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

**Date: 7 April 2015**

**THE APPEALS CHAMBER**

**Before:** Judge Sanji Mmasenono Monageng, Presiding Judge  
Judge Sang-Hyun Song  
Judge Cuno Tarfusser  
Judge Erkki Kourula  
Judge Ekaterina Trendafilova

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF THE PROSECUTOR v. MATHIEU NGUDJOLO CHUI**

**Public Document**

**Judgment**

**on the Prosecutor's appeal against the decision of Trial Chamber II entitled  
"Judgment pursuant to article 74 of the Statute"**



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

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**REGISTRY**

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**Registrar**  
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The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute” of 18 December 2012 (ICC-01/04-02/12-3-tENG),

After deliberation,

By majority, Judge Tarfusser and Judge Trendafilova dissenting,

*Delivers* the following

## JUDGMENT

The “Judgment pursuant to article 74 of the Statute” is confirmed. The appeal is rejected.

### REASONS

#### I. KEY FINDINGS

1. The Appeals Chamber finds that the evidence of a witness in relation to whose credibility the Trial Chamber has some reservations may be relied upon to the extent that it is corroborated by other reliable evidence. However, the Appeals Chamber also finds that there may be witnesses whose credibility is impugned to such an extent that he or she cannot be relied upon even if other evidence appears to corroborate parts of his or her testimony.

2. While a Trial Chamber should indeed assess the credibility of a witness in part by assessing whether the content of his or her testimony is confirmed by other evidence, the Trial Chamber is not required to find a witness to be credible simply because other evidence appears to confirm the content of some aspects of his or her testimony. In particular, if there are other reasons for doubting the witness’s credibility it is not *per se* unreasonable for a Trial Chamber to reject potentially corroborative evidence when making its credibility assessments.

3. The Appeals Chamber recalls that, in the context of interlocutory appeals, it has held that procedural errors that may have arisen prior to an impugned decision, but



which are “germane to the legal correctness or procedural fairness of the Chamber’s decision” may be raised on appeal. The Appeals Chamber considers that the aforementioned also applies if the impugned decision is a “decision under article 74”. Article 81 (1) (a) (i) of the Statute expressly provides that the Prosecutor may appeal a procedural error in relation to a “decision under article 74 [of the Statute]”. Furthermore, article 83 (2) of the Statute presupposes that a decision pursuant to article 74 of the Statute may be “materially affected by [...] [a] procedural error”. The Appeals Chamber considers that the impugned decision itself will only rarely contain procedural errors. Rather, it is likely that any procedural errors are committed in the proceedings leading up to a decision under article 74 of the Statute. Accordingly, it must be possible to raise procedural errors on appeal pursuant to article 81 (1) (a) (i) of the Statute in relation to decisions rendered during trial, and such errors may lead to the reversal of a decision under article 74 of the Statute, provided that it is materially affected by such errors. The Appeals Chamber considers that to decide otherwise would deprive the parties of the ability to raise procedural errors on appeal. In the view of the Appeals Chamber, this is irrespective of whether the proceedings before the Trial Chamber took place on an *ex parte* basis or not.

## II. BACKGROUND

4. On 18 December 2012, the Trial Chamber delivered the Acquittal Decision,<sup>1</sup> in which Mr Ngudjolo was acquitted of all charges against him and ordered to be immediately released.

5. On 20 December 2012, the Prosecutor filed her Notice of Appeal against the Acquittal Decision.

6. The Appeals Chamber has received numerous filings in relation to the present appeal and has issued 87 decisions and orders. What follows is a synopsis of the most relevant procedural background of the appeal proceedings.<sup>2</sup>

7. On 6 March 2013, the Appeals Chamber filed the Decision on Victim Participation, in which it decided that the victims “may, through their legal

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<sup>1</sup> The full citation, including the ICC registration reference of all designations and abbreviations used in this judgment are included in Annex 1.

<sup>2</sup> A more detailed procedural history is set out in Annex 2 of this judgment.



representatives, participate in the present appeal proceedings for the purpose of presenting their views and concerns in respect of their personal interests in the issues on appeal”.<sup>3</sup>

8. On 19 March 2013, the Prosecutor filed, confidentially, ex parte, available to the Prosecutor and Mr Ngudjolo only, the Document in Support of the Appeal. The Prosecutor filed a confidential redacted version of the Document in Support of the Appeal on 22 March 2013, and a public redacted version of the Document in Support of the Appeal on 3 April 2013. In the redacted version of the Document in Support of the Appeal, the Prosecutor’s entire third ground of appeal was redacted.

9. On 16 May 2013, the Appeals Chamber filed the Decision on Re-classification of the Document in Support of the Appeal, in which it ordered the re-classification of the confidential ex parte version of the Document in Support of the Appeal, to confidential, thus making the third ground of appeal available to all participants. References hereinafter to the Document in Support of the Appeal are to the confidential version.

10. On 19 June 2013, Mr Ngudjolo filed the Response to the Document in Support of the Appeal.

11. On 21 June 2013, the Appeals Chamber issued the Decision on Access to Documents Founding the Third Ground of Appeal, instructing the Registrar to re-classify various documents concerning the third ground of appeal as confidential. As a result of the reclassification, the participating victims acquired access to those documents.

12. On 18 July 2013, Victim Group I filed the Observations of Victim Group I.

13. On 22 July 2013, Victim Group II filed the Observations of Victim Group II.

14. On 29 July 2013, pursuant to the Appeals Chamber’s Order under Regulation 60 of the Regulations of the Court, the Prosecutor filed the Prosecutor’s Reply, along with one confidential annex.

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<sup>3</sup> [Decision on Victim Participation](#), p. 3.





15. On 19 August 2013, Mr Ngudjolo filed his Response to the Observations of the Victims.

16. On 28 August 2013, Mr Ngudjolo filed Mr Ngudjolo's Response to the Reply.

17. On 21 October 2014, an oral hearing was held to hear final submissions on the appeal.<sup>4</sup>

### III. STANDARD OF REVIEW

18. Pursuant to article 81 (1) (a) of the Statute, in an appeal against an acquittal decision, the Prosecutor may raise (i) procedural errors, (ii) errors of fact, or (iii) errors of law. Article 83 (2) of the Statute further establishes that the Appeals Chamber may only interfere with an acquittal decision if “the decision [...] appealed from was materially affected by error of fact or law or procedural error”.

19. The Appeals Chamber recalls that in its recent *Lubanga A 5 Judgment*,<sup>5</sup> it held that much of the principles regarding the standard of review in relation to appeals arising under article 82 (1) of the Statute are also applicable to an appeal against a conviction decision pursuant to article 81 (1) of the Statute.<sup>6</sup> The Appeals Chamber considers that the standard of review as set out in the *Lubanga A 5 Judgment* has equal application for an appeal against an acquittal decision.

20. Accordingly, with respect to legal errors, the Appeals Chamber “will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision”.<sup>7</sup> Furthermore, a decision is “‘materially affected by an error of law’ if the Trial Chamber ‘would have rendered a decision that is substantially different from the

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<sup>4</sup> [Scheduling Order](#). See also Transcript of 21 October 2014, ICC-01/04-02/12-T-4-CONF-ENG (ET), with public redacted version, ICC-01/04-02/12-T-4-Red-ENG (WT).

<sup>5</sup> See [Lubanga A 5 Judgment](#), para. 16 *et seq.*

<sup>6</sup> *Lubanga A 5 Judgment*, para. 17.

<sup>7</sup> *Lubanga A 5 Judgment*, para. 18.



decision that was affected by the error, if it had not made the error” (footnotes omitted).<sup>8</sup>

21. Regarding procedural errors, “an allegation of a procedural error may be based on events which occurred during the pre-trial and trial proceedings. However, as with errors of law, the Appeals Chamber will only reverse a decision of acquittal if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the decision would have substantially differed from the one rendered”.<sup>9</sup> As procedural errors often relate to alleged errors in a Trial Chamber’s exercise of its discretion, the Appeals Chamber has established by reference to its jurisprudence relevant to appeals under article 82 (1) of the Statute that:

The Appeals Chamber will not interfere with the Pre-Trial Chamber’s exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre-Trial Chamber.

[...][T]he Appeals Chamber’s functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial Chamber’s exercise of discretion [...], save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion. [Footnotes omitted.]<sup>10</sup>

22. With respect to the standard of review for factual errors, the Appeals Chamber previously held in relation to appeals pursuant to article 82 of the Statute that “it will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into

<sup>8</sup> [Lubanga A 5 Judgment](#), para. 19.

<sup>9</sup> [Lubanga A 5 Judgment](#), para. 20.

<sup>10</sup> [Lubanga A 4 A 6 Judgment](#), para. 41.



account irrelevant facts, or failed to take into account relevant facts. As to the ‘misappreciation of facts’, the Appeals Chamber has also stated that it ‘will not disturb a Pre-Trial or Trial Chamber’s evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it’” (footnotes omitted).<sup>11</sup>

23. The Appeals Chamber notes that in assessing an alleged error of fact, the Appeals Chambers of the *ad hoc* tribunals apply a standard of reasonableness,<sup>12</sup> thereby according a similar margin of deference to the Trial Chamber’s findings as that established by the Appeals Chamber in appeals pursuant to article 82 of the Statute. The rationale for this deferential approach to factual findings is that

[t]he Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness’[s] testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber’s duty to provide a reasoned opinion.<sup>13</sup>

24. Therefore, the Appeals Chamber “must *a priori* lend some credibility to the Trial Chamber’s assessment of the evidence proffered at trial”.<sup>14</sup> However, the Appeals Chamber’s intervention is required when “an unreasonable assessment of the facts of the case” carried out by the Trial Chamber “may have occasioned a miscarriage of justice”,<sup>15</sup> which constitutes a factual error. The ICTY Appeals Chamber has stated that what constitutes an erroneous evaluation of the evidence can only be determined on a case-by-case basis and that “[t]he Appeals Chamber cannot and should not legislate the circumstances that suffice to meet this test”.<sup>16</sup>

<sup>11</sup> [Lubanga A 5 Judgment](#), para. 21.

<sup>12</sup> [Blagojević and Jokić Appeal Judgment](#), para. 9; [Aleksovski Appeal Judgment](#), para. 63. See also [Lubanga A 5 Judgment](#), para. 24.

<sup>13</sup> [Kupreškić et al. Appeal Judgment](#), para. 32. See also [Lubanga A 5 Judgment](#), para. 24.

<sup>14</sup> [Gotovina and Markač Appeal Judgment](#), para. 50, referring to [Kayishema and Ruzindana Appeal Judgment](#), para. 119. See also [Lubanga A 5 Judgment](#), para. 25.

<sup>15</sup> [Gotovina and Markač Appeal Judgment](#), para. 50, referring to [Kayishema and Ruzindana Appeal Judgment](#), para. 119. See also [Lubanga A 5 Judgment](#), para. 25.

<sup>16</sup> [Kupreškić et al. Appeal Judgment](#), para. 225. See also [Lubanga A 5 Judgment](#), para. 25.



25. Accordingly this standard has been articulated by the Appeals Chamber of the *ad hoc* tribunals with respect to alleged factual errors in an acquittal decision as follows:

[C]onsidering that it is the Prosecution that bears the burden at trial of proving the guilt of the accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. A convicted person must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.<sup>17</sup>

26. Furthermore, the Appeals Chamber notes that the ICTY Appeals Chamber held in relation to an acquittal decision that "[it] will reverse only if it finds that no reasonable trier of fact could have failed to make the particular finding of fact beyond reasonable doubt and the acquittal relied on the absence of this finding".<sup>18</sup> The Appeals Chamber considers that, given that the onus is on the Prosecutor to prove the guilt of the accused (see article 66 (2) of the Statute) such an approach to alleged factual errors in appeals by the Prosecutor pursuant to article 81 (1) (a) of the Statute against an acquittal decision is appropriate.

27. The Appeals Chamber will assess the alleged legal, procedural and factual errors in the Acquittal Decision in light of the abovementioned standards of review.

#### IV. PRELIMINARY ISSUES

##### A. Mr Ngudjolo's request to declare the appeal inadmissible

28. Mr Ngudjolo argues that the appeal "should in principle be inadmissible for manifest groundlessness".<sup>19</sup> In support of his contention, Mr Ngudjolo avers that:

[The Prosecutor] lacks the grounds to challenge a judgment whose outcome could already be discerned in the interlocutory Severance Decision. Its acquiescence to this decision deprives it of the grounds to challenge the [Acquittal Decision], which was but the logical conclusion of the 21 November 2012 severance of the charges against the co-Accused. Its unconditional

<sup>17</sup> [Ndindiliyimana Appeal Judgment](#), para. 11, referring to [Mrkšić and Šivančanin Appeal Judgement](#), para. 15; [Seromba Appeal Judgment](#), para. 11; [Strugar Appeal Judgment](#), para. 14; [Rutaganda Appeal Judgment](#), para. 24.

<sup>18</sup> [Blagojević and Jokić Appeal Judgment](#), para. 9; [Brđanin Appeal Judgment](#), paras 12-14.

<sup>19</sup> [Response to the Document in Support of the Appeal](#), para. 25.



espousal of that severance has left it destitute of any legal means to challenge the acquittal. It has no legal basis for brandishing afresh its now obsolete theory of indirect co-perpetration based on article 25(3)(a) which was dismissed in the aforementioned decision, which it has now supported with its aforementioned observations.<sup>20</sup>

29. In Mr Ngudjolo's view, the appeal against the Acquittal Decision "can only be reflective of a lack of consistency springing from the Prosecution's intemperate judicial pursuit of the Acquitted Person".<sup>21</sup> Mr Ngudjolo argues that the Prosecutor's "two-pronged approach" of continuing its prosecution of Mr Ngudjolo on the basis of article 25 (3) (a) of the Statute while prosecuting Mr Katanga on the basis of article 25 (3) (d) of the Statute is an unacceptable strategy.<sup>22</sup>

30. The Prosecutor submits that, contrary to Mr Ngudjolo's contention, "the Prosecution has not renounced its case theory regarding indirect co-perpetration, neither with respect to Mr Katanga, nor with respect to [Mr Ngudjolo]".<sup>23</sup> She refers to her statement in the Prosecutor's Observations on Article 25 (3) (d) that the evidence in the record of the case "establishes the 'guilt of Germain Katanga *also* pursuant to the mode of liability of Article 25(3)(d)(ii)'" (emphasis in original).<sup>24</sup> In support of her contention the Prosecutor states that:

in its decision initiating the Regulation 55 process, the Chamber did not dismiss any of the charges against Mr Katanga. It merely gave notice pursuant to Regulation 55(2) that "the legal characterisation of facts may be subject to change". Accordingly, the Chamber may still convict Mr Katanga as an indirect co-perpetrator pursuant to Article 25(3)(a). [Footnotes omitted.]<sup>25</sup>

31. Victim Group I argues that the "simple fact" that the Prosecutor did not appeal the Severance Decision does not prevent her from appealing any future Trial Chamber decisions concerning Mr Katanga, including any recharacterisation by the Trial Chamber.<sup>26</sup>

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<sup>20</sup> [Response to the Document in Support of the Appeal](#), para. 22.

<sup>21</sup> [Response to the Document in Support of the Appeal](#), para. 21.

<sup>22</sup> [Response to the Document in Support of the Appeal](#), para. 24.

<sup>23</sup> [Prosecutor's Reply](#), para. 3.

<sup>24</sup> [Prosecutor's Reply](#), para. 3.

<sup>25</sup> [Prosecutor's Reply](#), para. 3.

<sup>26</sup> [Observations of Victim Group I](#), para. 10.



32. Victim Group II states that both the Prosecutor's decision not to seek leave to appeal the Severance Decision and the "content of [her] note on article 25(3)(d) in no way indicate [the Prosecutor's] explicit acquiescence to that decision. Nor does it follow that the [Prosecutor] can no longer rely on the mode of liability based on article 25(3)(a)".<sup>27</sup>

33. For the reasons that follow, the Appeals Chamber is not convinced by Mr Ngudjolo's submission that the appeal should be declared inadmissible. The Appeals Chamber recalls that the charges confirmed against Mr Ngudjolo and Mr Katanga by the Pre-Trial Chamber were that Mr Katanga and Mr Ngudjolo jointly committed, through other persons, war crimes within the meaning of article 25 (3) (a) of the Statute, during the attack on Bogoro on 24 February 2003.<sup>28</sup> The Appeals Chamber further recalls, however, that prior to the issuance of the Acquittal Decision, the Trial Chamber issued the Severance Decision whereby the charges against Mr Ngudjolo were severed from his co-accused Mr Katanga, and the parties and participants were notified in terms of regulation 55 of the Regulations of the Court, that the "mode of liability under which Mr Katanga stands charged is subject to legal recharacterisation on the basis of article 25 (3) (d) of the Statute".<sup>29</sup>

34. The Appeals Chamber finds that Mr Ngudjolo's argument that his acquittal was the inevitable result of the Severance Decision is not persuasive. Mr Ngudjolo's acquittal was by no means the necessary legal result of the Severance Decision. It is noted in particular that in the Severance Decision, the Trial Chamber made no findings relevant to Mr Ngudjolo's innocence or guilt, nor did it indicate any "intention" to acquit Mr Ngudjolo.<sup>30</sup> In the circumstances, the Appeals Chamber finds that the Prosecutor could not reasonably have been expected to appeal the Severance Decision on the basis that she disagreed with the Trial Chamber's "intention" to acquit Mr Ngudjolo. At the time the Severance Decision was issued, the acquittal had not yet been handed down and the reasons for the acquittal had not yet been known.

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<sup>27</sup> [Observations of Victim Group II](#), para. 10.

<sup>28</sup> [Confirmation of Charges Decision](#), para. 575.

<sup>29</sup> [Severance Decision](#), pp. 29-30.

<sup>30</sup> Severance Decision, paras 8-9.



35. As for Mr Ngudjolo's argument that the Prosecutor's positions in the cases against Mr Ngudjolo and Mr Katanga were inconsistent, the Appeals Chamber notes that the Prosecutor never indicated that she did not believe that Mr Katanga was guilty based on the mode of liability originally charged. The Prosecutor consistently stated that she considered him to be guilty "also" based on the mode of liability proposed by the Trial Chamber.<sup>31</sup> Although Mr Ngudjolo implies that this is impermissible, he supplies no legal argument to substantiate his position.

36. Accordingly, Mr Ngudjolo's request to declare the appeal inadmissible is rejected.

**B. The Prosecutor's request to disregard parts of Mr Ngudjolo's Response to the Reply**

37. On 4 September 2013, the Prosecutor filed the Prosecutor's Request to Disregard Submissions. The Prosecutor submits that in Mr Ngudjolo's Response to the Reply, Mr Ngudjolo "discusses, among others, the credibility of [w]itness P-250, a matter that goes to the heart of the appeal" (footnotes omitted).<sup>32</sup> The Prosecutor further submits that according to Mr Ngudjolo when witness P-250 exited the ICC Protection Programme, he returned to his village where he allegedly issued death threats against certain of his family members.<sup>33</sup> The Prosecutor contends that "these submissions are made for the first time in [Mr Ngudjolo's Response to the Reply], and are based on the transcript of an *ex parte* hearing, to which [she] is not privy" (footnote omitted).<sup>34</sup> Accordingly, the Prosecutor requests that the Appeals Chamber "disregard the [...] arguments included in [Mr Ngudjolo's Response to the Reply] that are based on an *ex parte* discussion with the Trial Chamber".<sup>35</sup>

38. On 17 September 2013, Mr Ngudjolo filed Mr Ngudjolo's Response to the Request to Disregard Submissions, requesting that the Appeals Chamber dismiss the Prosecutor's Request to Disregard Submissions.<sup>36</sup>

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<sup>31</sup> [Prosecutor's Reply](#), para. 3.

<sup>32</sup> Prosecutor's Request to Disregard Submissions, para. 3.

<sup>33</sup> Prosecutor's Request to Disregard Submissions, para. 3.

<sup>34</sup> Prosecutor's Request to Disregard Submissions, para. 3.

<sup>35</sup> Prosecutor's Request to Disregard Submissions, para. 5.

<sup>36</sup> Mr Ngudjolo's Response to the Request to Disregard Submissions, para. 47.



39. The Appeals Chamber notes that extensive submissions on the issue of witness P-250's credibility have been provided in the course of the appeals proceedings, including by the Prosecutor.<sup>37</sup> In this context, the Appeals Chamber also notes that, as the Prosecutor acknowledges, she "was informed by the Trial Chamber that in the context of discussions regarding protective measures for [w]itness D03-100, the latter indicated that he felt threatened by [...] [w]itness P-250".<sup>38</sup> Accordingly, the Appeals Chamber considers that the Prosecutor has not been prevented from making "informed submissions"<sup>39</sup> on witness P-250's credibility, including on the issue of the witness's alleged threats against witness D03-100. In these circumstances, the Appeals Chamber sees no ground to disregard Mr Ngudjolo's arguments to the extent that they relate to an *ex parte* hearing. The Prosecutor's Request to Disregard Submissions is therefore rejected.

### C. Additional errors alleged by Victim Groups I and II

40. The Appeals Chamber notes that Victim Groups I and II allege errors in the Acquittal Decision that were not specifically raised by the Prosecutor.

41. The Appeals Chamber observes that pursuant to article 81 (1) (a) and (b) of the Statute, only the Prosecutor and the convicted person, or the Prosecutor "on that person's behalf" may appeal a decision pursuant to article 74 of the Statute. It follows that victims are not entitled to bring an appeal against such a decision. The Appeals Chamber recalls that in its Decision on Victim Participation, it decided that the victims "may, through their legal representatives, participate in the present appeal proceedings for the purpose of presenting their views and concerns in respect of their personal interests in the issues on appeal".<sup>40</sup> The Appeals Chamber considers that in presenting their views and concerns, the participating victims may make observations as to alleged errors in the Acquittal Decision, even if these alleged errors were not specifically raised by the Prosecutor, as long as they affect the victims' personal interests and remain within the ambit of the Prosecutor's grounds of appeal.

<sup>37</sup> See e.g. [Response to the Document in Support of the Appeal](#), paras 157, 160-164, 168, 319-324, 331, 338, 341-342 and 346.

<sup>38</sup> Prosecutor's Request to Disregard Submissions, para. 4 referring to Transcript of 15 August 2011, ICC-01/04-01/07-T-291-CONF-ENG (ET), p. 13, lines 8-15.

<sup>39</sup> Prosecutor's Request to Disregard Submissions, para. 5, referring to [Katanga OA 2 Judgment](#), para. 20.

<sup>40</sup> [Decision on Victim Participation](#), p. 3 and para. 5.





Accordingly, the Appeals Chamber will address the submissions of Victim Group I and II to the extent that they comply with these criteria.

## V. MERITS

### A. First ground of appeal: alleged misapplication of the standard of proof

#### 1. Introduction

42. Under her first ground of appeal, the Prosecutor submits that

[a] number of key findings in the Judgment demonstrate a pattern whereby the Trial Chamber concluded that facts alleged by the Prosecution had not been established beyond reasonable doubt based on a possible alternative or competing inference or on other grounds. But, neither the competing inferences nor the other grounds purportedly establishing a reasonable doubt are based on evidence, logic, reason or common sense. At best, they establish a hypothetical alternative reading of the evidence. This demonstrates that the Trial Chamber, rather than applying the standard of proof beyond reasonable doubt, effectively required proof of the relevant facts to a degree of absolute certainty (i.e. beyond *any* doubt).<sup>41</sup>

43. To demonstrate the alleged error, the Prosecutor and the victims refer to several of the Trial Chamber's factual findings that, in their view, indicate that the Trial Chamber misapplied the standard of proof. These arguments are addressed below in sections 2 to 6. According to the Prosecutor, "[t]hese findings show a consistent pattern in the analysis of the evidence, whereby the Trial Chamber effectively entertained *any* doubt – including doubt not based on evidence, reason, logic or common sense" (emphasis in original).<sup>42</sup> In addition, the Prosecutor challenges statements of the Trial Chamber which, in her view, demonstrate a misconception of the applicable standard of proof. A similar argument is put forward by Victim Group I. The Appeals Chamber will address these arguments below in section 7.

44. The Prosecutor states that under the first ground of appeal, she is alleging errors of law.<sup>43</sup> Nevertheless, the Appeals Chamber considers that, to the extent that the alleged errors are based on challenges to the Trial Chamber's factual findings, her

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<sup>41</sup> [Document in Support of the Appeal](#), para. 38.

<sup>42</sup> [Document in Support of the Appeal](#), para. 53.

<sup>43</sup> [Document in Support of the Appeal](#), para. 39.



arguments under the first ground of appeal must be assessed against the standard of review for alleged factual errors<sup>44</sup> since, in order to analyse the Prosecutor's arguments, the Appeals Chamber is required to review the Trial Chamber's factual findings, and it is therefore appropriate to apply the standard of review for alleged factual errors.

