defence's suggestion, without support, that this alleged influence "*was a recurring theme during his testimony*"[324] is baseless.

81. The only alleged example referred to by the Defence misrepresents P-877's evidence and is taken out of context. P-877's statement that he "*did not witness the UPC commit any crimes when they were in Kilo*"[325] concerns very specific events that occurred in March 2003, namely the burning of villages by the UPC between Kobu and Kilo after their withdrawal from Bunia, and which are unrelated to his account of UPC crimes in November and December 2002. While P-877 clearly testified that he was not an eyewitness of these events, but drew the conclusion that UPC soldiers were responsible for this destruction based on his understanding of the circumstances, he also candidly volunteered, both in his statement and during testimony,[326] that [REDACTED] may have "reinforced" his conclusion. P-877 distinguished between events he personally witnessed and those he learnt about.

[321] DCB,para.423.
[322] DCB,para.422.
[323] DCB,para.430.
[324] DCB,para.432.
[325] *Ibid*.
[326] **P-877**:DRC-OTP-2077-0118,0123:25;T-109,76:17-77:13[T-109-FRA,67:23-69:4].

82. The Defence's claim that P-877 forged notes regarding the events in Ituri with a view to supporting his own account is unsubstantiated. First, P-877 only brought to the Prosecution's attention the existence of [REDACTED] when he was asked about them during his first interview.[327] Second, [REDACTED] that are irrelevant to P-877's account or, more generally, the case against **NTAGANDA.**[328] Third, [REDACTED][329] does not support the Defence's convoluted theory that P-877 fabricated [REDACTED] to use them at trial. Rather, it confirms that, as explained by P-877, [REDACTED],[330] [REDACTED],[331] not knowing that it would ever be used in a trial.[332]

P-892 and P-912

83. The Defence's apparent[333] suggestion that P-912 was well aware of [REDACTED] testimony omits relevant details. P-912 testified that she did not discuss the content of her testimony with [REDACTED]. That she was aware that [REDACTED] testified is unsurprising given [REDACTED].

84. The Defence points to a correction made by P-892 to her victim application about the location where [REDACTED] was raped by UPC soldiers to argue that she modified her account to conform to [REDACTED].[334] This derogatory and unfounded submission should be rejected. P-892 testified that her victim application form was not read back to her.[335] As acknowledged,[336] she corrected this mistake immediately.[337]

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[327] **P-877**:DRC-OTP-2069-2086,2087:9-2088:10. *See also* DCB,para.433.
[328] **DRC-OTP-2077-0140**,pp.0187,0213(transl.**DRC-OTP-2081-0589**,pp.0638,0664).
[329] [REDACTED].
[330] **P-877**:T-108,105:25-106:1;T-110,14:6-12.
[331] **P-877**:T-109,92:1-15.
[332] **P-877**:T-109,82:11-83:3.
[333] DCB,para.444. [REDACTED].
[334] *Ibid.*
[335] **P-892**:T-86,9:8-23.
[336] DCB,para.444 and fn.1315, referring to **P-892**:T-86,15:13-22: "*[REDACTED]*."
[337] **P-892**:T-86,15:13-22.

85. P-892 and P-912 provided credible and consistent accounts of P-912's rape,[338] which is the key feature of their evidence. P-912 describes the events in an accurate chronology: a prior failed attack at Mongbwalu,[339] a second attack during which the UPC took over Mongbwalu and she was raped, after which there was another attack when Lendu succeeded in ousting the UPC Hema soldiers.[340] P-912 was [REDACTED] at the time, confirming that the rape was during the First Attack in 2002. Her electoral card, obtained in 2011 before any interview with the OTP, confirms her date of birth. [341]

86. The Defence's convoluted and vague submissions regarding P-912's age and schooling,[342] and irrelevant matters such as P-892's [REDACTED],[343] do not disturb the coherence and reliability of their evidence.

P-894

87. The Defence challenge P-894's evidence based on inconsistencies between, on the one hand, his victim application and, on the other, his statement and testimony[344] should be rejected. There is no indication that the victim application form was read back to P-894 before he signed it. Given the manner in which the forms were filled[345] and, quite simply, the limited space available on the forms for any description of events,[346] it is not surprising that specific details of P-894's account were incorrectly captured in the form. When first interviewed by the Prosecution, P-894 provided details on the deaths of NGWENE and LUSALA; indicating

[338] PCB,para.421.
[339] **P-912**:T-148,35:18-46:6;T-149,11:7-21.
[340] **P-912**:T-148,49:20-73:22;T-149,9:18-10:8.
[341] **P-912**:T-148,33:19-34:1;94:6-95:21;97:21-98:4; T-149,18:11-19:11;**P-892**:T-85,5:5-18;35:18-20; T-86,12:1-13:1;**DRC-OTP-2092-0053**.
[342] DCB,para.445-446.
[343] DCB,para.447.
[344] DCB,paras.436,438,440.
[345] PCB,paras.75-79.
[346] P-894's victim application (DRC-OTP-2090-0099) generally captures in just eight lines his account of two murders, which he describes in their full detail in 145 lines in his statement (**P-894**:DRC-OTP-2076-0194,0202:39-0204:47,0208:62-0209:67).

which individual was killed by **NTAGANDA** and which was not.[347] P-894 also corrected the information contained in his victim application form[348] and credibly explained his basis for knowing about these two events.[349] P-894 remained entirely consistent with this account of the murders throughout his testimony. In fact, the Defence does not refer to a single inconsistency between P-894's statement and his testimony.

88. [REDACTED][350] [REDACTED][351] [REDACTED]. [REDACTED] witnesses testified about the location of LUSALA's remains, exactly where they were exhumed by the Prosecution.[352] [REDACTED],[353] [REDACTED],[354] and [REDACTED] and subsequently [REDACTED].[355] Other elements, such as the artefacts collected from the grave,[356] evidence of animal scavenging on the pelvis,[357] and the gender and age of the individual,[358] show that the remains are LUSALA's.

89. P-886's evidence regarding the timing of LUSALA's murder corroborates P-894's account.[359] *First*, the evidence referred to by the Defence does not support the assertion that, whereas P-894 testified that LUSALA was killed five days after the takeover of SAYO, he was, in fact, "*killed many days later*".[360] *Second*, P-886 testified that he returned to Sayo three days after the UPC's attack[361] [REDACTED].[362] P-886 was told that LUSALA had been killed the day before; he observed that his

[347] **P-894**:DRC-OTP-2076-0194,0202:39-0204:47.
[348] **P-894**:DRC-OTP-2076-0194,0209:68;T-104,40:4-14.
[349] **P-894**:DRC-OTP-2076-0194,0202:39-0204:47,0208:62-0209:67.
[350] **P-945**:DRC-OTP-2084-0002,p.0009;DRC-OTP-2070-0062.
[351] DCB,para.438.
[352] [REDACTED].
[353] [REDACTED].
[354] [REDACTED].
[355] [REDACTED].
[356] PCB,paras.373-374. *See also* **P-894**:DRC-OTP-2076-0194,0204:47, referring to LUSALA's clothes and house keys.
[357] **P-420**:DRC-OTP-2074-0208,0213: "*There is damage to the pelvis that is consistent with canid or felid scaving*"; [REDACTED].
[358] **P-420**:DRC-OTP-2074-0208,0213: "*The remains designated SAI2-F1-B1 are of male who was between 50 and 80 years old at death*"; **P-894**:DRC-OTP-2076-0194-R02,p.0202,para.40;T-103,105:12-106:1; **P-886**:T-37,48:24-49:18.
[359] *Contra*,DCB,para.438.
[360] [REDACTED].
[361] **P-886**:T-37,5:20-24.
[362] [REDACTED].

body was already decomposing and being eaten by scavengers.[363] Accordingly, P-886's and P-894's accounts are consistent that **NTAGANDA** killed LUSALA five days after the UPC took over Sayo.

V2

90. V2 lived in [REDACTED], Mongbwalu.[364] She said that an airport *''had not yet been constructed''* and she did *"not know whether it was a football pitch or an airport''*.[365] Indeed, the 'airport' as seen in the Mongbwalu video has no airport buildings and is simply a grass field where planes would land.[366] Defence wrongly assert that V2 was unable to locate Sayo[367] or Kodulu quarry.[368] She knew where Sayo,[369] and Kodulu quarry[370] were located.

91. V2, an [REDACTED], was brutally raped and her children and husband murdered by Hema perpetrators,[371] she is still mentally affected by her experiences[372] and did not wish to comment on the ethnic conflict between two other groups.[373]

92. V2 explained that she no longer possessed identifying documents for her deceased children, as they fled the war.[374] V2 confirmed her children's ages;[375] [REDACTED] was also from Mongbwalu, but did not live close to V2.[376] As V2 emotionally explained, she did not inform her new husband of her rape because

[363] **P-886**:T-37,47:6-7,49:21-22.
[364] *Contra*,DCB,paras.425-427.
[365] **V2**:T-202,71:11-21.
[366] **DRC-OTP-2058-0251**,00:06:48-00:11:00.
[367] DCB,para.426.
[368] DCB,para.426.
[369] DCB,para.426. *Cf*,**V2**:T-202,71:22-72:6.
[370] **V2**:T-202,75:24-76:23.
[371] PCB,paras.335,390(fn.1129),400(fn.1156),402(fn.1160),418.
[372] **V2**:T-202,3:12-8:5;40:18-41:4;46:2-19;55:10-56:4.
[373] *Contra*,DCB,paras.426-427;**V2**:T-202,73:6-14;74:18-75:22;60:1-4.
[374] **V2**:T-202,81:10-13;89:16-24.
[375] DCB,para.428,fn.1272.
[376] DCB,para.428;**V2**:T-202,36:10-16;83:5-9.

''it's a source of shame''.[377] V2 was consistent in her account[378] about the time before medical treatment for her rape.[379] Her hope for ICC assistance,[380] including medical help, does not suggest she lied.

Witness evidence about UN or NGO reports is not 'anonymous hearsay' evidence

93. The Defence confuses the nature of the evidence before the Chamber by characterising it as "anonymous hearsay" evidence.[381] Where the authors of UN or NGO reports have appeared as witnesses, as P-46, P-317, and P-315 have, the evidence before the Chamber is primarily their testimony about their observations and the methodology they used in documenting them, which are corroborated by their notes, reports and databases – *not* the other way around. The Chamber should assess the weight to be given to these witnesses' evidence in the same way it assesses the evidence of other individuals who observed the commission of crimes themselves or learnt about it from others: that is, in light of the totality of evidence, and without requiring that each fact attested to by a witness (or in each item of evidence) be proved separately beyond reasonable doubt.[382] P-46's evidence that the UPC recruited and used unnamed child soldiers is no different from the evidence of other witnesses who learnt that the UPC used children because their neighbours or children in their family went away to UPC camps or returned home with scars from UPC battles.

94. To the extent that P-46, P-317, and P-315's documents must be treated as primary evidence, the Prosecution recalls that hearsay evidence, even if stemming from

[377] **V2**:T-202,40:18-41:4. P-938 testified that it is common for rape victims to feel shame, and to not disclose their rapes due to fears of stigma and being ostracised by family: **P-938**:T-113,49:5-50:12;54:3-8.
[378] **V2**:T-202,27:3-23;65:2-8.
[379] DCB,para.428.
[380] DCB,para.429. **V2**:T-202,41:13-19.
[381] DCB,paras.27,450.
[382] *Lubanga* AJ,para.22; *Bemba et al.* AJ,para.868.

anonymous sources, can be relied upon as a matter of law,[383] in particular where it corroborates direct evidence.[384]

95. The *Lubanga*, *Katanga*, and *Bemba* trial judgements and the Appeals Chamber in the present case have all made findings based on UN or NGO reports. Such reports have been relied on to establish contextual elements of war crimes and crimes against humanity, such as the existence and nature of the armed conflict or of the widespread or systematic attack against the civilian population; they have also been relied on to establish the material elements of crimes.[385] Such reports have been relied on by other international tribunals.[386]

96. The factors to assess UN and NGO reports include: (i) whether the information was obtained and recorded contemporaneously[387] – reports prepared by first responders are valuable evidence from victims and witnesses shortly after crimes were allegedly committed; (ii) the consistency of the information itself, the reliability of the source, and the possibility for the Defence to challenge the source;[388] (iii) the rigorousness of methodology;[389] (iv) whether the information was collected and shared with cooperating partners, providing an opportunity for

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[383] *Lubanga* DCC,para.101; ICC-01/04-01/06-1399-Corr,paras.26-32; ICC-01/04-01/06-2589,para.33; ICC-01/04-01/07-T-170-Red,4:12–5:3; ICC-01/04-01/07-2362,para.12; ICC-01/04-01/07-2635,para.27(e). *See also* *Gacumbitsi* AJ,para.115.

[384] *Lubanga* DCC,para.106; *Katanga* DCC,paras.138-140; *Katanga* TJ,paras.90,327; *Bemba* TJ,paras.269-271; *Gacumbitsi* AJ,para.115.

[385] *Lubanga* TJ,paras.67,72,73,75-80,82,84,544-548,553-554,558-559,561,823, relying on **DRC-OTP-0074-0422** (*Lubanga* EVD-OTP-00623) for findings on background facts, the existence and nature of the armed conflict (including, in fn.1687, the airdropping of weapons at Mandro); and the use of children under the age of 15 in fighting in Kobu in February or March 2003 [REDACTED]; *Katanga* TJ, relying on **DRC-OTP-0152-0286** (*Katanga* EVD-OTP-00205), a UN report also admitted in evidence in the present case, for findings of murder in corroboration of testimony from P-317 and others at paras.819,854, and for findings on the existence of the armed conflict at paras.1199,1213-1214; ICC-01/05-01/08-3343,para.563, relying on NGO reports for findings of murder, rape, and pillaging, in corroboration of testimony, media articles, and *procès verbaux d'audition de victimes* submitted to the Bangui Court of Appeals, and paras.270-271, where the Trial Chamber properly directed itself to take a "*cautious[]*" approach with such evidence, but made clear that they could be used to "*corroborate other pieces of evidence*"; *Katanga* TJ,para.326; ICC-01/04-02/06-271-Conf,paras.39-42. C*ontra*,*Bemba* AJ Separate Opinion,para.64.

[386] *Taylor* TJ,para.529,fns.1247,1251,para.530,fn.1252,para.531,fn.155,para.534,fns.1260-1261,para.539,fns.1273-1274,paras.540-541,fns.1275-1278,para.544,fns.1293-1294,para.544,fn.1295,paras.556,558-559; *Krajišnik* TJ,para.473,fn.1081,paras.488,490,fns.1109,1117,paras.708-710; *Brdanin* TJ,paras.159,436,748,749,914.

[387] ICC-01/04-01/07-2635,para.27(c); ICC-01/04-02/06-271-Conf,para.41.

[388] *Katanga* DCC,para.141.

[389] ICC-01/04-02/06-271-Conf,para.39.

cross-checking and spotting of mistakes;[390] (v) whether the document was created for the specific purpose of criminal proceedings or for other reasons[391] such as in the course of a credible business;[392] (vi) whether the hearsay is first-hand or more removed;[393] (vii) whether there was any suggestion that there was motive to fabricate or distort the records, or bias;[394] (viii) whether the author's identity *as well as* the sources of information were anonymous, preventing the Chamber from determining whether the contents of the report have been imparted by an eyewitness or some other reliable source;[395] and (ix) whether the anonymity of the sources was due to protective measures similar to those that could be approved by the Court.[396] These factors give weight to the UN and NGO reports relied on here.

97. It is untrue that the Chamber has no reliable way of knowing how the information contained in P-46, P-315, and P-317's documents was elicited or provided.[397] These witnesses were extensively scrutinised by both Parties on their methodology and on the type of sources they relied upon. For P-46's "Individual Case Story",[398] P-46 testified that all of the entries reflect either her own interviews with children or interviews by one or two other colleagues working closely with her.[399] Accordingly, the Chamber has sufficient information about *who* made the observations featuring in reports, or *from whom* it was obtained.[400] Where P-315 could not reveal the name of the sources on **NTAGANDA**'s command over the Mongbwalu attack, she gave other information: the source's

[390] ICC-01/04-01/06-1399-Corr,para.37.
[391] ICC-01/04-01/07-2635,para.27(d).
[392] ICC-01/04-01/06-1399-Corr,para.37.
[393] ICC-01/04-01/06-1399-Corr,para.28.
[394] ICC-01/04-01/06-1399-Corr,para.37; ICC-01/04-01/07-2635,para.27(a).
[395] ICC-01/04-01/07-2635,paras.29-30.
[396] ICC-01/04-02/06-271-Conf,para.42.
[397] *Contra*,DCB,para.28.
[398] **P-46**:DRC-OTP-0208-0284.
[399] **P-46**:T-100,86:3-13,87:4-18.
[400] ICC-02/11-01/11-432,paras.29-30.

affiliation to an armed group, parts of the operation that he had been involved in, and whether his information was first-hand.[401]

98. UN and NGO witnesses had legitimate reasons to withhold sources. They were bound by confidentiality obligations that this Court is bound to respect due to the legal framework applicable to the testimony of UN witnesses.[402] All three witnesses promised confidentiality to their sources, and the Defence did not seek to compel P-315 to provide them. Such obligations of confidentiality do not damage the integrity of the proceedings, nor were organisations "*working closely with the Prosecution*".[403] The organisations have independent mandates. They refused disclosure of incriminating information but agreed to disclose potentially exculpatory information or information material to the Defence.[404]

99. P-315's belief that **NTAGANDA** should be called to account for his alleged crimes does not constitute bias.[405] Minor errors[406] are an unavoidable consequence of the circumstances in which the witnesses got information about the crimes and documented it – from a variety of sources, in the midst of conflict. The Chamber will be able to assess the witnesses' reliability by drawing from their evidence as a whole, including their experience, methodology, demeanour and the details of their account. To require these documents to be flawless would be to hold them to a higher standard than witnesses whose evidence is not backed up by contemporaneous records.

100. The Defence's assertion that self-reports of age and observations of specific crimes are "*all specific and incriminating facts for which anonymous hearsay evidence as*

[401] **P-0315**:T-108,42:13-18,43:17-25,44:24-45-2,48:5-7,14-17.
[402] ICC-01/04-02/06-713-Conf,para.9; ICC-01/04-02/06-888-Conf,para.15; **P-0315**:T-108,36:17-20;46:10-12, **P-315**: DRC-OTP-2058-0990,para.127,p.1012,final bullet point.
[403] *Contra*,DCB,para.29.
[404] *See below*,para.181. **P-10**:DRC-OTP-0206-0120, an uredacted copy of ICS pp.0189-0190; **D-211**:DRC-OTP-0223-0117, an unredacted copy of ICS pp.0190-0191. *See also*,in the unredacted, disclosed copy of ICS,**DRC-OTP-0001-0143-R01**, entries related to "[REDACTED]" and others.
[405] DCB,paras.450,454. DRC-OTP-2058-0990,paras.95-96.
[406] *Contra*,DCB,para.451.

presented in this case is inappropriate" is unexplained and unsupported.[407] The Chamber is not limited to scientific proof of age because it can reach conclusions based on its common sense and knowledge of the ways of the world, and can assess the witnesses' ability to do the same.

The Lack of Credibility of Defence Evidence

101. The Trial Chamber in *Popovic* confirmed that the Prosecution is not obliged to cross-examine an accused on every aspect of its case, nor must the Chamber accept as credible those parts of an accused's testimony which were not specifically challenged by the Prosecution in cross-examination.[408]

102. **NTAGANDA**'s testimony should not be given "substantial weight" solely because he took the stand.[409] Chambers routinely find that accused persons who testify are untruthful in whole or in part.[410] The Defence sweepingly dismisses all incriminating evidence against **NTAGANDA**, preferring to ignore it in favour of **NTAGANDA**'s testimony.