## 2. *Witness P-317*

45. The first alleged error relates to Witness P-317.

### (a) **Relevant procedural background and submissions on appeal**

46. Witness P-317, a UN employee, was tasked with setting up the Investigations Unit of the MONUC Human Rights Division in the DRC. The witness's investigation into the situation in Ituri took place from 24 March to 7 April 2003 and led to an interim report as well as an official report addressed to the UN Security Council.<sup>45</sup>

47. Witness P-317 testified that she learnt from the UPDF who were responsible for security in Ituri and who escorted her to the villages that had been attacked,<sup>46</sup> that Mr Ngudjolo was in command of the forces based in the area of Bogoro<sup>47</sup> and that the UPDF sought authorisation from Mr Ngudjolo to enter Bogoro before the witness and her team could travel there.<sup>48</sup> When the witness arrived in Bogoro, she met with Commander Dark who informed her that he was in charge of the Lendu forces in Bogoro and that [Mr] Katanga was his hierarchical superior.<sup>49</sup> Witness P-317 also testified that she met Mr Ngudjolo in April 2003 in Bunia. During her testimony, she stated that Mr Ngudjolo told her that he had organised the attacks on Bogoro and Mandro. The relevant part of the transcript reads as follows:

**Question:** You just said that you discussed Bogoro and Mandro. What were the topics that were raised relating to these two attacks?

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<sup>44</sup> See *supra* paras 22-23.

<sup>45</sup> See [Acquittal Decision](#), paras 284-285.

<sup>46</sup> Transcript of 6 December 2010, ICC-01/04-01/07-T-228-ENG (ET WT), p. 29, lines 4-10.

<sup>47</sup> Transcript of 6 December 2010, ICC-01/04-01/07-T-228-ENG (ET WT), p. 30, lines 11-14.

<sup>48</sup> Transcript of 6 December 2010, ICC-01/04-01/07-T-228-ENG (ET WT), p. 29, lines 12-24, p. 30, lines 11-25 to p. 31, line 1.

<sup>49</sup> Transcript of 6 December 2010, ICC-01/04-01/07-T-228-ENG (ET WT), p. 36, lines 9-15.



**Answer:** First of all, Mr. Ngudjolo accepted -- well, first of all, he said that it was he who had organised those two attacks for strategic reasons. And he essentially repeated what Commander Dark had said. In other words, that the Lendu villages around Bogoro had been bombarded from sometime prior by the UPC and that there was also a military camp in Mandro which needed to be unseated for the very same reasons, to protect the Lendu villages. However, when I asked the question, “Why did you also need to kill civilians,” Mr. Ngudjolo answered that there were no civilians among the Hema because they were all armed, including women and children.<sup>50</sup>

48. In assessing witness P-317’s credibility, the Trial Chamber found her evidence to be “very consistent”, and stated that the witness “expressed herself with authority [...] and ease during both the examination-in-chief and [...] cross-examinations”.<sup>51</sup> The Trial Chamber did not doubt the “objectivity and sincerity” of the witness, “an outsider to the conflict” who lacked any evidence of bias against Mr Ngudjolo.<sup>52</sup> It also did not “doubt that a conversation took place between [witness] P-317 and Mathieu Ngudjolo”, in which he “allegedly made the statements that the witness recorded in her report and then recalled subsequently during her testimony in court”.<sup>53</sup> The Trial Chamber concluded its assessment by stating that witness P-317 was “credible and that it [could] therefore rely on her testimony in the present case”.<sup>54</sup>

49. However, regarding witness P-317’s evidence in relation to Mr Ngudjolo’s position of authority before or during the attack on Bogoro, the Trial Chamber stated that while it had no reason to doubt the witness’s testimony, “it cannot be presupposed that the Accused actually assumed those military responsibilities imputed by the Prosecution”.<sup>55</sup> The Trial Chamber held further that although witness P-317’s statements were “somewhat indicative” of Mr Ngudjolo’s possible involvement in the attack on Bogoro, they were “too general ultimately to determine the Accused’s precise status and role in the Bedu-Ezekere *groupement*” (emphasis in original).<sup>56</sup> Furthermore, the Trial Chamber stated that “although the argument must be treated with caution”,<sup>57</sup> it could not be ruled out that Mr Ngudjolo, like others in Ituri at the

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<sup>50</sup> Transcript of 6 December 2010, ICC-01/04-01/07-T-228-ENG (ET WT), pp. 51-52.

<sup>51</sup> [Acquittal Decision](#), para. 289.

<sup>52</sup> [Acquittal Decision](#), para. 291.

<sup>53</sup> [Acquittal Decision](#), para. 292.

<sup>54</sup> [Acquittal Decision](#), para. 295.

<sup>55</sup> [Acquittal Decision](#), para. 434.

<sup>56</sup> [Acquittal Decision](#), para. 434.

<sup>57</sup> [Acquittal Decision](#), para. 434.



time,<sup>58</sup> had claimed responsibility for the attack “so that he would be given a higher rank if integrated into the regular Congolese army”.<sup>59</sup>

50. In its final conclusion on Mr Ngudjolo’s alleged admission to witness P-317, upon assessing the various pieces of evidence as a whole, the Trial Chamber noted Mr Ngudjolo’s statement to witness P-317 that he had organised the attacks on Bogoro and Mandro, and his subsequent statement to a Congolese Prosecutor that he had only led the attack on Bunia. The Trial Chamber concluded that these statements were vague and imprecise as well as inconsistent.<sup>60</sup> The Trial Chamber noted that Mr Ngudjolo did not mention to witness P-317 that he participated in the battle of Bunia, and that his statement to the Congolese Prosecutor did not mention “his participation in the hostilities at Bogoro and Mandro”.<sup>61</sup> Hence the Trial Chamber felt “compelled to treat such revelations with circumspection”.<sup>62</sup>

51. The Prosecutor takes issue with the Trial Chamber’s refusal to rely on witness P-317’s evidence to establish Mr Ngudjolo’s position of authority in the context of the attack on Bogoro. The Prosecutor raises arguments with respect to three key findings of the Trial Chamber that concerned Mr Ngudjolo’s alleged remarks to witness P-317: (i) that Mr Ngudjolo may have claimed “responsibility for an attack so that he would be given a higher rank if integrated into the regular Congolese army”,<sup>63</sup> (ii) that Mr Ngudjolo’s admission was “too general ultimately to determine the Accused’s precise status and role in Bedu-Ezekere *groupement*” (emphasis in original),<sup>64</sup> and (iii) that the admission was inconsistent with another admission made several weeks later to a Congolese Prosecutor.<sup>65</sup>

52. With respect to the *finding that Mr Ngudjolo may have claimed responsibility for the attack in order to advance his career*, the Prosecutor submits that this finding is based on speculation, is “unsupported by the record” and was “never proffered by

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<sup>58</sup> [Acquittal Decision](#), para. 434, with footnote 1005 referring to witness D03-11, the FNI President, who also claimed responsibility for the attack, Transcript of 15 April 2011, ICC-01/04-01/07-T-248-ENG (ET WT), pp. 28-29.

<sup>59</sup> Acquittal Decision, para. 434.

<sup>60</sup> Acquittal Decision, para. 497.

<sup>61</sup> Acquittal Decision, para. 497.

<sup>62</sup> Acquittal Decision, para. 497.

<sup>63</sup> Acquittal Decision, para. 434.

<sup>64</sup> Acquittal Decision, para. 434.

<sup>65</sup> Acquittal Decision, para. 497.



the [D]efence”.<sup>66</sup> The Prosecutor recalls that at the time that Mr Ngudjolo met with witness P-317, he had “joined the FNI-FRPI Alliance (on 22 March 2003) as the FRPI chief of staff” and “had signed a peace agreement on behalf of his militia [(18 March 2003)]” (footnotes omitted).<sup>67</sup> Therefore Mr Ngudjolo was already well recognised as “a senior ranking officer” and “did not have to confess to criminality to show his importance”.<sup>68</sup>

53. Furthermore, the Prosecutor argues that this finding is “against logic and common sense”.<sup>69</sup> First, she contends that the Trial Chamber found Mr Ngudjolo’s admission to witness P-317 to be somewhat indicative of Mr Ngudjolo’s possible role prior to the attack on Bogoro, and therefore in her view “the Chamber accepted that [Mr] Ngudjolo was truthful when referring to [witness] P-317 about his involvement in the preparation of the attack”.<sup>70</sup> This, the Prosecutor submits, is in contradiction with the Chamber’s “blanket conclusion that [Mr] Ngudjolo exaggerated his role in the attack when talking to [witness] P-317 – which must logically assume the untruthfulness of his account to [witness] P-317.”<sup>71</sup> Second, the Prosecutor contends that the finding is “logically incompatible” with the Trial Chamber’s other conclusions, namely “its rejection of the Defence’s theory that [Mr] Ngudjolo was an imposter who succeeded in duping all the senior figures in Ituri [...] and that he obtained a senior military rank through a combination of luck and career opportunism” (footnotes omitted).<sup>72</sup>

54. With respect to the *finding that Mr Ngudjolo’s admission was too general to allow for a definitive finding on his status and role*, the Prosecutor argues that the generality of the admission may mean that the Trial Chamber would have been unable to rely on the admission alone, but that this does not in itself diminish its probative value.<sup>73</sup> Victim Group I submits in this regard that witness P-317’s testimony was not too general, as the Trial Chamber claimed, but was rather sufficiently detailed and

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<sup>66</sup> [Document in Support of the Appeal](#), para. 56.

<sup>67</sup> Document in Support of the Appeal, para. 55.

<sup>68</sup> Document in Support of the Appeal, para. 55.

<sup>69</sup> Document in Support of the Appeal, para. 57.

<sup>70</sup> Document in Support of the Appeal, para. 57.

<sup>71</sup> Document in Support of the Appeal, para. 57.

<sup>72</sup> Document in Support of the Appeal, para. 57.

<sup>73</sup> Document in Support of the Appeal, para. 58.



relevant to determine Mr Ngudjolo's authority at the time of the events (he had the power to organise an attack, and the attack was motivated by "strategic reasons") (emphasis in original).<sup>74</sup>

55. Victim Group I submits that the Trial Chamber's finding that Mr Ngudjolo exaggerated when he claimed to have organised the attack on Bogoro was a "purely hypothetical and illogical explanation that contradicts the evidence tendered and examined in the case".<sup>75</sup> Victim Group I contends that the Trial Chamber committed an error in giving an explanation that Mr Ngudjolo himself did not offer for his statements during his conversation with witness P-317 and that is unsupported by the evidence.<sup>76</sup> Similarly, Victim Group II states that the Trial Chamber relied "on the existence of a 'forced' doubt not only wholly unsupported by the evidence in the record but also by relying on speculation ungrounded in fact".<sup>77</sup>

56. Mr Ngudjolo submits that the alleged admission to witness P-317 hinges on the word of this witness alone, and is "not corroborated by any other evidence".<sup>78</sup> Thus, in his view, the Trial Chamber reasonably held that it was not possible to make conclusive findings on the basis of the alleged admission to witness P-317.<sup>79</sup> Mr Ngudjolo further argues that witness P-317 "either fails to provide precise and concrete details or contradicted herself regarding her allegations".<sup>80</sup> Given that the witness's testimony was "riddled with glaring contradictions and flagrant inconsistencies", Mr Ngudjolo argues that despite the Trial Chamber's finding that witness P-317 was credible her testimony would not be "sufficient in and of itself" to secure a conviction.<sup>81</sup> Mr Ngudjolo contends that an admission is not binding on the court, which must verify the sincerity and the plausibility of the admission in light of other evidence.<sup>82</sup> In his view, the theory that he could have lied in claiming responsibility for the attack on Bogoro is reasonable, given that witness D02-236

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<sup>74</sup> [Observations of Victim Group I](#), para. 26, referring to Transcript of 6 December 2010, ICC-01/04-01/07-T-228-ENG (ET WT), p. 51, lines 24-25 to p. 52 lines 1-8.

<sup>75</sup> Observations of Victim Group I, para. 28.

<sup>76</sup> Observations of Victim Group I, para. 32.

<sup>77</sup> [Observations of Victim Group II](#), para. 13.

<sup>78</sup> [Response to the Document in Support of the Appeal](#), para. 46.

<sup>79</sup> Response to the Document in Support of the Appeal, para. 51.

<sup>80</sup> Response to the Document in Support of the Appeal, para. 52.

<sup>81</sup> Response to the Document in Support of the Appeal, para. 53.

<sup>82</sup> Response to the Document in Support of the Appeal, para. 54.



[elsewhere referred to as witness D03-11] also falsely admitted to claiming responsibility for the attack,<sup>83</sup> and that on another occasion Mr Ngudjolo also falsely claimed responsibility for the attack on Bunia.<sup>84</sup> In the end, according to Mr Ngudjolo, “the Prosecution still fails to set out other evidence which could corroborate the purported admission and justify a guilty verdict”.<sup>85</sup>

**(b) Determination of the Appeals Chamber**

57. The Prosecutor’s argument with regard to witness P-317 focuses on the purported “speculative” finding of the Trial Chamber that Mr Ngudjolo may have lied in his alleged admission to witness P-317 in order to advance his career.<sup>86</sup> The Prosecutor submits that the Trial Chamber refused to rely on the evidence of witness P-317 “because in [the Chamber’s] view it could not be excluded that [Mr] Ngudjolo lied to the witness and that he ‘may possibly have wanted to claim responsibility’ to enhance his career” (footnote omitted).<sup>87</sup> The Prosecutor further submits that the Trial Chamber “posed two other lesser justifications for refusing to credit [Mr] Ngudjolo’s admission”, namely that the alleged admission was too general to permit the Court to determine Mr Ngudjolo’s precise status and role within the Bedu-Ezekere *groupement* and that the alleged admission was inconsistent with another admission he had made several weeks later to the Congolese Prosecutor.<sup>88</sup>

58. The Appeals Chamber finds that the Prosecutor’s submissions do not accurately reflect the Trial Chamber’s findings. The Appeals Chamber notes that the Trial Chamber stated that Mr Ngudjolo’s alleged admission to witness P-317, although “somewhat indicative of the Accused’s possible involvement in the preparation of the attack on Bogoro”, was “too general ultimately to determine the Accused’s precise status and role in the Bedu-Ezekere *groupement*” (emphasis in original).<sup>89</sup> It then went on to find that, “furthermore”, it could not be ruled out that Mr Ngudjolo “had wanted

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<sup>83</sup> D02-236 or D03-11 testified that he had claimed responsibility for the attack on Bogoro during a broadcast on Radio France Internationale. See Transcript of 6 April 2011, ICC-01/04-01/07-T-244-ENG (CT WT), p. 57, lines 13-24 and Transcript of 15 April 2011, ICC-01/04-01/07-T-248-ENG (ET WT), p. 29, lines 11-19. See also *supra* footnote 59 and *infra* footnote 95.

<sup>84</sup> [Response to the Document in Support of the Appeal](#), para. 55.

<sup>85</sup> Response to the Document in Support of the Appeal, para. 56.

<sup>86</sup> [Document in Support of the Appeal](#), paras 55-58.

<sup>87</sup> Document in Support of the Appeal, para. 55.

<sup>88</sup> Document in Support of the Appeal, para. 58.

<sup>89</sup> [Acquittal Decision](#), para. 434.



to claim responsibility for an attack so that he would be given a higher rank if integrated into the regular Congolese army”—but did so while specifically stating that this argument “must be treated with caution”.<sup>90</sup> Thus, the Appeals Chamber finds that contrary to the Prosecutor’s argument, the conclusion that the alleged admission was “too general”<sup>91</sup> for any definitive determination of the accused’s role was the Trial Chamber’s primary finding, with the “speculative explanation”<sup>92</sup> of Mr Ngudjolo’s possible design for career advancement being subsidiary.

59. As regards the reasonableness of the Trial Chamber’s finding that Mr Ngudjolo’s alleged admission to witness P-317 was too general for a conclusive determination of Mr Ngudjolo’s role, the Appeals Chamber notes that the Trial Chamber found the witness credible and stated that it could rely on her testimony.<sup>93</sup> The Appeals Chamber notes, however, that Mr Ngudjolo’s alleged admission appears in said testimony almost in passing. It was by no means the focus of the witness’s testimony; she merely mentioned that Mr Ngudjolo said he had organised the attacks on Bogoro and Mandro for strategic reasons.<sup>94</sup> No other questions on the alleged admission itself appear to have been asked of the witness. In light of the foregoing, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to conclude that the alleged admission, as reported to witness P-317, was too general for a precise determination of Mr Ngudjolo’s status and role in the Bedu-Ezekere *groupement*.

60. Regarding the Trial Chamber’s alleged “speculative explanation”<sup>95</sup> that “it cannot be ruled out that [Mr]Mathieu Ngudjolo, akin to others in Ituri at the time, had wanted to claim responsibility for an attack so that he would be given a higher rank if integrated into the regular Congolese army” (footnotes omitted),<sup>96</sup> the Appeals Chamber notes that, although Mr Ngudjolo never attempted to justify his alleged admission to witness P-317 in this manner and in fact simply denied ever having met

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<sup>90</sup> [Acquittal Decision](#), para. 434.

<sup>91</sup> [Acquittal Decision](#), para. 434.

<sup>92</sup> [Document in Support of the Appeal](#), para. 56.

<sup>93</sup> *See supra* para. 48; [Acquittal Decision](#), para. 295.

<sup>94</sup> *See supra* para. 47; Transcript of 6 December 2010, ICC-01/04-01/07-T-228-ENG (ET WT), p. 51, line 25 to p. 52, line 1.

<sup>95</sup> *See supra* para. 57; [Document in Support of the Appeal](#), para. 56.

<sup>96</sup> [Acquittal Decision](#), para. 434.





the witness,<sup>97</sup> he did provide such an explanation with regard to his admission to the Congolese Prosecutor.<sup>98</sup> Furthermore, although the Trial Chamber does not mention the alleged admission to the Congolese Prosecutor at this point in the Acquittal Decision, the Chamber does refer to the testimony of witness D03-11, the FNI President, who testified that he had falsely claimed responsibility for the attack on Bogoro. The Appeals Chamber considers that in so doing, the Trial Chamber provided some evidentiary foundation for the possibility that Mr Ngudjolo may have wanted to “claim responsibility for an attack so that he would be given a higher rank if integrated into the regular Congolese army”.<sup>99</sup> The Appeals Chamber finds that when viewed in this light, the Trial Chamber’s findings are not speculative, but rather demonstrate that, based on similar evidence on the record, it was unable to rule out other explanations for Mr Ngudjolo’s alleged admission. Accordingly, the Appeals Chamber considers that the Trial Chamber’s finding was not unreasonable.

61. As regards the alleged contradiction between the Trial Chamber’s finding that it could not rule out that Mr Ngudjolo may have claimed responsibility for the attack on Bogoro in order to advance his career and its later “rejection of the Defence’s theory that Mr Ngudjolo was an imposter” who duped the senior figures in Ituri and “that he obtained a senior military rank through a combination of luck and career opportunism” (footnotes omitted),<sup>100</sup> the Appeals Chamber considers the Prosecutor’s arguments to be unpersuasive.

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<sup>97</sup> [Acquittal Decision](#), para. 290; [Mr Ngudjolo’s Closing Brief](#), paras 218-221.

<sup>98</sup> Acquittal Decision, para. 455; Transcript of 9 November 2011, ICC-01/04-01/07-T-331-CONF-ENG (CT), p. 64, line 8 and p. 65 line 4, with public redacted version, ICC-01/04-01/07-T-331-Red-ENG (CT WT).

<sup>99</sup> Acquittal Decision, para. 434. The relevant portion of D03-11’s testimony in response to the question by Mr Ngudjolo’s Counsel as to why the witness had claimed responsibility for the attack on Bogoro on RFI radio, reads as follows: “Following our logic, anything coming from any corner of the world to weaken the UPC would be good for us. Do you understand? So it was--that was why I said I was happy because my enemy, the UPC, had lost the battle and that was what I meant. And as I understood yesterday, this approach did not last long because Chief Kahwa came to me and said, “No, you know nothing. Why did you say that?” And he went on, he said, “Do you know the attack came from Beni? It was Mbusa’s people from Kinshasa, they attacked. Why did you say that?” And I said, “Well, I didn’t know, but for me and indeed for you, everything that puts the UPC in a difficult position is good for us. And that, quite frankly, is why I said that on the radio”, see Transcript of 6 April 2011, ICC-01/04-01/07-T-244-ENG (CT WT), p. 57, lines 13-24. See also Transcript of 15 April 2011, ICC-01/04-01/07-T-248-ENG (ET WT), pp. 28-29).

<sup>100</sup> [Document in Support of the Appeal](#), para. 57.



62. In relation to the latter finding, the Appeals Chamber notes that the Trial Chamber was considering Mr Ngudjolo's claim that after the attack on Bogoro he rose from the position of a nurse to a colonel in March 2003,<sup>101</sup> which itself purported to rebut the Prosecutor's argument that Mr Ngudjolo's "role and duties after 24 February 2003" formed a continuum with those he discharged prior to the attack.<sup>102</sup> In this regard, the Appeals Chamber also notes that the Trial Chamber, in its overall conclusions, considered that at the end of 2002, Mr Ngudjolo was a man of "some standing within the Bedu-Ezekere *groupement* owing to the status of his family, his highly-placed acquaintances in Ituri, his education and his military training in the civil guard" (emphasis in original).<sup>103</sup> The Chamber further noted that Mr Ngudjolo was "indeed working as a nurse [...] prior to the attack on Bogoro".<sup>104</sup> In addition, relying on various pieces of evidence, the Chamber noted that he was "well-acquainted with events in Ituri and they could not have been the figment of the imagination of a nurse with little knowledge of the situation in the district".<sup>105</sup> Thus, in the Trial Chamber's view, Mr Ngudjolo did not rise "from nurse to colonel[...] as simply a mixture of chance and careerist opportunism", as he contended, nor did his role and duties after 24 February 2003 necessarily form a continuum with those he discharged prior to the attack, as the Prosecutor contended.<sup>106</sup> Instead, the Trial Chamber was of the view that Mr Ngudjolo may have had a position of some importance prior to the attack, but not necessarily that of leader. The Appeals Chamber considers that, when viewed in this light, the Trial Chamber's finding regarding Mr Ngudjolo's alleged admission to witness P-317 that he may have "wanted to claim responsibility for an attack so that he would be given a higher rank if integrated into the regular Congolese army" simply indicates that the Trial Chamber considered that Mr Ngudjolo may have wanted to bolster his status *further*.<sup>107</sup> Accordingly, the Appeals Chamber finds that the Trial Chamber's findings regarding the alleged admission to witness P-317 and "its rejection of the Defence's theory that Mr Ngudjolo "was an imposter who succeeded in duping all the senior figures in Ituri [...] and that he obtained a senior military rank

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<sup>101</sup> [Acquittal Decision](#), para. 444.

<sup>102</sup> [Acquittal Decision](#), para. 444.

<sup>103</sup> [Acquittal Decision](#), para. 491.

<sup>104</sup> [Acquittal Decision](#), para. 492.

<sup>105</sup> [Acquittal Decision](#), para. 493.

<sup>106</sup> [Acquittal Decision](#), para. 444.

<sup>107</sup> [Acquittal Decision](#), para. 434.



through a combination of luck and career opportunism” (footnotes omitted)<sup>108</sup> are not contradictory.

63. Consequently, the Appeals Chamber rejects the Prosecutor’s argument in this regard.

3. *Witness P-279*

(a) **Relevant part of the procedural history and submissions on appeal**

64. Witness P-279 testified that he and his family fled the village of Dele for Zombe at the time that Governor Lomondo fell from power.<sup>109</sup> They settled in Zombe “for an indeterminate period [of time] and then returned to Dele after the UPC had left Bunia”, at which point the witness was “allegedly abducted by a commander from Bedu-Ezekere” (footnote omitted).<sup>110</sup>

65. Witness P-279 allegedly started military training the day after arriving at Zombe camp.<sup>111</sup> In all, the witness “claimed to have spent a month and a few weeks in the militia” (footnote omitted).<sup>112</sup> According to the Acquittal Decision, witness P-279 claimed that he was born on 30 August 1990 (which would have made him twelve years old at the time of the Bogoro attack).<sup>113</sup>

66. As part of its analysis of the testimony of witness P-279, the Trial Chamber evaluated a statement by the witness in which he claimed to have seen Mr Ngudjolo and Mr Katanga enter a school near the military camp to hold a meeting.<sup>114</sup> Although the witness claimed he was near the Bogoro market when he saw the two enter the school, the Trial Chamber noted on the site visit that the camp and the market were “too far apart for the witness to have been able to see the Accused enter Bogoro Institute” (footnote omitted).<sup>115</sup> In relation to the Prosecutor’s contention that the

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<sup>108</sup> [Document in Support of the Appeal](#), para. 57.

<sup>109</sup> [Acquittal Decision](#), para. 162.

<sup>110</sup> [Acquittal Decision](#), para. 162.

<sup>111</sup> [Acquittal Decision](#), para. 163.

<sup>112</sup> [Acquittal Decision](#), para. 167.

<sup>113</sup> [Acquittal Decision](#), para. 161.

<sup>114</sup> [Acquittal Decision](#), para. 176.

<sup>115</sup> [Acquittal Decision](#), para. 176.



witness was referring to a different school, which *was* near the market,<sup>116</sup> the Trial Chamber held that it was for the Prosecutor to clarify with the witness to which school he was referring, and that “the explanations provided by the Prosecution on the subject are but one interpretation, amongst others, of the witness’s testimony”.<sup>117</sup> At this point in its analysis, the Chamber had already “noted contradictions in other statements made by [witness] P-279”.<sup>118</sup> Subsequently, it emphasised “two [other] aspects of [witness P-279]’s testimony which considerably [reduced] any faith which might be invested in his testimony as a whole”.<sup>119</sup> Ultimately, the Chamber concluded that “[w]itness P-279’s assertions regarding his presence within the ranks of the Zombe combatants at the time of the attack on Bogoro [were], as previously noted, overly inaccurate and contradictory” and that “his attitude of denial regarding his precise age and his relationship with [witness] P-280 [affected] the general credibility of his testimony”.<sup>120</sup> The Trial Chamber further noted that “the testimony of [witness] D03-236, despite its relative probative value, further contributes to the doubts harboured by the Chamber as to his capacity to testify to the events in the case”.<sup>121</sup> Accordingly, it found itself unable to rely upon the witness’s testimony.<sup>122</sup>

67. Victim Group II submits that the Trial Chamber erred when it found that, contrary to his testimony, the witness would have been too far away to see Mr Ngudjolo and Mr Katanga enter a school after the attack on Bogoro.<sup>123</sup> Victim Group II contends that “the Prosecutor provided a credible explanation” that the witness was referring to a different school, which the Trial Chamber rejected.<sup>124</sup> In its view, by rejecting this explanation, the Trial Chamber applied an incorrect standard of proof

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<sup>116</sup> [Acquittal Decision](#), para. 176, citing Transcript of 15 May 2012, ICC-01/04-01/07-T-336-ENG (ET WT), p. 68, lines 9 -24.

<sup>117</sup> Acquittal Decision, para. 176.

<sup>118</sup> Acquittal Decision, para. 175. For instance the Trial Chamber noted that witness P-279 claimed during the hearing to have worked as a bodyguard for the wife of one of the Bedu-Ezekere commanders whereas in a previous statement he had mentioned working as a bodyguard for this very commander.

<sup>119</sup> Acquittal Decision, para. 177.

<sup>120</sup> Acquittal Decision, para. 189.

<sup>121</sup> Acquittal Decision, para. 189.

<sup>122</sup> Acquittal Decision, para. 190.

<sup>123</sup> [Observations of Victim Group II](#), para. 15.

<sup>124</sup> Observations of Victim Group II, para. 16, referring to Acquittal Decision, para. 176.



and “implicitly required the [Prosecutor] to prove that no other explanation was possible”.<sup>125</sup>

68. Victim Group II also avers that the Trial Chamber erred when it indicated that witness P-279 contradicted himself because in a previous statement he stated that he was Boba Boba’s bodyguard whereas in court, he claimed to have been Boba Boba’s wife’s bodyguard.<sup>126</sup> Victim Group II alleges that a possible explanation for the inconsistency “could be that the witness, having gained Boba Boba’s trust, as he had stated, had then been appointed by Boba Boba’s to guard his wife”.<sup>127</sup>

69. Victim Group II submits further that the Trial Chamber “failed to take appropriate account of [witness P-279’s] particular vulnerability”,<sup>128</sup> and “ascribed considerable weight to the aforementioned gaps or contradictions insofar as it considered them sufficient to cast doubt on the witness’[s] overall credibility”.<sup>129</sup>

70. Furthermore, Victim Group II submits that the Trial Chamber’s evaluation of witness P-279’s attitude in discussions concerning his date of birth and his relationship with witness P-280 “raise profoundly personal issues which can call into question [witnesses’] trust in those around them”, and thus witness P-279’s attitude of denial should not have been evaluated as “harshly” as it was by the Trial Chamber.<sup>130</sup> With respect to witness P-279’s reluctance to acknowledge his ties to witness P-280, Victim Group II argues that, in finding there was a risk of collusion between the two witnesses, the Trial Chamber failed to take into consideration the pressure allegedly exerted on their respective families to testify for the Defence.<sup>131</sup>

71. In addition, Victim Group II argues that the Trial Chamber failed to take into account the risk of collusion between witnesses D03-236 and D03-340 “when evaluating the probative value of [witness] D03-236’s testimony concerning [witness] P-279’s life as a militia member”,<sup>132</sup> adding that the Trial Chamber itself noted that

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<sup>125</sup> [Observations of Victim Group II](#), para. 17.

<sup>126</sup> [Observations of Victim Group II](#), para. 41.

<sup>127</sup> [Observations of Victim Group II](#), para. 42.

<sup>128</sup> [Observations of Victim Group II](#), para. 47.

<sup>129</sup> [Observations of Victim Group II](#), para. 48.

<sup>130</sup> [Observations of Victim Group II](#), para. 52. *See also* para. 54.

<sup>131</sup> [Observations of Victim Group II](#), paras 53-55.

<sup>132</sup> [Observations of Victim Group II](#), paras 56-57.



witness D03-236’s “statements were indeed surprising in many respects, notably with regard to life in Zumbe and Aveba” (footnote omitted).<sup>133</sup> Accordingly, Victim Group II contends that the Trial Chamber erred by failing “to take the action it should have taken on the basis of its own findings”<sup>134</sup> and by giving witness D03-236’s evidence the weight it did in challenging the credibility of witness P-279.<sup>135</sup>

72. Mr Ngudjolo submits that Victim Group II’s approach “consists not in demonstrating any purported factual or legal errors of the [Trial] Chamber, but in disputing the Chamber’s evaluation of the evidence, preferring their own evaluation”.<sup>136</sup> He states that “[n]ot only did the Chamber properly analyse [witness] P-279’s testimony [...], but it also weighed it against other evidence on the record, specifically the testimony of [witness] D03-236”.<sup>137</sup> Regarding the contradictions in witness P-279’s statements concerning his alleged presence in the militia, Mr Ngudjolo argues that the Trial Chamber provided reasons for its findings.<sup>138</sup> Finally, Mr Ngudjolo submits that Victim Group II provides “[its] own interpretation of [witness] P-279’s testimony regarding his age” and “[its] own personal evaluation of the testimonies of [witnesses] D03-236 and D03-340” (footnotes omitted).<sup>139</sup>

### (b) Determination of the Appeals Chamber

73. The Appeals Chamber finds that Victim Group II’s argument that the Trial Chamber “required the [Prosecutor] to prove that no other explanation was possible”<sup>140</sup> is misplaced. The Trial Chamber declined to accept an untested and unverified explanation from the Prosecutor as to which school the witness was referring to when he testified that he saw Mr Ngudjolo and Mr Katanga enter after the attack on Bogoro. In fact, a review of the relevant transcript reveals that the witness specifically stated that the school in question had been located next to the UPC

<sup>133</sup> [Observations of Victim Group II](#), para. 58.

<sup>134</sup> [Observations of Victim Group II](#), para. 59.

<sup>135</sup> [Observations of Victim Group II](#), para. 60.

<sup>136</sup> [Mr Ngudjolo’s Response to the Observations of the Victims](#), para. 79. *See also*, para. 80.

<sup>137</sup> [Mr Ngudjolo’s Response to the Observations of the Victims](#), para. 83.

<sup>138</sup> [Mr Ngudjolo’s Response to the Observations of the Victims](#), para. 88.

<sup>139</sup> [Mr Ngudjolo’s Response to the Observations of the Victims](#), para. 89.

<sup>140</sup> [Observations of Victim Group II](#), para. 17.



military camp.<sup>141</sup> The school that fits this description would have been the Bogoro Institute, which was said to be within the UPC military camp in 2003.<sup>142</sup>

74. Accordingly, based on the evidence before it, the Trial Chamber determined that, given the distance between the market and the camp, the witness, contrary to his testimony, could not have seen Mr Ngudjolo and Mr Katanga enter the school. In these circumstances, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to reject the Prosecutor's explanation, which was not supported by the witness's testimony.

75. As regards Victim Group II's remaining arguments, the Appeals Chamber finds that although Victim Group II's submissions may present an alternative interpretation of the evidence, they do not, as submitted by Mr Ngudjolo, indicate a clear error on the part of the Trial Chamber. In particular, they do not demonstrate that no reasonable trier of fact could have decided as did the Trial Chamber. For instance, when discussing the Trial Chamber's analysis of witness P-279's evidence regarding his alleged work as a bodyguard for Boba-Boba, Victim Group II provides its own explanation for the inconsistencies in the witness's evidence but fails to demonstrate a clear error on the part of the Trial Chamber.

76. More specifically regarding Victim Group II's argument that the Trial Chamber failed to take into account the witness's particular vulnerability, the Appeals Chamber notes that the Trial Chamber *did* explicitly acknowledge that the witness was considered vulnerable, whilst also noting that his difficulties in answering questions from the defence team "bore no likeness" to other witnesses for the Prosecutor.<sup>143</sup> Given the deference that should be afforded to a Trial Chamber's credibility assessments of witnesses, the Appeals Chamber considers that the *weight* given to witness P-279's acknowledged vulnerability was not unreasonable.

77. Finally, as regards Victim Group II's argument that the Trial Chamber gave witness D03-236's evidence too much weight when assessing witness P-279's

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<sup>141</sup> Transcript of 21 May 2010, ICC-01/04-01/07-T-145-CONF-ENG (ET), with public redacted version, ICC-01/04-01/07-T-145-Red2-ENG (WT), p. 33, lines 21-23.

<sup>142</sup> [Report of the Site Visit](#), para. 45; [Acquittal Decision](#), paras 319-320.

<sup>143</sup> [Acquittal Decision](#), para. 183.



evidence, the Appeals Chamber recalls that the Trial Chamber acknowledged the “relative probative value” of witness D03-236’s evidence.<sup>144</sup> The Appeals Chamber finds that, despite the Trial Chamber’s cautious approach to witness D03-236’s evidence, the Chamber acknowledged that it served only to further the doubts that it was already entertaining concerning witness P-279’s ability to testify truthfully to the events.<sup>145</sup> Accordingly, the Appeals Chamber finds that, on the whole, the Trial Chamber’s evaluation of witness P-279’s credibility was not unreasonable.

78. Accordingly, Victim Group II’s arguments are rejected.

4. *Witness D02-176*

(a) **Relevant part of the procedural history and submissions on appeal**

79. Witness D02-176 was a captain and company commander of the UPC in Bogoro,<sup>146</sup> a militia predominantly composed of the Hema community and led by Mr Thomas Lubanga. He appeared as a defence witness for Mr Katanga.

80. The witness testified that he “[TRANSLATION] knew very well’ that [Mr] Ngudjolo was the ‘[TRANSLATION] number one’” during the attack on Bogoro and that he was the “[TRANSLATION] commander of operations’ during the attack on Bogoro” and that it was the “[TRANSLATION] truth known to all”.<sup>147</sup> The witness identified several leaders who belonged to the Lendu movement, which he thought was called the FNI and of which Mr Ngudjolo was the Chief of Staff.<sup>148</sup> Under cross-examination, when asked if Mr Ngudjolo was the most senior commander of the forces he was fighting against in the battle at Bunia in May 2003, witness D02-176 answered: “Yes based on what I heard, that is correct”.<sup>149</sup>

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<sup>144</sup> [Acquittal Decision](#), para. 189.

<sup>145</sup> [Acquittal Decision](#), para. 189.

<sup>146</sup> [Acquittal Decision](#), para. 431.

<sup>147</sup> [Acquittal Decision](#), para. 431, citing Transcript of 10 May 2011, ICC-01/04-01/07-T-257-CONF-ENG (CT), p. 6, lines 22-25 to p. 7, lines 1-4, with public redacted version, ICC-01/04-01/07-T-257-Red-ENG.

<sup>148</sup> [Acquittal Decision](#), para. 431, citing Transcript of 10 May 2011, ICC-01/04-01/07-T-257-CONF-ENG (CT), p. 7, lines 11-25 to p. 8, lines 1-11, with public redacted version, ICC-01/04-01/07-T-257-Red-ENG (CT WT).

<sup>149</sup> See Transcript of 9 May 2011, ICC-01/04-01/07-T-256-CONF-ENG (ET), p. 28, lines 2-5, with public redacted version, ICC-01/04-01/07-T-256-Red2-ENG (WT).





81. In assessing witness D02-176's credibility, the Trial Chamber stated that it "certainly cannot underestimate this testimony inasmuch as [witness] D02-176 belonged to the UPC senior command, had responsibility for a company and was engaged in defending the village of Bogoro".<sup>150</sup> The Trial Chamber further acknowledged that "he was in principle particularly well-placed to state which military commanders were at enemy positions" given the numerous occasions that UPC troops had attacked the Bedu-Ezekere *groupement*.<sup>151</sup> However, in assessing witness D02-176's evidence, the Trial Chamber held that the witness's assertion was based on "anonymous hearsay", and came from someone "who did not live in Zumbe and who [...] provided no further details on Mathieu Ngudjolo's status within that locality".<sup>152</sup> Furthermore, the Chamber stated that it "cannot rule out that the witness had associated Mathieu Ngudjolo's status in the FNI with the position which he considered him to have held prior to the attack on Bogoro".<sup>153</sup>

82. The Prosecutor disputes this latter conclusion of the Trial Chamber, namely that the Chamber was unable to exclude the possibility that the witness may have confused Mr Ngudjolo's status in the FNI in March 2003 with his status and position prior to the attack on Bogoro.<sup>154</sup> The Prosecutor submits that this "inference is not based on any evidence on the record", in that "the witness's testimony did not leave open the possibility that he was confused and had mistaken when [Mr] Ngudjolo [had] held the relevant position of command" (footnote omitted).<sup>155</sup>

83. Building on this argument, Victim Group I submits that the Trial Chamber "does not explain (explicitly or implicitly) as to how it arrived at this conclusion" (footnote omitted).<sup>156</sup> Victim Group I argues that this finding contradicts the testimony of witness D02-176, who clearly stated that Mr Ngudjolo was the commander who supervised the Bogoro attack.<sup>157</sup> In its view, the Trial Chamber's

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<sup>150</sup> [Acquittal Decision](#), para. 432.

<sup>151</sup> [Acquittal Decision](#), para. 432.

<sup>152</sup> [Acquittal Decision](#), para. 433.

<sup>153</sup> [Acquittal Decision](#), para. 433.

<sup>154</sup> [Document in Support of the Appeal](#), para. 60.

<sup>155</sup> [Document in Support of the Appeal](#), para. 60.

<sup>156</sup> [Observations of Victim Group I](#), para. 37.

<sup>157</sup> [Observations of Victim Group I](#), paras 38-39.



interpretation contradicts what the witness stated in court, and is not supported by evidence on the record.<sup>158</sup>

84. Victim Group II similarly supports the Prosecutor's submissions, stating that the Trial Chamber relied "on the existence of a 'forced' doubt not only wholly unsupported by the evidence in the record but also by relying on speculation ungrounded in fact".<sup>159</sup>

85. Mr Ngudjolo argues that an "exhaustive analysis" of the relevant transcripts indicates why the Trial Chamber found that this witness may have been confused about Mr Ngudjolo's status at the time of the attack on Bogoro.<sup>160</sup> First, Mr Ngudjolo recalls that during his testimony witness D02-176, in response to a question about who were the Lendu commanders who attacked Bogoro, mentioned amongst others the name "Ngadjole".<sup>161</sup> Later, upon the Presiding Judge seeking clarification as to who the witness was actually referring to, witness D02-176 stated that "[t]he name was Ngadjole and not Ngudjolo".<sup>162</sup> Mr Ngudjolo states further that the witness's first answer regarding whether Ngudjolo was the most senior commander in Zombe at the time of the attack was, "[i]t is not possible for me to know that",<sup>163</sup> and that he only finally answered in the affirmative at the Prosecution's insistence explaining that he had not properly understood the question.<sup>164</sup> Additionally, Mr Ngudjolo contends that only in response to a question from the Court did the witness spontaneously name him as the leader of an armed movement (MRC).<sup>165</sup>

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<sup>158</sup> [Observations of Victim Group I](#), para. 40.

<sup>159</sup> [Observations of Victim Group II](#), para. 13.

<sup>160</sup> [Response to the Document in Support of the Appeal](#), para. 61.

<sup>161</sup> Response to the Document in Support of the Appeal, para. 60. See Transcript of 9 May 2011, ICC-01/04-01/07-T-256-CONF-ENG (ET), with public redacted version, ICC-01/04-01/07-T-256-Red2-ENG (WT) p. 9, lines 8-10, p. 10, lines 12-14, p. 12, lines 3-6.

<sup>162</sup> Response to the Document in Support of the Appeal, para. 60 citing Transcript of 9 May 2011, ICC-01/04-01/07-T-256-CONF-ENG (ET), with public redacted version, ICC-01/04-01/07-T-256-Red2-ENG (WT) p. 10, lines 24-25.

<sup>163</sup> Response to the Document in Support of the Appeal, para. 58, citing Transcript of 9 May 2011, ICC-01/04-01/07-T-256-CONF-ENG (ET), with public redacted version, ICC-01/04-01/07-T-256-Red2-ENG (WT) p. 27, line 7.

<sup>164</sup> Response to the Document in Support of the Appeal, para. 60 citing Transcript of 9 May 2011, ICC-01/04-01/07-T-256-CONF-ENG (ET), with public redacted version, ICC-01/04-01/07-T-256-Red2-ENG (WT), p. 25, lines 4-12, p. 27, lines 20-25 to p. 28, lines 1-5.

<sup>165</sup> Response to the Document in Support of the Appeal, para. 62 citing Transcript of 9 May 2011, ICC-01/04-01/07-T-256-CONF-ENG (ET), with public redacted version, ICC-01/04-01/07-T-256-Red2-ENG (WT), p. 25, lines 4-12, p. 61, lines 12-20.



**(b) Determination of the Appeals Chamber**

86. The Appeals Chamber recalls that the Trial Chamber examined witness D02-176's testimony in the context of assessing the position held by Mr Ngudjolo before or during the attack on Bogoro. While noting that the witness was "well-placed to state which military commanders were at enemy positions",<sup>166</sup> the Trial Chamber nevertheless determined that the witness's assertion regarding Mr Ngudjolo's position in the Bedu-Ezekere *groupement* was "founded on anonymous hearsay, was made by an individual who did not live in Zumbe and who, to boot, provided no further details on Mathieu Ngudjolo's status within that locality".<sup>167</sup> The Trial Chamber then added that "[f]urther still, having examined his statement, the Chamber cannot rule out that the witness had associated Mathieu Ngudjolo's status in the FNI with the position which he considered him to have held prior to the attack on Bogoro".<sup>168</sup> It is this latter inference drawn by the Trial Chamber that the Prosecutor contends is not based on any evidence on the record.

87. The Appeals Chamber is not persuaded by this argument. Although the Trial Chamber did not elaborate on why it drew this inference, the Appeals Chamber considers that an examination of the transcripts of witness D02-176's testimony provides some evidentiary basis for it. The Appeals Chamber notes that, when questioned by Counsel for Mr Ngudjolo in relation to the Lendu commanders that the witness identified as being present in Bogoro on 24 February 2003, the witness stated:

Q. Well, Witness, these Lendu commanders whose names you mentioned, to what group did they belong?

A. These commanders belonged to the Lendu movement.

Q. Which movement?

A. I do not know. I think it was called the FNI, if I am not mistaken. It was the FNI, and the Chief of Staff was Ngudjolo.<sup>169</sup>

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<sup>166</sup> [Acquittal Decision](#), para. 432.

<sup>167</sup> [Acquittal Decision](#), para. 433.

<sup>168</sup> [Acquittal Decision](#), para. 433.

<sup>169</sup> Transcript of 10 May 2011, ICC-01/04-01/07-T-257-CONF-ENG (CT), p. 8, lines 6-11, with public redacted version, ICC-01/04-01/07-T-257-Red-ENG (CT WT).



88. The Appeals Chamber recalls in this regard that, at the end of the trial, it was uncontested that the FNI-FRPI alliance came into existence after 22 March 2003<sup>170</sup> and that Mr Ngudjolo joined that movement as Deputy Chief of Staff with responsibility for operations.<sup>171</sup> The Trial Chamber also noted Mr Ngudjolo's active participation as Chief of Staff of the FNI-FRPI at several official events held in March 2003.<sup>172</sup> Thus, given that the FNI-FRPI movement only came into being after the attack on Bogoro, Mr Ngudjolo could not have been its Chief of Staff at the time of the attack, as the witness appears to be suggesting. Therefore, the Appeals Chamber finds that the Trial Chamber's holding that it "[could not] rule out that the witness had associated Mathieu Ngudjolo's status in the FNI with the position which he considered him to have held prior to the attack on Bogoro"<sup>173</sup> was based on the evidence in the record and was not unreasonable. Accordingly, the Appeals Chamber rejects the Prosecutor's argument.

## 5. *The attack on Bogoro*

### (a) **Relevant part of the procedural history and submissions on appeal**

89. The Trial Chamber declined to make findings beyond reasonable doubt in respect of the events that occurred at Bogoro, stating that:

[I]n view of the factual findings regarding the Accused's role, the Chamber made no findings beyond reasonable doubt, either in fact or in law, with respect to the crimes charged in this case, given that such issues have no impact [upon] the judgment. This approach seems all the more justified as such findings could affect the continuation of the trial against Germain Katanga.<sup>174</sup>

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<sup>170</sup> [Prosecutor's Closing Brief](#), paras 746 *et seq.* The Prosecutor, at para. 746, stated: "Selon l'Accusation, ce n'est pas un hasard si l'alliance n'a été finalisée qu'après le 22 mars, car cela coïncide avec l'arrivée de Katanga à Bunia pour signer un accord de cessez-le-feu, ce qui démontre que, pour que l'alliance devienne officielle et qu'elle soit pleinement en vigueur, la présence et l'accord tant de Ngudjolo que de Katanga étaient indispensables" (footnotes omitted) In this regard, Mr Ngudjolo testified that he had learned of the existence of the FNI on 18 March and that he joined it, in Bunia, only after 21 March 2003 and subsequently added that it was not formally concluded until after 22 March 2003. *See* Transcript of 28 October 2011, ICC-01/04-01/07-T-328-CONF-ENG (CT2), p. 33, lines 5-8, p. 37, lines 6-9, p. 63, lines 19-21, with public redacted version, ICC-01/04-01/07-T-328-Red-ENG (CT2 WT).

<sup>171</sup> [Acquittal Decision](#), paras 469, 494.

<sup>172</sup> [Acquittal Decision](#), paras 472-486, 500.

<sup>173</sup> [Acquittal Decision](#), para. 433.

<sup>174</sup> [Acquittal Decision](#), para. 112.



Nevertheless, the Trial Chamber provided an overview of what it considered took place during the attack on Bogoro, while emphasising that this overview did not constitute findings of fact beyond reasonable doubt:

[T]he Chamber considered it useful to provide an overview of the conduct of the attack on Bogoro and the violence allegedly committed there on 24 February 2003, on the understanding that this approach does not consist in making findings beyond reasonable doubt as to the material elements of the crimes.<sup>175</sup>

90. Victim Group I takes issue with the Trial Chamber's approach in this regard. According to Victim Group I, the Trial Chamber describes the attack on Bogoro on the basis of several witnesses' testimony, and though not questioning said witnesses' credibility or the reliability of their testimony, "concludes not by reaching a finding of fact, but instead by using the conditional mood".<sup>176</sup> Victim Group I submits that the Trial Chamber's approach "contravenes logic and the applicable standards of proof".<sup>177</sup> Regarding the Trial Chamber's reference to the trial of Mr Katanga, Victim Group I states that as the evidence applies equally to both Mr Katanga and Mr Ngudjolo, "if the Chamber considers certain facts to have been established in view of the evidence in the record, [it] would not make a different finding depending on the accused concerned".<sup>178</sup> Furthermore, Victim Group I argues that the findings on such facts would not in themselves entail findings on legal characterisation or the responsibility of either of the Accused.<sup>179</sup> Victim Group I also contends that the approach of the Trial Chamber was inconsistent in declining to make findings of fact regarding the attack on Bogoro as these were unessential to the conviction of Mr Ngudjolo, but not applying this rule to other unessential findings.<sup>180</sup> Victim Group I particularly highlights the Trial Chamber's final findings regarding its description of the attack, in which the Trial Chamber appears to make definitive findings in one paragraph, but in the next paragraph (and while relying on the same testimonies) switches to the conditional mood.<sup>181</sup> Victim Group I argues that the Trial Chamber has "contravened articles 66 (3) and 74 (5) of the Statute and erred in law", and that

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<sup>175</sup> [Acquittal Decision](#), para. 113.

<sup>176</sup> [Observations of Victim Group I](#), para. 45.

<sup>177</sup> [Observations of Victim Group I](#), para. 46.

<sup>178</sup> [Observations of Victim Group I](#), para. 47.