103. **NTAGANDA** adapted his account using the Logbook and rearranged the loose Logbook pages to fit the sequence of events he wished to portray.[411] The Defence presented no evidence that the loose Logbook pages constitute one *ensemble*;[412] **NTAGANDA** failed to address the question with [REDACTED]. Nor is there evidence that the Logbooks were found at **NTAGANDA**'s residence.[413]

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[407] DCB,para.30.
[408] DCB,para.25, citing *Popović* TJ,para.21 *See also*,PCB,para.31.
[409] DCB,para.1152.
[410] *Katanga* TJ,para.105; *Prlić* TJ,para.399; ICC-01/04-02/12-3-t,para.461; *Taylor* TJ,paras.2227-2228. A Chamber "is required to determine the overall credibility of an accused testifying in his own trial and then assess the probative value of the accused's evidence in the context of the totality of the evidence": *Popović* TJ,para.21.
[411] *See*,PCB,paras.64,467. *See:* DCB,para.468 and footnote 1393 where the Prosecution explicitly does not concede that the order **Ntaganda** presented during his testimony is the order in which the messages appear. *See also*,PCB,paras.283-296
[412] DCB,para.467.
[413] DCB,para.466. *See*,**P-245**:T-142,24:24-27:8.

104. The Chamber admitted the Logbooks in their entirety and can rely on any message it deems relevant.[414] **NTAGANDA** stated that he never imagined that the Logbooks would one day be used in a court of law; *''[i]f I had known, I would have fled with the logbook when the UPDF drove us out.''*[415]

105. The Defence submits that messages addressed to persons (''TO'' and ''INFO'') demonstrate that the sender and receiver are not together in the same area.[416] Conversely, [REDACTED] testified that when a message was sent ''TO'' a party it was simply so it would be executed by them, in contrast, when it was sent as ''INFO'' to a party, it was for the purpose of informing them.[417] [REDACTED] did not mention the *whereabouts* of the addressees and it cannot be inferred that the parties are not physically near the sender.[418] A rudimentary look through various logbook messages shows this theory is wrong: messages sent ''INFO'' to ''ALL stations FPLC'', means that all radio operators receive the message even when the sender is together with some of those very units.[419]

106. There is no reliable evidence that the absence of Logbook messages meant that **NTAGANDA**'s *phonie* was switched off or not plugged in.[420]

107. [REDACTED][421] [REDACTED].[422]

Credible evidence of the First Attack

(i) The Defence's case primarily relies on a single source: NTAGANDA himself

108. Strikingly, almost two thirds of the Defence's "*overview of the second FPLC attempt to liberate Mongbwalu*",[423] relies on **NTAGANDA** as a single,

[414] *Contra*,*D*CB,para.470.
[415] **D-300**:T-222,73:21-24.
[416] DCB,para.473.
[417] [REDACTED].
[418] *Contra*,*D*CB,para.473.
[419] [REDACTED].
[420] DCB,para.474. *See* PCB,Section VII.A.2.b.
[421] [REDACTED].
[422] [REDACTED].

uncorroborated source.[424] The Defence seeks to corroborate **NTAGANDA** by heavily relying on his own flawed interpretation of the Logbooks and the Mongbwalu video.[425] As a result, over 90 percent of this chapter is based on **NTAGANDA**'s own words or interpretation of documentary evidence, while the remainder relies on Prosecution witnesses whom the Defence repeatedly described as "biased" and "unreliable".[426] Only seven footnotes in this section refer to a Defence witness other than **NTAGANDA**.[427]

109. Here again, **NTAGANDA**'s challenge to Prosecution witnesses[428] and the commission of crimes by the UPC during the First Attack rests mainly on **NTAGANDA**'s testimony. For instance, the Defence asks the Chamber to disregard the evidence of four UPC soldiers who participated in the attack and witnessed UPC crimes on the sole basis that "*Mr NTAGANDA explained how the heavy weapons were lawfully used resulting in the enemy fleeing Sayo*".[429]

110. Moreover, the Defence impermissibly relies on statements by Counsel as evidence. To challenge P-17's evidence, the Defence refers to a claim by "[REDACTED]" that purportedly contradicts P-17,[430] citing as a source not [REDACTED] himself, as he did not testify, but to counsel during questioning, to "*the information that we have, among others, from [REDACTED]*".[431]

111. The Defence misrepresents the evidence provided by Prosecution witnesses. The Defence tries to discredit P-55 by describing his basis of knowledge as "*information he obtained during meetings he did not attend, by putting his ear on the*

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[423] DCB,paras.489-559 (and fns.1418-1641).
[424] This chapter comprises 70 paragraphs, which are supported by 223 footnotes. 152 of these footnotes (or 68%) exclusively refer to **NTAGANDA**.
[425] A further 51 footnotes (or 23%) refer to the Logbooks or the Mongbwalu video.
[426] The Defence refers to Prosecution witnesses in 17 footnotes (or 7%).
[427] Namely, Witness D-17.
[428] *See above*,paras.45-53.
[429] DCB,para.658 and fn.1893, referring, exclusively, to **D-0300**:T-217,49:20-51:9.
[430] DCB,para.306 and fn.787.
[431] [REDACTED] did not testify and the Defence never disclosed any statement for him. *See also e.g.* DCB,para.448, fn.1338.

wall".[432] However, in the very same portion of testimony referred to by the Defence, P-55 made it clear that although he did not attend one particular meeting, "*sometimes [he] was sitting with [REDACTED], and they would normally converse [REDACTED] in which [they] were living and sometimes [he] listened to their conversations which were focused on the preparation for that attack and also to prepare the troops [REDACTED]*".[433]

112. The Defence refers to facts not in evidence. The Defence asserted, without referring to any evidence, that, during his video-recorded meeting with the *Servantes de Dieu* Nuns in Mongbwalu, "*KISEMBO knew* **BWANALONGA** *was at the Appartements, [but] opted not to provide this information, which is linked to operations*".[434] This assertion has no basis in the evidence. In relation to this same meeting, the Defence also asserted that KISEMBO and **NTAGANDA** visited "*two religious congregations*" and that while KISEMBO is in the meeting "*NTAGANDA is taking measures to ensure the security of the perimeter on the outside*", neither of which are substantiated.[435]

113. On another occasion, the Defence asserts, again without providing an evidentiary basis, that during the Mongbwalu operation "[REDACTED] *phonie was not plugged-in*",[436] an assertion which is unsupported by any evidence. Moreover, the reference to five separate logbook messages[437] to support the assertion that "*NTAGANDA was not in VHF radio contact with either SALUMU or SEYI's brigades*"[438] is misleading. None of these messages support this assertion.

[432] DCB,para.494.
[433] **P-55**:T-70,48:14-49:10.
[434] DCB,para.641.
[435] KISEMBO only visited one religious congregation, namely the *Servantes de Dieu Nuns*, while **NTAGANDA**, who remained outside, "*was just waiting for his flight to leave*" (**D-300**:T-217,92:14-15) and "*was [...] speaking on the phone for a long time with the owners of the plane that we took at that time*" (**D-300**:T-217,92:20-21).
[436] DCB,para.474.
[437] DCB, fn.1401.
[438] DCB,para.474.

114. A further example is the Defence's uncited assertion that one of the objectives for exchanging troops between Bunia and Aru was "*mixing troops from different geographic origins*".[439] The following paragraph[440] contains at least two assertions on the same troop exchange, but is unsupported by evidence.

115. The Defence takes evidence out of context. The Defence cites only a part of P-55's testimony,[441] while excluding his evidence, a few lines further, where he makes it clear that, in the UPC, the expression "*Kupiga na kuchaji*" referred to pillaging the possessions of the local inhabitants.[442]

116. The Defence incorrectly quotes P-190 as having said that "[*t]here was no plan to deal with the civilians, only to attack the armed forces on site*".[443] P-190 was asked "*whether there were any contingency plans on how to deal with civilians on the battlefield, civilians caught up in the attack"* and his answer was *"no*".[444]

117. The Defence refers to evidence that directly contradicts its factual assertion. For instance, in support of the Defence's assertion that "*[e]ven civilians from the Lendu ethnic group could and did return*",[445] the Defence refers to the evidence of P-907 that "*[w]hat I said is that all the ethnic groups began to come back one by one except the Lendu. No Lendu returned to the village*".[446]

118. Another example is the Defence's reference to P-16 to say that "*[g]old mining activities in Mongbwalu at the time were limited to amateurish small scale individual*

[439] DCB,para.170.
[440] DCB,para.171.
[441] DCB,para.761 and fn.2175, referring to **P-55**:T-72,10:7-13.
[442] **P-55**:T-72,11:1-14.
[443] DCB,para.587 and fn.1690, referring to **P-0190**:T-97,7:10: "*Q. And is that a no you're not aware, or no there were no contingency plans for dealing with civilians on the battlefield? A. There was no plan to deal with civilians during the attack. The only thing I'm aware of is that there was a strategy to take over, to take back the town, and to do so they had to attack the forces on site. There was an armed group that was on site*".
[444] **P-190**:T-97,7:8-12: "*Q. Sir, are you aware whether there were any contingency plans on how to deal with civilians on the battlefield, civilians caught up in the attack? A. No. Q. And is that a no you're not aware, or no there were no contingency plans for dealing with civilians on the battlefield? A. There was no plan to deal with civilians during the attack. The only thing I'm aware of is that there was a strategy to take over, to take back the town, and to do so they had to attack the forces on site. There was an armed group that was on site*".
[445] DCB,para.786.
[446] DCB, fn.2240, referring to **P-0907**:T-90,51:11-12.

gold prospectors".[447] P-16 stated that "Mongbwalu *a changé de main très souvent à cause de la possibilité d'extraire les revenus*",[448] which, in fact, contradicts the Defence's claim that "*[g]old mining in Mongbwalu was not an objective*".[449]

119. The Defence misstates the DNA results for the [REDACTED] family, stating that exhumations revealed only a single match.[450] In fact, the state of decomposition of the five skeletal remains was so advanced that the DNA samples taken from three of the bodies could not be used in any testing.[451]

120. Of the two bodies whose DNA sample was suitable for testing, SAI1-F1-B3 (the body of [REDACTED]) showed a familial match with the [REDACTED] family, while SAI1-F1-B5, the body determined to be aged 2-4[452] years generated a gender result of male.[453] DNA samples were tested only for a biological relationship between parent-child or siblings, not for a [REDACTED] relationship (as existed between [REDACTED] and SAI1-F1-B5). The age and gender of the five bodies exhumed at SAI1-F1 fully corroborate the testimony of both [REDACTED] and [REDACTED].[454]

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[447] DCB,para.245.
[448] DCB, fn.516 referring to **P-16**:DRC-OTP-0126-0422-R03,para.120.
[449] DCB, Part IV, Chapter II, Section IV.
[450] DCB,para.665.
[451] **P-945**,DRC-OTP-2084-0002,p.0010. *See also*,**P-945**:T-124,69:21-70:1.
[452] **P-420**,DRC-OTP-2074-0202,p.0204,0205 determined the age of SAI1-F1-B5 to be 2-4 years old, corroborating [REDACTED]'s testimony that [REDACTED]was two and a half years old. See, [REDACTED].
[453] **P-945**,DRC-OTP-2084-0002,p.0010.
[454] **SAI1-F1-B1 generated no DNA results** (**P-945**,DRC-OTP-2084-0002,p.0009.) **P-420**:DRC-OTP-2074-0174: SAI1-F1-B1 determined to be aged 7-11. [REDACTED] estimated this female body to be aged 14 [REDACTED]. **SAI1-F1-B2 generated no DNA results** (**P-945**,DRC-OTP-2084-0002,p.0009.) **P-420:**DRC-OTP-2074-0180: determined to be aged 18-29 male. [REDACTED] estimates [REDACTED] was aged 19-20 [REDACTED]. **SAI1-F1-B3 body of [REDACTED] DNA match**. [REDACTED]. **SAI1-F1-B4 generated no DNA results**: (**P-420**:DRC-OTP-2074-0195 determined to be aged 13-17, clothes indicate a female and **P-937**, DRC-OTP-2075-0510. See also exhumed clothing: DRC-OTP-2069-2380, DRC-OTP-2069-2382, [REDACTED] testified that [REDACTED] was aged 12-14, and he last saw her wearing a skirt and top [REDACTED]. **SAI1-F1-B5 generated no DNA results though this could be due to the familial relationship between the DNA provider**, **P-945**,DRC-OTP-2084-0002,p.0009. [REDACTED]. **P-420**,DRC-OTP-2074-0202,p.0204,0205 determined the age of SAI1-F1-B5 to be 2-4 years old, corroborating [REDACTED]'s testimony that [REDACTED] was two and a half years old [REDACTED].

(ii) Witness P-290 does not corroborate NTAGANDA's account

121. The Defence argues that the [REDACTED].[455] This is flawed.

122. *First*, P-290's whereabouts are not relevant to the chronology of the First Attack or to **NTAGANDA'**s role in it.[456] **NTAGANDA**'s account of the timing of his travels to and from Mongbwalu rests solely on his own testimony.[457] [REDACTED],[458] [REDACTED],[459] [REDACTED].[460] [REDACTED].[461]

123. *Third*, the Prosecution was unaware when P-290 testified that **NTAGANDA** would argue that [REDACTED]. The onus was on **NTAGANDA** to raise this issue during cross-examination if he wanted to establish it, or challenge P-290's contrary account, but he failed to do so. Accordingly, the Chamber cannot ascribe any weight to this aspect of **NTAGANDA**'s testimony. Lastly, the Defence fails to explain why, given its claim that "*the most important issue related to P-290 [...] is not related to the evidence he provided*",[462] it opposed recalling the witness to testify.[463]

The Defence's description of a military parade in Mandro is unsupported

124. The military parade at Mandro in video DRC-OTP-0082-0016 did not take place "*towards the end of October 2002*"[464] and just "*before [the troops'] departure to Mongbwalu*".[465] While the exact date of this video is not in evidence, there is no evidence – not even in **NTAGANDA**'s testimony cited by the Defence[466] – that the troops present at this parade in Mandro "*later participated in the FPLC operation in*

[455] DCB,paras.484-488.
[456] *Contra*,DCB,para.484.
[457] *See* in particular, DCB,paras.513-514,516-522,529-530,538-539,546,553,558-559.
[458] *See* PCB,paras.64 and 291.
[459] DCB,para.484.
[460] [REDACTED].
[461] *See*, [REDACTED].
[462] DCB,para.484.
[463] ICC-01/04-02/06-2143-Conf.
[464] DCB,para.172.
[465] DCB,para.779. *See also* paras.174,591,690.
[466] DCB,para.174 and fn.403, referring to **D-0300**:T-216,6:13-16;12:7-12.

Mongbwalu", as claimed by the Defence.[467] As argued,[468] KAHWA's statements in Mandro did not reflect the reality of the instructions given to UPC soldiers, but constituted propaganda meant for the public and the international community, hence the journalists. This is confirmed by no less than five Prosecution witnesses who participated in the First Attack and were instructed to commit crimes.[469]

Credible evidence of the Second Attack

(i) Prosecution witnesses who met P-154 are credible and reliable

125. These witnesses are corroborated by the evidence from insider, overview and expert witnesses, as well as by documentary evidence.[470] It has not been shown that any witnesses made false statements, or that they were manipulated or otherwise incited to lie by a Prosecution intermediary.[471] No witnesses testified that P-154 manipulated, coached, or encouraged witnesses to lie. The Defence questioned nine Prosecution witnesses about the role of intermediary P-154, their knowledge of one another's existence or status, their alleged contacts, and purported incentives to testify. The fact that the witnesses did not confirm the Defence's collusion theory is not indicative of dishonesty. It only shows that this theory is false.

126. P-18 stated: "*No* one *reminded me. I talked about what I'd seen and what I had gone through personally. And nobody told me what I had to say. I'm testifying to what happened and what happened to me personally*".[472]

127. Witnesses were forthright when the Defence questioned them about their knowledge of other witnesses and how they met,[473] some because they live in the

[467] DCB,para.174.
[468] PCB,paras.913-916.
[469] *See e.g.* PCB,paras.303-308,338.
[470] *I.e.*: P-805, P-863, P-868, P-857, P-55, P-901, P-963, P-17, P-934, P-935, P-420, P-945, P-937, P-938, P-939, P-810.
[471] DCB,para.852.
[472] **P-18**:T-111,45:14-18; *see also*: **P-19**:T-116,54:9-15,58:19-29;T-117:13:4-7.
[473] **P-301**:T-150,21:13-22:22; **P-300**,T-167,52:7-55:11.

same area,[474] or because they crossed paths during the Second Attack.[475] The Defence put P-113's name to P-19, who responded she did not know that person,[476] but the transcript shows that the name given by Defence Counsel in English was translated into a completely different -and male - name in French,[477] the language used to thereafter translate the question into Swahili. Similarly, witnesses of attacks may have lived in the same area for many years and may be known to each other, but alone this does not cast doubt on their credibility. By way of analogous example, witnesses from the same family are not considered unreliable on the sole basis that they are related or live together. The witnesses did not discuss their testimony with others.[478]

128. It is logical that witnesses who have been victims of the same attack will describe common patterns or events and even each other's presence. Each of the witnesses' accounts is detailed and given from their own unique perspective during extremely traumatic events. Details such as the routes they took when fleeing, their victimisation and what they witnessed are unique to them, and refute the Defence's allegations of collusion or contamination.

129. The Defence takes innocuous information and tries to spin it into something sinister[479] but none of the points, taken separately or together, constitutes evidence that P-154 motivated witnesses to lie to the Court.

130. P-154 was tasked by the Prosecution as an intermediary intermittently between [REDACTED], mainly in the investigation into crimes allegedly committed during attacks on Lipri, Bambu, Kobu in 2003. Given the difficult security situation that precluded travel to the area, the Prosecution asked P-154 to

[474] **P-113**:T-119,37:17-38:21;**P-100**:T-132,49:17-50:5,52:9-24.
[475] **P-105**:T-134,40:23-41:10,49:12-19.
[476] **P-19:**T-117,7:18-21.
[477] **P-19**:T-117-FRA,8:5-6 [REDACTED].
[478] *i.e.*:**P-18**:T-112,15:18-16:5; **P-100**:T-132,523-6; **P-113**:T-119,38:16-18,56:25-57:6; **P-105**:T-134,47:24-48:16.
[479] DCB,paras.857-872.

identify victims of the alleged attack. After the investigators conducted interviews (without the intermediary), the Prosecution asked P-154 to monitor the witnesses' security. At the time, protection mechanisms were not in place and witnesses could not be reached by telephone. P-154 reported on his tasks, and occasionally attached a document he drafted entitled "*Listes de présence*".[480]

131. The evidence shows that witnesses had very limited contact with P-154 many years ago. The witnesses who did remember P-154 were candid about their contact with him and described his role such as they knew it, in accordance with their capacity, understanding, and memory.[481] Both P-105 and P-301 testified that they did not know P-154 and explained in detail how they were identified as victims, as far as they recall.[482]

132. P-154, [REDACTED],[483] [REDACTED],[484] [REDACTED].[485] He had no reason to fabricate Lendu victim accounts. P-154 [REDACTED] (P-300 and P-792) to identify victims because he was not from the area.[486]

133. P-100 had a good recollection of his interactions with P-154 and P-792: "*I spoke with [REDACTED]. He told me that there was a delegation from the ICC which had asked him to write down the names of victims, those who had lost members of their families and who could be witnesses. And that is how [REDACTED], who knew about the victims who had spent -- who had lost members of their families called up people to come to Bunia.*"[487] P-100 had a discussion with P-154 in the presence of P-792; P-792 said nothing.[488] When P-154 spoke to individual victims, P-100 confirmed that "*he*

[480] ICC-01/04-02/06-1519-Conf.
[481] **P-19**:T-116,56:15-57:8; **P-113**:T-119,23:9-24:3,32:15-33:16; **P-18**:T-112,13:1-2,16:12-17:2; **P-100**:T-132,11:9-16,47:25-48:4; **P-300**:T-167,41:21-42:16; **P-127**:T-141,11:14-12:9; **P-792**:T-151,16:19-17:11,18:2-20,20:3-16.
[482] **P-105**:T-134,37:23-38:23,43:11-23; **P-301**:T-150,16:24:17:7,19:23-20:5.
[483] **P-300**,T-167,52:7-11.
[484] **P-300**:T-167,44:7.
[485] **P-100**:T-132,51:8-9.
[486] **P-105**:T-134,37:23-38:23,43:11-23; **P-100**:T-132,11:10-11,47:20,49:7-10.
[487] **P-100**:T-132,47:25-48:4; see also:11:9-16: [REDACTED].
[488] **P-100**:T-132,47:25.

would call one person while the others remained outside"[489] and that the persons waiting for their turn did not discuss the 2003 events.[490] The discussion P-154 had with individuals for the purpose of ascertaining whether they were victims of the attack does not show collusion.