<sup>179</sup> [Observations of Victim Group I](#), para. 47.

<sup>180</sup> [Observations of Victim Group I](#), para. 48.

<sup>181</sup> [Observations of Victim Group I](#), paras 49-51.



this again demonstrates “the Chamber’s misinterpretation of the standards required to establish the facts and the standards of proof in general. It compounds the Chamber’s other errors in this regard and so materially affects the [Acquittal Decision]”.<sup>182</sup> Victim Group I then requests that the Appeals Chamber “clarify the principles to be followed by the [Trial] Chambers in this matter”.<sup>183</sup> Lastly, Victim Group I submits that the Trial Chamber erred because no reasonable trier of fact could have failed to make findings beyond reasonable doubt regarding the acts of violence that occurred during the attack on Bogoro.<sup>184</sup>

**(b) Determination of the Appeals Chamber**

91. The Appeals Chamber is not persuaded by the arguments of Victim Group I. In the Appeals Chamber’s view, the Trial Chamber’s statements in relation to the attack on Bogoro were confusing. The Trial Chamber should either have determined whether the attack on Bogoro was established beyond reasonable doubt or refrained from making statements in relation to the attack at all. Nevertheless, the fact that it did make such statements does not support the allegation that the Trial Chamber misapplied the standard of proof. The Trial Chamber was clear in the relevant paragraphs of the Acquittal Decision, that it was providing an overview of the conduct of the attack on Bogoro on the understanding that it was *not* making findings beyond reasonable doubt in relation to the material elements of the crimes.<sup>185</sup> Accordingly, the arguments of Victim Group I are rejected.

*6. The attack on Bunia on 6 March 2003*

**(a) Relevant part of the procedural history and submissions on appeal**

92. During the trial, the Prosecutor sought to establish that Mr Ngudjolo held the position of leader of the Lendu combatants from Bedu-Ezekere *groupement* who attacked Bogoro on 24 February 2003. To this end, the Prosecutor introduced evidence relating to events in the period following the attack on Bogoro, such as the attacks on Mandro on 4 March 2003 and Bunia on 6 March 2003. In her Closing

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<sup>182</sup> [Observations of Victim Group I](#), para. 53.

<sup>183</sup> [Observations of Victim Group I](#), para. 54.

<sup>184</sup> [Observations of Victim Group I](#), para. 56.

<sup>185</sup> [Acquittal Decision](#), para. 113.



Brief, the Prosecutor submitted that Mr Ngudjolo's alleged role during these attacks can only be explained by the fact that he was the leader before the attack on Bogoro.<sup>186</sup> It is in this context that the attack on Bunia was assessed by the Trial Chamber in the Acquittal Decision.

93. The Trial Chamber noted that the UPDF with the assistance of Lendu armed groups drove the UPC out when they attacked Bunia on 6 March 2003.<sup>187</sup> It noted further that two defence witnesses, namely witness D03-88 and witness D03-66, testified that Mr Ngudjolo was present but did not lead the attack on Bunia. Witness D03-66 testified that Banya Mande Jacques was the leader of the combatants from Bedu-Ezekere *groupement*.<sup>188</sup> Furthermore, the Trial Chamber observed that, according to a piece of documentary evidence, in response to a question from a Congolese prosecuting officer as to whether he was "ever present during military operations", Mr Ngudjolo replied that he "[TRANSLATION] directed only the operation that took place on 6 March 2003 in Bunia".<sup>189</sup> Mr Ngudjolo explained in court that "he had in fact been seeking to justify his rise to the key position of FNI-FRPI Chief of Staff and, therefore, [that] was the only reply he could give that prosecutor".<sup>190</sup> However, Mr Ngudjolo asserted that he actually did not take part in the battle but spent the night in Epoville, a neighbourhood of Bunia.<sup>191</sup>

94. The Trial Chamber held that:

[It] is unpersuaded by the justifications advanced by the Accused at trial and in view of his statements to the Congolese prosecutor, it cannot rule out the possibility that he led the Lendu combatants from Bedu-Ezekere during the Bunia operation, but is nonetheless unable to so determine beyond reasonable doubt. Mathieu Ngudjolo appears to claim leadership of the entire operation, whereas everything points to the Bunia offensive having been led by the UPDF and Lendu combatants. The Accused fails to indicate which troops he led in

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<sup>186</sup> See [Prosecutor's Closing Brief](#), paras 370-371.

<sup>187</sup> [Acquittal Decision](#), para. 452.

<sup>188</sup> Acquittal Decision, para. 454, citing Transcript of 25 August 2011, ICC-01/04-01/07-T-298-CONF-ENG (CT), p. 10, lines 6-12, with public redacted version, ICC-01/04-01/07-T-298-Red2-ENG (CT WT).

<sup>189</sup> Acquittal Decision, para. 455, citing to EVD-OTP-00283: Pro Justitia Statement, 17 June 2004 (DRC-OTP-0039-0058).

<sup>190</sup> Acquittal Decision, para. 455, citing Transcript of 9 November 2011, ICC-01/04-01/07-T-331-CONF-ENG (CT), p. 64, lines 8-25 to p. 65, lines 1-4, with public redacted version, ICC-01/04-01/07-T-331-Red-ENG (CT WT).

<sup>191</sup> Acquittal Decision, para. 455.



Bunia at the time. The Chamber further notes that in response to the Congolese prosecutor, the Accused made no mention of any participation whatsoever in the battles of Bogoro and Mandro.<sup>192</sup>

95. The Prosecutor submits that “there is no evidence that [Mr] Ngudjolo ever claimed to have led the UPDF”, and thus the Court never made a finding that he claimed overall responsibility, but instead merely stated that he “seemed” to have done so.<sup>193</sup> The Prosecutor contends that a “speculative and impressionistic assertion of this kind, supported by no evidence, cannot be sufficient to draw any inference or to establish reasonable doubt.”<sup>194</sup>

96. The Prosecutor further argues that requiring Mr Ngudjolo to specify in his admission to the Congolese Prosecutor whether he led the UPDF troops or the Lendu combatants of Bedu-Ezekere, in order to give appropriate weight to his admission, was “plainly unreasonable”.<sup>195</sup> The Prosecutor submits that, given that the Trial Chamber had determined that the UPDF was led at the time of the attack by someone other than Mr Ngudjolo, namely Captain Kiza, and that Mr Ngudjolo “had a position of authority at the relevant time in a different group (the Lendu combatants), there was no basis to expect that any admission by [Mr] Ngudjolo would have had to specify the group that he was leading”.<sup>196</sup> Finally, the Prosecutor objects to the Trial Chamber’s reliance on the fact that in his admission to the Congolese Prosecutor Mr Ngudjolo “did not mention having participated in the battles of Bogoro or Mandro” (footnote omitted).<sup>197</sup> In the Prosecutor’s view it was “unnecessary for the Chamber to expect that an admission by the accused of one attack would necessarily have to mention the accused’s involvement in *other* attacks” (emphasis in original).<sup>198</sup>

97. Mr Ngudjolo submits that although the Trial Chamber did not accept his explanation regarding his purported admission to the Congolese Prosecutor, several other pieces of evidence support the contention that he did not lead the attack on

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<sup>192</sup> [Acquittal Decision](#), para. 456.

<sup>193</sup> [Document in Support of the Appeal](#), para. 63.

<sup>194</sup> Document in Support of the Appeal, para. 63.

<sup>195</sup> Document in Support of the Appeal, para. 64.

<sup>196</sup> Document in Support of the Appeal, para. 64.

<sup>197</sup> Document in Support of the Appeal, para. 65.

<sup>198</sup> Document in Support of the Appeal, para. 65.





Bunia.<sup>199</sup> He further submits that the Prosecutor failed to corroborate the purported admission which may have justified a guilty verdict.<sup>200</sup> Moreover, Mr Ngudjolo points out that the attack on Bunia does not impinge directly on this case, as it occurred after the events of Bogoro.<sup>201</sup>

**(b) Determination of the Appeals Chamber**

98. The Prosecutor's arguments under this section essentially challenge the three findings underpinning the Trial Chamber's primary finding that it could not establish beyond a *reasonable* doubt that Mr Ngudjolo directed the Lendu combatants during the attack on Bunia.<sup>202</sup> In the Prosecutor's view, these findings are further examples of the Trial Chamber requiring "proof beyond *any* conceivable doubt" (emphasis in original) and thereby misapplying the standard of proof.<sup>203</sup>

99. The first finding that the Trial Chamber made is that Mr Ngudjolo "appears to claim leadership of the entire operation, whereas everything points to the Bunia offensive having been led by the UPDF and [the] Lendu combatants".<sup>204</sup> The Prosecutor claims that the Trial Chamber's finding here is "speculative and impressionistic" and "supported by no evidence".<sup>205</sup> The Appeals Chamber finds that the Prosecutor's arguments in this regard are unpersuasive. Given the plain meaning of the words used by Mr Ngudjolo when being interviewed by the Congolese Prosecutor,<sup>206</sup> it does not appear incorrect to hold that he "appears to claim leadership of the entire operation". In the view of the Appeals Chamber, it was not unreasonable for the Trial Chamber to make this observation, given that there was undisputed evidence that the attack on Bunia was actually led by the UPDF with the assistance of

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<sup>199</sup> [Response to the Document in Support of the Appeal](#), para. 64.

<sup>200</sup> [Response to the Document in Support of the Appeal](#), para. 64.

<sup>201</sup> [Response to the Document in Support of the Appeal](#), para. 66.

<sup>202</sup> [Document in Support of the Appeal](#), para. 62.

<sup>203</sup> [Document in Support of the Appeal](#), para. 62.

<sup>204</sup> [Acquittal Decision](#), para. 456.

<sup>205</sup> [Document in Support of the Appeal](#), paras 63-64.

<sup>206</sup> *See supra* para.94. In this regard it is recalled that Mr Ngudjolo stated to the Congolese Prosecutor that he directed only the operation that took place on 6 March 2003.



Lendu combatants<sup>207</sup> and that Mr Ngudjolo could therefore *not* have had overall responsibility – a point that the Prosecutor concedes.<sup>208</sup>

100. With regard to the Trial Chamber’s second finding, namely that in order for it to give Mr Ngudjolo’s alleged admission any credence he would have had to have specifically stated which troops he led,<sup>209</sup> the Appeals Chamber considers that the Trial Chamber simply reinforced its first observation when it added that Mr Ngudjolo also did not indicate which troops he led. The Appeals Chamber considers that the Trial Chamber’s reasoning does not, as such, indicate that it required too exacting a standard of proof, but merely further explains why the Chamber was not convinced by Mr Ngudjolo’s admission to the Congolese Prosecutor. Accordingly, the Appeals Chamber considers that the Trial Chamber’s finding in this respect was not unreasonable.

101. The Prosecutor further disputes the reasonableness of the Trial Chamber’s related finding (made elsewhere in the Acquittal Decision) that Mr Ngudjolo’s admission to witness P-317 was inconsistent with his subsequent statements to the Congolese Prosecutor in that Mr Ngudjolo made no mention in the latter of his participation in the battles of Bogoro and Mandro. The Prosecutor argues that the finding essentially required the two admissions to be “fully symmetrical” before the Trial Chamber could find them to be reliable. [Footnote omitted.]<sup>210</sup> She further argues that it was “unnecessary for the Chamber to expect that an admission by the accused of one attack would necessarily have to mention the accused’s involvement in *other* attacks” (emphasis in original).<sup>211</sup> While this amounts essentially to the same argument, the Prosecutor raises this argument in two different contexts: (i) with respect to the Trial Chamber’s findings on the attack on Bunia and Mr Ngudjolo’s alleged admission to the Congolese Prosecutor,<sup>212</sup> and (ii) with respect to the Trial

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<sup>207</sup> See [Acquittal Decision](#), para. 452. Note that the Trial Chamber also referenced a MONUC report in this regard.

<sup>208</sup> [Document in Support of the Appeal](#), para. 64.

<sup>209</sup> Acquittal Decision, para. 456.

<sup>210</sup> Document in Support of the Appeal, para. 58.

<sup>211</sup> Document in Support of the Appeal, para. 65.

<sup>212</sup> Acquittal Decision, para. 456.



Chamber's overall conclusions, at the point of its collective evaluation of Mr Ngudjolo's admissions to witness P-317 and the Congolese Prosecutor.<sup>213</sup>

102. The Appeals Chamber is not persuaded by the Prosecutor's arguments. The Trial Chamber did not require the two admissions to be "fully symmetrical". Rather, it noted that they differed. In the view of the Appeals Chamber, the fact that two admissions that an accused person made were not identical is a relevant consideration that a Chamber may take into account when evaluating the evidence. Given the Trial Chamber's other findings (as discussed in the preceding paragraphs) that underpin its primary finding (namely, that it could not "establish beyond a reasonable doubt" that Mr Ngudjolo led the Lendu combatants during the attack on Bunia), the Appeals Chamber finds that there is no indication that the Trial Chamber gave undue weight to the differences between the two admissions.

103. Second, with respect to the Trial Chamber's evaluation of Mr Ngudjolo's alleged admissions to witness P-317 and to the Congolese Prosecutor in its overall conclusions,<sup>214</sup> the Appeals Chamber notes that, while not impugning the credibility of the sources of either alleged admission, the Trial Chamber found itself "compelled to note a certain inconsistency between these two items of evidence", such that "[t]he first one fails to mention Mathieu Ngudjolo's participation in the battle of Bunia and the second does not mention his participation in hostilities at Bogoro and Mandro".<sup>215</sup> Accordingly, the Trial Chamber held that it was "compelled to treat such revelations with circumspection".<sup>216</sup> In the view of the Appeals Chamber, this approach of the Trial Chamber was not unreasonable. As noted above, differences between two admissions of an accused person are relevant to the evaluation of the evidence and may therefore be taken into account by the Trial Chamber. There is no indication that the Trial Chamber gave undue weight to this factor. In this regard, the Appeals Chamber also recalls that the Trial Chamber's primary finding concerning Mr Ngudjolo's alleged admission to witness P-317 was not unreasonable. Furthermore, the Trial Chamber found that in view of Mr Ngudjolo's alleged admission to the Congolese Prosecutor "it cannot rule out the possibility that he led the Lendu

<sup>213</sup> [Acquittal Decision](#), para. 497.

<sup>214</sup> [Acquittal Decision](#), para. 497.

<sup>215</sup> [Acquittal Decision](#), para. 497.

<sup>216</sup> [Acquittal Decision](#), para. 497.



combatants from Bedu-Ezekere during the Bunia operation, but is nonetheless unable to so determine beyond reasonable doubt”.<sup>217</sup> As indicated above, the Appeals Chamber considers the Trial Chamber’s finding in this regard not to be unreasonable.

104. The Appeals Chamber therefore rejects the Prosecutor’s submissions, which fail to establish that the Trial Chamber incorrectly applied the standard of “beyond reasonable doubt”.

7. *Alleged errors in the formulation of the standard of proof and the Trial Chamber’s overall conclusion*

(a) **Statements in the concluding paragraphs of the Acquittal Decision**

(i) *Relevant part of the procedural history and submissions on appeal*

105. In its overall conclusion, the Trial Chamber stated:

Furthermore, *it cannot necessarily be entirely discounted* that, as a soldier operating within the prevailing political and military context of the time, Mathieu Ngudjolo was able to position himself as a key figure after the battle of Bogoro, but not before. Furthermore, the Chamber is of the view that his appointment to a very senior position within the FNI/FRPI alliance does not *necessarily* prove that he was already a senior military leader prior to the appointment and, in particular, before 24 February 2003. [Emphasis added.]<sup>218</sup>

106. First, the Prosecutor highlights the Trial Chamber’s use of the phrase “it cannot necessarily be entirely discounted” in the first sentence of the above-cited part of the Acquittal Decision and of the word “necessarily” in the second sentence.<sup>219</sup> The Prosecutor argues that this language is inconsistent with the standard of beyond reasonable doubt, and “unambiguously reflects that the Trial Chamber misunderstood the meaning of proof beyond reasonable doubt and applied an incorrect standard of proof to an absolute certainty”.<sup>220</sup> In her view, beyond reasonable doubt as articulated in article 66 (3) of the Statute, does not require that the Chamber “*necessarily and*

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<sup>217</sup> [Acquittal Decision](#), para. 456.

<sup>218</sup> [Acquittal Decision](#), para. 500.

<sup>219</sup> [Document in Support of the Appeal](#), para. 66.

<sup>220</sup> [Document in Support of the Appeal](#), para. 67.



*totally*” exclude an alternative possibility (emphasis in original).<sup>221</sup> The relevant question is whether such a scenario can “*reasonably* be excluded” (emphasis in original).<sup>222</sup>

107. Second, the Prosecutor contends that the Trial Chamber “failed to indicate any factual or evidentiary basis for its competing inference that [Mr] Ngudjolo might have imposed himself as a soldier, leader, and indispensable interlocutor only afterwards”.<sup>223</sup> The Prosecutor observes that this inference appears “unsupported by logic or common sense” especially in light of the Chamber’s other findings regarding Mr Ngudjolo’s importance.<sup>224</sup> The Prosecutor concludes that since the Trial Chamber acknowledged that prior to the attack on Bogoro, Mr Ngudjolo “was an important person within the Bedu-Ezekere *groupement* with a military background, and at the same time rejected the possibility that [Mr] Ngudjolo’s appointment as the Chief of Staff of the FNI-FRPI Alliance on 22 March 2003” was obtained through a combination of luck and career opportunism, “it is mystifying how the Chamber reached the hypothetical inference that [...] [he] might not have held a senior military position within the Bedu-Ezekere *groupement* on the day of the Bogoro attack” (emphasis in original).<sup>225</sup>

108. In response, Mr Ngudjolo submits that the Trial Chamber “[did] not appear to have required an impossible standard of proof. Rather, it [explained] that there were several possible findings, one of which did not discount [his] innocence [...], hence justifying its acquittal verdict.”<sup>226</sup>

(ii) *Determination of the Appeals Chamber*

109. Article 66 (3) of the Statute provides that “[i]n order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.” The ICTR Appeals Chamber in *Rutaganda* described the most essential aspects of the “reasonable doubt” standard as follows:

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<sup>221</sup> [Document in Support of the Appeal](#), para. 66.

<sup>222</sup> Document in Support of the Appeal, para. 67.

<sup>223</sup> Document in Support of the Appeal, para. 68.

<sup>224</sup> Document in Support of the Appeal, para. 68.

<sup>225</sup> Document in Support of the Appeal, para. 68.

<sup>226</sup> [Response to the Document in Support of the Appeal](#), para. 69.



The reasonable doubt standard in criminal law cannot consist in imaginary or frivolous doubt based on empathy or prejudice. It must be based on logic and common sense, and have a rational link to the evidence, lack of evidence or inconsistencies in the evidence.<sup>227</sup>

110. The Appeals Chamber considers that the Trial Chamber's statement that "it [could not] necessarily be entirely discounted that [...] [Mr] Ngudjolo was able to position himself as a key figure after the battle of Bogoro",<sup>228</sup> read on its own, could indeed give the impression that the Trial Chamber applied a standard of proof that is more stringent than what is required under article 66 (3) of the Statute. Nevertheless, the Trial Chamber's statement must be understood in its context.

111. The Appeals Chamber notes that, for its overall conclusion on Mr Ngudjolo's status, the Trial Chamber relied on the following pieces of evidence: (i) "several witnesses [who] in essence confirmed that the Accused was the leader of the Bedu-Ezekere militia"; (ii) witness P-28; (iii) witness P-317; and (iv) evidence postdating the attack on Bogoro.<sup>229</sup>

112. As regards the "several witnesses [who] in essence confirmed that the Accused was the leader of the Bedu-Ezekere militia",<sup>230</sup> the Appeals Chamber notes that the Trial Chamber found that as the evidence was hearsay and as none of the witnesses were actually present in the Bedu-Ezekere *groupement* before the attack "this evidence [...] must be considered with the greatest circumspection, especially as it relates to a crucial point in the Prosecution's case".<sup>231</sup> The Appeals Chamber further notes that the Trial Chamber held that "the witnesses in question did not provide any other details on the authority purportedly held by Mathieu Ngudjolo in their view or on the manner in which he exercised it" and that the Trial Chamber could not "discount the possibility that some witnesses associated Mathieu Ngudjolo's status in the FNI in late March 2003 with the position which he [...] held prior to the attack on

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<sup>227</sup> [Rutaganda Appeal Judgment](#), para. 488.

<sup>228</sup> [Acquittal Decision](#), para. 500.

<sup>229</sup> [Acquittal Decision](#), para. 496.

<sup>230</sup> [Acquittal Decision](#), para. 496.

<sup>231</sup> [Acquittal Decision](#), para. 496.



Bogoro”.<sup>232</sup> Accordingly, the Trial Chamber could “only attach very low probative value to their testimony”.<sup>233</sup>

113. As regards witness P-28, the Appeals Chamber recalls that the witness stated that “Zumbe was [Mr Ngudjolo’s] territory”, that he had seen Mr Ngudjolo “in Bogoro after the fighting ended” and that “Bogoro was attacked by FRPI, FNI and APC combatants” (footnotes omitted).<sup>234</sup> The Appeals Chamber notes that the Trial Chamber found that it could rely on parts of his testimony,<sup>235</sup> but held that it did “not intend to take into consideration the testimony concerning Mathieu Ngudjolo’s participation in the attacks on Bogoro and Mandro, since it does not consider credible the witness’s statement that he was in the militia”.<sup>236</sup> However, although the Trial Chamber referred to witness P-28 in its overall conclusion,<sup>237</sup> it is unclear what role his evidence ultimately played in the Trial Chamber’s decision on the position Mr Ngudjolo’s held during the attack on Bogoro.

114. Regarding witness P-317, the Trial Chamber considered that she was a credible witness and that it could therefore rely on her testimony in the case.<sup>238</sup> Nevertheless, the Trial Chamber held that although witness P-317’s statements were somewhat indicative of Ngudjolo’s possible involvement in the attack on Bogoro, they were “too general ultimately to determine the Accused’s precise status and role in the Bedu-Ezekere *groupement*” (emphasis in original).<sup>239</sup>

115. As regards the evidence which related to events postdating the attack on Bogoro,<sup>240</sup> the Trial Chamber stated that “this evidence [...] does not support a finding beyond reasonable doubt that Mathieu Ngudjolo was indeed the commander-in-chief of the Lendu combatants from Bedu-Ezekere who were present in Bogoro on 24 February 2003”.<sup>241</sup>

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<sup>232</sup> [Acquittal Decision](#), para. 496.

<sup>233</sup> [Acquittal Decision](#), para. 496.

<sup>234</sup> [Acquittal Decision](#), para. 226.

<sup>235</sup> [Acquittal Decision](#), para. 252.

<sup>236</sup> [Acquittal Decision](#), para. 254.

<sup>237</sup> [Acquittal Decision](#), para. 496.

<sup>238</sup> [Acquittal Decision](#), para. 295.

<sup>239</sup> [Acquittal Decision](#), para. 434.

<sup>240</sup> [Acquittal Decision](#), paras 444 *et seq.*

<sup>241</sup> [Acquittal Decision](#), para. 499.



116. Finally, the Appeals Chamber notes that the Trial Chamber indicated that it “possessed [...] no other reliable evidence previous to [March 2003] supporting a finding beyond reasonable doubt that Mathieu Ngudjolo was the commander-in-chief of the Lendu combatants from Bedu-Ezekere”.<sup>242</sup>

117. It follows therefore that, in the case at hand, in order to determine whether Mr Ngudjolo was the commander-in-chief of the Lendu combatants at the time of the attack on Bogoro, the Trial Chamber had to rely on the aforementioned pieces of evidence. Noting that the evidence was either hearsay, very general or only circumstantial, and recalling that it “will not disturb a [...] Trial Chamber’s evaluation of the facts just because the Appeals Chamber might have come to a different conclusion”,<sup>243</sup> the Appeals Chamber finds that, despite the Trial Chamber’s somewhat cursory analysis in this section and its use of the phrase “necessarily be entirely discounted”,<sup>244</sup> it was not unreasonable to conclude that, on the basis of the totality of the evidence, it could not be established that Mr Ngudjolo was the commander-in-chief of the Lendu combatants *during* the attack on Bogoro.

118. Accordingly, the Appeals Chamber finds that the Trial Chamber’s conclusion does not demonstrate that it applied too exacting a standard when assessing the evidence and rejects the Prosecutor’s arguments in this regard.

**(b) Statement concerning the existence of an alleged fact**

*(i) Relevant part of the procedural history and submissions on appeal*

119. In outlining its criteria for the evaluation of evidence, the Trial Chamber gave a brief overview of how it applied the standard “beyond reasonable doubt”, stating:

It is the Chamber’s position that the fact that an allegation is not, in its view, proven beyond reasonable doubt does not necessarily mean that the Chamber questions the very existence of the alleged fact. It simply means that it considers

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<sup>242</sup> [Acquittal Decision](#), para. 500.

<sup>243</sup> [Ruto OA Judgment](#), para. 56; [Muthaura OA Judgment](#), para. 55. See also [Mbarushimana OA Judgment](#), paras 1, 17.

<sup>244</sup> [Acquittal Decision](#), para. 500.





that there is insufficient reliable evidence to make a finding on the veracity of the alleged fact in light of the standard of proof.<sup>245</sup>

120. Victim Group I alleges that the Trial Chamber misinterpreted and misapplied the standard of proof, arguing that the Trial Chamber erred by conflating the need to establish the veracity of the facts with the standard of proof beyond reasonable doubt.<sup>246</sup> In this regard, Victim Group I submits that:

[T]o convict an accused, the Chamber need not establish the “veracity” of the facts (and hence need not explore the plausibility of other scenarios) but must be persuaded by the Prosecution of the guilt of the accused “beyond reasonable doubt”. In other words, it must not have reasonable doubt as to the existence of facts necessary for a conviction. [Emphasis in original, footnote omitted.]<sup>247</sup>

121. Victim Group I further argues that the Trial Chamber’s misapplication of the standard of proof is evident in both its evaluation of witness testimony, in particular witness P-280, and in its “illogical approach” to its findings on the attack on Bogoro.<sup>248</sup>

122. Mr Ngudjolo argues that Victim Group I’s assertions regarding the Trial Chamber’s interpretation of the standard of proof are erroneous.<sup>249</sup> In his view, the term “veracity” denotes that the facts are in accordance with the truth.<sup>250</sup> Mr Ngudjolo further argues that the Trial Chamber must satisfy itself of the veracity of the facts beyond reasonable doubt or risk arriving at a decision on the basis of facts which are “possibly or certainly untrue”.<sup>251</sup>

(ii) *Determination of the Appeals Chamber*

123. In the view of the Appeals Chamber, the Trial Chamber’s statement that “the fact that an allegation is not, in its view, proven beyond a reasonable doubt does not necessarily mean that the Chamber questions the very existence of the alleged fact”<sup>252</sup> is unclear. At the end of the trial, it is the obligation of the Trial Chamber to determine whether, based on the evidence before it, a fact is established beyond reasonable

<sup>245</sup> [Acquittal Decision](#), para. 36.

<sup>246</sup> See [Observations of Victim Group I](#), para. 21.

<sup>247</sup> [Observations of Victim Group I](#), para. 21.

<sup>248</sup> [Observations of Victim Group I](#), para. 22.

<sup>249</sup> [Mr Ngudjolo’s Response to the Observations of the Victims](#), para. 16.

<sup>250</sup> [Mr Ngudjolo’s Response to the Observations of the Victims](#), para. 17.

<sup>251</sup> [Mr Ngudjolo’s Response to the Observations of the Victims](#), para. 17.

<sup>252</sup> [Acquittal Decision](#), para. 36.



doubt and to indicate as such. Any discussion of its view on the “very existence of [...] alleged fact[s]” that have not been established beyond reasonable doubt is unnecessary and incorrect in law.

124. The Appeals Chamber, however, also notes that the Trial Chamber emphasised that the standard of proof “must be applied to establish the facts forming the elements of the crime or the mode of liability alleged against the accused, as well as with respect to the facts which are indispensable for entering a conviction”.<sup>253</sup> The Appeals Chamber further notes that the Trial Chamber went on to state that “the fact that an allegation is not, in its view, proven beyond a reasonable doubt [...] simply means that it considers that there is insufficient reliable evidence to make a finding on the veracity of the alleged fact in light of the standard of proof”.<sup>254</sup>

125. Accordingly, the Appeals Chamber considers that the Trial Chamber was correct in its further elaboration of the standard of proof, namely that the elements of the crime and the mode of liability alleged against the accused, as well as the facts which are “indispensable for entering a conviction” must be established beyond reasonable doubt.<sup>255</sup> Thus, while unnecessary and potentially confusing, the Appeals Chamber finds that the Trial Chamber’s statement on establishing “the very existence of a fact” was merely dicta and not an articulation of any legal standard. Accordingly, Victim Group I’s argument is rejected.

#### 8. *Overall conclusion on the first ground of appeal*

126. In sum, the Appeals Chamber concludes that it has not been established that the Trial Chamber was misinformed of the standard of ‘beyond reasonable doubt’ or applied a standard that was too exacting. Accordingly, the Prosecutor’s first ground of appeal is rejected.

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<sup>253</sup> [Acquittal Decision](#), para. 35.

<sup>254</sup> [Acquittal Decision](#), para. 36.

<sup>255</sup> [Acquittal Decision](#), para. 35.



**B. Second ground of appeal: alleged failure to consider the totality of the evidence**

*1. Introduction*

127. Under the second ground of appeal, the Prosecutor alleges that the Trial Chamber “adopted a wrong approach at each of the three different stages of the decision-making process, when it (a) assessed the credibility of the evidence; (b) made factual findings; and (c) reached its final decision on the guilt of [Mr] Ngudjolo”.<sup>256</sup> The Prosecutor submits that the Trial Chamber failed to consider the totality of the evidence “[t]hroughout the three phases of its decision-making process”<sup>257</sup> and in particular “committed a legal error when it failed to assess individual items of evidence or specific facts in light of the entire record and in the context of other key relevant corroborating evidence (including circumstantial and hearsay evidence) or other key facts found by the Chamber”.<sup>258</sup>

128. The Prosecutor further submits that the Trial Chamber committed an error of fact as “no reasonable trier of fact could have found that the evidence together with the factual findings entered by the Trial Chamber falls short of establishing beyond reasonable doubt that [Mr] Ngudjolo was the leader of the Lendu combatants of the Bedu-Ezekere who attacked Bogoro on 24 February 2003”.<sup>259</sup>

129. To demonstrate the purported errors the Prosecutor provides “a limited number of examples at each stage of the decision making process”, which, according to her, “were critical to the Trial Chamber’s refusal to find that [Mr] Ngudjolo led the Lendu combatants of Bedu-Ezekere who attacked Bogoro on 24 February 2003”.<sup>260</sup> As under the first ground of appeal, since the Prosecutor uses examples of alleged factual errors to demonstrate the alleged legal error, the Appeals Chamber will analyse these examples against the standard of review applicable to factual errors.<sup>261</sup>

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<sup>256</sup> [Document in Support of the Appeal](#), para. 72.

<sup>257</sup> Document in Support of the Appeal, para. 72.

<sup>258</sup> Document in Support of the Appeal, para. 72.

<sup>259</sup> Document in Support of the Appeal, para. 73.

<sup>260</sup> Document in Support of the Appeal, para. 86. *See also* para. 138.

<sup>261</sup> *See supra* para. 44.



2. *First stage: Assessment of the credibility of evidence*

(a) **Assessment of Documentary evidence: the Soap Letter**

(i) *Relevant procedural history and submissions on appeal*

130. During the trial the Prosecutor tendered into evidence the so-called Soap Letter,<sup>262</sup> dated 4 January 2003,<sup>263</sup> a letter written by defence witness D03-66 to “Operator Oudo”, Chief at Olongba [Walendu-Bindi], requesting money to buy soap. The Soap Letter, in particular, the stamp affixed thereto, which reads “Forces de Résistance Patriotique en Ituri, Bureau d’Etat Major-Siège Tasi/Zumbe”, [TRANSLATION: Patriotic Force of Resistance in Ituri, Office of the General Staff Headquarters, Tasi-Zumbe], (emphasis omitted, footnote omitted)<sup>264</sup> was a piece of documentary evidence which the Prosecutor relied on to establish that, prior to 24 February 2003, the Bedu-Ezekere militia developed into an organised, hierarchical military structure with a general staff that was headquartered in Zumbe.<sup>265</sup>

131. Witness D03-66, the author of the Soap Letter, testified that he and Martin Banga (vice-chairman of the youth committee) had travelled together, unbeknown to his Chief (witness D03-88),<sup>266</sup> to the Tatu market to buy supplies.<sup>267</sup> At the market he met with Oudo, the person who was in charge of the market and whom he knew well, and mentioned that they needed assistance to purchase soap.<sup>268</sup> According to the witness, in order to obtain Oudo’s assistance he wrote the Soap Letter and once it was written, Oudo took the letter to his office and returned with the money.<sup>269</sup>

<sup>262</sup> See Annex I, EVD-OTP-00025: Letter signed in Bolo on 4 January 2003 (DRC-OTP-0029-092).

<sup>263</sup> See Transcript of 4 February 2010, ICC-01/04-01/07-T-96-CONF-ENG (CT), p. 24, lines 9-18, with public redacted version, ICC-01/04-01/07-T-96-Red-ENG (WT).

<sup>264</sup> [Prosecutor’s Closing Brief](#), para. 322.

<sup>265</sup> Prosecutor’s Closing Brief, paras 301-304, 322.

<sup>266</sup> Transcript of 23 August 2011, ICC-01/04-01/07-T-296-CONF-ENG (ET), p. 27, lines 9-14, p. 28, lines 16-20, with public redacted version, ICC-01/04-01/07-T-296-Red2-ENG (WT).

<sup>267</sup> Transcript of 23 August 2011, ICC-01/04-01/07-T-296-CONF-ENG (ET), p. 29, lines 12-14, with public redacted version, ICC-01/04-01/07-T-296-Red2-ENG (WT).

<sup>268</sup> Transcript of 23 August 2011, ICC-01/04-01/07-T-296-CONF-ENG (ET), p. 26, lines 11-18, with public redacted version, ICC-01/04-01/07-T-296-Red2-ENG (WT).

<sup>269</sup> Transcript of 23 August 2011, ICC-01/04-01/07-T-296-CONF-ENG (ET), p. 42, lines 12-18.



132. When presented with the Soap Letter in court, witness D03-66 recognised it as the letter he had written but claimed that he had no knowledge of the stamp or how it came to be appended on the Soap Letter.<sup>270</sup>

133. In the Acquittal Decision, the Trial Chamber assessed the Soap Letter and the stamp affixed thereto and stated as follows:

374. Regarding the letter requesting soap, it wishes to emphasise that this is the sole document, amongst all the evidence before it, bearing this stamp. It further notes that the author of this letter, whose statements in this regard it nevertheless recognises should be considered with caution, denied having affixed this stamp and also alleged that this was not the stamp used at the time. Furthermore, on the basis of the sole document before it, the Chamber is not in a position to determine exactly in what circumstances and on what date the stamp was affixed. Finally, there is no other evidence to show that the FRPI was already established in Zumbe on 4 January 2003, when this document was allegedly dispatched. [Footnote omitted.]<sup>271</sup>

375. Thus, in the Chamber's view, the existence of a general staff in Zumbe in early January 2003 cannot be established on the basis of this one testimony and the presentation of a stamp which it has not been able to authenticate.<sup>272</sup>

134. The Prosecutor, first, takes issue with the Trial Chamber's finding that the stamp on the letter was not authentic, arguing that there is "substantial reason" to reject this assessment.<sup>273</sup> In her view, the fact that witness D03-66 confirmed the existence of a stamp but that it was different from the one used is no evidentiary basis to believe that a false stamp was placed on the letter.<sup>274</sup> Further still, the Prosecutor contends that witness P-250, who saw the letter for the first time during his testimony, "authenticated the stamp by stating who made the stamp, when, where and why" (footnote omitted).<sup>275</sup>

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<sup>270</sup> See [Acquittal Decision](#), para. 374. See also Transcript of 23 August 2011, ICC-01/04-01/07-T-296-CONF-ENG (ET), p. 47, lines 18-25, with public redacted version, ICC-01/04-01/07-T-296-Red2-ENG (WT); Transcript of 24 August 2011, ICC-01/04-01/07-T-297-CONF-ENG (ET), p. 53, lines 4-23, with public redacted version, ICC-01/04-01/07-T-297-Red2-ENG (WT).

<sup>271</sup> Acquittal Decision, para. 374.

<sup>272</sup> Acquittal Decision, para. 375.

<sup>273</sup> [Document in Support of the Appeal](#), para. 94.

<sup>274</sup> Document in Support of the Appeal, para. 94.

<sup>275</sup> Document in Support of the Appeal, para. 94.



135. The Prosecutor further argues that even if the stamp was inauthentic “the *letter itself* was authentic and reliable” (emphasis added).<sup>276</sup> The Prosecutor submits that the Trial Chamber made no finding on the letter’s authenticity and instead “implicitly accepted [witness] D03-66’s claim that the letter’s contents were not true”.<sup>277</sup> The Prosecutor argues that the Trial Chamber “failed to consider that both [the] letter and stamp were highly incriminating against the accused, therefore [witness] D03-66 had an interest in lying” (footnote omitted).<sup>278</sup>

136. Lastly, the Prosecutor submits that the Trial Chamber committed a “clear error”: (i) in failing to take into account relevant corroborative evidence or (ii) in demanding more corroboration and (iii) by failing to authenticate the Soap Letter even though witness D03-66 confirmed that he wrote the letter.<sup>279</sup> This “clear error”, the Prosecutor avers, ultimately impacted on the Trial Chamber’s ability to correctly assess the witnesses’ accounts regarding Mr Ngudjolo’s authority.<sup>280</sup> Moreover, the Prosecutor submits that the Trial Chamber “dismissed the value of the letter because it had separately determined, on slim bases, that it would not credit the two Prosecution witnesses [P-250 and P-28] whose evidence corroborated the letter and in turn was corroborated by it”.<sup>281</sup>

137. Victim Group I submits that the Trial Chamber erred when it failed to make “a comprehensive analysis of [witness D03-66’s] credibility [by] evaluating the body of evidence in its entirety” and by refusing to rely on the content of the Soap Letter to corroborate the testimony of witnesses P-250 and P-28.<sup>282</sup> Victim Group I further submits that the Trial Chamber “failed to analyse the ties between [Mr] Ngudjolo and [witness] D03-66, and between [witness D03-66] and the other Defence witnesses”.<sup>283</sup> Victim Group I submits that, given these ties, “it is surprising that the [Trial] Chamber could consider that [witnesses] D03-66 and D03-55 ‘hailed from different

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<sup>276</sup> [Document in Support of the Appeal](#), para. 95.

<sup>277</sup> Document in Support of the Appeal, para. 96.

<sup>278</sup> Document in Support of the Appeal, para. 96.

<sup>279</sup> Document in Support of the Appeal, para. 97.

<sup>280</sup> Document in Support of the Appeal, para. 97.

<sup>281</sup> Document in Support of the Appeal, para. 98.

<sup>282</sup> [Observations of Victim Group I](#), para. 74.

<sup>283</sup> Observations of Victim Group I, para. 77.



environments' and, similarly, were credible when they asserted that [witness] P-250 did not belong to a militia" (footnote omitted).<sup>284</sup>

138. Mr Ngudjolo submits that the Soap Letter establishes no link to his alleged authority in the Bedu-Ezekere *groupement*, all the more so since his name does not even appear in the letter.<sup>285</sup> Mr Ngudjolo avers that witness P-250, who was discredited by the Trial Chamber even before the Acquittal Decision was released, was "exceedingly vague on the subject of the letter", recalling that the witness testified that "he had never seen [the letter] but that it was taken on the journey and was in the hands of the senior leaders" (footnote omitted).<sup>286</sup> In relation to the submissions of Victim Group I, Mr Ngudjolo disagrees that the Trial Chamber failed to comprehensively assess witness D03-66's credibility stating that the Chamber "may deem a witness credible with respect to certain issues and not on other issues, by considering not only the witness's testimony in its entirety but other testimony and evidence on the record as well"; thus, in his view, Victim Group I fails to demonstrate a legal or factual error.<sup>287</sup>

(ii) *Determination of the Appeals Chamber*

139. The Prosecutor's arguments regarding the Soap Letter may be understood as alleging three errors with respect to: (a) the Trial Chamber's assessment that the stamp was not authentic; (b) the Trial Chamber's findings on the reliability of the content of the letter and (c) the Trial Chamber's purported disregard of the mutually corroborative aspects of the Soap Letter and the evidence of witnesses P-250 and P-28. Victim Group I also makes observations on (d) the Trial Chamber's evaluation of this evidence, in particular, the Chamber's assessment of witness D03-66.

(a) **The Trial Chamber's finding that the stamp was not authentic**

140. As regards the authentication of the stamp, the Appeals Chamber recalls the Prosecutor's argument that the stamp affixed to the Soap Letter was indicative of the fact that the Lendu militia of Bedu-Ezekere had a defined chain of command with a

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<sup>284</sup> [Observations of Victim Group I](#), para. 78.

<sup>285</sup> [Response to the Document in Support of the Appeal](#), para. 150.

<sup>286</sup> [Response to the Document in Support of the Appeal](#), para. 146.

<sup>287</sup> See [Mr Ngudjolo's Response to the Observations of the Victims](#), paras 40-41.



staff headquarters and an established hierarchy that existed well before the battle of Bogoro.<sup>288</sup>

141. Witness P-250 testified that he was aware of the letter but had seen it for the first time in the courtroom. When asked by the Prosecutor if he recognised the stamp he confirmed that he did and went on to offer up the following explanation with regard to the name “Tatsi Zumbe”:

Tatsi-Zumbe is a normal name. At the beginning we didn’t have set titles or expressions. We had to find a proper name and that is the name that we decided upon. At that time, the FRPI was before us and so we changed it, we changed, and we became FNI and they kept their name, FRPI.<sup>289</sup>

142. During cross-examination, and in answer to the question as to who made the stamp, witness P-250 stated that:

It was an old man, Tatsi, whom we found somewhere quickly. He made this stamp. His name was Edouard.<sup>290</sup>

143. The Appeals Chamber notes that, apart from witness P-250’s testimony, which the Trial Chamber did not find to be reliable, no other evidence was offered to authenticate the stamp. The Chamber also noted that the stamp was not seen on any other documentary evidence before it. In addition, while acknowledging that his testimony in this regard had to be considered with caution, the Chamber recalled that witness D03-66 denied affixing the stamp to the letter and alleged that this was not the stamp used at the time.<sup>291</sup> Accordingly, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to conclude that, without more, it was “not in a position to determine exactly in what circumstances and on what date the stamp was affixed”.<sup>292</sup> As a result, the Trial Chamber’s conclusion that it could not, on the basis of a discredited witness and an unauthenticated stamp, establish the existence of a general staff in Zumbe in early January 2003 was not unreasonable.

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<sup>288</sup> [Prosecutor’s Closing Brief](#), paras 320-322.

<sup>289</sup> Transcript of 4 February 2010, ICC-01/04-01/07-T-96-CONF-ENG (CT), p. 19, lines 8-19, with public redacted version, ICC-01/04-01/07-T-96-Red-ENG (WT).

<sup>290</sup> Transcript of 18 February 2010, ICC-01/04-01/07-T-104-CONF-ENG (ET), p. 70, lines 9-21, with public redacted version, ICC-01/04-01/07-T-104-Red-ENG (WT).

<sup>291</sup> [Acquittal Decision](#), para. 374.

<sup>292</sup> Acquittal Decision, para. 374.





**(b) The Trial Chamber's findings on the reliability of the content of the letter**

144. As a preliminary matter, the Appeals Chamber notes that the Prosecutor refers in her submissions under this section to the Trial Chamber's findings on the "authenticity" of the Soap Letter. The Appeals Chamber finds that, in this context, the Prosecutor's use of the term "authenticity" is misplaced. Since the author of the letter confirmed that he had written the letter, a fact which appears to be uncontested by the Prosecutor,<sup>293</sup> the Trial Chamber accepted the Soap Letter's authenticity.<sup>294</sup> The Appeals Chamber considers that the Prosecutor's arguments are therefore better understood as relating to the Trial Chamber's finding as to the reliability of the content of the letter which will be examined below.

145. With respect to the reliability of the content of the letter itself, the Appeals Chamber notes that the Trial Chamber did not make any explicit finding thereon. However, contrary to the Prosecutor's contention, the Trial Chamber did not "implicitly [accept witness] D03-66's claim that the letter's contents were not true".<sup>295</sup>

146. This is demonstrated by the Trial Chamber's later reliance on the letter when assessing the credibility of witness D03-88. In this regard the Trial Chamber held that witness D03-88, "despite being the chief of the *groupement*, came to have only limited control over some of the principal combatants in Bedu-Ezekere" (emphasis in original).<sup>296</sup> In support of this finding, the Trial Chamber referred to witness D03-66's statement that he had been to the Walendu-Bindi *groupement* "without informing the chief of his *groupement*" (emphasis in original).<sup>297</sup> The Trial Chamber held further that:

What is particularly interesting, however, is not that [w]itness D03-88 was unaware of the movement of such a large number of people but, rather, that [witness] D03-66 was a member of this delegation, comprising at least 15

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<sup>293</sup> See [Document in Support of the Appeal](#), para. 97.

<sup>294</sup> [Acquittal Decision](#), para. 374-375. See also Transcript of 24 August 2011, ICC-01/07-01/07-297-T-RED 2-ENG (WT), p. 48, lines 4-5 and lines 8-10.

<sup>295</sup> Document in Support of the Appeal, para. 96.

<sup>296</sup> Acquittal Decision, para. 368.

<sup>297</sup> Acquittal Decision, para. 369.



persons, under the leadership of Martin Banga, who was the vice-chairman of the youth committee. [Footnote omitted.]<sup>298</sup>

147. The Appeals Chamber considers that the Trial Chamber's references to witness D03-66 being "a member of this delegation, comprising at least 15 persons, under the leadership of Martin Banga",<sup>299</sup> coupled with the footnote referring to the Soap Letter, indicates that the Chamber did, in fact, rely on the content of the Soap Letter and, thus, did not "implicitly [accept witness] D03-66's claim that the letter's contents were not true".<sup>300</sup> Accordingly, the Appeals Chamber rejects the Prosecutor's arguments in this regard.

**(c) The Trial Chamber's purported disregard of the mutually corroborative evidence**

148. The Appeals Chamber notes that, as stated by the ICTY Appeals Chamber, while corroboration is "an element that a reasonable trier of fact may consider in assessing the evidence",<sup>301</sup> the question of whether or not to consider it forms part of the Trial Chamber's discretion.<sup>302</sup> Turning to the Prosecutor's arguments that the Trial Chamber erred in disregarding relevant corroborating evidence when assessing the value of the Soap Letter and authenticating the stamp affixed to it, the Appeals Chamber notes that the Trial Chamber did in fact rely on the content of the letter without needing to resort to potential corroborating evidence of witness P-250 and witness P-28, as noted in the preceding section, to establish that a delegation from Zombe travelled to Aveba. Thus, the Chamber did not dismiss the "value of the letter" as the Prosecutor alleges.<sup>303</sup> With respect to the stamp, it is noted that witness P-250 was the only witness who provided a possible explanation for the stamp, which the Trial Chamber rejected since it found that the witness was not credible. In these circumstances, as confirmed in paragraph 143 above, the Appeals Chamber finds that

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<sup>298</sup> [Acquittal Decision](#), para. 369. In support of its statement, the Trial Chamber referred to the Soap Letter in a footnote to this sentence.

<sup>299</sup> [Acquittal Decision](#), para. 369.

<sup>300</sup> [Document in Support of the Appeal](#), para. 96.

<sup>301</sup> [Mrkšić and Šljivančanin Appeal Judgment](#), para. 264.

<sup>302</sup> In the [Limaj Appeal Judgment](#), the ICTY Appeals Chamber, at para. 203, stated: "Moreover, corroboration of testimonies, even by many witnesses, does not establish automatically the credibility, reliability or weight of those testimonies. Corroboration is neither a condition nor a guarantee of reliability of a single piece of evidence. It is an element that a reasonable trier of fact may consider in assessing the evidence. However, the question of whether to consider corroboration or not forms part of its discretion" (footnotes omitted).

<sup>303</sup> [Document in Support of the Appeal](#), para. 98.



it was not unreasonable for the Trial Chamber to conclude that, in the absence of any other evidence, it was unable to authenticate the stamp.

149. Accordingly, the argument that the Trial Chamber erred in disregarding relevant corroborating evidence when assessing the value of the Soap Letter is rejected.

150. Accordingly, the Prosecutor's arguments in this regard are rejected.

**(d) Credibility assessment of witness D03-66**

151. Victim Group I submits that the Trial Chamber should have evaluated more thoroughly witness D03-66's credibility in light of his ties to Mr Ngudjolo and other Defence witnesses, especially since the Trial Chamber appears simultaneously to believe and disbelieve his testimony.<sup>304</sup>

152. The Appeals Chamber notes that the Trial Chamber (in setting out how it evaluated oral testimony during the trial) stated, *inter alia*, that "[i]n certain instances, the Chamber did not rely on part of a witness's account whilst accepting other aspects of his or her evidence, thereby acknowledging that it is possible for a witness to be accurate on some issues and unreliable on others".<sup>305</sup> Regarding witness D03-66, the Appeals Chamber observes that the Trial Chamber clearly expressed some misgivings regarding his testimony. For example, in the Trial Chamber's analysis of the Soap Letter, it noted that witness D03-66's statements on the letter "should be considered with caution".<sup>306</sup> The Appeals Chamber further observes that the Trial Chamber did not accept witness P-250's testimony as regards the Soap Letter because the Trial Chamber had (for other reasons) found witness P-250 to be inherently lacking in credibility.<sup>307</sup> As for Victim Group I's specific submission that it was "surprising" that the Trial Chamber should find that witnesses D03-66 and D03-55 "hailed 'from different environments'" (footnote omitted),<sup>308</sup> it is noted that the Trial Chamber was not in fact stating that all four witnesses under discussion were from "different environments", but rather that the two different pairs of witnesses (witnesses D03-66 and D03-55, and witnesses D02-160 and D-02-161) were from "different

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<sup>304</sup> See *supra* para. 137.