134. P-792 confirmed that he helped identify victims for P-154,[491] whom he first met through P-300.[492] P-792 neither discussed the details of the witnesses' account with them,[493] nor held collective meetings[494] or told the victims what to say.[495] The Defence did not suggest to P-792 that he was [REDACTED]; a document with one name does not prove it relates to P-792.[496]

135. P-300 assisted P-154 by facilitating contacts with the community.[497] P-300, [REDACTED], stiffened at the suggestion that he could have introduced himself as an "assistant".[498] He did not recall having been reimbursed for witness expenses.[499] The Defence did not put to P-300 that the particular witness expense was incurred by P-105, despite the fact that P-105 had testified earlier about it. This may have impeded P-300's memory of the event. [500]

136. P-300 volunteered information about [REDACTED]; at that point, investigators "*decided to stop <u>any</u>* involvement [REDACTED] *had with the witnesses out of abundance of caution*".[501] This was very early in the investigation, in April 2005, before most witnesses were interviewed and the first time investigators met

[489] **P-100**:T-132,52:2.
[490] **P-100**,T-132,51:21-52:8.
[491] **P-792**:T-151,16:19-17:11,18:2-20,20:3-16.
[492] **P-792**:T-151,20:17-21:8,22:11-15.
[493] **P-792**:T-151,20:3-8 [REDACTED].
[494] **P-792**:T-151,20:14-16.
[495] **P792**:T-151,21:16-22-2.
[496] DCB,para.857,fn.2402.
[497] **P-300**:T-167,41:21-44:24.
[498] This allegation comes from an internal investigation report, which is not a verbatim of the conversation with P-300, and was not read back to him: **DRC-OTP-2090-0406**; **P-300**:T-167,44:20-45:5,50:9-11.
[499] **DRC-OTP-2090-0406**; **P-300**:T-167,45:20-47:22.
[500] **P-105**:T-134,37:15-41:15
[501] **DRC-OTP-2090-0406**, (emphasis added); **P-300**:T-167,64:13-25; *contra*,DCB,para.861.

with P-154.[502] No evidence suggests that P-300 colluded with witnesses. P-300 candidly explained what he knew about combatants[503] and that he was not a military man.[504] The Defence did not put to him that he was a combatant, let alone that [REDACTED];[505] and none of the sources cited by the Defence support this allegation.[506]

137. P-127[507] was [REDACTED].[508] There is nothing suspicious about victims [REDACTED] wanting crimes affecting their areas to be investigated. P-127 testified transparently about [REDACTED].[509] He firmly rejected any suggestion that he was in the Lendu military.[510] P-127 knows P-154 as [REDACTED] who was interested in the events that occurred in Lipri.[511] The Defence makes no specific allegation of influence that P-127 had on any witnesses; and no evidence suggests it.

138. There is no evidence that P-790 was involved in identifying witnesses.[512] P-790's name and phone number appear on one of the *Listes de présence* as a generic [REDACTED].[513] By then, in July 2006, the witnesses had all provided statements; P-154 was tasked to monitor their security. It is not P-790 who produced notes,[514] but P-792.[515]

139. The Prosecution recalls that P-154's identity was properly redacted pursuant to the Protocol establishing a redaction regime.[516] The Defence made its

[502] [REDACTED].
[503] *I.e.*: **P-300**:T-167,29:13-31:15,69:12-70:23.
[504] **P-300**:T-167,30:8-15,70:13-16.
[505] *Contra*,DCB,para.857.
[506] DCB,para.857,fn.2398.
[507] *Contra*,DCB,para.857,fn2405; **P-127**:T-138,108:1-7.
[508] **P-127**:T-138,109:13-24.
[509] **P-127**:T-139,33:6-34:15;T-140,10:15-22.
[510] **P-127**:T-140,10:1-11:1.
[511] **P-127**:T-141,11:14-12:9.
[512] *Contra*,DCB,para.861.
[513] Investigation note **DRC-OTP-2092-0325**, and original: **DRC-OTP-0198-0072.**
[514] *Contra*,DCB,para.864**.**
[515] **DRC-OTP-2058-0164**.
[516] ICC-01/04-02/06-411-AnxA,paras.36-37, Category D.4. *See*¸DCB,para.865.

application to lift this standard redaction only after P-18 testified.[517] P-18 was not evasive about the person who first facilitated her contact with the Prosecution some ten years before;[518] she simply stated that she "*couldn't establish the difference between all these different people*", and added *"[t]o the best of my knowledge they were all working for the same service*".[519] P-18's initial answer that no one had "*facilitated*" her contacts with the investigators may be the result of the terminology used in questioning her. P-18 insisted that she met the investigators "*personally*", which suggests the misunderstanding.[520] When asked precise questions about specific events appropriate with her level of education and ability, P-18 answered without difficulty.[521]

140. The Defence assertion that P-154 colluded with witnesses to get witness allowance money from the ICC[522] is not supported by the evidence. P-154 honestly reported to investigators that three witnesses preferred [REDACTED] so they could keep their allowance, thus showing transparency rather than participation in "a scheme".[523] In any case, the investigators did not suspect or suggest that P-154 influenced witnesses to lie.

141. P-100 testified that he [REDACTED].[524] When asked by the Defence to explain his complaint that P-154 did not pay an allowance to him, Witness P-100 answered that P-154 "*said simply that the money he was given was for him to provide food for us and that the money was not meant to be handed over to us, that it wasn't money intended to be given to us so that we could take home. He said the money given to him was for food, for our food, not even for providing hotel accommodation for us*".[525]

[517] **P-18**:T-111,47:4-48:6. P-18 testified on 27-29 June 2016 (T-110-T-112); the Defence filed its request on 4 July 2016, ICC-01/04-02/06-1435.
[518] *Contra*,DCB,para.865.
[519] **P-18**:T-112,17:2-8
[520] **P-18**:T-111,49:11-50:8.
[521] **P-18**:T-112,12:11-13,13:1-2,16:12-17:2.
[522] DCB,para.870.
[523] DCB,fn 2442.
[524] **P-100**:T-132,52:1-8. P-18 testified that she stayed in a guest house: **P-18**:T-112,12:20-25.
[525] **P-100**:T-132,51:5-20.

This is not indicative of impropriety, let alone collusion. The Defence opted not to ask P-100 whether P-154 exerted any improper influence over him. Witnesses P-113[526] and P-18[527] confirmed that there was no impropriety with witness expenses.

142. Contrary to the Defence assertion that it received only "summaries",[528] the Prosecution disclosed the complete *Listes de présences* and reports from P-154.[529] No witnesses testified with knowledge of the circumstances of creation of the lists, reports and internal investigation notes; witnesses who were questioned by the Defence contested the Defence's interpretation. Internal investigation notes are not read back to or signed by the witnesses.[530]

143. A simple inspection of the "*Listes de présence"*[531] shows what they are: P-154's reports on the witnesses' situation, according to his role as an intermediary.[532] The documents list [REDACTED].

144. The *Listes* are not indicative of group meetings;[533] they show just the opposite. They reference witnesses who live in distant localities, some even outside of Ituri, thereby making it highly improbable - given insecurity and costs - that they could travel to meet.[534] P-301 [REDACTED], and the *Listes* report exactly that.[535] [REDACTED], thereby confirming that his name on the *Listes* did not mean that

[526] **P-113**:T-119,35:17.
[527] **P-18:**T-112,18:6-19:6.
[528] DCB,para.871.
[529] *I.e.*: **DRC-OTP-2095-0089;DRC-OTP-2092-0213-R03; DRC-OTP-2092-0215-R02; DRC-OTP-2095-0113; DRC-OTP-2095-0206-R01; DRC-OTP-2095-0217-R01; DRC-OTP-2096-0566; DRC-OTP-2096-0641-R01.**
[530] See ICC-01/04-01/06-T-104,pp.24-25, Trial Chamber I found that "[…] investigator's notes will be a personal record - not the witness's - of what the latter said", and that "[t]he presumption will be that unsigned statements are not shown to witnesses, because the lack of a signature casts doubt over whether the witness accepted the contents as accurate."
[531] The Defence uses the word "*listes*", referring to both the investigative notes extracting Rule 77 information from the originals, and the *listes* themselves. **DRC-OTP-2092-0319** is the investigator note extracting information from **DRC-OTP-2092-0207-R03**, the same goes for **DRC-OTP-2092-0321** and **DRC-OTP-2092-0213-R03**, **DRC-OTP-2092-0323** and **DRC-OTP-2092-0215-R02**, **DRC-OTP-2092-0325** and **DRC-OTP-0198-0072**.
[532] **DRC-OTP-0198-0072**; **DRC-OTP-2092-0207**; **DRC-OTP-2092-0213-R03**; **DRC-OTP-2092-0215-R02**.
[533] *Contra*,DCB,*i.e.*:para.866-867.
[534] **DRC-OTP-2092-0207**; **DRC-OTP-2092-0213-R03**; **DRC-OTP-2092-0215-R02** [REDACTED].
[535] **P-301**:T-150,20:2-22; **DRC-OTP-2092-0207** (shown to P-300); **DRC-OTP-2092-0213-R03** (shown to P-301); **DRC-OTP-2092-0215-R02,** first page, third-row.

he was personally meeting with anyone, let alone in a group.[536] There is no further available information on the circumstances in which each of the witnesses were contacted for the purpose of each of these reports, whether it was physical contact, by telephone, or through a third party.

145. Witnesses were not evasive when confronted with the *Listes*, they simply could not testify to their meaning because they had nothing to do with their creation. P-113 and P-18 did not sign three *Listes*.[537] Only one list contains signatures; P-113's signature appears on the document while P-18's signature does not.[538] P-113 recognised her name and signature, and genuinely tried to remember the circumstances of it.[539] She volunteered that she recognised [REDACTED].[540] P-301 and P-300 similarly listed the persons they knew from the list presented to them, and contradicted the Defence theory that these lists document group gatherings,[541] as they do not know all of the people on them.[542] This is because the *Listes* do not list participants to group meetings.

146. Three <u>other</u> reports drafted by P-154 assert that he met certain persons at the same time for the limited purpose of monitoring their security and well-being.[543] These reports detail the content of the discussions of the intermediary with these witnesses and the objectives of the meeting.[544] but they do not reveal any impropriety or influence by P-154 on the witnesses' substantive accounts. Moreover, P-154 began monitoring the security situation of witnesses *after* the

[536] **P-301**:T-150,20:2-22.
[537] *Contra*,DCB,para.865.
[538] **DRC-OTP-0198-0072**.
[539] **P-113**:T-119,32:15-33:16.
[540] **P-113**:T-119,37:17-38:21.
[541] *See also*: **P-127**:T-141,11:14-12:9.
[542] **P-301**:T-150,21:13-22:22; **P-300**,T-167,52:7-55:11.
[543] **DRC-OTP-2095-0217-R01**(P-19,P-100,P-27,P-108); **DRC-OTP-2095-0206-R01**(P-39 and unspecified); **DRC-OTP-2095-0113**(P-27,P100,P113,P-106,P-108).
[544] **DRC-OTP-2095-0206-R01**,p.206: [REDACTED],pp.208-209; **DRC-OTP-2095-0217-R01**,p.217-218 : « *evaluation des conditions des victimes* » ; **DRC-OTP-2095-0113**,p.0113-0115.

Prosecution had interviewed those witnesses.[545] It would be to no advantage to attempt to influence witnesses months after they had already given a statement.

147. The fact that witnesses do not remember meetings about their security, or their general concerns as victims over ten years ago, is not indicative of dishonesty. Witnesses did remember events that were meaningful to them. P-18 and P-19 remembered P-154's assistance [REDACTED].[546]

148. Nor is there evidence of collusion between witnesses. It is not surprising that individuals can remember important days of the week, such as church days or market days or the day their child was born. Nor is it suspicious that [REDACTED] documenting attacks on their areas recorded specific dates of events close in time to when the events occurred.[547] Incidentally, the Defence does not allege that those dates are incorrect.

149. Second, the Defence alleges that the MULENDA invitation letters are a "*product of propaganda*",[548] by seeking to compare them to a different document that it argues is propaganda. The content of the MULENDA invitation letters bear no resemblance to the other, unrelated document and its language does not suggest a propaganda fabrication.[549] The Defence further asserts that the mention of Ngabulo as the place where MULENDA wrote one of the letters demonstrates that they are fake. However, this purported call for peace on the hill between Sangi and Buli[550] is referred to repeatedly in the evidence,[551] including by insider P-963.[552] [REDACTED].[553] [REDACTED][554] - [REDACTED].[555]

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[545] **DRC-OTP-2095-0089**,p.0089: [REDACTED].
[546] **P-18**:T-112,16:12-17:2; **P-19**:T-116,56:15-22;T-117,7:18-21,10:9-11:22.
[547] *Contra*,DCB,paras.892-894; **DRC-OTP-0065-0003**; **DRC-OTP-2055-1346**.
[548] DCB,paras.873-877.
[549] **DRC-OTP-0065-0003**, **DRC-OTP-2055-0364**.
[550] **P-790**:DRC-OTP-2078-2408
[551] **P-790**:T-53,48:10-49:19; **P-113**:T-118,24:8-23; **P-100**:T-131,44:13-45:9; **P-27**:DRC-OTP-0096-0052-R04,pp.0057-0058,para.26-28; **P-868**:T-177,66:18-67:11.
[552] **DRC-OTP-0065-0003**,p.0003-0004, and *Contra* to Defence assertion in para.876, dated 22 and 23 February, not 27 and 28; **P-963**:T-79,52:17-53:14.

150. Third, the Defence misrepresents the evidence when disputing that eight photographs of dead bodies depict the UPC mass murder in Kobu.[556] P-301 *did* recognise the photographs as the banana field during his interview;[557] the Defence suggestions related rather solely to [REDACTED] in one photograph.[558] During his interview, P-805 also identified the banana field in all but one photograph.[559] He explained during testimony that this one photograph showed an area adjacent to the banana field in Kobu.[560]

151. [REDACTED].[561] The body in this photograph visibly bears the same scars on the torso as another photograph in which several different witnesses recognised DYIKPANU.[562] The Defence's assertion that a person cannot identify a corpse, particularly of a friend, relative, partner or child by any other physical features than a full frontal facial image is incorrect. Moreover, many witnesses who identified individuals in the photographs were present in Kobu and saw the photographed bodies in person shortly after the bodies were discovered.[563]

152. Lastly, it is not necessary to call a photographer to authenticate a photograph;[564] another witness can testify that a photograph is a fair and accurate representation of that which it purports to be.[565] Nor is the identification of the

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[553] [REDACTED].
[554] [REDACTED].
[555] [REDACTED].
[556] DCB,paras.878-891. The Prosecution relies on PCB,paras.608-610.
[557] *Contra*,DCB,para.885.
[558] [REDACTED].
[559] *Contra*,DCB,para.886.
[560] [REDACTED].
[561] [REDACTED].
[562] **DRC-OTP-0152-0240** (duplicates: **DRC-OTP-0077-0292**, **DRC-OTP-2058-1110**)
[563] *i.e.*: in relation to DYIKPANU: [REDACTED].
[564] *Contra*,DCB,paras.878-883.
[565] *State v. Baugh* -Court of Appeals of Ohio, Seventh Appellate District, Mahoning County Apr 22, 1997 1997 Ohio App. LEXIS 1647: "A proper foundation is required in which there must be testimony that a photograph is a fair and accurate representation of that which it is purported to be. Generally this foundation testimony need not be provided by a photographer who took the photograph, but may be given by any witness who knows that the picture fairly depicts what it is purported to represent."; *US v. Clayton*,p.1074: "*The standard of FRE 901(a), which requires that evidence be authenticated 'sufficient to support a finding that the matter in question is what its proponent claims' has been satisfied by proper foundation evidence in this case. […] a witness qualifying a photograph "need not be the photographer or see the picture taken; it is sufficient if he recognizes and identifies the object depicted and testifies that the photograph fairly and correctly represents it*."

photographer at all relevant to the present case. Photographs were taken and numerous witnesses who were present at the scene, or who recognised slain individuals, testified that these photographs were taken of the massacre of Lendu in the banana field in Kobu.[566]

153. The Defence chart[567] tallying witnesses who lost loved ones in the Kobu massacre with the number of bodies exhumed at KOB1 is misleading. The witnesses referred to did not testify that their relatives were all buried in a single location, at KOB1. Further, P-420 testified about the possibility of additional mass graves in the vicinity.

154. [REDACTED][568] [REDACTED].[569] [REDACTED].[570] [REDACTED].[571] [REDACTED]. [572] [REDACTED][573] [REDACTED].[574] [REDACTED].[575]

(ii) Credible evidence of UPC rape and sexual slavery during the Second Attack

155. Expert testimony supports P-18, P-19 and P-113's direct and eye-witness accounts.[576] All three witnesses and UPC insiders[577] corroborate the UPC pattern of sexual slavery during the Second Attack: capture, rape, exploitation, and displacement. Their unique and detailed accounts show that this evidence is true.[578] The Defence did suggest to P-18, P-113, P-19 that they were not raped.

156. The Defence's theory that P-154 sought to influence their accounts after they gave a statement, speculating that an investigation into those crimes may start

[566] PCB,paras.608-610.
[567] DCB,para.229.
[568] DCB,para.930;
[569] [REDACTED].
[570] [REDACTED].
[571] [REDACTED]
[572] [REDACTED].
[573] [REDACTED].
[574] [REDACTED].
[575] [REDACTED].
[576] PCB:paras.575,577,579,580.
[577] PCB,paras.582-583.
[578] PCB,paras.574,576,578.

again at some later but unknown time, is nonsensical.[579] Similarly, the allegation that P-18 and P-19 lied in order to get medical care is unsupported.

157. The Defence's "photo board"[580] has no probative value. The photographs are of poor quality; LINGANGA's photograph is too dark and he is wearing a hat.[581] P-19 identified LINGANGA because his bodyguards referred to him by name;[582] she was too scared to look him in the eyes.[583]

158. The Defence highlights irrelevant details in P-113's account of her sexual slavery by MULENDA - such as the provision of water from [REDACTED] - to suggest that the witness, raped and detained by armed men, voluntarily paid a social visit to her rapist.[584] MULENDA was the third UPC soldier[585] to rape P-113 since she had been captured,[586] forced to carry looted goods[587] and cook[588]. [REDACTED].[589] [REDACTED].[590] [REDACTED],[591] [REDACTED].

159. P-113 was raped in a coercive environment. She was detained, threatened and passed between armed soldiers who forced her to move about.[592] Rule 70 must be applied to cases of sexual violence.[593] The second element of sexual slavery does not require proof of coercion.[594] Individuals cannot genuinely consent when rights of ownership are exercised over them.[595]

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[579] DCB,para.946.
[580] DCB,para.946.
[581] **DRC-D18-0001-1753**.
[582] **P-19**:T-115,39:6-9;T-116,7:5-7.
[583] **P-19**:T-116,62:10-11.
[584] DCB,para.958.
[585] **P-113**:T-118,36:1-37:3,46:3-18,50:23-51:17.
[586] **P-113**:T-118,30:7-32:15.
[587] **P-113**:T-118,42:2-43:12
[588] **P-113**:T-118,33:3-13,35:4-23.
[589] **P-113**:T-118,52:1-11.
[590] **P-113**:T-118,53:25-54-12.
[591] **P-113**:T-118,57:1-2.
[592] See also: *Kunarac* TJ,paras.542-543.
[593] Rule 70, RPE.
[594] Second element of the crime of sexual slavery under articles 7(1)(g) and 8(2)(e)(vi): "The perpetrator caused such person or persons to age in one or more acts of a sexual nature."
[595] See also: *Kunarac* TJ: para.542, AJ:para.120: "Indeed, the Appeals Chamber does not accept the premise that lack of consent is an element of the crime since, in its view, enslavement flows from claimed rights of

160. [REDACTED].[596] Her "yes" then "no" answers [REDACTED] only reveal that she did not understand the question the first time.[597] P-113 did not deny having received any payment from the Prosecution;[598] the complex initial question[599] did not relate to expenses, it conflated financial assistance, compensation and reparations.[600]

161. P-113's prior statements to the Prosecution and other evidence in the case suggest that [REDACTED]. P-113 suffers from PTSD,[601] she experienced incredibly traumatic events including multiple rapes and the death of [REDACTED], which can impact memory.[602] This does not cast doubt on the credibility of her testimony.[603] P-113's explained why she delayed reporting of the death of [REDACTED], and the original date she had provided.[604]

162. P-113 has been consistent about the circumstances of her rapes and sexual slavery since she revealed it. Her testimony is detailed and the events she describes demonstrate that she witnessed events which occurred during the Second Attack. Her identification of MULENDA is solid: [REDACTED].[605]

163. P-790 testified that [REDACTED] three women who were captured by the UPC, raped and later freed, one of them in Centrale.[606] This shows only the widespread perpetration of sexual slavery by UPC troops,[607] not group meetings or collusion. P-113 escaped in [REDACTED],[608] P-18 was shot [REDACTED] and

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ownership; accordingly, lack of consent does not have to be proved by the Prosecutor as an element of the crime".
[596] [REDACTED].
[597] **P-113**:T-119,51:12-17.
[598] **P-113** :T-119,35:14-36:8.
[599] Despite the Chamber's order that the questioning of this witness be adapted to her capacities: **P-113**:T-118:3,7:9.
[600] **P-113** :T-119,18:1-19:2.
[601] **P-938**:DRC-OTP-2059-0069-R04,p.0074
[602] **P-933**:T-84,25:5-22.
[603] **P-113**:T-119,64:13-24.
[604] **P-113**,T-118,58 :20-23,61:5-14,64:11-25;T-119,14:3-15:4.
[605] **P-113**,T-119:63:7-10.
[606] **P-790**:T-54,32:5-21,34:12-17.
[607] Contra,DCB,para.962.
[608] **P-113**:T-118,55:22-57:2.

left for dead in Sangi,[609] P-19 escaped in Kobu and was shot in [REDACTED].[610] All three women have testified that they never openly discussed their rapes,[611] only revealing them to the Prosecution in 2013. The Defence did not put to P-790 the names of P-18, P-19 or P-113.

164. P-19 testified that UPC beatings and mutilations occurred in [REDACTED], not in Kobu.[612] In Kobu, P-963 was [REDACTED].[613] P-113 and P-19 were neither brought to Kobu at the same time, nor from the same location.[614] The evidence of these witnesses is not contradictory. P-113 saw Hema civilians pillage in Bambu, not in Kobu.[615]

Credible evidence in respect of Counts 6 and 9, and 14-16

(i) Individual witness accounts

165. Chambers have recognised that victims of serious physical and mental trauma may be unable to remember every detail of their experience, and have found that minor inconsistencies (such as errors in naming the precise village in which an event occurred or the commander in charge) were fairly common among victim witnesses. Chambers also take note of the large lapse in time between the traumatic events and a witness's recounting of the event.[616] This is particularly apt to the evaluation of the testimony of former child soldiers, considering the nature of the harm they suffered, their young age at the time and the passage of over a decade since the events took place.

166. Here again, the Defence argues that all the former child soldier witnesses are lying, yet it also relies on their testimony. For instance, the Defence argues that P-

[609] **P-18**:T-111,10:12-21,20:7-21:2,79:25-82:19.
[610] **P-19**:T-115,50:7-51:22.
[611] **P-19**:T-115,56:10-17; **P-18**:T-111,31:14-33:11; **P-113**:T-118,63:9-65:7.
[612] **P-19**:T-116,3:9-5:21. *Contra*,DCB,para.959.
[613] **P-963**:T-79,51 :5-9,70:2-14,71:14-25
[614] **P-113**:T-118,42:2-43:12; **P-19**:T-115,32:19-33:2,34:24-35:16;T-116,47:11-12.
[615] **P-113**:T-118,52:16-24. *Contra*,DCB,977.
[616] *Sesay* TJ,paras.532-536. *See also: Taylor* TJ,paras.1379-1393.

888 never participated in any attack on Mongbwalu[617] but relies on his evidence for its assertion that the civilian population in Mongbwalu all left before the First Attack (which mischaracterises his testimony).[618] The Defence argues that P-898 lied about being a child soldier[619] and about being present in Mongbwalu,[620] yet relies on his evidence to discredit P-768 with regard to the duration of the fighting in the First Attack.[621] The Defence also relies on P-898 as the *only* support for the contention that KISEMBO took measures in Mongbwalu to stop the civilians from looting[622] and that any *ratissage* conducted in Mongbwalu and Sayo was conducted "in accordance with military practice."[623] This particular reliance on P-898's evidence is particularly noteworthy as it concedes that P-898 was recruited and used by the UPC in the military operation in Sayo when he was under the age of 15.[624] Further, P-898's evidence about seizing abandoned enemy weapons is not proof that any *ratissage* conducted in Mongbwalu and Sayo was conducted in accordance with military practice; P-898 testified that there was also looting of civilian goods and killing of Lendu women.[625]

167. The Defence mischaracterises P-758's [REDACTED]:[626] she was not "rejected" by the Court, rather she was asked to provide additional documentation to substantiate her victim application.[627] After portraying P-761 as a "malign influence" over P-758, the Defence improperly asserts that P-758 [REDACTED] and that the Prosecution withheld this "highly material" information.[628] Even on a plain reading of P-761's testimony there is no legitimate basis to suggest

[617] DCB,paras.1221-1223.
[618] DCB,para.596.
[619] DCB,para.1260.
[620] DCB,paras.635,1245(a)-(c),1260.
[621] DCB,para.279.
[622] DCB,para.579.
[623] DCB,para.787.
[624] *Contra*,DCB,paras.1232,1260,1329.
[625] **P-898**:T-154,13:6-21;21:22-22:2. As part of this operation, P-898 also testifies about the taking of civilian prisoners, some of whom were subsequently murdered (*see:* T-154,18:8-19:4).
[626] DCB,paras.1166,1169.
[627] [REDACTED].
[628] DCB,para.1178.

[REDACTED]. Furthermore, the Prosecution disclosed known contact between [REDACTED] to the Defence. [REDACTED].

168. Corroboration is not required under rule 63(4), especially in regard to sexual violence; the Defence suggestion that P-758's evidence about being raped is unreliable on this basis should be disregarded.[629] Further, to suggest that because [REDACTED] he could "corroborate" her accounts of being raped is absurd.[630] One of the *many* details P-758 provided in her account[631] was that [REDACTED], information that is contained in documents signed by **NTAGANDA**.[632] Finally, as [REDACTED] is not alleged to have raped P-758 it is not surprising that she "did not identify any alleged rapist" when shown his image.[633] Defence claims that P-758 failed to recognize her rapist on a video[634] without evidence of *who* is on the film.

169. P-883 maintained that she was never in the APC but was fighting *against* the APC and that references to APC in her victim application form were errors by the person recording her information that was never read back to her;[635] therefore, referring to her as having "recanted" her prior statement is wrong.[636] As it is plausible to be unable to read or write a complete account of an event[637] but be able to decipher a simple form (containing one's name and birthdate[638]) or school record, branding P-883 an outright liar who intentionally obstructed cross-examination is unjustified.[639] P-883 recognised her birth certificate initially without having any information read to her, which is consistent with this

[629] DCB,paras.1167,1184-1189,1545.
[630] DCB,para.1185.
[631] *Contra*,*D*CB,para.1186.
[632] **DRC-OTP-0016-0047** (transl. **DRC-OTP-2052-0151**); **DRC-OTP-0016-0049** (transl. **DRC-OTP-2052-0154**); **DRC-OTP-0016-0055** (transl. **DRC-OTP-2052-0157**).
[633] DCB,para.1187.
[634] DCB,para.1188.
[635] PCB,para.712.
[636] DCB,para.1194.
[637] **P-883**:T-168,13:17-19; T-169,67:21-23.
[638] **P-883**:T-169,67:16-19.
[639] **P-883**:T-169,73:19-20 (with regard to this record, P-883 was first read the majority of information by Defence Counsel before: T-169,70:25-71:21)

explanation.[640] Finally, as P-883 was possibly shown records belonging to a different student,[641] it is logical that the information was inconsistent with her description of her schooling and that she reacted with surprise rather than contrition.[642] Her ability to recall the names of several teachers who appear in corresponding personnel records[643] is strongly indicative of her candour.

170. The Defence concedes that it "cannot be excluded that [P-898] may have got to Mandro"[644], confirmation of his recruitment by the UPC: he was enrolled and sent for training in [REDACTED].[645] Further, as set out in paragraph 166 above, the Defence also acknowledges his involvement in the First Attack.[646]

171. The Defence asserts that P-898's school records contradict his association with the UPC.[647] P-898 credibly explained the timing of his absence from school, which was corroborated [REDACTED].[648] Any lack of precision in this evidence is resolved by evaluating each witness's testimony as a whole.[649]

172. The Defence also partially and selectively quotes P-898's evidence in respect of [REDACTED].[650] It also disputes the reliability of the [REDACTED][651] [REDACTED] of recruits based mainly on the argument that the "FPLC" did not exist before September 2002.[652] **NTAGANDA**'s testimony used to support this point is general, without reference to a date or any mention of "FPLC" in documents.[653] The Defence itself concedes that the "roots" of the FPLC go back to

[640] **P-883**:T-168,46:7-9; *Contra*,DCB,paras.1196,1197.
[641] PCB,para.711.
[642] DCB,para.1200.
[643] PCB,para.711.
[644] DCB,para.1260.
[645] PCB,paras.697,698. *See above*,paras.30-33.
[646] DCB,paras.579,787.
[647] DCB,para.1236.
[648] **P-898**:T-155,44:4-24 [REDACTED]; **P-918**:T-156,15:22-24 [REDACTED]. *Also:* **P-918**:T-155,94:23-95:10; T-158,23:1-17.
[649] *Contra*,DCB,paras.1231, 1235, 1236.
[650] [REDACTED]. **P-898**:T-154,34:5-9 [REDACTED].
[651] **DRC-OTP-2081-0072**, **DRC-OTP-2081-0003**, **DRC-OTP-2081-0005**.
[652] DCB,para.1254.
[653] DCB,para.1254,fn.3599.

April 2002[654] and that before September 2002, "*members of the FPLC were organised in a military structure with a defined chain of command, modelled on organisations its senior leaders previously belonged to*".[655] The argument that this would "make the documents the first ever to bear the expression "FPLC"[656] is incorrect. The most that could be argued is that this is the earliest use of FPLC on documents in the possession of the Prosecution.

173. Attempts to discredit P-898 on the basis of P-911's testimony ought to be disregarded.[657] P-911 confirmed that P-898 was a soldier.[658] Furthermore, the Defence relies on P-911's testimony on key issues despite suggesting that he concealed information from the Chamber[659] and created forged documents.[660] P-911 is the only witness the Defence relies upon, in an attempt to argue that **NTAGANDA** did not intend for FPLC troops to rape.[661] The Defence also relies on P-911's testimony that his instructions were to ask the age of recruits in order to reject those under 18[662]—evidence that sits uncomfortably with children under the age of 15, [REDACTED] .[663]

174. P-10's identification of herself in the Rwampara video is unassailable.[664] The fact that she was unable to recognise certain members of the UPC, including political staff, or how much time elapsed between her training and accompanying **NTAGANDA** to Rwampara that day is irrelevant to whether she was able to identify herself.[665] [REDACTED].[666] [REDACTED],[667] [REDACTED].

[654] DCB,para.154.
[655] DCB,para.570. *Contra*,**D-300**:T-233,22:18-25,24:6-25.
[656] DCB,para.1254.
[657] DCB,paras.1233, 1245, 1250, 1260.
[658] **P-911**:T-160,38:5-25. *Contra*,DCB,paras.1233,1245,1250,1260.
[659] DCB,para.1250.
[660] DCB,para.1260.
[661] DCB,para.703.
[662] DCB,para.1506. The Prosecution discussed the inappropriate attribution of P-55 in support of this proposition in para.220.
[663] [REDACTED].
[664] DCB,para.1277.
[665] *Contra*,DCB,para.1277.
[666] DCB,para.1272,1273.
[667] PCB,para.40.

[REDACTED].[668] The Defence only partially cites D-211's evidence to assert that D-211 "contradicted" P-10's testimony about [REDACTED],[669] as D-211 testified to not knowing.[670]

175. Finally, Chambers at other tribunals have found that children under the age of 15 were conscripted and used by armed groups based upon the testimony of former child soldiers alone.[671]

(ii) P-46's evidence is credible and reliable

176. The Defence's unsourced assertion that P-46 said "*no one had lied to her about age*"[672] misrepresents her evidence. P-46 provided examples where interviewees *had* lied.[673] P-769's case is inapt:[674] he was never presented as a child *to* P-46 or her partners.[675] His age was lowered to 16 or 17 in documents to facilitate his safe passage out of Bunia because he deserted the UPC.[676]

177. The Defence attacks the reliability of P-46's age assessments based largely on her 172-entry "Individual Case Story" ("ICS"),[677] mischaracterised as her "*database*",[678] of which only four pages were ever available.[679]

178. P-46 did not overstate the number of UPC children under 15.[680] The Defence's conclusion hinges on a comparison of the number of UPC child soldiers P-46

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[668] [REDACTED].
[669] DCB,para.1276.
[670] **D-211**:T-248,32:22-23,33:8-12.
[671] *Sesay* TJ,paras.1630,1697 (expressly confirmed on appeal, paras.918-919); *Fofana* TJ,paras.282,667,683; *Brima* TJ,paras.1253,1256,1275; *Taylor* TJ,paras.1403-1410,1440-1450.
[672] DCB,para.1384; *see also* para.1405. *See also* the characterisation in the DCB,para.1309 of P-46 having "*indicated that she was* ***unable*** *to provide an age estimate based on images of subjects*" (emphasis added), where the record shows clearly that she *declined* to do so, stating *five times* that she did not *want to guess*, and thinking it an exercise unfit for a courtroom. **P-46**:T-103,24:7-9,16,23,25,26:1-2,6,9-10.
[673] **P-46**:T-101,103:20-24; T-100,24:9-11,25:5-11. *See also* **P-46**:T-100,37:21-38:4,T-101,97:11-15, acknowledging the possible presence of individuals over 18 years of age at the transit centres in Bunia.
[674] DCB,paras.1384,1406.
[675] **P-769**:T-122,59:10-60:6.
[676] **P-769**:T-122,42:9-21.
[677] **P-46**:DRC-OTP-0208-0284; T-100,82:8-10,83:3-21.
[678] DCB,para.1385, referring to a "*database*" for which no ERN is provided; para.1400, referring to DRC-OTP-0208-0284.
[679] **P-46**:DRC-OTP-0138-0106. *See* **P-46**:T-100,29:11-30-1.

testified about, with the number of UPC child soldiers identified *in the ICS*.[681] This comparison overlooks an important distinction: the numbers of UPC child soldiers consistently provided by P-46 in both trials were not drawn from the ICS, nor from any other documents in evidence; the numbers are P-46's recollection, and her computation, having consulted her own documents overnight during her *Lubanga* testimony.[682] It is therefore impossible to reliably compare the two sets of numbers. The Defence misrepresents the number of 167 UPC child soldiers identified by P-46's section as a number relating to "*the relevant time period*".[683] The 167 were UPC child soldiers identified by her section *overall*. P-46 did not "*later recognise*[]"that the number of UPC child soldiers for the relevant time period was 71; she *never tied the figure of 167* to the relevant period – the number was always 71.[684]

179. The Defence's computation gleaned from the ICS excludes children who received no training or were demobilised quickly, and children interviewed at age 15, even ones recruited over a year before their interview.[685] Even accepting *arguendo* the Defence's number of UPC child soldiers recruited or used in the period of the charges as correct (50[686]), that is still a considerable number[687] – a third of the individuals identified in the ICS –, and, even by the Defence's computation, *all* 50 were aged *14 and below*.[688]

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[680] *Contra*,DCB,para.1400,fn.3938, citing a line in P-46's transcript containing a Defence question.
[681] DCB,paras.1399-1400.
[682] **P-46**:DRC-OTP-2054-6568(*Lubanga* T-205),p.6639,l.22-p.6641,l.1;DRC-OTP-2054-6723(*Lubanga* T-206),p.6724,l.22-p.6725,l.7;T-101,100:1-101-15, where the witness testifies that the numbers she gave do not necessarily refer to the ICS and agrees that the general number of people she identifies as being under 15 either at the time of recruitment or use is roughly the same "*as was in respect of the Lubanga case*".
[683] DCB,para.1399.
[684] P-46's answer about 71 UPC children cannot be read without reference to the question she was asked – in *Lubanga*, and again in *Ntaganda* by Defence – which clearly circumscribed her answer to the number of children under 15 recruited or used by the UPC *in a specific time period*. *See* **P-46**:T-101,100:3-10,101:10-15.
[685] DCB,para.1400("*seven…*"). *See above*,paras.30-33. And DCB,para.1400,fn.3940 (Prosecution notes that the children at entries 21,27,52,77,84,85,105,157,158 would have been under 15 years old when recruited).
[686] DCB,paras.1401,1385.
[687] *Cf* DCB,para.1402.
[688] *See* chart in DCB,para.1401.

180. The challenge to P-46's reliability disproportionately emphasises the particularities of interviews at Rwampara with 21 children who had not been demobilised,[689] taking her evidence out of context. The assertion that P-46 admitted that "*information in her databases was often collected by others*" draws from her testimony about *one* Rwampara interview.[690] The circumstances of this set of interviews do not properly represent P-46's role interviewing the majority of about 200 children whom her section met.[691] She conducted over 100 of the ICS's interviews. P-46 did not admit that "*she did nothing to verify the ages of these 50 individuals*".[692] She conceded she had not verified the ages of "*the specific kids […] interviewed in Rwampara*" – except for one child in that group she saw later on –, because the situation was unstable and they remained in the camp.[693] For others, i.e. in transit centres, she cross-checked with others when in doubt.[694]

181. [REDACTED].[695] [REDACTED].[696] [REDACTED].[697] [REDACTED].[698] [REDACTED].