<sup>305</sup> [Acquittal Decision](#), para. 50.

<sup>306</sup> Acquittal Decision, para. 374.

<sup>307</sup> Acquittal Decision, para. 374, referring to paras 127-159 of the Acquittal Decision.

<sup>308</sup> [Observations of Victim Group I](#), para. 78.



environments”. The Trial Chamber noted that “[w]hilst the two witnesses [witnesses D03-66 and D03-55] called by the Defence for Mathieu Ngudjolo were living in Bedu-Ezekere *groupement*, those testifying for the Defence of [Mr] Katanga [witnesses D02-160 and D-02-161] were students in Walendu-Bindi *collectivité*” (emphasis in original).<sup>309</sup>

153. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber’s assessment of witness D03-66 credibility was not unreasonable. Accordingly, Victim Group I’s arguments in this regard are rejected.

**(b) Credibility assessment of witness P-250**

154. The Appeals Chamber notes that the Prosecutor relied on the testimony of witness P-250 to establish, *inter alia*, Mr Ngudjolo’s role as leader of the Lendu militia that attacked Bogoro on 24 February 2003. Witness P-250 claimed to have been a militia member within the military structure of the Bedu-Ezekere *groupement* and testified, *inter alia*, that he was a member of a delegation dispatched from Zumbe by Mr Ngudjolo to Mr Katanga in Aveba where the decision to attack Bogoro was made.<sup>310</sup> Witness P-250 “described the strategy implemented to win the battle in addition to details of the various itineraries followed by the commanders” (footnote omitted).<sup>311</sup>

155. Both Defence teams challenged witness P-250’s testimony on the basis that during the relevant period he was not a militia member but a student at Kagaba and Gety and therefore could not testify to the events under examination.<sup>312</sup>

*(i) Relevant part of the procedural history and submissions on appeal*

156. In assessing witness P-250’s credibility, the Trial Chamber found his evidence to be “particularly diffident” with respect to Mr Ngudjolo’s authority and role in the military structure of the Bedu-Ezekere *groupement*.<sup>313</sup> Pointing to numerous

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<sup>309</sup> [Acquittal Decision](#), para. 153.

<sup>310</sup> [Acquittal Decision](#), para. 131.

<sup>311</sup> [Acquittal Decision](#), para. 133.

<sup>312</sup> [Acquittal Decision](#), para. 135.

<sup>313</sup> [Acquittal Decision](#), para. 138.



inconsistencies in his evidence and observations relating to his demeanour in court, the Trial Chamber noted that:

138. Within a short time span in the course of his testimony, [w]itness P-250 stated that soldiers were not authorised to meet Mathieu Ngudjolo on an individual basis, only to claim in apparent contradiction or at the very least extemporaneously, that even an ordinary soldier could report to the Accused or provide him with information directly. In addition, the Chamber found the testimony of [witness] P-250 particularly nebulous on the subject of the “*phonie*” [communication device] linking Zumbe (Bedu-Ezekere *groupement*) and Chyekele (Walendu-Bindi *collectivité*). Witness P-250’s testimony regarding the “*phonie*” contradicted his previous testimony that there were no modern means of communication capable of reaching positions outside of Bedu-Ezekere *groupement*.

139. What is more, [w]itness P-250 contradicted his previous testimony in regard to the delegation led by commander Boba Boba which Mathieu Ngudjolo allegedly dispatched to Aveba. [Witness] P-250 maintained during his testimony that Bahati de Zumbe was the delegation “[TRANSLATION] head of mission” and served as a guide on the journey to Aveba, whereas in his statement in December 2006, he had stated that commander Bahati was one of the officers that this delegation had met in Aveba.

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

157. As to his demeanour the Trial Chamber held:

Lastly, the Chamber cannot fail to note that on occasion, [witness] P-250 made curious statements and behaved oddly during his testimony. It will be recalled that he threatened to interrupt his testimony and even, on one day, refused to appear in court. He claimed that lead counsel for Germain Katanga had visited his father during the [1990’s], and when presented with his school reports, stated that the battle of Bogoro had taken place in 2005. The Chamber is mindful of the fact that his behaviour might have been affected by his experiences during the war, but wishes to note that none of the other witnesses considered to be vulnerable behaved in such a peculiar manner. [Footnotes omitted.]<sup>315</sup>

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<sup>314</sup> [Acquittal Decision](#), paras 138-140.

<sup>315</sup> [Acquittal Decision](#), para. 141.



158. In addition, the Trial Chamber examined documentary evidence in the form of school reports which the Chamber held to be of “some probative value and tend to prove that [witness] P-250 was indeed studying in Kagaba in 2002-2003”, adding, however, that these documents alone are insufficient to cast doubt on witness P-250’s credibility.<sup>316</sup>

159. Finally, in reviewing other testimonial evidence in relation to witness P-250’s activities during 2002-2003, the Trial Chamber noted in particular the testimony of witness D03-100, a person close to witness P-250, who testified that the latter was a student at the relevant time.<sup>317</sup> Furthermore, in assessing the Prosecutor’s allegation against witness D03-100, that he testified for the defence in order to put a stop to death threats made by members of Mr Ngudjolo’s family against his own family, the Trial Chamber, noting that witness D03-100 had spontaneously volunteered the fact that there was conflict between the two families, examined the impact of any possible tension by comparing witness D03-100’s testimony on witness P-250’s schooling in 2002-2003 with four other defence witnesses who had useful information in this regard.<sup>318</sup> The Trial Chamber found that their testimonies as to the fact that witness P-250 was in Gety during the school year 2002-2003, corroborated each other and were even more convincing given the witnesses’ different circumstances.<sup>319</sup> In the Trial Chamber’s view, the testimony of the four defence witnesses reinforced “the credibility of [witness] D03-100’s statement that [witness] P-250 was studying in Walendu-Bindi *collectivité* at the material time” (emphasis in original).<sup>320</sup>

160. In conclusion the Trial Chamber held with respect to witness P-250’s credibility:

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

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<sup>316</sup> [Acquittal Decision](#), paras 144-147.

<sup>317</sup> [Acquittal Decision](#), para. 149.

<sup>318</sup> [Acquittal Decision](#), paras 151-152.

<sup>319</sup> [Acquittal Decision](#), para. 153.

<sup>320</sup> [Acquittal Decision](#), para. 153.



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

159. Having taken the view that it is highly unlikely that [witness] P-250 could have been simultaneously a militia member in Zumbe and a student in Kagaba, and given that his testimony was based specifically on his status as a militia member the Chamber finds itself unable to rely on his testimony in this case. [Emphasis in original.]<sup>321</sup>

161. The Prosecutor disputes the Trial Chamber's finding that witness P-250 was not a member of the Bedu-Ezekere militia. In support of this argument the Prosecutor submits, *inter alia*, that:

- i. With respect to the Trial Chamber's finding that witness P-250 was not a member of the militia nor was he present at the Bogoro attack, the Prosecutor argues that the Trial Chamber ignored again its factual findings and witness P-250's detailed account of the Zumbe delegation that travelled to Aveba and his account of the Walendu-Bindi FRPI, also mentioned in the Soap Letter.<sup>322</sup> Moreover, the Prosecutor avers that the Trial Chamber dismissed the corroborative evidence of witness P-28 on the basis that they may have colluded to give false evidence.<sup>323</sup> As regards witness P-250's detailed account of the attack on Bogoro, the Prosecutor argues that the Trial Chamber found substantial relevant parts of his testimony to be proven by other evidence, yet disregarded that evidence as corroborative when assessing witness P-250's credibility;<sup>324</sup>
- ii. With respect to the Trial Chamber's finding that witness P-250 was not a member of the militia nor was he present at the Bogoro attack, the Prosecutor argues that the Trial Chamber ignored again its factual findings and witness P-250's detailed account of the Zumbe delegation that travelled to Aveba and his account of the Walendu-Bindi FRPI, also mentioned in the Soap Letter.<sup>325</sup>

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<sup>321</sup> [Acquittal Decision](#), paras 157-159.

<sup>322</sup> [Document in Support of the Appeal](#), para. 107.

<sup>323</sup> Document in Support of the Appeal, para. 108.

<sup>324</sup> Document in Support of the Appeal, para. 109.

<sup>325</sup> Document in Support of the Appeal, para. 107.



Moreover, the Prosecutor avers that the Trial Chamber dismissed the corroborative evidence of witness P-28 on the basis that they may have colluded to give false evidence.<sup>326</sup> As regards witness P-250's detailed account of the attack on Bogoro, the Prosecutor argues that the Trial Chamber found substantial relevant parts of his testimony to be proven by other evidence, yet disregarded that evidence as corroborative when assessing witness P-250's credibility;<sup>327</sup>

- iii. As to the Trial Chamber's finding that witness P-250 was a student in Kagaba and not a militiaman during the relevant period, the Prosecutor contends that the Trial Chamber erred by first concluding that the school reports were reliable despite the lack of proper authentication of the reports. With particular emphasis on the testimony of witness D03-100 the Prosecutor contends that he (who, according to the Defence, was the source of the reports) "was never questioned about the reports by the Defence [and thus] did not confirm that the school reports came from him or how they came into his possession;"<sup>328</sup>
- iv. Furthermore, the Prosecutor avers that when the Trial Chamber assessed evidence of the four defence witnesses that witness P-250 was not a militiaman but just a student, the Trial Chamber failed to take into account relevant evidence and facts when it assessed their credibility.<sup>329</sup>

162. Building on the arguments of the Prosecutor, Victim Group II submits that the Trial Chamber, "in considering that [witness] P-250's testimony was sometimes inaccurate, contradictory and odd, failed to attach the appropriate weight to its own conclusions that '[witness] P-250's description of the living conditions in Zumbe after the fall of Governor Lompondo has the undeniable ring of sincerity'".<sup>330</sup> According to Victim Group II, the Trial Chamber's assessment of witness P-250's testimony failed to take into account that "a substantial number of details of the attack as related by the

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<sup>326</sup> [Document in Support of the Appeal](#), para. 108.

<sup>327</sup> Document in Support of the Appeal, para. 109.

<sup>328</sup> Document in Support of the Appeal, para. 113.

<sup>329</sup> Document in Support of the Appeal, para. 116.

<sup>330</sup> [Observations of Victim Group II](#), para. 90.





witness were admitted by the Chamber by way of other evidence,” thereby corroborating witness P-250’s account.<sup>331</sup>

163. Victim Group II concludes that three aspects of the Trial Chamber’s analysis are open to criticism: (i) the interpretation of some of the witness’s evidence when the Trial Chamber found contradictions; (ii) the weighing of the witness’s evidence, the school reports and the evidence of the four defence witnesses in question; and (iii) “the total failure to take account of the situation of witness P-250 in particular, given the pressure placed on him and his family of which the Chamber was fully aware”.<sup>332</sup>

164. Mr Ngudjolo refutes the Prosecutor’s arguments concerning witness P-250, arguing that “since [w]itness P-250’s presence in Zumbe, and especially his status as a combatant raised a doubt which the Prosecution was unable to dispel, his statements cannot be relied on as true” (footnote omitted).<sup>333</sup> He argues that, “[c]onsistent with legal scholarship”, “contradictions at the heart of a testimony entirely divest it of probative value”.<sup>334</sup> As a result, the “accuracy of certain of the facts conveyed by [witness] P-250 cannot re-imbue his testimony as a whole with credibility”.<sup>335</sup>

165. Mr Ngudjolo submits that witness P-250 himself recognised the authenticity of the disputed school records<sup>336</sup> and that the Prosecutor did not challenge the authenticity of these documents. Mr Ngudjolo concludes that it was “for the Prosecution to provide proof that these documents [were] false or inauthentic”, and she failed to do so.<sup>337</sup>

166. Replying to Mr Ngudjolo’s arguments, the Prosecutor submits that she did object to the admission of the disputed school reports, “contesting the manner in which [Mr Ngudjolo] sought to prove their authenticity”.<sup>338</sup> The Prosecutor also argues that when citing witness D03-100’s testimony that witness P-250 was a student, Mr Ngudjolo ignores “parts of [witness] D03-100’s testimony that are

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<sup>331</sup> [Observations of Victim Group II](#), para. 91.

<sup>332</sup> [Observations of Victim Group II](#), para. 100.

<sup>333</sup> [Response to the Document in Support of the Appeal](#), para. 162.

<sup>334</sup> [Response to the Document in Support of the Appeal](#), para. 162.

<sup>335</sup> [Response to the Document in Support of the Appeal](#), para. 162.

<sup>336</sup> [Response to the Document in Support of the Appeal](#), para. 166.

<sup>337</sup> [Response to the Document in Support of the Appeal](#), para. 166.

<sup>338</sup> [Prosecutor’s Reply](#), para. 17.



relevant to understanding why [witness] D03-100 would falsely claim that [witness P-250] was just a student”, and that, given the witness’s evidence, “it is not surprising that [witness] D03-100 would try to falsely maintain that [witness P-250] was not with the militia at the relevant time”.<sup>339</sup>

(ii) *Determination of the Appeals Chamber*

167. The arguments raised by the Prosecutor, which are broadly underscored by those of Victim Group II, focus on the alleged failure of the Trial Chamber to consider various pieces of evidence in the record which, according to the Prosecutor, tend to corroborate aspects of witness P-250’s testimony that established Mr Ngudjolo’s authority in Bedu-Ezekere. In the Prosecutor’s view, when rejecting witness P-250’s testimony in its entirety, the Trial Chamber failed to consider how his evidence related to and undermined the evidence of defence witnesses.<sup>340</sup> This, the Prosecutor argues, demonstrates the Trial Chamber’s failure to consider the entirety of the evidence when it found witness P-250 lacked credibility.<sup>341</sup>

168. The Appeals Chamber considers that, as the Prosecutor herself pointed out,<sup>342</sup> a Trial Chamber may indeed rely on certain aspects of a witness’s evidence and consider other aspects unreliable. The Appeals Chamber further finds that the evidence of a witness in relation to whose credibility the Trial Chamber has some reservations may be relied upon to the extent that it is corroborated by other reliable evidence.<sup>343</sup> However, the Appeals Chamber also finds that there may be witnesses whose credibility is impugned to such an extent that he or she cannot be relied upon even if other evidence appears to corroborate parts of his or her testimony.

169. The Appeals Chamber considers that in relation to witness P-250, the Trial Chamber found the latter to be the case. In the Trial Chamber’s view, witness P-250’s credibility was impugned to the extent that it affected his capacity to testify to the facts in issue and his evidence became entirely divested of reliability.

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<sup>339</sup> [Prosecutor’s Reply](#), para. 18.

<sup>340</sup> [Document in Support of the Appeal](#), para. 103.

<sup>341</sup> [Document in Support of the Appeal](#), para. 103.

<sup>342</sup> [Document in Support of the Appeal](#), para. 78.

<sup>343</sup> [Document in Support of the Appeal](#), para. 76, citing [Ntagerura Appeal Judgment](#), para. 174; [Halilović Appeal Judgment](#), para. 125.



170. Accordingly, even though parts of witness P-250's testimony appear to have been corroborated by other evidence, this would not, as correctly suggested by Mr Ngudjolo, "re-imbue" his credibility or the reliability of his evidence.<sup>344</sup> While a Trial Chamber should indeed assess the credibility of a witness in part by assessing whether the content of his or her testimony is confirmed by other evidence, the Trial Chamber is not required to find a witness to be credible simply because other evidence appears to confirm the content of aspects of his or her testimony.<sup>345</sup> In particular, if there are other reasons for doubting the witness's credibility it is not *per se* unreasonable for a Trial Chamber to reject potentially corroborative evidence when making its credibility assessments. In the present case, the Appeals Chamber notes that the Trial Chamber had doubts that witness P-250 was a member of the Bedu-Ezekere militia, and, since his entire testimony was premised on the fact that he was a member of the militia, the Trial Chamber found that it could not rely on his evidence at all.

171. In light of the foregoing, the Prosecutor's argument that numerous examples of testimonial evidence, as well as the Soap Letter, show that aspects of witness P-250's testimony were corroborated by other witnesses, and that therefore witness P-250 should have been relied upon, fails to establish that the Trial Chamber's findings were unreasonable. The Prosecutor's argument is therefore rejected.

172. The Prosecutor, in addition, submits that the Trial Chamber erred in failing to consider the lack of proper authentication of the school reports.<sup>346</sup> The Appeals Chamber notes that in this regard the Trial Chamber acknowledged that it would have been useful if the reports were shown to witness D03-100 for him to be able to confirm their provenance, however, the Trial Chamber recalled that the burden of proof lies with the Prosecutor and that nothing prevented the Prosecutor from challenging the authenticity during cross-examination or by calling an expert to verify the authenticity.<sup>347</sup> Accordingly, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to accept the reports as authentic having found that Mr Ngudjolo had discharged his obligations by stating who the source of the

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<sup>344</sup> [Response to the Document in Support of the Appeal](#), para. 162.

<sup>345</sup> *See supra* para. 152.

<sup>346</sup> [Document in Support of the Appeal](#), para. 113.

<sup>347</sup> [Acquittal Decision](#), paras 146-147.



reports was when tendering them into evidence.<sup>348</sup> The Prosecutor's arguments in this respect are therefore rejected.

173. Finally, the Prosecutor argues that the Trial Chamber failed to take into account relevant evidence and facts when it assessed the credibility of defence witnesses and the reliability of their accounts that witness P-250 was not a member of the militia.<sup>349</sup> In particular, the Prosecutor submits with respect to witness D03-100 that even though the Trial Chamber acknowledged that the witness and his family had been in conflict with Mr Ngudjolo's family, it nevertheless ignored the fact that witness D03-100 refused to give a direct response to repeated questions about whether his testimony was unaffected by the conflict.<sup>350</sup>

174. In this regard, the Appeals Chamber notes that the Trial Chamber found that the witness himself spontaneously volunteered the information that there had been conflict between the two families.<sup>351</sup> The Appeals Chamber further notes that the Trial Chamber considered this acknowledgment to be "an indication of the witness's attempt at transparency and [that it] should be taken into account when assessing his credibility".<sup>352</sup> In addition, the Trial Chamber considered the impact of any possible tension or threats from Mr Ngudjolo's family on witness D03-100 by comparing his testimony with the testimony of other witnesses that contained useful information about witness P-250's schooling in 2002-2003.<sup>353</sup> In the Trial Chamber's assessment, given that the evidence of the four defence witnesses was mutually corroborative, and convincing since they hailed from different environments, their accounts reinforced the credibility of witness D03-100's statement that witness P-250 was a student at the material time.<sup>354</sup> In light of this, the Appeals Chamber finds that the Trial Chamber did not ignore the possible effect of threats on witness D03-100's evidence. Rather, the Appeals Chamber finds that the Trial Chamber carefully examined the evidence of other defence witnesses to test the reliability of witness D03-100's testimony.

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<sup>348</sup> [Acquittal Decision](#), para. 146.

<sup>349</sup> [Document in Support of the Appeal](#), para. 114.

<sup>350</sup> [Document in Support of the Appeal](#), para. 115.

<sup>351</sup> [Acquittal Decision](#), para. 151.

<sup>352</sup> [Acquittal Decision](#), para. 151.

<sup>353</sup> [Acquittal Decision](#), para. 152.

<sup>354</sup> [Acquittal Decision](#), para. 153.



Accordingly, the Prosecutor's arguments that the Trial Chamber's findings were unreasonable are therefore rejected.

**(c) Credibility assessment of witnesses P-28 and P-219**

175. Apart from challenging the Trial Chamber's assessment of the credibility of witness P-250, the Prosecutor also challenges the credibility assessment of two other prosecution witnesses, namely witnesses P-28 and P-219, in order to further demonstrate the "systemic" nature of the Trial Chamber's alleged error.<sup>355</sup>

*(i) Witness P-28*

**(a) Relevant part of the procedural history and submissions on appeal**

176. Witness P-28 was a prosecution witness against Mr Katanga who testified that he was related to Mr Katanga's wife and that he arrived in Aveba shortly before Mr Katanga's wedding.<sup>356</sup> Witness P-28 claimed that whilst travelling between Avenyuma and Aveba, he was abducted by the men of a local commander and forced to undergo military training in Bulandjabo camp.<sup>357</sup> Furthermore, witness P-28 testified that he joined Mr Katanga's combatants and became a member of his personal escort.<sup>358</sup> In this capacity, witness P-28 claimed to have witnessed the preparations for the attack on Bogoro and subsequently participated in the attacks on Bogoro and Mandro before being demobilised.<sup>359</sup> With regard to Mr Ngudjolo, witness P-28 stated that "Zumbe was his territory" and that he had seen Mr Ngudjolo in Bogoro "after the fighting ended" (footnotes omitted).<sup>360</sup> He testified further that Bogoro was attacked by FRPI, FNI and APC combatants and the attack on Mandro was launched by Zumbe combatants.<sup>361</sup> Witness P-28 also testified regarding the visit of the Zumbe delegation to Aveba before the attack on Bogoro.<sup>362</sup> During the trial, the Prosecutor and Mr Katanga were at odds as to the date on which witness P-28 was

<sup>355</sup> [Document in Support of the Appeal](#), para. 119.

<sup>356</sup> [Acquittal Decision](#), paras 221-223.

<sup>357</sup> Acquittal Decision, para. 223, citing Transcript of 18 November 2010, ICC-01/04-01/07-T-219-CONF-ENG (CT), p. 16, lines 22-25 to p. 17, lines 1-2, with public redacted version, ICC-01/04-01/07-T-219-Red-ENG (CT WT).

<sup>358</sup> Acquittal Decision, para. 224.

<sup>359</sup> Acquittal Decision, paras 224-225.

<sup>360</sup> Acquittal Decision, para. 226.

<sup>361</sup> Acquittal Decision, para. 226.

<sup>362</sup> Acquittal Decision, para. 155.



supposed to have arrived in Aveba and as to whether he was a member of the militia.<sup>363</sup>

177. The Trial Chamber found witness P-28 to lack credibility when he stated that he was abducted by a commander from Walendu-Bindi, that he arrived in Aveba in November 2002, and that he was a combatant in the Aveba militia. In the Trial Chamber's view, witness P-28's testimony, when viewed in the context of the testimony of at least four defence witnesses (D02-134, D02-129, D02-161, and D02-259)<sup>364</sup> "can only impel the Chamber to find that he is not credible on various points and that he could only have arrived in Aveba in early February 2003 at the earliest".<sup>365</sup>

178. The Trial Chamber held further:

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

[...]

254. With regard to [witness] P-28's testimony about Mathieu Ngudjolo, the Chamber will draw inferences from the findings above relating to the credibility of the witness, case by case, in the present judgment, depending on the subject matter. The Chamber wishes to make clear that nevertheless, as of now, it does not intend to take into consideration the testimony concerning Mathieu Ngudjolo's participation in the attacks on Bogoro and Mandro, since it does not consider credible the witness's statement that he was in the militia.<sup>366</sup>

179. The Prosecutor alleges that the Trial Chamber erred by failing to take into account relevant evidence and facts when assessing witness P-28's credibility. In her view, the Chamber failed to consider:

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<sup>363</sup> [Acquittal Decision](#), para. 227.

<sup>364</sup> See [Acquittal Decision](#), paras 243, 244.

<sup>365</sup> [Acquittal Decision](#), para. 251.

<sup>366</sup> [Acquittal Decision](#), paras 252, 254.



- a. Witness P-28's clarification that he arrived in Aveba after Mr Katanga's engagement instead of after Mr Katanga's wedding (as he indicated in his statement to the Prosecutor) or that he attended the wedding (as testified to in court).<sup>367</sup>
- b. Witness P-28's account of when he arrived in Aveba was supported by witness D02-161 who stated that he was in Aveba from September 2002.<sup>368</sup>
- c. The fact that witness P-28 provided a detailed account regarding Mr Katanga's trip from Aveba to Beni in 2002, which was corroborated by Mr Katanga and witness D03-88. Furthermore, witness P-28 "provided a detailed account regarding the Zumbe delegation's trip to Aveba before the Bogoro attack which was corroborated by [witness] P-250 and the Soap Letter".<sup>369</sup>

180. Victim Group I and Victim Group II raise similar arguments as the Prosecutor in this respect submitting that the Trial Chamber committed an error in its evaluation of witness P-28's testimony in that it failed to take into account his entire testimony and his behaviour during his testimony, which materially affected the Acquittal Decision.<sup>370</sup>

181. Mr Ngudjolo submits that witness P-28's evidence does not relate to him.<sup>371</sup> Mr Ngudjolo further submits that witness P-28 "lied about his recruitment into the militia", made a "candid and spontaneous admission about the false conscription" and in such circumstances "no reasonable trier of fact can rely on his testimony" (footnote omitted).<sup>372</sup> Moreover, Mr Ngudjolo submits that witness P-28's evidence regarding the journey of the Zumbe delegation to Aveba is contradicted by witnesses P-279, P-12 and D03-300.<sup>373</sup>

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<sup>367</sup> [Document in Support of the Appeal](#), para. 120.