182. The name of the ACPA who contributed to the ICS is not "*highly exculpatory and essential information*".[699] Nor did the Defence request that P-46 be required to name her.[700]

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[689] Of the group, only 12 were available for a follow-up interview two days after the initial identification. **P-46**:DRC-OTP-2082-1832,pp.1832,1834; T-100,68:1-4. For more misrepresentations about the Rwampara children, *see* DCB,para.1409, referring to entries 35,38,39,40 in unspecified notes, which judging by the transcript portion relied on in fn.3975, would be DRC-OTP-2082-1832 – a *34 entry-long* document.
[690] DCB,para.1385,fn.3917. *See* **P-46**:T-102,56:25-57:2;DRC-OTP-2082-1832,p.1839, no.7.
[691] **P-46**:T-100,46:9-17.
[692] *Contra*,DCB,para.1385. Emphasis added.
[693] **P-46**:T-102,56:1-5,10-12.
[694] **P-46**:T-102,56:5-10.
[695] *Contra*,DCB,paras.1386,1413-1414.
[696] [REDACTED].
[697] [REDACTED].
[698] Contra,DCB,para.1414,fn.3996. [REDACTED].
[699] *Contra*,DCB,para.1386,fn.3919. The Defence asked no questions about the ACPA whose name was revealed in **P-46**:DRC-OTP-0206-0120.
[700] This possibility was agreed to by the UN in waiving P-46's immunity from legal process, and the UN Representative was available to make representations for the UN. *See* ICC-01/04-02/06-888-Conf; ICC-01/04-02/06-713-Conf,para.8,Anx1.

183. The caselaw cited by the Defence will not help the Chamber assess P-46's evidence. P-46's testimony and documents are not offered as sole proof of counts 6, 9, and 14-16.[701] P-46 obtained the information recorded in her documents through direct observation or by speaking directly from the children, who spoke to her about their personal experiences.[702] Direct evidence is preferable to anonymous hearsay evidence when available;[703] there should be no automatic rejection of P-46's evidence obtained directly from the victims.

184. P-46's age assessments were based on the children's appearance and behaviour, information the children provided including their age,[704] the school they attended, their siblings, and their occupation;[705] they were informed by P-46's long career as a child protection officer;[706] and benefited from feedback from social workers who interacted with the children extensively.[707] P-46's mandate was not to conduct criminal investigations, but it was nonetheless her professional responsibility to make accurate age assessments. While her immediate remit was children under 18 years, P-46 testified that accurate age assessments were a prerequisite for appropriate institutional responses and assistance;[708] were needed by the UNSRSG on Children in Armed Conflict or for

[701] DCB,para.1392,fn.3927, citing *Gbagbo* Decision Adjourning CoC,para.29, which speaks of heavy reliance on hearsay evidence as sole proof of allegations, defining anonymous hearsay by the insufficiency of information about who made the observation reported or from whom the source obtained it; and *Haradinaj* TJ,para.317, rejecting anonymous hearsay as sole evidence relied on, and multiple hearsay because the source did not specify her source.
[702] *Cf* DCB,para.1392,fn.3926, citing *Ndindabahizi* AJ (*see* paras.113-115, where the ICTR AC faulted the TC's reliance on hearsay evidence where the source had not explained how his source or sources knew about the timing of a killing) and *Gotovina* TJ (*see* paras.239-241, where the TC discarded uncorroborated anonymous hearsay evidence of a killing where the sources had not learnt about the crime directly from its victim).
[703] *Cf* DCB,para.1392,fn.3926, citing *Bagasora* TJ,para.890, where the TC did not rely on hearsay evidence of a murder victim's inclusion on a list of targets where the basis and reliability of the source's information were unclear, *and* the Chamber had better evidence available, including direct (documentary) evidence and evidence of similar targeted killings the same day, of which Bagasora was informed contemporaneously.
[704] **P-46**:T-100,24:1-25-11.
[705] **P-46**:T-101,101:19-102-11.
[706] **P-46**:T-100,8:23-10:3.
[707] **P-46**:T-100,24:11-18.
[708] **P-46**:T-100,25:12-26:9.

other reports; and because the Rome Statute had entered into force for the DRC in 2002.[709]

(iii) The Chamber is competent to assess age based on videos and photographs[710]

185. The Chamber is competent to assess the age of individuals appearing in video and photographic material as it is to assess any other item of evidence.[711] The Chamber can consider factors such as facial features (*e.g.* the absence of facial hair), physical or bodily development (*e.g.* whether a girl has developed breasts), behaviour, height and size (including in comparison to other persons or objects such as vehicles and furniture, as well as in relation to the weapons being carried or uniform being worn).[712] National courts have found that a videotape or photograph can provide the sole evidence for a trier of fact to identify an accused, even in the absence of any witness corroboration; photographs and videos "speak for themselves".[713] Indeed, a video or photograph "*is, to a certain extent, testimonial evidence and should be used by a trier of fact in determining whether a crime has been committed and whether the accused before the court committed the crime*".[714]

186. In this case, the videos provide the Chamber with the child's movements, body posture, relative size and facial features. A screenshot, such as those annexed by the Defence, does not adequately capture any of these elements.[715]

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[709] **P-46**:T-100,15:9-16,20:13-22,25:14-26-9,83:17-21,90:5-9,94:4-23,.
[710] DCB,paras.1283-1332.
[711] PCB,para.685. The Appeals Chamber concurred with Trial Chamber I's conclusion that "it is feasible for non-expert witnesses to differentiate between a child who is undoubtedly less than 15 years old and who is undoubtedly over 15" (*Lubanga* TJ,para.643, cited with approval in *Lubanga* AJ,para,189. *See also: Lubanga* AJ,paras.191,198,218,222).
[712] *Lubanga* AJ,para.189 (factors were considered specifically in relation to witness testimony about age, but the same principles would apply to such an assessment by the Chamber).
[713] *See*,*R. v.* Nikolovski,para.36; *R. v. Dodson*, [1984] 1 W.L.R. 971 (C.C.A.); *R. v. Downey*, [1995] 1 Cr. App. R. 547; *People v. Bowley*,p.861: "*We hold, therefore, that a photograph may, in a proper case, be admissible into evidence not merely as illustrated testimony of a human witness but as probative evidence in itself of what it shows*".
[714] *R. v. Nikolovski*,para.28.
[715] DCB,paras.1308-1331,AnxF.

187. The Defence urges the Chamber to apply a new "*more stringent approach*" requiring it to find not just that a child is "*clearly*" under the age of 15, but that he or she is "*pre-pubescent*", which the Defence purports to be age 11 in girls and age 13 in boys.[716] None of the factors set out by the Defence warrant departing from the already "cautious" approach exercised previously by this Court,[717] nor is there any statutory basis to follow this approach.

188. Moreover, the Defence mischaracterises P-116's evidence where he testified that he could distinguish between a child aged 11-13 years and one aged 16-18 years as an affirmation that "he would apply a 3-4 year margin of error to a visual assessment."[718] That was plainly not the thrust of his evidence. Similarly, the photographs of "asylum seekers" relied upon by the Defence should also be disregarded: they are not in evidence and they are irrelevant, given that they refer to an entirely different age limit.[719]

189. The Defence changes the Statute's legal requirements by urging the Chamber to consider whether it would be "unreasonable" to exclude that a person identified in a video as under 15 years could actually be 15 years or more.[720] If true, the Chamber must consider whether it is unreasonable to exclude that a person identified as 15- 17 in videos could actually be 13-14.[721]

190. Finally, the Defence asserts that the Prosecution failed to articulate a "general age range" that it considers to be within the "margins of reasonableness,"[722] creating another requirement – and taking out of context the Appeals Chamber's finding that "it suffices that it is established that the victim is within a certain *age*

[716] DCB,paras.1287,1292,1300,1324.
[717] *Lubanga* AJ,para.222 citing *Lubanga* TJ,paras.643-644.
[718] DCB,para.1290.
[719] DCB,paras.1288,1289 and Annex F.
[720] DCB,para.1292.
[721] DCB,para.1300.
[722] DCB,paras.1285,1308.

range, namely *under* the age of fifteen years".[723] The Prosecution is not required to prove the exact age of a victim of the crimes charged under counts 14, 15 and 16;[724] a principle that equally applies to video evidence or the evidence of eye-witnesses who made age assessments.

191. The Defence's related argument that the Prosecution has failed to adduce evidence of the age of children in the UPC who appear in the videos must also fail.[725] There is no requirement that video evidence be corroborated by other evidence in order for it to be relied upon;[726] the videos are themselves the evidence, from which the Chamber is poised to assess the age.[727] The Prosecution *did* adduce evidence of the age of individuals in videos.[728]

192. The Chamber can rely on the age assessments provided by the numerous witnesses who trained, fought beside, used as escorts, saw, interviewed or otherwise directly interacted with, or who were themselves, children who were under the age of 15 and in the UPC.[729] This evidence is reliable and probative. Assessing age does not require particular expertise.[730] The Chamber is able to weigh and evaluate the reliability of a witness's evidence as to how they were able to assess the age of a child they observed, much as it can the reliability of other testimony. Such evidence does not require any further corroboration.[731]

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[723] *Lubanga* AJ,para.198.
[724] *Lubanga* AJ,para.198.
[725] DCB,para.1283.
[726] *Lubanga* AJ,para.218.
[727] *See*,*R. v. Nikolovski*; *R. v. Dodson*; *R. v. Downey*; *People v. Bowley*.
[728] *E.g.* **P-10**:T-47,6:3-16,53:23-54:6,62:9-16;T-48,11:8-18,15:1-25;T-49,12:16-19,13:6-11.
[729] *E.g.* PBC,paras.631,659,665,685-692.
[730] *R v. Cox*,p.179: *"It was proved by the officer of the National Society for the Prevention of Cruelty to Children that he has seen the children, and he stated what he believe were their respective ages, all of which were under sixteen. A police constable gave evidence generally confirming the officer. The mistress of the school was called, and she believed they were under the statutory limit for such schools."; B v. London Borough of Merton*,para.27: *"Of course, there may be cases where it is very obvious that a person is under or over 18. In such cases there is normally no need for prolonged inquiry; indeed, if the person is obviously a child, no inquiry at all is called for."* (*see*,DCB,paras.1288,1291).
[731] *Contra*,DCB,1383,1390. *See*,*Lubanga* AJ,paras.218,234. *Also*,Rule 63(4).

193. TCI relied on age assessments provided by eye witnesses as proof that children were recruited and used by the UPC, which was affirmed by the Appeals Chamber.[732] TCII also relied on the evidence of eye-witnesses regarding children's age and found that there were children under the age of 15 in the ranks of the Ngiti militia, even though it ultimately did not assign criminal responsibility to Germain Katanga for using them.[733]

194. The *Taylor* Trial Chamber was satisfied beyond reasonable doubt that a witness was under the age of 15 during the time period of the charges based on the Chamber's *own* assessment of this witness's age when he appeared to testify.[734]

195. Throughout the DCB, the Defence attempts to characterise anything other than the testimony of a former child soldier as "indirect evidence".[735] This is erroneous and misrepresents the reliable and probative nature of evidence based on direct observation and interaction. Moreover, the Defence contention that these witnesses give an insufficient basis for their testimony about the age of the child soldiers in the UPC is unsustainable.

196. The direct evidence of Prosecution witnesses who observed and interacted with children under the age of 15 in the UPC is overwhelming and credible. The Defence's challenges to this testimony[736] are vague and hollow, such as simply asserting P-892's testimony that she saw an 8-10 year old UPC child soldier was "unrealistic"[737] or urging the Chamber to disregard P-14's evidence because it is too specific and therefore "implausible"[738] (most notably, P-14's testimony that he

[732] *Lubanga* TJ,paras.641-731; *Lubanga* AJ,para.188-189,196-198,235.
[733] *Katanga* TJ,paras.1062,1084,1086-1088.
[734] *Taylor* TJ,paras.1425,1431.
[735] DCB,para.1163,1389,1390.
[736] DCB,paras.1439-1491.
[737] DCB,para.1488.
[738] DCB,paras.1462,1463.

saw five bodyguards of **NTAGANDA**'s at UPC HQ, each of whom were aged 13-18[739]).

197. Other Defence challenges to this evidence are unreasonable, such as requiring the full name of a child in order for the age assessment provided by a witness to be deemed reliable. For example, the Defence disputes the reliability of P-907's evidence about *any* of the children he observed in the UPC because he provided the name of a child in his own unit that the Defence concludes is "uncommon" and may be the same individual listed in a MONUC database (a document which the Defence paints as unreliable in other sections of the DCB[740]), who would have been over 15 in March 2003.[741] Similarly, the Defence categorises P-769's evidence about two particular UPC child soldiers whom he assessed to be "14, 13 years old" as "manifestly insufficient."[742] Yet, P-769, [REDACTED],[743] detailed his conversation with the children about their level of schooling at the time they joined the UPC, remembered that they were from [REDACTED] and recalled one was named [REDACTED].[744] The Defence further criticises P-769 for only recalling a single name, and also appears to dispute the reliability of his evidence because [REDACTED] is "*a common name*".[745]

(iv) Documentary evidence is reliable and probative

198. The Chamber should disregard the Defence challenge to UPC's internal letter dated 12 February 2003.[746] It is addressed to the G5 of the FPLC, signed by the UPC National Secretary, copied to the UPC État Major; the text plainly refers to children in the same armed group. There is nothing in the letter to support the

[739] DCB,para.1463 refers only to de-contextualised portion of P-14's evidence (*see:* **P-14**: T-136,34:13-35:16;36:10-14).
[740] *See*,DCB,para.27.
[741] DCB,para.1444.
[742] DCB,para.1469.
[743] **P-769**:T-120,38:12-39:12.
[744] **P-769**:T-121,7:22-8:3.
[745] DCB,para.1469.
[746] **DRC-OTP-0113-0070**. *See*,DCB,paras.1368-1373.

Defence theory that the UPC was involved in the demobilisation of Lendu children, children from PUSIC or children from 'self-defence forces' (most of whom were subsumed in the UPC, even by **NTAGANDA's** admission[747]).[748] The Defence's further theory that persons outside the UPC (P-31) was "the source of [the 10-15/16 year old] formulation" is speculative and unsupported by the evidence.[749] Given this clear indication of the presence of children aged 10-15 or 16 years in the UPC in February 2003, it is reasonable for the Chamber to conclude that all references in other official UPC documents to *'enrolement des mineurs'*,[750] *'des enfants en armes'*,[751] *'les enfants dans l'armée'*[752] and '*enfant soldats*'[753] includes children under 15.

199. The Defence attempts to dismiss this internal UPC document, stating that "*very little information was adduced concerning who Mr ADUBANGO was*".[754] The document, however, provides that very information: ADUBANGO BIRI was the *Secrétaire National à l'Éducation Nationale*. The Defence uses ADUBANGO BIRI itself as an example of an Alur member in the UPC.[755]

200. The Defence tries to distinguish between children who may have been part of the 'self-defence forces' from those in the UPC. For instance, the Defence suggests that KISEMBO's 30 October 2002 order referring to *"tous les enfants, c'est-à-dire moins de 18 ans. Et cela, meme dans les FORCES D'AUTO-DEFENSE"*, shows that the practice of enrolling individuals under 18 years of age was prevalent in *these* forces (and implicitly, *not* in the UPC). Such a reading is not supported by the full text of this order.[756] Further, any children under the age of 15 who were

[747] PCB,para.124 (in particular, **D-300**:T-225,34:18-35:4).
[748] DCB,para.1372.
[749] DCB,para.1336.
[750] **DRC-OTP-0029-0274**.
[751] **DRC-D01-0003-5894**.
[752] **DRC-OTP-0109-0136** at 0137.
[753] **DRC-D01-0003-5896**.
[754] DCB,para,1369.
[755] DCB,paras.70(fn.116),121.
[756] DCB,para.1340.

"absorbed" from the self-defence forces into the UPC were recruited, regardless of other considerations.[757]

201. Lastly, given D-13's close relationship with LUBANGA,[758] his impressions about certain documents and the motivations behind them ought to be afforded little, if any, weight.[759]

202. The Defence asserts that APC or Ugandan forces were the only soldiers in uniform in Bunia before summer 2002[760] but provides no reference to the evidence. Similarly, none of the sources referred to in support of the assertion that Lingo camp did not exist until 2003 substantiate that claim.[761]

203. The Defence also mischaracterises P-55's evidence to support its assertion that an "*age threshold*" was in place in the UPC.[762] P-55 is asked if there was a "*lower age limit to joining the UPC, that the UPC didn't take children of a certain age*", to which P-55 responds: "*No. I was never told that*".[763] Moreover, in relation to the 12-year old boy trained at [REDACTED], the Defence attempts to deflect this clear evidence of UPC recruitment by referring to the "unofficial nature of any training" at [REDACTED] training camp, supported by the assertion that "*no witness testified that they saw this purported training camp*".[764] The Defence then cites one line from P-55's testimony (about this boy); however, a few pages later in the same transcript, P-55 testifies to having been personally sent by **NTAGANDA** to [REDACTED] to attend a graduation ceremony, where he provided weapons, uniforms and boots to the recruits.[765]

[757] DCB,paras.1162,1342-1348,1353,1359,1365.
[758] ICC-01/04-02/06-2141-Anx,paras.2-3.
[759] DCB,para.1339,1341,1355.
[760] DCB,para.1181.
[761] DCB,para.1175.
[762] DCB,paras.1506,1508.
[763] **P-55**: T-71,66:3-68:7.
[764] DCB,para,1508.
[765] **P-55**: T-71,81:14-82:2.

204. It is similarly difficult to reconcile **NTAGANDA**'s testimony that *"there weren't troops under the age of 18 in the FPLC"*[766] and that the only demobilisation he was aware of in the FPLC involved children accompanying KISEMBO,[767] with the Defence's assertion that various UPC documents–some of which **NTAGANDA** did not recognise[768]–showed a willingness to forthrightly acknowledge and confront the issue.[769] Furthermore, there is no credible basis to assert that DRC-D01-0003-5896 is an acknowledgement by **NTAGANDA** of the "imperfect execution" of the two demobilisation decrees from LUBANGA referred to therein.[770] **NTAGANDA** testified that the document was signed by his secretary on his orders, later that it was prepared when he was away and that the content of the letter was explained to him upon his return.[771]

(v) Rape and sexual slavery of child soldiers

205. To suggest that P-758's account of being repeatedly raped and sexually enslaved is unreliable because it lacks corroboration is contrary to the express provision in rule 63(4) that guards against such a requirement especially in respect of sexual violence. The Defence ignores that [REDACTED] corroborate her account.[772]

206. P-758 provided the names and ages of specific victims, and even details of injuries sustained by one of these girls.[773]

207. P-17 provided detailed evidence of ABELANGA's two young female bodyguards, including their names and age range, and his cogent basis for this

[766] **D-300**: T-239,15:7; 17:6-9.
[767] **D-300**: T-239,15:7-16:7; 30:16-24.
[768] *For instance:* **D-300**: T-239,9:1-2,9:19-24 (**DRC-OTP-0113-0070**); 26:17-28:8 (**DRC-OTP-0151-0299**).
[769] DCB,para.1360.
[770] DCB,para.1365.
[771] **D-300**:T-239,25:2-26:16.
[772] PCB,paras.720,721,722,726.
[773] PCB,para.775. *Contra*,DCB,para.1549.

age assessment.[774] He also provided a clear basis for his knowledge of ABELANGA's rape of these two girls, which the Chamber can assess in light of P-17's overall reliability.

208. P-907 provided an assessment of [REDACTED]'s age ("no more than 12 years of age"[775]) based on his observations of and interactions with her.[776] Although P-887 did not give a specific age,[777] she described a "pre-pubescent" girl,[778] which by the Defence's own submissions should suffice.[779] P-907 also testified about his independent knowledge of [REDACTED]'s repeated victimisation by UPC soldiers and the injuries that she suffered as a result,[780] and that no one was punished for raping her.[781] P-887 testified [REDACTED], which she explained meant that they had sex with her.[782] For the reasons articulated in paragraph 210 below, this constituted rape.[783]

209. The Chamber should disregard the Defence's cursory dismissal of P-883's compelling and detailed account of sexual violation, which included providing highly personal information about the injuries she sustained, [REDACTED] and her pregnancy.[784]

210. It is incorrect that there is no legal norm confirming that children are unable to consent to sexual relations.[785] Given the highly coercive environment in which these acts of sexual violence were perpetrated, any inquiry of possible consent is misplaced. But that said, footnote 64 to the EoC for rape under article 8(2)(e)(vi) specifies that age-related incapacity renders an individual incapable of giving

[774] **P-17**:T-58,51:12-52:1.
[775] **P-907**:T-89,55:11.
[776] **P-907**:T-89,55:8-19; 57:1-9. *Contra*,DCB,paras.1552,1553,1554
[777] DCB,para.1553.
[778] **P-887**:T-93,39:23-40:5.
[779] DCB,para.1292.
[780] **P-907**:T-89,55:20-21.
[781] **P-907**:T-89,56:4-7.
[782] **P-887**:T-93,40:6-22.
[783] *Contra*,*D*CB,para.1554.
[784] PCB,para.776.
[785] DCB,para.1544.

genuine consent to the invasion of their body (*i.e.* rape). Accordingly, children under the age of 15 are not capable of consenting to sexual relations.

(i) NTAGANDA's individual criminal responsibility

Article 25

211. The Prosecution's submissions regarding direct co-perpetration are relevant.[786] The Chamber may give notice under regulation 55(2), even in final deliberations.[787] For perpetration by means there is no need to prove the direct perpetrators' intent, only **NTAGANDA**'s.[788] In any event, direct perpetrator's intent can be inferred.

(i) Article 25: The First Attack

212. **NTAGANDA** is the only Defence witness to assert that he did not rape civilians, instruct his troops not to rape civilians or punish others for raping or sexually abusing civilians or his escorts.[789]

213. Neither D-251 nor D-17 refers to rapes of civilians or punishment by **NTAGANDA**. The Defence relies on D-251's alleged personal views of **NTAGANDA**;[790] then wrongly relies on D-17's evidence of rapes of fellow UPC soldiers (irrelevant to the rape and sexual slavery of civilians). D-17 did not confirm that **NTAGANDA** never raped [REDACTED], or that **NTAGANDA** punished UPC soldiers for rapes. When asked if he was aware if **NTAGANDA** ever raped [REDACTED], revealingly, D-17 only went so far as to say he ''*never*

[786] DCB,para.561. *Contra*,PCB,para.25.
[787] *Katanga* AJ Reg.55,paras.1,87,93-96.
[788] *See* Ambos,p.994,mns.11-12: *"The perpetration by means… presupposes that the person who commits the crime…can be used as an instrument or tool…by the indirect perpetrator… as the master-mind or 'man in the background'… The direct perpetrator is normally an innocent agent, not responsible for the criminal act. …However, especially in the field of…systematic or mass criminality organised, supported or tolerated by the State, the direct perpetrator or executor normally performs the act with the necessary mens rea and is fully aware of its illegality*''.
[789] DCB,paras.701-709.
[790] DCB,paras.704-705.

saw that''.[791] D-17 was extremely evasive about **NTAGANDA**'s [REDACTED].[792] D-17's courtroom demeanour and responses were also telling when asked about **NTAGANDA**'s rape of [REDACTED]. D-17 did not deny that **NTAGANDA** had sex with, or raped, [REDACTED]. Instead D-17 denied ''*hearing anyone speak*'' of [REDACTED] rape or sexual relations with **NTAGANDA**, or that he knew anything about her having no choice.[793]

214. There is limited evidence whether UPC soldiers received training or instructions that they should not rape or harm civilians.[794] Critically, there was no training or instructions to spare Lendu civilians: rather, **NTAGANDA**, and other UPC leaders, consistently instructed that all Lendu were the enemy and should be targeted without distinction.[795] Anti-Lendu songs sung at Mandro military training camp - in **NTAGANDA**'s presence - included lyrics about exterminating Lendu and raping Lendu girls.[796] This was the ideology that **NTAGANDA** developed.[797]

215. The G5 monthly report,[798] upon which the Defence relies and concedes was written by ''*[t]he FPLC staff officer responsible for, inter alia, civilian affairs*'',[799] details complaints from civilians living in Hema areas against UPC soldiers, including about rape.[800] Accordingly, even *Hema* civilians were victims of UPC-perpetrated rapes.

216. The Mongbwalu video does not support **NTAGANDA**'s claim that he and other FPLC leaders did not intend to displace civilians:[801] As the Defence

[791] DCB,paras.705-706.
[792] **D-17**:T-254,36:7-39:2.
[793] **D-17**:T-254,36:7-39:14. D-17's categorical denials were instead about him slapping [REDACTED].
[794] DCB,para.703. P-911 is the only witness whom the Defence relies upon for this proposition.
[795] PCB,paras.170,195-196, 236, 303-305,308,313,327, 338,434,498-500,622,807-813,1027-1029,1033,1036.
[796] PCB,paras.195-196. *See e.g.* **P-10**:T-47,37:25-44:7.
[797] DCB,para.703.
[798] **DRC-OTP-0109-0136**.
[799] DCB,paras.1346-1347.
[800] **DRC-OTP-0109-0136**, pp.0136-0137, pp.0139-0140.
[801] DCB,paras.727-728.

concedes, KISEMBO and **NTAGANDA** address *Hema*, and not Lendu, civilians who had returned to Mongbwalu.[802] Their claims were propaganda and did not reflect reality,[803] as evidenced by the statements of some civilians in the same video. For instance, when asked by ARERENG whether the ethnic conflict was still ongoing in the area from Aru to Mongbwalu, a truck driver explains: "*Bon, dans cette zone-là, il ne reste que dans un seul côté. Les gens de l'autre côté se sont enfuis, alors il ne reste plus que d'un seul côté, de l'autre côté, il n'y a plus de problème*."[804] The evidence shows that most Lendu were unable to return to their homes;[805] the evidence cited by the Defences shows no different.[806]

217. D-54's testimony does not support the Defence's assertion that **NTAGANDA** and the UPC[807] did not target the Lendu, nor that **NTAGANDA** did not intend the displacement of civilians during the First Attack. D-54 testified that KAHWA – not **NTAGANDA** – sheltered inhabitants, including some Lendu [808] of predominantly Hema villages.[809] There is no evidence that the ''Bosco'' sent by KAHWA to bring civilians to Mandro, was **NTAGANDA**.[810] In fact, D-54 and most other Defence witnesses acknowledged the conflict's inter-ethnic nature. [811] D-54 reveals the reality that Lendu were targeted: KAHWA had to reassure the

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[802] DCB,para.728,fn.2081;**DRC-OTP-2058-0251**,01:53:42-01:55:12(Transl.**DRC-OTP-2102-3766**,ll.1970-2009).
[803] PCB,paras.224,895-926.
[804] **DRC-OTP-2058-0251**(transl.DRC-OTP-2102-3766,3810:1529-1532).
[805] PCB,paras.313-329,818; DCB,para.786,fn.2240.
[806] DCB,para.786, fn.2240: citing **P-907** (T-90,51:11-12) who states the opposite, namely, that no Lendu could return; **P-800** (T-69,32:24-25,10:13-14), who described how some returned after the first attack on Mongbwalu (i.e. not the charged incident), and said all tribes returned after the war ended (i.e. the war between the tribes that ended some years later, not after the relevant battle at Mongbwalu); and **P-859** (T-51,7:25, who states that he is Lendu). In another passage not cited by the Defence, **P-859** explains he had the courage to return to Mongbwalu *because [REDACTED]* (T-51,25:19 26:10).
[807] DCB,paras.725-730.
[808] **D-54**:T-244,17:20-19:7,21:2-21.
[809] D-54 confirms that the civilians came from villages Sala (**D-54**,T-244,12:22-13:12.), Lonyo (**D-54**:T-244,10:1-23), which were predominantly Hema villages; and Kparnganza (**D-54**:T-244,15:6-11). D-54 described as mixed Hema and Lendu (**D-54**:T-243,71:2-72:24); but Hema spokesman Pilo Kamaragi confirms it was a Hema locality (DRC-OTP-0126-0030, p.0030).
[810] **D-54**:T-244,16:7-17:14.
[811] *See* PCB,paras.112,200-202. *See e.g.* **D-54**:T-243,72:1-17; **D-17**:T-254,23:20-24:1;T-255,43:1-4; **D-251**:T-260,78:13-79:13; **D-172**:T-245,21:1-18,69:3-11,80:2-81:6,83:16-19,111:1-25; **D-211**:T-247,52:5-53:19; **D-38**:T-249,47:5-50:18; **D-210**:T-207,14:15-15:9; **D-57**:T-246,10:9-25;29:25-30:23,31:12-14.

frightened Lendu that they would not be killed.[812] KAHWA's actions cannot be said to represent **NTAGANDA**'s or the UPC's views. KAHWA split from the UPC to form PUSIC soon after, in November 2002,[813] and the UPC expelled KAHWA, *i.a.* for alleged insubordination, treason and for trying to divide the UPC.[814]

218. P-963 does not support the Defence contention that SALUMU personally sought to avoid destruction,[815] or confined targets to military objectives.[816] Rather, P-963 confirmed that the UPC used heavy weapons to destroy identified targets – no matter what – including if necessary ''*the house and the people in it*''.[817] P-963 confirmed that, generally, military and civilian objects were not distinguished.[818]

219. **NTAGANDA**'s claim that he cared "for religious people and places",[819] based on visiting a congregation with KISEMBO, lacks credibility.[820] Nuns in that same video questioned KISEMBO's honesty concerning the disappearances of the priest and three nuns.[821] **NTAGANDA** is the sole evidence for his claim that he instructed SALUMU to provide security for the ''people of God…in the Catholic church''.[822] Credible evidence of **NTAGANDA's** murder of BWANALONGA, orders to kill three nuns, attack against churches and pillage of religious property, prove otherwise.[823]

[812] **D-54**:T-244,17:20-18:25.
[813] PCB,para.136. *See e.g.* **P-12**:DRC-OTP-2054-0073,p.0082:25-p.0083:8; **DRC-OTP-0074-0422**, pp.0468-0469.
[814] **DRC-OTP-0089-0057**,p.0057.
[815] DCB,para.741 (emphasis added).
[816] DCB,para.744.
[817] **P-963**:T-78,82:4-83:20.
[818] **P-963**:T-78,84:7-20. [REDACTED].
[819] DCB,para.756.
[820] PCB,paras.350-354.
[821] PCB,para.351.
[822] DCB,para.756,fn.2153.
[823] PCB,paras.169,346-360,395,406,412,414-415,424,539,547,549,551,555-556,563,732,797-798,800,802,966,981,1046.

220. **NTAGANDA's** claimed "zero tolerance" of looting of enemy goods is not credible,[824] merely citing **NTAGANDA**'s own evidence that he burnt looted goods in Komanda, executed an FPLC member for pillaging from a civilian in Bunia,[825] and allegedly arrested ABELANGA for looting.[826] **NTAGANDA** confirmed that LUBANGA ordered the execution regarding the Bunia incident,[827] where the victim was his own neighbour.[828] In contrast, P-963 testified that **NTAGANDA** ordered the execution of a UPC soldier for stealing goods from Hema civilians.[829] The ethnicity of the victims of theft for which ABELANGA was allegedly punished is unknown.[830]

221. Nor do the three Logbook messages cited by the Defence show **NTAGANDA** prohibiting theft from enemy civilians.[831] In the first message (19 November 2002), **NTAGANDA** does not ban theft outright, but only excessive theft.[832] In the second message (17 February 2003), **NTAGANDA** merely showed anger that thefts were impeding his troops' work.[833] Indeed, this message shows such thefts occurring at leadership level. The third message (3 December 2002)[834] confirms merely that the UPC protected their own civilians from enemy attack.

222. The Defence raises no reasonable doubt[835] that **NTAGANDA** specifically intended to discriminate against non-Hema, and thus persecute them.[836]

223. First, Logbook messages regarding LIRIPA's execution do not mention the victim's ethnicity or status (civilian or military).[837] They make no mention of

[824] DCB,paras.773-775.
[825] DCB,para.774.
[826] DCB,para.775.
[827] **D-300**:T-215,42:9-43:10.
[828] **D-300**:T-227,83:7-84:3[T-227-FRA,82:6-28].
[829] PCB,para.1071; **P-963**:T-80,38:4-24.
[830] DCB,para.775.
[831] DCB,para.774; DRC-OTP-2102-3854,p.4034(first), p.4000(first),p.3858(second).
[832] Emphasis added. DCB,para.774; DRC-OTP-2102-3854,p.4034(first).
[833] DCB,para.774; DRC-OTP-2102-3854,p.4000(first).
[834] DCB,para.774; DRC-OTP-2102-3854,p.3858(second).
[835] DCB,para.796.
[836] *See* PCB,paras.432-440,616-622,1034-1039.
[837] DCB,para.796,fn.2260. **DRC-OTP-2102-3854**,p.3920(first and second).

NTAGANDA's views.[838] An additional message, ignored by the Defence, indicates that LIRIPA was executed for failing to follow orders, abusive use of a weapon, discharge of ammunition, and public drunkenness.[839] Second, **NTAGANDA** concedes that other examples of his purported support for non-Hema, were not his initiative but were orders from LUBANGA.[840] Third, as described above, it was not **NTAGANDA** – but rather KAHWA – who supported Lendu civilians in Mandro.[841]

224. It was **NTAGANDA**, not KASANGAKI who interrogated the priest BWANALONGA for allegedly colluding with the enemy. **NTAGANDA** acknowledges his own authority as he authorised the interrogation, implausibly denying that it was unconnected to the priest's ethnicity.[842]

225. Defence also cannot rely on P-769's testimony to argue that **NTAGANDA** and the UPC did not target Lendu.[843] P-769 said that: ''[w]e were told that the UPC was not a tribal militia. *Rather, that their aim was to take over Congo in its entirety*, and that *we weren't just fighting* enemies, *be they Bahema or Balendu*, *but that we were fighting the government*''.[844] P-769 confirmed that the UPC had grander territorial designs over the entire country and was going beyond the traditional Lendu-Hema conflict. P-769 confirms in the rest of his testimony that the UPC's ideology involved targeting of Lendu: "*[C]ommanders…would give us advice and […] explain the ideology of the UPC by means of songs*'',[845] which included songs insulting their Lendu enemies. For instance: ''*Micheline, give me a knife with a basin so that I can slit the throat of a Lendu*''.[846]

[838] DCB,para.796.
[839] **DRC-OTP-2102-3854**,p.3920(first).
[840] DCB,paras.774,796.
[841] *See* para.217 above.
[842] DCB,para.796.
[843] DCB,paras.795-796.
[844] Emphasis added. **P-769**:T-120,31:7-12.
[845] **P-769**:T-120,30:13-14.
[846] **P-769**:T-120,31:13-33:10.

Article 25: The Second Attack

NTAGANDA participated in the planning of the Second Attack[847]

226. The Defence attempts to place the failed Lipri attack in January 2003 so as to argue that the preparation meeting that **NTAGANDA** participated in fell in January, and therefore did not concern the Second Attack.[848] This is wrong.

227. **NTAGANDA** testified that after the failed attack on Lipri when the *saba-saba* was lost and two UPC officers died (KAREKA and Bosco "ZERO ONE"), BEBWA CHADRAK was appointed to head the Mwanga Battalion.[849] **NTAGANDA** testified that these events occurred around 26-28 January 2003.[850] This is contradicted by reliable evidence.

228. The logbook shows that[851] on 25 January 2003, **NTAGANDA** appointed BEBWA CHADRAK as a Commander SP.[852] On 11 February 2003, **NTAGANDA** ordered that BEBWA be sent from Mahagi to Bunia.[853] BEBWA was therefore not in Mwanga. On 12 February 2003, **NTAGANDA** sent the new appointments and UPC structure to all FPLC units. This message shows that at this time, four days before the attacks, the Mwanga Battalion was commanded by KAREKA, not BEBWA, who appears as the 4th Battalion commander, on the Marabo-Komanda axis.[854]

229. The evidence proves that this failed attack in Lipri, during which battalion commander KAREKA and the S4 ZERO died,[855] occurred later, on 17 February

[847] *See* main submissions PCB,paras.449-450.
[848] DCB,paras.1023-1031.
[849] **D-300**:T-219:38:23-39:14,42:10-45:8.
[850] DCB,paras.1023-1032.
[851] **NTAGANDA** was cross examined on those points: **D-300**:T-238,39:21-:45:2.
[852] **DRC-OTP-2102-3854**,p.4017(third).
[853] **DRC-OTP-2102-3854**,p.4007(first);
[854] **DRC-OTP-2102-3854**,p.4005.
[855] And not Battalion commander ZERO ONE and S4 KAREKA, as presented by **NTAGANDA**: **DRC-OTP-2102-3854**,p.4005, mentioning KAREKA as the Mwanga Battalion "commander"; **P-55**:T-71,44:23;T-74,43:23-45:1.