<sup>368</sup> [Document in Support of the Appeal](#), para. 120.

<sup>369</sup> [Document in Support of the Appeal](#), para. 120.

<sup>370</sup> [Observations of Victim Group I](#), paras 93-109; [Observations of Victim Group II](#), paras 110-118.

<sup>371</sup> [Response to the Document in Support of the Appeal](#), para. 181.

<sup>372</sup> [Response to the Document in Support of the Appeal](#), para. 181.

<sup>373</sup> [Response to the Document in Support of the Appeal](#), para. 182.



**(b) Determination of the Appeals Chamber**

182. With respect to the Prosecutor's contention that the Trial Chamber failed to take into account witness P-28's clarification concerning a contradiction between the witness's statement to the Prosecutor in April 2006 and his evidence in court (that he arrived in Aveba after Mr Katanga's engagement instead of after Mr Katanga's wedding, which took place on 18 November 2002) the Appeals Chamber notes that the Trial Chamber viewed witness P-28's account in this regard as a contradiction which was inconsistent with the witness's portrayal of the ceremony being a significant personal event. The Appeals Chamber finds that the Prosecutor does not substantiate her assertion that the Trial Chamber failed to consider witness P-28's clarification when arriving at its conclusion. In the Appeals Chamber's view, regardless of any clarification witness P-28 may have given, the Trial Chamber found his evidence on this point to be contradictory. In this regard, the Appeals Chamber recalls that a Trial Chamber "is not required to set out in detail why it accepted or rejected a witness's testimony, or justify its evaluation of testimony in cases where there are discrepancies in the evidence" (footnote omitted).<sup>374</sup> Accordingly, the Prosecutor's arguments on this point are rejected.

183. Similarly, the Prosecutor submits that the Trial Chamber failed to consider that witness P-28's account of when he arrived in Aveba was supported by witness D02-161. The Appeals Chamber notes that the Trial Chamber discredited witness P-28 in relation to the date that he arrived in Aveba on the basis of four other witnesses who placed his arrival in early 2003 instead of November 2002. Furthermore, in relation to witness D02-161, the Trial Chamber specifically stated that even though it considered this witness to be credible, his evidence could only be taken into account if it was corroborated.<sup>375</sup> The Appeals Chamber notes that the Prosecutor does not refer to any evidence that would corroborate witness D02-161's testimony. Accordingly, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to rely on the testimony of the four other witnesses who placed P-28's arrival in Aveba at a later date. Consequently, the Prosecutor's arguments are rejected.

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<sup>374</sup> [Muhimana Appeal Judgment](#), para. 176.

<sup>375</sup> [Acquittal Decision](#), para. 248.





184. Lastly, the Prosecutor argues that the Trial Chamber failed to consider witness P-28's detailed account of Mr Katanga's trip from Aveba to Beni in 2002, which was corroborated by other testimonial evidence and his detailed account of the Zumbe delegation's trip to Aveba before the attack on Bogoro, which too was corroborated by witness P-250 and the Soap Letter. The Appeals Chamber considers that, given the Trial Chamber's finding that witness P-28 could only have arrived in Aveba as early as February 2003, it was not unreasonable for the Trial Chamber to disregard his evidence regarding the events pre-dating his arrival. Accordingly, the Prosecutor's arguments are rejected.

(ii) *Witness P-219*

(a) **Relevant part of the procedural history and submissions on appeal**

185. Witness P-219 testified that after the fall of Governor Lomondo he fled Bunia in August 2002 and went to Aveba where he lived with a member of Mr Katanga's family.<sup>376</sup> The witness stated that as a trader by profession, he had regular access to the markets and military camps in the Walendu-Bindi *collectivité*, including the BCA camp where Mr Katanga was the leader of the Ngiti militia.<sup>377</sup> Witness P-219 claimed to have witnessed the preparations for the attack on Bogoro, he spoke of flights carrying military supplies between Aveba and Beni and stated that a "*phonie*" existed between Aveba and Zumbe on which Mr Ngudjolo and Mr Katanga communicated regularly before the attack on Bogoro.<sup>378</sup> The witness also testified that he went on foot to Bogoro, out of curiosity, the day after the attack of 24 February 2003 and made the return journey back to Aveba the same day.<sup>379</sup> Witness P-219 maintained that after the attack on Bogoro he had been able to talk, on several occasions, about the details of the attack with various combatants who had participated in the attack such as witness D03-88, commander Bahati de Zumbe, commander Yuda, even

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<sup>376</sup> [Acquittal Decision](#), para. 256.

<sup>377</sup> [Acquittal Decision](#), paras 257-258.

<sup>378</sup> [Acquittal Decision](#), paras 259 and 262.

<sup>379</sup> [Acquittal Decision](#), para. 260, citing Transcript of 18 October 2010, ICC-01/04-01/07-T-205-CONF-ENG (ET), p. 54, lines 20-25 to p. 56, lines 1-22, with public redacted version, ICC-01/04-01/07-T-205-Red-ENG (WT); Transcript of 22 October 2010, ICC-01/04-01/07-T-209-CONF-ENG (ET), p. 10, lines 20-21, with public redacted version, ICC-01/04-01/07-T-209-Red-ENG (WT).



Mr Katanga and Mr Ngudjolo.<sup>380</sup> Notably, witness P-219 testified that Mr Ngudjolo allegedly admitted to him that “Germain instigated the war in Bogoro, but he could not have won if I had not gone to help him. He could not have won because he had been repulsed several times.”<sup>381</sup>

186. In evaluating witness P-219’s testimony, the Trial Chamber questioned “whether [the witness] actually could have been a *direct observer* of the events he reported” (emphasis added).<sup>382</sup> Referring to three “significant inconsistencies” between his prior statement to the Prosecutor and his testimony in court, the Trial Chamber noted that on several occasions witness P-219 “modified or attenuated the accounts he had provided in prior statements, either presenting as hearsay what he had initially claimed to have witnessed, or declining to provide concrete details about matters that he observed before the attack on Bogoro”.<sup>383</sup> Moreover, the Trial Chamber found several aspects of witness P-219’s testimony to be “highly implausible”.<sup>384</sup> For instance, the Trial Chamber found it difficult to believe that he travelled around 100 km (distance of a return journey between Aveba and Bogoro) on foot in a single day given his physical problems with mobility and the Trial Chamber’s knowledge of the terrain from its site visit.<sup>385</sup> In addition, the Trial Chamber expressed surprise that “the witness could have met such a large number of commanders during the very short time he spent in Bogoro on that day” and that “he was the only witness to [remark on] the presence of defiled corpses and human remains on [...] display” (footnotes omitted).<sup>386</sup> The Trial Chamber concluded that “the accumulation in [witness] P-219’s account of such extraordinary events, mentioned by him alone, throws into serious doubt his claim that he travelled to Bogoro”.<sup>387</sup>

187. In relation to other testimonial evidence concerning witness P-219’s presence in Aveba and the period in which he had allegedly arrived there, the Trial Chamber

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<sup>380</sup> [Acquittal Decision](#), para. 261.

<sup>381</sup> [Acquittal Decision](#), para. 263.

<sup>382</sup> [Acquittal Decision](#), para. 270.

<sup>383</sup> [Acquittal Decision](#), paras 270-271.

<sup>384</sup> [Acquittal Decision](#), para. 272.

<sup>385</sup> [Acquittal Decision](#), para. 272.

<sup>386</sup> [Acquittal Decision](#), para. 272.

<sup>387</sup> [Acquittal Decision](#), para. 272.



noted the testimony of five defence witnesses (D02-134, D02-161, D02-228, D02-129 and D03-11) and a prosecution witness, P-28, all of whom testified to either seeing or knowing that witness P-219 was in Aveba in or around May of 2003 or, in the case of witness P-28, who claimed to have seen witness P-219 in Aveba but did not know whether he had arrived before or after the attack on Bogoro.<sup>388</sup>

188. Ultimately, the Trial Chamber concluded:

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

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

283. For all these reasons, it is the Chamber's view that it cannot rely on this witness's testimony in the present case.<sup>389</sup>

189. The Prosecutor disputes the Trial Chamber's finding that witness P-219 was not present in Aveba prior to the Bogoro attack. She submits that the Trial Chamber failed to take into account evidence, which in her view, corroborates that witness P-219 was present in Aveba before the Bogoro attack.<sup>390</sup> Furthermore, the Prosecutor avers that witness P-219 "provided details regarding events after the attack, including the meeting of commanders under the mango trees by the UPC camp", which was corroborated by witnesses P-250 and P-28.<sup>391</sup>

190. Mr Ngudjolo submits with respect to witness P-219 that he never made any admission to this witness while noting the absence of compelling evidence to corroborate the admission and the failure of the Prosecutor to confront him with witness P-219's testimony.<sup>392</sup>

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<sup>388</sup> [Acquittal Decision](#), para. 273.

<sup>389</sup> [Acquittal Decision](#), paras 281-283.

<sup>390</sup> [Document in Support of the Appeal](#), para. 121.

<sup>391</sup> [Document in Support of the Appeal](#), para. 121.

<sup>392</sup> [Response to the Document in Support of the Appeal](#), para. 201.



**(b) Determination of the Appeals Chamber**

191. The Appeals Chamber finds that the Prosecutor’s argument, namely that other evidence which tended to corroborate witness P-219’s account should have informed the Trial Chamber’s decision with respect to this witness’s credibility,<sup>393</sup> is not persuasive. The Appeals Chamber notes that the Trial Chamber found that witness P-219 “modified or attenuated the accounts he had provided in prior statements”<sup>394</sup> and that several aspects of witness P-219’s testimony were “highly implausible”.<sup>395</sup> Moreover, the Appeals Chamber notes that the Trial Chamber discredited witness P-219 in relation to the date that he claimed to have arrived in Aveba on the basis of five defence witnesses, who testified that witness P-219 arrived in Aveba in or around May 2003.<sup>396</sup> The Appeals Chamber notes further that the Trial Chamber disregarded witnesses P-250 and P-28’s potentially corroborative evidence in relation to witness P-219’s testimony about events after the attack on Bogoro because it found that both witnesses P-250 and P-28 lacked credibility.

192. In light of this the Appeals Chamber can discern no error in the credibility assessment of the Trial Chamber with respect to witness P-219. The Trial Chamber found witness P-219 to be not credible and rejected the entirety of his testimony.<sup>397</sup> As stated in relation to witness P-250, in the Appeals Chamber’s view, it was not unreasonable for the Trial Chamber to disregard evidence that may have potentially corroborated witness P-219’s testimony as no corroboration is possible when a witness’s credibility is impugned to such an extent that his or her testimony is entirely devoid of any reliability.<sup>398</sup> Accordingly the Prosecutor’s arguments on this point are rejected.

**(d) Conclusion in relation to the “first stage”**

193. In sum, the Appeals Chamber notes that none of the Prosecutor’s “examples” put forward to support her contention that the Trial Chamber’s approach to assessing the credibility of evidence was erroneous actually disclose an error on the part of the Trial Chamber. Accordingly, the Prosecutor’s arguments are rejected.

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<sup>393</sup> [Document in Support of the Appeal](#), para. 121.

<sup>394</sup> [Acquittal Decision](#), paras 270-271.

<sup>395</sup> [Acquittal Decision](#), para. 272.

<sup>396</sup> [Acquittal Decision](#), para. 275.

<sup>397</sup> [Acquittal Decision](#), paras 281-283.

<sup>398</sup> *See supra* para. 169.



### 3. *Second Stage: Fact Finding*

194. The Prosecutor challenges the correctness of the Trial Chamber's approach to the fact-finding process throughout the Acquittal Decision.<sup>399</sup> To demonstrate the alleged error the Prosecutor refers to the Trial Chamber's findings on Mr Ngudjolo's admissions to witness P-317 and the Congolese Prosecutor.<sup>400</sup> Furthermore, the Prosecutor argues that the Trial Chamber erred in its assessment of hearsay evidence, referring once more to the Trial Chamber's findings regarding witness D02-176.<sup>401</sup> Moreover, the Prosecutor refers to the alleged admissions by Mr Ngudjolo and Mr Katanga to witness P-219, witness P-12 and witness P-160.<sup>402</sup> Victim Groups I and II allege further errors in relation to the Trial Chamber's approach to the fact finding process in the Acquittal Decision.<sup>403</sup>

#### (a) **Mr Ngudjolo's admission to P-317**

##### (i) *Relevant part of the procedural history and submissions on appeal*

195. As rehearsed under the first ground of appeal, the Trial Chamber, in its final conclusion, noted Mr Ngudjolo's statement to witness P-317 that he had organised the attacks on Bogoro and Mandro, and his subsequent statement to a Congolese Prosecutor that he had only led the attack on Bunia.<sup>404</sup> The Trial Chamber concluded that these statements were vague and imprecise as well as inconsistent.<sup>405</sup> The Trial Chamber noted that Mr Ngudjolo did not mention to witness P-317 that he participated in the battle of Bunia, and that his statement to the Congolese Prosecutor did not mention his participation in the hostilities at Bogoro and Mandro. Accordingly, the Trial Chamber felt "compelled to treat such revelations with circumspection".<sup>406</sup>

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<sup>399</sup> [Document in Support of the Appeal](#), para. 86.

<sup>400</sup> *See infra*, section (a).

<sup>401</sup> *See infra*, section (b).

<sup>402</sup> *See infra*, section (c).

<sup>403</sup> *See infra* sections (d)-(e).

<sup>404</sup> *See supra* para.50.

<sup>405</sup> [Acquittal Decision](#), para. 497.

<sup>406</sup> [Acquittal Decision](#), para. 497.



196. The Prosecutor submits that the Trial Chamber’s “decision to not give weight to [Mr] Ngudjolo’s confession [...] illustrates its failure to properly assess the probative value of evidence in its context”.<sup>407</sup> In addition, she argues that the Trial Chamber disregarded key facts and corroborating evidence which should have led it to conclude that Mr Ngudjolo’s admission to witness P-317 was accurate.<sup>408</sup> Much of the Prosecutor’s arguments in this regard are summarised under the first ground of appeal and will not be repeated here.<sup>409</sup>

197. Mr Ngudjolo argues that all the facts raised here by the Prosecutor do not prove beyond reasonable doubt that he played a role in the attack on Bogoro.<sup>410</sup> He argues further that merely claiming that he was the recognised leader without providing evidence in support is insufficient and the Prosecutor “cannot possibly rely on such inferences to demonstrate the alleged liability of the Acquitted Person”.<sup>411</sup> Reiterating his evidence that he had never met with witness P-317, Mr Ngudjolo argues that the Prosecutor failed to provide any other evidence to support the alleged admission that he made to P-317.<sup>412</sup> With regard to his alleged admission to the Congolese Prosecutor, Mr Ngudjolo argues that “[i]t cannot logically be inferred that because of his participation in the attack in Bunia, he led the attack against Bogoro on 24 February 2003”.<sup>413</sup>

(i) *Determination of the Appeals Chamber*

198. With respect to the Prosecutor’s contention that the Trial Chamber’s decision “to not give weight to [Mr] Ngudjolo’s confession [...] illustrates its failure to properly assess the probative value of evidence in its context”,<sup>414</sup> the Appeals Chamber notes that contrary to the Prosecutor’s contention, the Trial Chamber did give weight to the admission. In this regard, the Appeals Chamber observes that, in its overall conclusions, the Trial Chamber stated that the admission was one of the pieces

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<sup>407</sup> [Document in Support of the Appeal](#), para. 123.

<sup>408</sup> Document in Support of the Appeal, paras 126-131.

<sup>409</sup> See *supra* paras 51 *et seq.*

<sup>410</sup> [Response to the Document in Support of the Appeal](#), para. 188.

<sup>411</sup> Response to the Document in Support of the Appeal, para. 188.

<sup>412</sup> Response to the Document in Support of the Appeal, para. 191.

<sup>413</sup> Response to the Document in Support of the Appeal, para. 196.

<sup>414</sup> Document in Support of the Appeal, para. 123.



of evidence that it had to treat with “circumspection”<sup>415</sup> thus indicating that the admission was not disregarded in the Trial Chamber’s assessment but would be treated with caution.<sup>416</sup> As regards the probative value attached to the admission by the Trial Chamber, the Appeals Chamber finds that none of the arguments raised by the Prosecutor demonstrate that the Trial Chamber assessed the admission out of context. The Appeals Chamber considers that the Prosecutor’s arguments here amount to mere disagreement with the Trial Chamber’s conclusion as to the probative value of the admission and as such no clear error on the part of the Trial Chamber may be discerned.

199. With respect to the Prosecutor’s argument that the Trial Chamber disregarded some of its own factual findings as well as the testimony of other witnesses and corroborative evidence when assessing the accuracy of the alleged admission to P-317,<sup>417</sup> the Appeals Chamber finds these arguments to be unpersuasive as they do not demonstrate how the findings were affected by this alleged omission on the part of the Trial Chamber. The Trial Chamber’s main finding with regard to the alleged admission was that it was “too general” for any determination as to Mr Ngudjolo’s precise status and role in the Bedu-Ezekere *groupement*.<sup>418</sup> As already discussed under the first ground of appeal, an examination of the substance of P-317’s testimony and the admission shows this portion of the Trial Chamber’s findings to be reasonable.

**(b) Exclusion of hearsay evidence**

200. The Prosecutor contests the rejection of the evidence of several witnesses including witness D02-176, on the position held by Mr Ngudjolo before and during the attack on Bogoro to demonstrate that the Trial Chamber assessed their evidence in isolation.<sup>419</sup>

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<sup>415</sup> [Acquittal Decision](#), para. 497.

<sup>416</sup> [Acquittal Decision](#), para. 497.

<sup>417</sup> [Document in Support of the Appeal](#), paras 126-131.

<sup>418</sup> [Acquittal Decision](#), para. 434.

<sup>419</sup> [Document in Support of the Appeal](#), paras 132-134.



(i) *Relevant part of the procedural history and submissions on appeal*

201. The Trial Chamber, in the context of assessing the evidence related to the position held by Mr Ngudjolo before and during the attack on Bogoro, noted the testimony of witness D02-176 who stated that “[TRANSLATION] he knew very well” that Mr Ngudjolo was the “[TRANSLATION] number one” and “[TRANSLATION] commander of operations” during the attack on Bogoro.<sup>420</sup> According to the Trial Chamber, witness D02-176 stated it to be a “[TRANSLATION] truth known to all”.<sup>421</sup> While the Trial Chamber acknowledged that witness D02-176 was “well placed to state which military commanders were at enemy positions, given [...] that UPC troops had attacked Bedu-Ezekere *groupement* on numerous occasions” (emphasis in original),<sup>422</sup> the Chamber nonetheless held that his assertion was “founded on anonymous hearsay [...] made by an individual who did not live in Zumbe and who [...] provided no further details on [Mr] Ngudjolo’s status within that locality”.<sup>423</sup> Furthermore, having examined witness D02-176’s statement, the Trial Chamber held that it “[could] not rule out that the witness had associated [Mr] Ngudjolo’s status in the FNI with the position which he considered him to have had held prior to the attack on Bogoro”.<sup>424</sup>

202. In the Prosecutor’s view, the Trial Chamber disregarded the following evidence or facts when it rejected witness D02-176’s statements:

- i. Witness D02-176 had direct knowledge of the Bedu-Ezekere Lendu commanders, some of whom he attended school with in Bogoro. His UPC forces also attacked Zumbe before the attack on Bogoro in February 2003.
- ii. Mr Ngudjolo was widely regarded as a leader and shortly after the attack on Bogoro he was shown on Ituri news as a senior military authority at critical meetings. He was shown deference by Commander Dark and signed the 18 March 2003 cessation of hostilities agreement on behalf of the Lendu.

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<sup>420</sup> [Acquittal Decision](#), para. 431.

<sup>421</sup> [Acquittal Decision](#), para. 431.

<sup>422</sup> [Acquittal Decision](#), para. 432.

<sup>423</sup> [Acquittal Decision](#), para. 433.

<sup>424</sup> [Acquittal Decision](#), para. 433.





- iii. Mr Ngudjolo’s admissions to witnesses P-317 and P-219 respectively, including Mr Katanga’s alleged admission to witnesses P-12 and P-160 that he asked for Mr Ngudjolo’s assistance for the attack confirm that he played a role in organizing the Bogoro attack. Moreover, by Mr Ngudjolo’s admission to the Congolese Prosecutor, he was admitting he had the ability to organise a key military operation just two weeks after the Bogoro attack.
- iv. Lastly, in finding that the witnesses did not live in Zumbe and therefore their evidence could not be accorded much probative value, the Trial Chamber failed to take into account that although not from Zumbe, all of the “hearsay” witnesses lived in close proximity and like all Bogoro residents had an interest in knowing who led their enemies.<sup>425</sup>

203. Mr Ngudjolo argues that the Prosecutor “broadly interprets” the evidence of witness D02-176.<sup>426</sup> Mr Ngudjolo submits that “it appears rather that [witness] D02-176 stated that he knew the Lendu who had attended his school”, that the witness “neither mentioned [him] nor the other military leaders” and that “[h]e could well have been referring to ordinary militia members”.<sup>427</sup> In relation to Commander Dark, Mr Ngudjolo submits that only he could have enlightened the Trial Chamber on all aspects of the attack however, the Prosecutor refused to hear him and instead preferred unreliable witnesses like witness P-250.<sup>428</sup>

*(ii) Determination of the Appeals Chamber*

204. The Appeals Chamber notes that the Trial Chamber assessed witness D02-176’s testimony in conjunction with that of other witnesses who testified to the position held by Mr Ngudjolo prior to the attack on Bogoro, and concluded that it could only attach very low probative value to this evidence as a whole.<sup>429</sup> The Trial Chamber reached this conclusion on the basis that: (i) most of the testimony was hearsay, (ii) it came from witnesses who were not actually present in Bedu-Ezekere *groupement* prior to the Bogoro attack; and (iii) it provided very little detail on the authority purportedly

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<sup>425</sup> [Document in Support of the Appeal](#), para. 134.

<sup>426</sup> [Response to the Document in Support of the Appeal](#), para. 208.

<sup>427</sup> [Response to the Document in Support of the Appeal](#), para. 208.

<sup>428</sup> [Response to the Document in Support of the Appeal](#), paras 210-211.

<sup>429</sup> [Acquittal Decision](#), para. 496.



held by Mr Ngudjolo in their view or on the manner in which he exercised it.<sup>430</sup> Moreover, as the Trial Chamber pointed out in stating that said evidence must be treated with circumspection, “it relates to a crucial point in the Prosecution’s case”.<sup>431</sup> The Appeals Chamber considers that none of these findings are unreasonable.

205. With respect to the specific evidence or facts that the Prosecutor alleges the Trial Chamber erred by failing to take into account, the Appeals Chamber notes that this evidence appears to relate to (i) events that took place *after* the attack on Bogoro; (ii) events that the Trial Chamber already otherwise discussed; (iii) statements that the Trial Chamber found to lack specificity to have any meaningful probative value; or (iv) evidence as to *why*, as the Trial Chamber already acknowledged in its discussion of his testimony,<sup>432</sup> witness D02-176 might in theory have been well-placed to know what was going on with his enemies in the Bedu-Ezekere *groupement*.<sup>433</sup> The Appeals Chamber finds that, at best, the Prosecutor is putting forward a possible alternative interpretation of the evidence, but she has failed to establish any error on the part of the Trial Chamber that would render the Chamber’s approach unreasonable. Accordingly, the Prosecutor’s arguments are rejected.

**(c) Admissions to witnesses P-219, P-12 and P-160**

206. The Prosecutor takes issue with the Trial Chamber’s rejection of the alleged admissions made to these witnesses by Mr Ngudjolo and Mr Katanga that, in her view, attest to the fact that “the Ngiti needed support to take over Bogoro” (footnote omitted).<sup>434</sup> In the Prosecutor’s view the Chamber should also have considered the corroborative effect of other evidence.<sup>435</sup>

207. The Appeals Chamber finds that the Prosecutor’s arguments are unsubstantiated. The Prosecutor merely points to the findings of the Trial Chamber without demonstrating how they were erroneous. In any event, the Appeals Chamber recalls that, with respect to witness P-219, it has already found that the Trial

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<sup>430</sup> [Acquittal Decision](#), para. 496.

<sup>431</sup> [Acquittal Decision](#), para. 496.

<sup>432</sup> [Acquittal Decision](#), paras 432-433.

<sup>433</sup> [Acquittal Decision](#), paras 434, 496.

<sup>434</sup> [Document in Support of the Appeal](#), para. 135.

<sup>435</sup> [Document in Support of the Appeal](#), para. 135.