2003.[856] The fact that Commander AMÉRICAIN refused to advance on 18 February 2003 - the launch of the Kobu attack - "PARCE QU'IL A PEUR DE LA FAÇON DONT ILS ONT PRIS NOTRE ARME A LIPRI" - as recorded in the Logbook, also indicates that the failed attack had *just* occurred. Indeed, AMÉRICAIN did not refuse to go on operation on 13 February 2003; he did so only on 18 February 2003, just *after* the failed Lipri attacks.[857]

230. This timing is confirmed by [REDACTED],[858] [REDACTED]. [REDACTED].[859]

231. [REDACTED].[860] [REDACTED],[861] [REDACTED].[862]

232. The exact timing of the preparation meeting is irrelevant. Even if, for the sake of argument, it had occurred in January, **NTAGANDA** still participated in the planning of the Second Attack. That meeting could only relate to this attack, because it addressed in detail the roles and responsibilities of commanders, and the movement of troops to attack Lipri, Bambu and Kobu.[863] No other large-scale, coordinated attack to seize this area occurred at the time. [REDACTED] evidence is corroborated by UPC insiders who testified that **NTAGANDA** planned the Second Attack.[864]

233. It is not necessary to prove **NTAGANDA**'s actual knowledge of crimes under articles 25 and 30. It suffices to prove that he was aware that he contributed to the plan in which the crimes would occur in the ordinary course of events, of which there is ample evidence.[865] Other than for direct perpetration, the Prosecution is

[856] **P-55**:T-71,35:11-36:8;T-74,43:23-47:15; **P-17**:T-63,13:5-14:21; **P-127**:T-139,4:1-6; **P-105**:T-133,53:7-21; DRC-OTP-0152-0286,pp.301-301,para.57.
[857] **DRC-OTP-2102-3854**,p.3982(second) ; **P-17**:T-59,46:20-47:18; **P-907**:T-90,11:6-7.
[858] [REDACTED].
[859] [REDACTED].
[860] [REDACTED].
[861] [REDACTED].
[862] [REDACTED].
[863] [REDACTED].
[864] P-901, P-907, *see* PCB,paras.449-450.
[865] PCB,paras.441-495,993-1048.

not required to prove **NTAGANDA**'s physical presence during the First or Second Attacks for his individual criminal responsibility for the charged crimes.[866]

234. Not only are the Defence's claims that he knew nothing about the operations or crimes in the Second Attack, and had no contact with UPC commanders leading the operation[867] contradicted by credible evidence,[868] but also **NTAGANDA** admits that: (a) in his role as Deputy chief of staff in charge of operations and logistics he ''*was really aware of everything that was going on at all times*'';[869] (b) his role was as an ''*implementer or executer*'';[870] (c) he gave orders[871] – so had a command role; and, (d) he was fully aware of the UPC's "*long-standing*'' objectives to open up the roads between Mongbwalu and Bunia, including *via* Kobu and Bambu, or Nyangaray.[872]

235. These claims are further undermined by the Defence's concessions about the vast array of FPLC means of communications at their disposal.[873]

236. The Defence implies that P-55 was wrong that SALONGO and TCHALIGONZA gave information to **NTAGANDA** about the Lipri operation because TCHALIGONZA had no Thuraya.[874] P-55 never said that TCHALIGONZA had a Thuraya,[875] but that TCHALIGONZA and SALONGO (who did have a Thuraya)[876] transmitted the information to **NTAGANDA** *via* Thuraya. P-17 and P-963 both confirmed that, during the Second Attack, the commanders communicated with one another and UPC headquarters using

[866] PCB,para.495. For instance, for direct and indirect co-perpetration proof of essential contributions to the common plan does not need not to be at execution stage of the crime, so that presence at the place of the crime is not an element to be proven. *See e.g.* *Lubanga* AJ,paras.473,488-490.
[867] DCB,paras.1011-1158.
[868] PCB,paras.441-495.
[869] PCB,para.1079; **D-300**:T-222,67:25-68:3.
[870] PCB,para.1055; **D-300**:T-215,36:21-37:4.
[871] PCB,paras.1055,1060-1076.
[872] DCB,paras.1048-1049.
[873] DCB,para.176,177,178,1084-1085,1116-1120; *See*,PCB,para.463: P-963 and P-17 also confirm that Thurayas and motorolas were used during the Second Attack. *See also*,PCB,para.272; **D-300**:T-213,10:21-11:3.
[874] DCB,paras.1119-1120.
[875] DCB,para.1120. *Cf*,PCB,para.470. **P-55**:T-71,42:9-15.
[876] DCB,para.177.

Motorola radios and Thurayas.[877] Even commanders who did not usually have a Thuraya could receive one during service missions.[878]

237. There is reliable direct and circumstantial evidence that proves **NTAGANDA**'s intent and knowledge about the Second Attack.

238. The Defence claims that LUBANGA could not have known about crimes committed in the Second Attack from senior MONUC officials, solely on the basis that P-317 stated that the more junior MONUC military observers only learnt of the massacre at the end of March 2003, are weak.[879] The Defence refers to the 24 February 2003 video in which senior MONUC Officers Mahmoud KHAN and a General met with LUBANGA and other high-ranking UPC officials, and discussed the Second Attack: including, allegations that UPC troops were chasing fleeing people in the forests around Nyangaray and Kobu.[880]

239. P-55's testimony that he received information from [REDACTED] about the Kobu massacre is highly credible. P-55's information was that a man named *Rwandais*[881] dressed in a suit to pretend to be a minister while UPC soldiers hid around him; and civilians were shot.[882] P-17 confirmed that an officer - whom he says was *Papa Oscar* - supported by armed units - dressed as a civilian to make the Lendu believe they had come to negotiate.[883] The evidence also shows that UPC troops killed civilians in the Buli area in addition to executing prisoners in Kobu.[884] The fact that P-55 does not know all of the details of the unfolding of the Kobu massacre is irrelevant. He knows what he was told by [REDACTED].[885] P-55

[877] PCB,para.463; **P-963**:T-79,44:5-45:15,49:21-50:2;**P-17**:T-59,64:19-24,66:2-7,78:10-79:23.
[878] **P-901**:T-28,20:8-19.
[879] DCB,paras.1132-1139.
[880] DCB,para.1147; PCB,para.483,fn.1397.**DRC-OTP-0127-0061**,1.29.09-1.33.09(transc.**DRC-OTP-2082-1033**,p.1075,l.1447-p.1077,l.1518).
[881] *Rwandais* was a UPC soldier involved in the pacification meeting attack: **P-901**:T-29,31:2-32:6; **P-963**:T-79,89:25-90:3; **P-17**:T-60,40:7-20; **P-907**:T-90,68:2-13.
[882] **P-55** :T-71,50:7-52:6.
[883] **P-17**,T-59,81:9-82:18.
[884] PCB,paras.596-598.
[885] **P-55**:T-74,65:16-21.

has specific and corroborated insider knowledge, which was not contaminated by later reports from international organisations.[886]

240. [REDACTED][887] [REDACTED].[888]

241. P-16's knowledge of the Kobu massacre from different sources reveals how well-known it was.[889] P-16 did not state that the Mongbwalu operation occurred after the Kobu massacre, but that **NTAGANDA** called for MULENDA to meet him in Mongbwalu after the Kobu massacre, when Mongbwalu was already under UPC control.[890] Expert testimony supports P-16 that some of the victims at Kobu were killed by gunshot or projectile injury.[891]

242. The Prosecution disputes **NTAGANDA's** claim that he first learnt of the crimes committed in Kobu, Lipri, Bambu and *environs* in 2004.[892] Even if the Chamber accepts this testimony, **NTAGANDA**'s failure to fulfil his ongoing legal obligations to take any reasonable measures to investigate or punish the crimes that occurred in 2003, also demonstrates his intent and knowledge.

(ii) Article 25: Crimes against children in the UPC

243. The record is replete with evidence of **NTAGANDA**'s intent and knowledge for the recruitment and use of children under the age of 15.[893]

244. A striking example is the video of his visit to the Rwampara training camp, which vividly captures the images of children under the age of 15 – some appear

[886] **DRC-OTP-0074-0422**,p.0444.para.69; **DRC-OTP-0152-0286**,p.0303.para.63.
[887] **P-55**:T-71,51:13-53:19,56:18-57:21;T-74,59:4-66:1,69:18-70:23.
[888] [REDACTED].
[889] **P-16**:DRC-OTP-0126-0422,paras.155-159. *See also* **P-768**:T-34,61:4-13.
[890] **P-16**:DRC-OTP-0126-0422,para.163.The reference at para.153 to an operation on Mongbwalu in February 2003 is clearly an error, and must have meant the operation on Bambu and Kobu, as the same sentence refers to **NTAGANDA** and others already being in Mongbwalu and constituting a rear base for the forces at Bambu and Kobu. This interpretation is supported by para.154, which refers to the prior Mongbwalu operation in November.
[891] PCB,paras.614 and 615.
[892] DCB,paras.1154-1158.
[893] PCB,paras.1015-1021.

dwarfed by the adults surrounding them – who were highly visible in the crowd and to whom LUBANGA referenced **NTAGANDA**'s visits to the camp.[894] The images do not tally with the Defence's assertions regarding the Prosecution's evidence whatsoever.[895] This video evidence exemplifies how **NTAGANDA** knew and intended the recruitment of children under 15 and their use in hostilities. By his presence, and by LUBANGA's reference to his role, **NTAGANDA** encourages the training of the recruits and underscores his own role in training and using them. **NTAGANDA** knowingly created the circumstances that led to the recruitment of children under 15. **NTAGANDA** was on actual notice that the UPC was training and using children: As the most senior military leader of the UPC (after LUBANGA) during that visit, he sees the children, and indeed, is surrounded by them. This was, moreover, shortly after LUBANGA's demobilisation decrees that allegedly reflected the UPC's sensitivity to and full knowledge of the presence of children in the ranks. The evidence shows that he did not even enquire as to their age.[896] Although the evidence in this case shows that a large number of children under the age of 15 were recruited and used in the UPC,[897] the Prosecution does not need to prove that the presence of children was widespread in order for the Chamber to find that **NTAGANDA** intended, or must have been aware of, the conscription or enlistment of children under the age of 15 within the FPLC.[898] **NTAGANDA**'s intent and knowledge can be inferred even if a small number of children below 15 were recruited or used: for instance, if he used them as escorts and fighters, or if his co-perpetrators, with whom he regularly engaged, used them as escorts.[899]

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[894] PCB,para.650,fn.1951,para.1016,fn.3145.**DRC-OTP-0120-0293**,00:08:43-00:12:00(transl.**DRC-OTP-0120-0298**,p.0305:144-p.0307:194)(*esp*.p.0306:175-0307:194);00:23:07:00:24:34(transl.**DRC-OTP-0120-0298**,p.0311:297-308).
[895] DCB,paras.1527-1540.
[896] *Sesay* TJ,paras. 1702-1704.
[897] PCB,paras.623-625,629-644,658,664-666.
[898] DCB,paras.1515,1540.
[899] PCB,paras.664,666.

245. The Defence is wrong to say that the established *mens rea* for article 8(2)(e)(vii) "*'clearly deviates' from a standard prescribed by the Statute*".[900] In particular, that the *mens rea* expressly prescribed in the EoC for article 8(2)(e)(vii), that "[t]he perpetrator knew or should have known that such person or persons were under the age of 15 years", does not apply because it is incompatible with article 30.[901]

246. Article 30 applies "*[u]nless otherwise provided*". Although it was not initially "*settled at the Rome Conference […] whether only the Rome Statute could 'otherwise provide', or whether other sources, such as the EoC, could also provide for a deviation*", it is clear that "[t]he latter view was eventually accepted".[902] This is evident not only from the General Introduction to the EoC, which specifies that the "*[e]xceptions to the article 30 standard*" are set out in the Elements,[903] but has also been consistently recognised by this Court.[904]

247. When interpreting intent and knowledge under article 30, the Chamber should adopt a plain language interpretation of the text, namely, whether a prohibited consequence "*will occur in the ordinary course of events*".[905] Although the *Lubanga* Appeals Chamber held – for both article 30(2)(b) and 30(3) alike – that the standard for the foreseeability of events is virtually certainty, it recognised that "*absolute certainty about a future occurrence can never exist*".[906] In *Bemba*, the Prosecution also noted its concern that the Appeals Chamber's interpretation of article 30, from which it derived the "*virtual certainty*" standard, appeared to give insufficient consideration to what the "*ordinary course of events*" really means, in

[900] DCB,para.1521.
[901] DCB,paras.1521-1523.
[902] Piragoff and Robinson,p.1118(mn.14).
[903] *See* EoC, General Introduction,para.2 (further explaining that the exceptions identified in the Elements are "based on the Statute, including applicable law under its relevant provisions" e.g. art.21). *See also* Statute, art.9(3).
[904] *See e.g.* *Lubanga* DCC,para.359; *Katanga* DCC,para.251; CD,para.133 (fn. 558). It was not necessary for the Trial Chamber in *Lubanga* to rule on this issue: *see* *Lubanga* TJ,para.1015. Nor was it at issue in *Katanga*, although the Trial Chamber appeared to acknowledge this possibility: *Katanga* TJ,paras.1049,1069,1086-1088.
[905] PCB,para.994-995.
[906] *Lubanga* AC,para.447.

practical terms.[907] Nor was this question addressed in the *Bemba* AJ. Accordingly, the Chamber should ensure any interpretation of article 30 is in keeping with the Statute – including the aim to end impunity – and, accordingly, reject the Defence's arguments that it must apply an artificially high threshold test. Notwithstanding the "*virtual certainty*" language, the broader context of *Lubanga* evinces no intention to repudiate the statutory requirement that liability attaches when the accused is aware that the consequence will occur "*in the ordinary course of events*" – nor could it do so. And it is for this Trial Chamber now to apply this test meaningfully in practice. In this context, the Defence overstates the matter when arguing the irrelevance of ICTY jurisprudence concerning foreseeable consequences of a common plan.[908] Although such case law is not directly binding upon this Court, it may assist in recognising factual circumstances in which it can properly be said that a person is aware that crimes *will occur in the ordinary course of events*. By contrast, concepts such as *dolus directus* or *dolus eventualis,* remain abstract concepts which require great caution since they are likewise not grounded in the Statute, may be susceptible to a variety of different meanings in different national legal systems, and still do not explain how the standards in article 30(2)(b) or 30(3) should be applied in practice.[909]

248. The Defence challenge to P-190's account of child abduction from a Mudzipela school[910] fails to look at the totality of the trial evidence and the level of credible

[907] *See* ICC-01/05-01/08-T-373,p. 49,ln.4-p.50,ln.4.
[908] DCB,paras.1517-1520 (*esp*. para.1519).
[909] DCB,paras.1519-1520. *See*,*e.g.*,Piragoff and Robinson,p.1122,fn.77: "*The concept 'dolus eventualis' does not have a monolithic or uniform meaning within all civil law systems. Nevertheless, in all civil law systems. It generally includes awareness of a substantial or higher degree of probability that the consequence will occur, and in many systems, it also includes awareness of a serious risk that a consequence will occur, coupled with indifference to that outcome or reconciliation with that outcome. Some systems may also include some forms of inadvertence in this concept. Due to different national conceptions, attempts to define the concepts were abandoned during the negotiations. Whatever may be the merits of the distinction under national legal systems, it was clear that the first-noted meaning of 'dolus eventualis' is included (i.e. "will occur in the ordinary course of events"). The latter meanings of 'dolus eventualis' or 'recklessness' were not incorporated explicitly into article 30, although it may be open to the Court to interpret the inclusion of some aspects of these meanings, which import a high degree of advertence or probability. The concepts may also exist in some specific crimes in the Statute under a different name (e.g., article 28)….*" Emphasis added.
[910] DCB,para.1531.

detail given by P-190 on the event.[911] Witnesses confirm that: the UPC abducted children from schools and forcibly recruited them into their ranks,[912] including **NTAGANDA** personally;[913] children were abducted from other locations;[914] parents were pressured to give their children for recruitment,[915] and some parents tried to get their children back.[916] The Defence provides an incomplete account of D-57's testimony,[917] as he confirms that: (a) in 2002 to 2003 there was more than one primary school in Mudzipela;[918] and (b) the UPC had children below 15 years [REDACTED] primary school in Mudzipela received approximately 10 children in 2002 or 2003 who had been recruited by the UPC.[919]

249. The Defence takes an artificial and piecemeal approach to the consistent evidence that during **NTAGANDA**'s meetings with officials from MONUC, local and international child protection agencies, and human rights organisations he routinely acknowledged that there were children within the UPC. He also told child protection and MONUC officials that the children were orphans who volunteered to join.[920] P-31's testimony of **NTAGANDA's** meeting with MONUC is supported by the 2 October 2002 MONUC report of a meeting with Commander Bosco;[921] HRW's report, "Ituri: '*Covered in Blood*", describing a MONUC meeting with Commander Bosco;[922] and P-315's testimony and notes of her own meeting with **NTAGANDA**, where he admitted the presence of children in the UPC.[923] P-31 may have been mistaken about the name of one MONUC

[911] PCB,para.15.
[912] PCB,paras.629,635(*esp*, fn.1901). *See also* **P-14**:T-136,42:22-46:1;T-137,5:7-7:1.
[913] PCB,paras.629,635 (*esp*. fn.1903). *See also* **P-888**:T-105,16:6-18,17:16-22:2.
[914] PCB,para.635.
[915] PCB,paras.636-640.
[916] PCB,para.641.
[917] DCB,para.1531.
[918] **D-57**:T-246,23:1-25:3.
[919] PCB,para.690.
[920] DCB,para.1532. *Cf*,PCB,paras.820-821.
[921] PCB,para.820; **DRC-OTP-2067-1914**,pp.1914,1916,para.10.
[922] PCB,para.820; **P-768**:T-34,49:16-21;**DRC-OTP-0074-0797**,p.0851.
[923] PCB,para.821; **P-315**:DRC-OTP-2062-0363,p.0363;T-107,75:8-79:9;88:3-92:23;T-108,65:24-67:10;DRC-OTP-2058-0990,p.1004,para.81-p.1007,para.99 (*esp*.p.1005,para.87).

official whom he recalled being present,[924] but this does not undermine that the meeting took place.

250. No evidence supports the assertion that *"numerous witnesses testified that the word* kadogo *or "child" referred to anyone up to 18 years of age"*.[925] P-901's testimony relates to questions about the term "*child of Djugu"*, not *kadogos* or child soldiers.[926]

251. P-46's contemporaneous reports[927] of a UPC child soldier's account do not state that **NTAGANDA** executed six children, but instead record that **NTAGANDA** executed six UPC soldiers in the presence of child soldiers.[928] This information is contained in a report admitted into evidence.

252. P-17's testimony does not support the Defence's assertion that the UPC ''repeatedly taught soldiers that rape was not permitted and that there would be serious punishment doing so''.[929] Instead [REDACTED].[930]

253. None of the evidence cited by the Defence, with the sole exception of **NTAGANDA**'s testimony, supports its contention that **NTAGANDA** punished for rapes of UPC soldiers.

254. Defence relies on evidence from P-17 and P-815 that is irrelevant to Counts 6 and 9, as it concerns non-UPC civilian women: P-17 described punishment by KISEMBO - not **NTAGANDA** - for the rape of Nyali civilian women,[931] explaining that there would have been no punishment had it not been for KISEMBO, whose mother was Nyali and who was encouraging Nyali elders in

[924] DCB,para.1532.
[925] DCB,para.1534.
[926] *Contra*,DCB,para.1534,fns.4347-4348. **P-901**:T-31,42:15-20.
[927] *See*,**DRC-OTP-0152-0274**,p.0279. The Prosecution acknowledges its error in referring to **DRC-OTP-0152-0256**, not in evidence.
[928] DCB,para.1536. *Cf*,PCB,para.1016,fn.3142.
[929] DCB,para.1560.
[930] [REDACTED].
[931] DCB,para.1560,fn.4397. *Cf*,**P-17**:T-59,42:20-43:11.

Kilo to recruit Nyali children for the UPC.[932] P-17 was otherwise not aware of *any* UPC soldiers punished for rapes of civilians in Kilo.[933] P-815, [REDACTED], testified that his civilian daughter and other girls were kept against their will by Hema soldiers as "*wives*", and raped, until P-815 paid money to the soldiers' commander to secure their release.[934] P-55 confirms that no PMF ever complained to him about rape.[935] Indeed, there is evidence that UPC soldiers and recruits did not report their rapes, in particular if commanders had raped them, because they did not think that their complaints would be addressed.[936] The fact that rapes were not reported, or grossly underreported, does not mean that they did not occur. There were also no proper investigations: P-55 confirmed that when he saw PMFs with children who had been impregnated by other UPC, [REDACTED].[937] D-17 did not confirm that **NTAGANDA** ever punished anybody for rapes of UPC soldiers, but claimed ABELANGA was punished for taking property from civilians without paying.[938]

Ntaganda's Individual Criminal Responsibility: Article 28

255. The evidence adduced at trial establishes beyond reasonable doubt that **NTAGANDA** is criminally responsible as a commander under article 28(a). The Defence arguments to the contrary are sparse and unconvincing.

(i) NTAGANDA was in Effective Command and Control

256. **NTAGANDA** claims that he did not have effective command and control in his capacity as the Deputy Chief of Staff for operations and organisation.[939]

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[932] **P-17:**T-59,42:6-19.
[933] **P-17**:T-59,43:2-11.
[934] DCB,para.1560. *Cf*,**P-815**:T-76,10:19;41:14-55:6. There was an initial error in interpretation that was corrected, as it was not the soldiers who were arrested for the rapes, but the three girls arrested and held as the soldiers' "*wives*".
[935] DCB,para.1560. *See* **P-55**:T-71,95:7-97:9.
[936] PCB,para.788.
[937] DCB,para.1560. [REDACTED].
[938] DCB,para.1560. **D-17**:T-254,32:4-33:5;T-255,53:6-21.
[939] DCB,para.802.

NTAGANDA then contradictorily concedes that he did exercise command and control at a specified period during the First Attack but then "*handed over his command responsibility*" once KISEMBO arrived in Mongbwalu.[940] **NTAGANDA** then denies, without explanation or any attempt to grapple with Prosecution evidence, his *de facto* command and control over FPLC forces and Hema civilian supporters.[941] **NTAGANDA** also claims he did not exercise command and control during the Second Attack providing a discredited account of being in Rwanda.[942]

257. **NTAGANDA**'s assertions are meritless and contradicted by substantial credible evidence that establishes **NTAGANDA**'s effective command and control over his subordinates.[943]

258. **NTAGANDA** points to his title of Deputy Chief of Staff for operations and organisation to claim that he is not liable under article 28(a). However, establishing effective control is not a simple matter of stating one's title,[944] rather it is a fact specific inquiry of indicators which "will necessarily depend on the case and are a matter of evidence."[945]

259. **NTAGANDA**'s claim that he "handed over his command responsibility" to KISEMBO is not credible.[946] **NTAGANDA** did not relinquish effective command and control. During the whole of the charged period, **NTAGANDA** retained the material ability to prevent or punish the commission of the crimes charged or

[940] DCB,para.803.
[941] DCB,paras.804-805.
[942] DCB,paras.1040-1047; PCB,paras.487-495.
[943] PCB,paras.1060-1076.
[944] *Bemba* TJ,para.189 (stating that a finding that a person was legally or formally appointed to a position of military command or authority over the relevant forces is neither required, nor sufficient in itself, to satisfy the effective control requirement of Article 28(a). However, it may serve as an *indicium* of effective control). Although the Appeals Chamber overturned Mr Bemba's conviction, it did not alter the Trial Chamber's legal findings on effective control, which were consistent with the jurisprudence of other international criminal tribunals.
[945] *Bemba* TJ,paras.185,188. *See also* *Popović* AJ,para.1860 (citing *Ndahimana* AJ,para.53); *Perišić* AJ,para.87; *Bagosora* AJ,para.450; *Strugar* AJ,para.254; *Blaškić* AJ,para.69)
[946] DCB,para.803.

submit the matter to the competent authorities for investigation and prosecution. The test of effective control turns on "the relationship between the individuals (i.e. the commander and subordinates) and is not limited to a consideration of whether actual control is being exercised at any given moment."[947] To hold otherwise would significantly narrow the legal concept of command responsibility and "restrict [it] to those who were in control and not reaching those who could have taken that control to prevent these crimes or punish them."[948] Notwithstanding the Defence claim of "handing over command responsibility" and its implausibility, "[t]he issue is not whether the superior was in command at any given moment but rather whether he or she had the material ability to prevent or punish the perpetrators of the crimes."[949] And, in any case, multiple commanders may (and in any functioning military organisation usually do) simultaneously exercise effective command and control over the same subordinates.[950]

260. **NTAGANDA**'s discredited account of being in Rwanda during the Second Attack was fully explained previously.[951] The Prosecution recalls that credible evidence establishes **NTAGANDA**'s effective command and control during the Second Attack when he was in Bunia and Fataki,[952] approximately 28 and 45 kilometres (respectively) from Kobu and easily within radio range. And, in any event, he concedes that he always retained the ability to communicate (even in his false Rwanda alibi).[953]

[947] *Popović* AJ,paras.1857-1858 (citing with approval, in part, the *Popović* TJ).
[948] *Popović* AJ,paras.1857-1858 (citing with approval, in part, the *Popović* TJ).
[949] *Popović* AJ,paras.1857-1858 (citing with approval, in part, the *Popović* TJ); *Bemba* TJ,para.183.
[950] *Bemba* TJ,paras.185,698; *Popović* AJ,para.1892 (citing *Nizeyimana* AJ,paras.201,346).
[951] PCB,paras.487-495.
[952] PCB,paras.487-495.
[953] **D-300**:T-238,29,11:16.

(ii) NTAGANDA knew or should have known of the crimes

261. The Defence asserts, with little explanation, that it "cannot be inferred" that **NTAGANDA** knew of his subordinates' crimes unless he was "present" or received reports of those crimes "direct[ly]" or by "phonie".[954] This is not only incorrect, but fails to exculpate him.

262. First, the Prosecution recalls its submission that the evidence proves beyond reasonable doubt that **NTAGANDA** possessed a greater degree of *mens rea* concerning his subordinates' crimes than required by law. Indeed, consistent with the Prosecution's submissions on his liability under article 25, **NTAGANDA** actually knew, to the standard in article 30, that his subordinates were committing or about to commit the charged crimes.[955] This Chamber is entitled to find that this exceeds even the degree of 'actual knowledge' required by article 28.[956] Consequently, it should determine that article 28 is an exception to article 30, so as to avoid incorporating a *de facto* intent requirement which is alien to this mode of liability.[957]

263. Second, **NTAGANDA** has been charged not only with actual knowledge of his subordinates' crimes but, alternatively, that owing to the circumstances, he

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[954] DCB,para.807. *See also*,paras.806,808-809.
[955] *See*,PCB,para.1077.
[956] The *Bemba* AJ, rendered after the filing of the PCB, divides on the nature of the *mens rea* for article 28, with no majority consensus on any interpretation. Consequently, this Chamber is not bound in that regard. Specifically, Judges Monag and Hofmański viewed the article 28 *mens rea*—knew or, owing to the circumstances, should have known—as a "unitary standard", which thus necessarily is an exception to article 30: *Bemba* AJ Dissenting Opinion,paras.265-266. Judges Van den Wyngaert and Morrison, by contrast, considered that "knowledge" for the purpose of article 28 must meet the standard of article 30, requiring that the "commander is virtually certain of the guilt of his or her subordinates", but apparently accepting the "*sui generis*" nature of article 28 liability as estalished in customary international law. By necessary implication, they also allowed, however, that the "should have known" standard under article 28 does not meet the requirement of article 30. *See*,*Bemba* AJ Separate Opinion,para.46. Finally, Judge Eboe-Osuji seemed to consider that article 30 must apply to *both* the "knew" and "should have known" standards in article 28, and that a superior must have 'connived in' or 'condoned' their subordinates' crimes to be held liable: *Bemba* AJ Concurring Opinion,paras.12-13; *see also*,paras.249-250.
[957] *See*,PCB,paras.994 (fn. 3104),1077 (fn. 3323). Calibrating a 'pure' knowledge standard to require proof of a "virtual certainty" amounts to equating it with *dolus directus* in the second degree, which is an intent standard. *See also*,DCB,para.1519 (noting that article 30 "requires nothing less than *dolus directus*, in the first or second degree").

should have known of them.[958] He entirely fails to address this point, beyond stating that he "takes issue" with this standard, which he considers to have "been rejected several times in the case law [of the] ad hoc tribunals".[959] This is irrelevant. Regardless of whether this assertion is correct or not, the underlying proposition is irrelevant. The standard encompassing a limited form of criminal negligence,[960] was plainly and deliberately introduced in the Statute,[961] which is the controlling source of law under article 21. It cannot be 'interpreted away'. Indeed, the careful distinction made between article 28(a)(i) and (b)(i) in this respect illustrates the drafters' explicit intention to impose an active criminal law duty upon military commanders and persons effectively acting as such to remain informed of their subordinates' activities, consistent with military practice.[962] If the Chamber were to interpret the "should have known" standard in article 28(a)(i) to equate with the "had reason to know" standard, as **NTAGANDA** seems to invite, this would render ineffective the "consciously disregarded" standard in article 28(b)(i), and the drafters' decision to differentiate the liability of military and other superiors.

264. Of particular relevance in assessing—if necessary—whether **NTAGANDA** "should have known" of his subordinates' crimes is his own involvement in preparing, planning and/or executing UPC operations and crimes, and his wider receipt of information from UPC members, the international community, the media, and/or other persons.[963] Moreover, findings that **NTAGANDA** had actual knowledge of some crimes by his subordinates must have sufficed in the circumstances of this case to put him on notice of the risk of other crimes, such

[958] *See*,UDCC,para.149.
[959] DCB,para.800.
[960] This is limited by the condition that the superior should have known of their subordinates' crimes, "owing to the circumstances". As such, even this *mens rea* standard is not a form of strict liability, since it still requires an awareness of circumstances putting the superior 'on notice' that their duty to inform themselves has become active.
[961] *See*,*e.g.*,*Bemba* DCC,paras.429,432-434; *Lubanga* DCC,para.358; Van Sliedregt, pp.200-201; Olásolo,p.101; Badar,pp.412-413; Meloni,pp.180,182-186; Boas *et al*, pp.258-259; Robinson,pp.664-667.
[962] *See further*,*e.g.*,Sandoz,mn. 3560; *Blaškić* TJ,paras.312-332; *Delalić* TJ,paras.388-390.
[963] UDCC,para.149; PCB,paras.1077-1091.

that he should have known of them.[964] The same "should have known" standard applies similarly to all crimes, including the conscription, enlistment, and use of children under the age of 15. The Defence attempt to carve out an exception for that crime and substitute actual knowledge of the child's age for the "should have known" standard[965] ignores the drafters' plain language imposing that standard on commanders in article 28(a) and, additionally in the article 8(2)(e)(vii) EoC.[966]

265. Third, the required *mens rea* for article 28 can be inferred.[967] This Chamber can determine beyond reasonable doubt that **NTAGANDA** knew or, owing to the circumstances at the time, should have known of his subordinates' crimes not only on the basis of direct evidence that relevant matters were reported to him, but also by inference from all the circumstances as a whole, as this is the only reasonable inference available.

(iii) NTAGANDA failed to take all necessary and reasonable measures

266. **NTAGANDA**'s arguments as to the measures he took are unpersuasive.[968] The evidence plainly establishes that **NTAGANDA** failed to take all necessary and reasonable measures within his power to prevent or repress the crimes or to submit the matter to the competent authorities for investigation and prosecution. The general, ambiguous and limited "preventive" and "repressive" measures that **NTAGANDA** claims he and the FPLC took[969] are patently inadequate and

[964] *See*,*e.g.*,*Strugar* AJ,para.301; *Hadžihasanović* AJ,para.30 (in the context of the "had reason to know" standard applicable under customary international law; PCB,paras.1077-1091.
[965] DCB,para.1523.
[966] *See*,Kelt and von Hebel,p.31 (stating that when "should have known" is expressly stated in the EoC, the standard of knowledge is lower than required under article 30).
[967] *Bemba* AJ Dissenting Opinion,paras.268-270; *Bemba* TJ,para.191. *See also* *Galić* AJ,paras.171-173,180-182; *Krnojelac* AJ,para.156; *Delalić* AJ,para.129.
[968] DCB,paras.235,810-814.
[969] DCB,paras.235,811,813.

unreasonable in light of **NTAGANDA**'s extensive material ability[970] and the extent and categories of crimes committed.

267. **NTAGANDA**'s material ability to take measures was not limited, nor did he face any difficulties to take the wide range of necessary and reasonable measures available to him in the circumstances.[971]

a. He could have ordered or initiated genuine or adequate investigations into the allegations of the commission of crimes by UPC forces and/ or Hema civilian supporters[972]—but he did not.

b. He could have reported information about the commission or possible commission of crimes by the UPC forces and/ or the Hema civilian supporters to the appropriate authorities[973]—but he did not.

268. He could have disciplined, dismissed, demoted or refrained from promoting or rewarding members of the UPC forces and/or Hema civilian supporters who were involved in the commission of crimes. [974] Yet, the limited measures that he claims he took are inadequate and unreasonable—and far from 'significant'[975]—in light of his extensive material ability, and the crimes committed. They are patently insufficient and disproportionate in these circumstances. To the contrary, by overwhelmingly tolerating, subsequently rewarding and even ordering the commission of such conduct, **NTAGANDA** condoned the conduct and fostered

[970] PCB,paras.1060-1076. *See* *Bemba* TJ,paras.198 (defining 'reasonable' measures as those reasonably falling within the commander's material power). *See also* paras.199 and 203. *See also* *Bemba* AJ,paras.167 (noting that "t]he scope of the duty to take 'all necessary and reasonable measures' is intrinsically connected to the extent of a commander's material ability to prevent or repress the commission of crimes or to submit the matter to the competent authorities for investigation and prosecution"),168 ("and assessment of whether a commander took all 'necessary and reasonable measures' will require consideration of what measures were at his or her disposal in the circumstances at the time").
[971] *See*,*Bemba* TJ,paras.198,199,203, and *Bemba* AJ,paras.167-168.
[972] UDCC,para.150; CD,para.172.
[973] DCC,para.150(b); UDCC,para.150 (b); CD,para.172.
[974] DCC,para.150(c); UDCC,para.150(c); CD,para.172. See also PCB,paras.1095-1096.
[975] *Contra*,DCB,para.813 (referring to "[s]ignificant repressive measures taken by Mr NTAGANDA and the FPLC").

an environment in which the perpetrators of the crimes could thrive.[976] As noted, **NTAGANDA**'s alternative explanation to YUDA's promotion is implausible.[977]

269. In addition, he could have issued orders that were necessary and reasonable in the circumstances to prevent or repress the commission of crimes by the UPC forces and/or Hema civilian supporters involved in the commission of the crimes[978]—but he did not. For example, he failed to provide clear orders aimed at ensuring compliance with IHL.[979] In fact, he did not even adequately train his forces in IHL.[980] **NTAGANDA**'s purported "[g]eneral preventive measures" such as "ideology training, pre-operation briefings, senior leadership speeches" [981] are obscure and, in any event, inadequate. To the contrary, by imbuing the recruits with hatred towards Lendu without distinction, UPC training under **NTAGANDA** promoted the violation of fundamental principles of IHL.[982] Moreover, **NTAGANDA** could have also required reports from subordinates that military actions were carried out in accordance with IHL, but he did not.[983]

270. In sum, the totality of the evidence clearly establishes that **NTAGANDA** failed to take all the necessary and reasonable measures within his power in these circumstances to prevent or repress the commission of the crimes or to submit the matter to the competent authorities for investigation or prosecution.

(iv) NTAGANDA causally contributed to his subordinates' crimes, even though this is not required by article 28

271. **NTAGANDA** asserts, without argument or authority, that "the Prosecution must prove a causation element between the crimes committed and the failure of

[976] PCB,paras.1101,1107.
[977] PCB,para.1108.
[978] DCC,para.150 (d); UDCC,para.150 (d); CD,para.172.
[979] PCB,para.1096. *Contra*,DCB,para.811 (referring to "issuing clear orders" as general preventive measures).
[980] PCB,para.1096.
[981] DCB,para.811.
[982] PCB,paras.1098,1101.
[983] PCB,para.1096.

the commander to exercise proper control."[984] This casts no doubt at all—nor could it—on the Prosecution submission that no such requirement exists, and that references to causation rest on a misinterpretation of article 28.[985]

272. In this context, the Prosecution further recalls that causation is not the only means to establish the culpability of the superior for the crimes of their subordinates (also known as the "personal nexus")—this is adequately ensured by the requirements for *mens rea* (limiting the superior's liability to those of their subordinates' crimes which meet the requisite standard) and effective control (so that the superior could have prevented or punished the subordinates' crimes, if he or she so chooses).

273. The derivative nature of superior responsibility does not entail that it amounts to accessorial participation in the subordinates' crimes—rather, superior responsibility is a unique non-participatory mode of liability which, by its focus on the superior's breach of duty, gives effect to the requirements of international humanitarian law, while remaining linked to the scope of the subordinates' crimes through its derivative nature and the personal nexus.

274. Applying the correct interpretive principles to article 28 does not require causation, nor indeed create any ambiguity triggering the application of article 22(2); this follows from analysis of the plain terms of article 28 (when all linguistic versions are considered), its context (within article 28, requiring equal application of the chapeau to: all kinds of superiors, military and civilian; all kinds of applicable *mens rea*; and all the required measures; beyond article 28, in avoiding duplication of article 25), the object and purpose of the Statute (inter alia, to give effect to IHL), and is further informed by the drafting history (which shows no consensus among States for a causal contribution requirement, markedly departing from customary international law).

[984] DCB,para.799.
[985] *See*,PCB,para.1109.

275. Applying a theory of causation based on a superior's breach of an independent, 'general duty' to exercise control properly, as in *Bemba*, is not only unsupported by the text of article 28, but also shifts the emphasis of superior responsibility from its proper scope (whether the superior took all necessary and reasonable measures to prevent or punish subordinates' crimes) to more vague and subjective questions of "responsible command", and creates significant liability gaps which will distort the equal application of superior responsibility.

276. This Chamber is thus entitled—and urged—to find that article 28 does not impose any causal contribution requirement at all. Indeed, the Bemba Appeal Judgment, which was rendered after the Prosecution filed its Final Brief, again features no majority consensus on the correct interpretation of the Statute on this issue[986]—reflecting just the same perplexity evident in the decision of every other Chamber of this Court which has sought to apply a causation requirement coherently.[987] This again underlines the misconceptions and compromises that inhere in attempting to reconcile causation with superior responsibility.

277. In any event, though not legally required, the evidence proves beyond reasonable doubt that **NTAGANDA** causally contributed to his subordinates' crimes.[988]

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[986] Specifically, Judges Monag and Hofmański acknowledged that article 28 is "open to two readings", but preferred their understanding of the lish-text version, and required proof of causation. Significantly, however, their analysis was also bound together with their analysis of *mens rea*, since it was on this latter basis that they considered article 28 (with a causal contribution requirement) could thus still be distinguished from article 25(3)(c) and (d)(ii). *See* *Bemba* AJ Dissenting Opinion,paras.33-333. Judges Van den Wyngaert and Morrison, by contrast, noted the "different meanings" in the "different language versions of the Statute", and rejected any causation requirement in article 28 because it "cannot be upheld from a logical point of view": *Bemba* AJ Separate Opinion,paras.51-52,56. Finally, Judge Eboe-Osuji considered that causation must be required, but based on his view that superior responsibility is a form of responsibility for participation in the subordinates' crimes (similar in kind to liability under article 25), rather than the "*sui generis*" responsibility which has otherwise been consistently recognised in customary international law: *Bemba* AJ Concurring Opinion,paras.186-257.

[987] *See*,*e.g.*,*Bemba* DCC,paras.423-426 (able to apply the casual contribution requirement only to a superior's 'failure to prevent' subordinates' crimes, even though the reference to causation in article 28—whatever its meaning—applies to the provision as a whole); ICC-01/05-01/08-3343,paras.210-213 (finding that article 28 imposes a causal contribution requirement, but without forming a consensus on the applicable standard, and applying a theory of causation based on breach of a 'general duty' to exercise control properly).

[988] *See*,PCB,paras.1111-1112. *See also*,para.1096. *Contra*,DCB,para.815.

IV. Conclusion

278. The Prosecution hereby reiterates and reincorporates by reference all the previous submissions and conclusions set out in its Closing Brief.

Fatou Bensouda
Prosecutor

Dated this 7th November 2018
At The Hague, The Netherlands