Chamber's decision not to rely on his evidence was not unreasonable.<sup>436</sup> Similarly, the Trial Chamber found that since witnesses P-12 and P-160 were married, it could not exclude the possibility that they had colluded before coming to testify which the Chamber stated, "preclud[ed] any corroboration".<sup>437</sup> The Trial Chamber therefore considered their assertions with "utmost circumspection" and "afford[ed] them little probative value" (footnote omitted).<sup>438</sup> The Appeals Chamber finds no error in the Trial Chamber's assessment. Accordingly, the Prosecutor's arguments are rejected.

**(d) Witness P-280**

208. Victims Groups I and II submit that the Trial Chamber erred when it found that it could not rely on witness P-280.<sup>439</sup>

*(i) Relevant part of the procedural history and submissions on appeal*

209. Witness P-280 testified that he lived near Bunia until the fall of Governor Lompondo in August 2002.<sup>440</sup> At this time he fled in the direction of Zumbe hill, but while fleeing was abducted by a commander from Bedu-Ezekere *groupement*.<sup>441</sup> He was then taken to Lagura camp, where he underwent military training, which was frequently interrupted by fighting.<sup>442</sup> The witness testified that he participated in the attacks on Mandro and Kasenyi in addition to the attack on Bogoro.<sup>443</sup>

210. In describing the attack on Bogoro, the Trial Chamber noted contradictions between witness P-280's previous statements and his testimony in court.<sup>444</sup> When asked to explain these contradictions the witness stated that he must have conflated several battles.<sup>445</sup> In this regard, the Trial Chamber held that "the contradiction noted between his prior statement and his in-court testimony with regard to the unfolding of

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<sup>436</sup> See *supra* para. 192.

<sup>437</sup> [Acquittal Decision](#), para. 441.

<sup>438</sup> [Acquittal Decision](#), para. 441.

<sup>439</sup> [Observations of Victim Group I](#), paras 138 *et seq* and [Observations of Victim Group II](#), paras 63-74.

<sup>440</sup> [Acquittal Decision](#), para. 193.

<sup>441</sup> [Acquittal Decision](#), para. 193.

<sup>442</sup> [Acquittal Decision](#), para. 194.

<sup>443</sup> [Acquittal Decision](#), para. 199.

<sup>444</sup> [Acquittal Decision](#), para. 204.

<sup>445</sup> [Acquittal Decision](#), para. 205.



the attack on Bogoro affects the apparent credibility of what initially appeared to be a plausible and measured account of the attack”.<sup>446</sup>

211. Moreover, witness P-280 drew, at the behest of Defence counsel for Mr Ngudjolo,<sup>447</sup> a Sketch of Zumbe<sup>448</sup> which indicated the location of the airport, the market, the camp, the house of Mr Ngudjolo and the church.<sup>449</sup> In this respect, the witness testified, *inter alia*, that a “group from Zumbe airport attacked Bogoro alongside his own group”.<sup>450</sup> The Trial Chamber reasoned that given that witness P-280 “claimed to have lived in Zumbe before leaving Bedu-Ezekere *groupment*” the Chamber “expected the witness to exhibit a good level of local knowledge of the locality” and thus the “description he provided should therefore be factored into the assessment of his credibility”.<sup>451</sup> However, the Trial Chamber, citing to its Report of the Site Visit, noted that it was “difficult to place the airport at the location indicated by the witness” and “[i]n light of the Closing Briefs submitted by the parties the Chamber finds it difficult to rely on P-280’s claim that there was an airport in Zumbe”.<sup>452</sup> Furthermore, upon a closer examination of the Sketch of Zumbe the Trial Chamber noted that “this representation of the village of Zumbe was in fact more consonant with the topography of the village of Aveba” which was further confirmed when compared with a sketch drawn by witness D02-258 to describe Aveba.<sup>453</sup> Thus, the Trial Chamber held that in light of this it could not “exclude the possibility that the witness transposed what he knew of Aveba to flesh out his description of Zumbe”.<sup>454</sup>

212. Lastly, the Trial Chamber also considered the testimony of witness D03-340, a relative of witness P-280, who was called by the Defence for both Mr Ngudjolo and Mr Katanga “to testify to [witness] P-280’s activities during 2002-2003”.<sup>455</sup> The Trial

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<sup>446</sup> [Acquittal Decision](#), para. 206.

<sup>447</sup> Acquittal Decision, paras 208-213.

<sup>448</sup> See Annex I.

<sup>449</sup> Acquittal Decision, para. 195 and 208.

<sup>450</sup> Acquittal Decision, para. 211 citing Transcript of 28 June 2010, ICC-01/04-01/07-T-161-CONF-ENG (ET), p. 46, lines 23-25 to p. 47, lines 1-12, with public redacted version, ICC-01/04-01/07-T-161-Red2-ENG (WT);

<sup>451</sup> Acquittal Decision, para. 211.

<sup>452</sup> Acquittal Decision, para. 209.

<sup>453</sup> Acquittal Decision, para. 212.

<sup>454</sup> Acquittal Decision, para. 218.

<sup>455</sup> Acquittal Decision, para. 214. See also [Observations of Victim Group I](#), para. 152.



Chamber noted that witness D03-340's account that "[witness] P-280 lived with him throughout the war, was never a member of the militia and did not take part in the attack on Bogoro"<sup>456</sup>, "though of relative probative value, further fuelled its doubts as to [witness P-280's ability] to testify to the events [of the] case".<sup>457</sup> In conclusion the Trial Chamber noted that "[witness] P-280's account of his presence within the ranks of the Zumbe combatants at the time of the attack on Bogoro is excessively imprecise and contradictory".<sup>458</sup> It found that witness P-280's testimony, taken as a whole, "implicitly confirms [witness] D03-340's testimony", indicating that witness P-280 "fled Dele for Aveba and never visited the Bedu-Ezekere *groupement*".<sup>459</sup> The Trial Chamber thus found itself unable to rely on witness P-280's testimony.<sup>460</sup>

213. Victim Group I submits that witness P-280 lived in Zumbe only briefly, and the Trial Chamber was not justified in expecting him "to exhibit a good level of local knowledge of the locality".<sup>461</sup> Victim Group I further submits that, contrary to Mr Ngudjolo's submissions, the witness did not lie about the existence of an airport in Zumbe, but rather indicated that he had been told there was a place that "[TRANSLATION] served as an airport" (emphasis omitted).<sup>462</sup> Victim Group I argues that the Trial Chamber's references to its own observations during the site visit cannot constitute evidence,<sup>463</sup> and that the Trial Chamber should not have relied on the Report of the Site Visit in its evaluation of the evidence.<sup>464</sup> Victim Group I also submits that the Trial Chamber erred in its analysis of the Sketch of Zumbe,<sup>465</sup> stating that the Trial Chamber's finding "that it cannot rule out the possibility that the witness transposed what he had seen of Aveba to flesh out his description of Zumbe' is illogical and is based on an unreasonable and speculative analysis of evidence

<sup>456</sup> [Acquittal Decision](#), para. 215.

<sup>457</sup> Acquittal Decision, para. 218.

<sup>458</sup> Acquittal Decision, para. 218.

<sup>459</sup> Acquittal Decision, para. 218.

<sup>460</sup> Acquittal Decision, para. 219.

<sup>461</sup> [Observations of Victim Group I](#), para. 139, referring to Acquittal Decision, para. 211.

<sup>462</sup> Observations of Victim Group I, para. 140, referring to Transcript 29 June 2010, ICC-01/04-01/07-T-162-CONF-ENG (ET), p. 9 with public redacted version, ICC-01/04-01/07-T-162-Red-ENG (WT). See also Observations of Victim Group I, paras 144-146, where Victim Group I argue that placed in context, and contrary to the Trial Chamber's assertions, the question of the existence of an airport in Zumbe was not central to witness P-280's testimony.

<sup>463</sup> Observations of Victim Group I, para. 141.

<sup>464</sup> Observations of Victim Group I, para. 142.

<sup>465</sup> Observations of Victim Group I, paras 147-151.



admitted into the record” (emphasis in original).<sup>466</sup> Finally, Victim Group I contends that the Trial Chamber did not undertake “a comprehensive evaluation” of witness D03-340’s credibility<sup>467</sup> and that there were various considerations, which “make it clear that [witness D03-340] had an interest in testifying for the accused persons”.<sup>468</sup> Victim Group I concludes that “[i]n view of the various credibility problems posed by [witness] D03-340, the Chamber has not given sufficient reasons for its preference of his testimony over that of [witness] P-280, whose high level of precision and plausibility it nonetheless acknowledges”.<sup>469</sup>

214. In response, Mr Ngudjolo contends that the Trial Chamber “provided proper reasons for its decision not to rely on [witness] P-280’s testimony”.<sup>470</sup> Mr Ngudjolo submits that Victim Group I’s assertion that the Trial Chamber should not have relied on the Report of the Site Visit “is completely illogical” because the “judicial site visit formed part of the pursuit of the truth”, and it would therefore be “ludicrous to ask the Chamber not to take into account its own findings during the site visit in its evaluation of the testimonies”.<sup>471</sup> He further submits that “all the parties and participants [...] had the opportunity to submit their observations on the [Report of the Site Visit]”.<sup>472</sup> Thus Mr Ngudjolo avers that “the Chamber’s findings during the judicial site visit are judicial findings”.<sup>473</sup> Finally, Mr Ngudjolo states that the “insinuation [...] that the [Trial] Chamber did not comprehensively evaluate [witness] D03-340’s credibility is unfounded”, especially given the Trial Chamber’s ultimate conclusion that witness D03-340’s account was “of relative probative value”.<sup>474</sup>

215. In relation to the Trial Chamber’s finding that witness P-280 contradicted himself when describing how the UPC soldiers were attacked and killed,<sup>475</sup> in his earlier statement and in his subsequent testimony in court, Victim Group II observes that there was no contradiction. In Victim Group II’s view, the witness was describing

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<sup>466</sup> [Observations of Victim Group I](#), para. 147, citing [Acquittal Decision](#), paras 211-213.

<sup>467</sup> [Observations of Victim Group I](#), para. 153.

<sup>468</sup> [Observations of Victim Group I](#), para. 155.

<sup>469</sup> [Observations of Victim Group I](#), para. 156, citing [Acquittal Decision](#), para. 202.

<sup>470</sup> [Mr Ngudjolo’s Response to the Observations of the Victims](#), para. 57.

<sup>471</sup> [Mr Ngudjolo’s Response to the Observations of the Victims](#), para. 65.

<sup>472</sup> [Mr Ngudjolo’s Response to the Observations of the Victims](#), para. 66.

<sup>473</sup> [Mr Ngudjolo’s Response to the Observations of the Victims](#), para. 67.

<sup>474</sup> [Mr Ngudjolo’s Response to the Observations of the Victims](#), para. 72.

<sup>475</sup> *See* [Acquittal Decision](#), para. 205.



the “‘second-stage’ of the attack - the assault on the UPC camp - which supplements the account of the massacre of the civilians in the houses using bladed weapons”.<sup>476</sup>

216. In response to Victim Group II’s argument concerning witness P-280 generally, Mr Ngudjolo submits that Victim Group II “follows the same approach [as with respect to witness P-279] by rejecting the [Trial] Chamber’s evaluation of [witness] P-280’s testimony and proposing [its] own”.<sup>477</sup>

(ii) *Determination of the Appeals Chamber*

217. The Appeals Chamber finds that Victim Group I’s submissions are unpersuasive. Victim Group I’s contention that the Report of the Site Visit is not evidence under article 74 of the Statute is without merit given that the Trial Chamber clearly indicated that the Report of the Site Visit was part of “‘the entire proceedings’” prior to rendering the Acquittal Decision.<sup>478</sup> It was clear from that decision that the Trial Chamber would potentially take information from the Report of the Site Visit into account when assessing the evidence in the case, and Victim Group I has not established that this approach was wrong in law.

218. Victim Group I contends that the Trial Chamber should have taken into account the amount of time that witness P-280 lived in Zumbe when determining his “level of local knowledge of the locality” (emphasis in original) and that the Trial Chamber read the Sketch of Zumbe from the wrong orientation.<sup>479</sup> The Appeals Chamber finds that these arguments amount to mere disagreement with the Trial Chamber’s evaluation of the evidence and do not allege a specific error. Similarly, with respect to Victim Group II’s explanation of the apparent contradiction in witness P-280’s testimony regarding the attack on Bogoro, the Appeals Chamber finds that Victim Group II is merely offering an alternate interpretation of the evidence before the Trial Chamber, rather than identifying a specific error in the finding. The Appeals Chamber recalls that witness P-280 himself did not offer up the explanation that

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<sup>476</sup> [Observations of Victim Group II](#), para. 71.

<sup>477</sup> [Mr Ngudjolo’s Response to the Observations of the Victims](#), para. 90, citing [Observations of Victim Group II](#), paras 63-71.

<sup>478</sup> [Decision of 14 February 2012](#), para. 2.

<sup>479</sup> [Observations of Victim Group I](#), paras 139, 147-151.



Victim Group II is alleging for the apparent contradiction and instead explained that he must have “conflated several battles” (footnote omitted)<sup>480</sup>.

219. Finally, the Appeals Chamber notes that although the Trial Chamber mentioned the possibility that the witness had “transposed” his knowledge of Aveba,<sup>481</sup> it was not the primary basis for the Trial Chamber’s decision not to rely on witness P-280’s testimony. The primary basis for this decision was the Trial Chamber’s determination that the witness’s testimony was not only “peculiar” but also “excessively imprecise and contradictory”.<sup>482</sup> This decision was buttressed not only by the Trial Chamber’s concerns regarding the Sketch of Zumbe, but also by doubts stemming from the evidence of a defence witness, and its overall evaluation of witness P-280’s evidence (which indicated to the Trial Chamber that he had never in fact visited Bedu-Ezekere *groupement*).<sup>483</sup> In light of these findings, the Trial Chamber’s decision not to rely on witness P-280’s evidence was not unreasonable.

220. Accordingly, the arguments of Victim Groups I and II are rejected.

*(iii) Determination of the Appeals Chamber*

**(e) Witness-V2 and Witness-V4**

221. Witness V-2 and witness V-4 both testified as to Mr Ngudjolo’s alleged role in the attack on Bogoro. According to Victim Group II, witness V-2 “stated that she had learnt from several sources that Germain Katanga and Mathieu Ngudjolo were responsible for the attack and that they had provided training on the night before the attack”.<sup>484</sup> Witness V-4 stated that Mr Ngudjolo and Mr Katanga were responsible for the 2001 attack on Bogoro and that “[i]n 2003, they were the same ones who continued to attack and wage war”.<sup>485</sup>

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<sup>480</sup> [Acquittal Decision](#), para. 205.

<sup>481</sup> Acquittal Decision, paras 213, 218.

<sup>482</sup> Acquittal Decision, paras 204, 218.

<sup>483</sup> Acquittal Decision, para. 218.

<sup>484</sup> [Observations of Victim Group II](#), para. 134.

<sup>485</sup> Observations of Victim Group II, para. 137, citing Transcript of 24 February 2011, ICC-01/04-01/07-T-234-CONF-ENG (CT), p. 26, lines 5-8, with public redacted version, ICC-01/04-01/07-T-234-Red-ENG (CT WT).





(i) *Relevant part of the procedural history and submissions on appeal*

222. The Trial Chamber noted that both victims testified that Mr Ngudjolo was one of those responsible for the attack on Bogoro.<sup>486</sup> According to the Trial Chamber, witness V-2's evidence came from market women from the north, who said (as recounted by the witness) "that Mathieu Ngudjolo took part in training with people from his area [...] in Zumbe".<sup>487</sup> In the Trial Chamber's view, this did not "attest to his responsibility in Zumbe", and thus the statements could be of only "little probative value".<sup>488</sup> The Trial Chamber reached the same conclusion with regard to witness V-4, who asserted that Mr Ngudjolo and Mr Katanga were both responsible for the Bogoro attack, but "failed to provide further details, particularly as to the source of such information".<sup>489</sup> The Trial Chamber also noted "the somewhat confused statements of [witness V-4], who also held them [Mr Ngudjolo and Mr Katanga] responsible for the 2001 attack" (footnote omitted).<sup>490</sup> It ultimately found that although the victims were Bogoro residents, their testimony could "only be afforded low probative value insofar as the source of the information provided by one witness could not be ascertained, the other witness's testimony was implausible, and none of the witnesses ever lived in Zumbe".<sup>491</sup>

223. Victim Group II argues that the Trial Chamber "failed to take into account all the information provided in two testimonies [of witness V-2 and witness V-4] given by individuals particularly well placed to testify about the situation before the attack and who had detailed knowledge of the events which concerned them directly" (footnote omitted).<sup>492</sup> It submits that the Trial Chamber erred in excluding the testimonies of these two victims "on the common ground that neither witness lived in Zumbe and then on the ground that with respect to one of them, the source of the information was unknown and with respect to the other, the testimony was

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<sup>486</sup> [Acquittal Decision](#), para. 438.

<sup>487</sup> [Acquittal Decision](#), para. 438.

<sup>488</sup> [Acquittal Decision](#), para. 438.

<sup>489</sup> [Acquittal Decision](#), para. 439.

<sup>490</sup> [Acquittal Decision](#), para. 439.

<sup>491</sup> [Acquittal Decision](#), para. 440.

<sup>492</sup> [Observations of Victim Group II](#), para. 133.



implausible”.<sup>493</sup> Regarding the fact that the witnesses did not live in Zumbe, Victim Group II argues that the Trial Chamber should “have taken into account that [the two victims] lived near the events and that they had an interest in knowing facts concerning them” (footnote omitted), such as “the identity of the individuals who led the troops during the 2001 attack and prepared for another attack against them”.<sup>494</sup> Victim Group II further argues that, contrary to the Trial Chamber’s argument that the source of witness V-2’s information was unknown:

[Witness] V-2 indeed indicated that she had been given the information about Mathieu Ngudjolo by a person close to her and whose identity she provided (identifying that person as number 2 on the list) and from women who came to the market - and who it could reasonably be assumed were individuals she would meet regularly when they came to Bogoro.<sup>495</sup>

224. Victim Group II further submits that “[n]o reasons were given for the criticism that witness V-4’s testimony was implausible”.<sup>496</sup>

225. Mr Ngudjolo submits that witness “V-4’s claim that the attack on Bogoro in 2001 was carried out by [Mr] Katanga and [Mr] Ngudjolo’s forces is completely false” (footnote omitted).<sup>497</sup> Mr Ngudjolo further submits that the only *identified* source of witness V-2’s information regarding the preparations for the attack on Bogoro was her parents, who, in turn, learnt about it from witness D03-410.<sup>498</sup> According to Mr Ngudjolo, however, witness D03-410 denied witness V-2’s claim, and stated that though he was friends with witness V-2’s father, he had not seen him between the years 2000 and 2006 and had therefore never warned him of the imminent attack.<sup>499</sup> Mr Ngudjolo also submits that witness V-2 admitted that she could not identify the women who had allegedly warned her of the attack.<sup>500</sup> He states that these “are material factors intentionally excluded by [Victim Group II] in [its] subjective analysis”.<sup>501</sup>

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<sup>493</sup> [Observations of Victim Group II](#), para. 138 and more generally, paras 133-140.

<sup>494</sup> [Observations of Victim Group II](#), para. 139.

<sup>495</sup> [Observations of Victim Group II](#), para. 140.

<sup>496</sup> [Observations of Victim Group II](#), para. 140.

<sup>497</sup> [Mr Ngudjolo’s Response to the Observations of the Victims](#), para. 115.

<sup>498</sup> [Mr Ngudjolo’s Response to the Observations of the Victims](#), para. 117.

<sup>499</sup> [Mr Ngudjolo’s Response to the Observations of the Victims](#), para. 117.

<sup>500</sup> [Mr Ngudjolo’s Response to the Observations of the Victims](#), para. 117.

<sup>501</sup> [Mr Ngudjolo’s Response to the Observations of the Victims](#), para. 117.



(ii) *Determination of the Appeals Chamber*

226. The Appeals Chamber notes that the evidence given by both witness V-2 and witness V-4 regarding Mr Ngudjolo's alleged role in the attack on Bogoro was hearsay, based on information from mostly unidentified or loosely identified sources. The Appeals Chamber notes that the fact that evidence is hearsay does not necessarily deprive it of probative value, but does indicate that the weight or probative value afforded to it may be less, "although even this will depend upon the infinitely variable circumstances which surround hearsay evidence" (footnote omitted).<sup>502</sup> Although witness V-2 specifically identified one of the sources of her information, stating that witness D03-410 had spoken to her father on the matter, witness D03-410 stated that he had not met with the witness's father during the years 2000-2006, and denied having any particular knowledge in relation to the attack.<sup>503</sup> For the Trial Chamber to have chosen which witness to believe was within its discretion, as long as the Trial Chamber provides reasons as to why it finds one witness credible over the other.<sup>504</sup> With respect to the women who came to the market, witness V-2 was unable to identify any of them by name, and said specifically that although she would see them at the market, they weren't people she knew.<sup>505</sup> As regards witness V-4, the Trial Chamber stated that she failed to provide further details for her assertion that Mr Ngudjolo and Mr Katanga were responsible for the attack, particularly with respect to the source of the information. The Appeals Chamber notes that the fact that the individuals were not from Zumbe added to the Trial Chamber's concern that they were not particularly well placed to know who was responsible for the attack. The Trial Chamber's decision to afford the victims' testimony only low probative value appears to be consistent with its reasoning and decision-making on hearsay evidence elsewhere in the Acquittal Decision.<sup>506</sup> Furthermore, contrary to Victim Group II's assertion that "[n]o reasons were given for the criticism that witness V-4's testimony was implausible",<sup>507</sup> the Trial Chamber explicitly noted "the somewhat confused statements of the witness, who also held [Mr Ngudjolo and Mr Katanga] responsible

<sup>502</sup> [Aleksovski Appeal on Admissibility of Evidence](#), para. 15.

<sup>503</sup> Transcript of 14 September 2011, ICC-01/04-01/07-T-311-Red-ENG (WT), p. 44, lines 12-18, p. 45, lines 6-12, p. 46, lines 10-12.

<sup>504</sup> See, for instance, [Muvunyi Appeal Judgment](#), para. 147.

<sup>505</sup> Transcript of 23 February 2011, ICC-01/04-01/07-T-233-Red-ENG (CT WT), p. 11, lines 2-6.

<sup>506</sup> See [Acquittal Decision](#), paras 440 and 496.

<sup>507</sup> [Observations of Victim Group II](#), para. 140.



for the 2001 attack” (footnote omitted),<sup>508</sup> thereby giving an evidentiary basis for its statement that the witness’s testimony was implausible. Accordingly, the Appeals Chamber considers that the Trial Chamber’s finding here that it could only afford low probative value to the victims’ testimony was not unreasonable.

#### 4. *Third Stage: Final assessment of all facts and evidence*

227. Finally, the Prosecutor contends that “[a]s a result of the errors described in the preceding section, the [Trial] Chamber failed to take into consideration all the relevant evidence and its own factual findings. Its ultimate conclusion on the guilt or innocence of [Mr] Ngudjolo was therefore vitiated by the legal and factual errors discussed above”.<sup>509</sup>

228. Having rejected the errors the Prosecutor has alleged in relation to the first and second stages of the fact-finding process, the Appeals Chamber does not consider it necessary to address the Prosecutor’s argument in relation to the third stage, as she has raised no separate argument.

#### 5. *Conclusion*

229. In light of the foregoing, the Prosecutor’s second ground of appeal is rejected.

### **C. Third ground of appeal: the Prosecutor’s right to have an adequate opportunity to present her case**

#### 1. *Introduction*

230. The Prosecutor’s third ground of appeal relates to the Trial Chamber’s management of Mr Ngudjolo’s alleged interference with witnesses and victims while in detention at the Court.

231. On 18 December 2008, after having received submissions from the Prosecutor and the Legal Representatives of the victims that both Mr Ngudjolo and Mr Katanga maintained influence in the DRC, and that they might be able to bear pressure on victims and witnesses in the case, the Trial Chamber requested the Registrar to, *inter*

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<sup>508</sup> [Acquittal Decision](#), para. 439.

<sup>509</sup> [Document in Support of the Appeal](#), para. 137.



*alia*, “file [...] a [...] report [...] in order to determine whether there are reasonable grounds to believe that a detained person is attempting to interfere with or intimidate a witness, jeopardise public safety or the rights or freedoms of any person, or to violate a nondisclosure order made by a chamber”.<sup>510</sup>

232. On 14 January 2009, the Registrar reported to the Trial Chamber that there was a “reasonable suspicion that there may be an attempt by [Mr Ngudjolo] to engage in activities listed under regulation 101 of the [Regulations of the Court] or regulations 175(1) and 184(1) of the [Regulations of the Registry]”,<sup>511</sup> namely influencing testimonies or disclosing confidential information to unauthorised third parties.

233. On the same day, the Prosecutor applied to hold an *ex parte* hearing on the protection of witnesses and victims on the basis that she was “in possession of information giving serious grounds to believe that [Mr Ngudjolo] has had contact with the outside from the detention centre in order to pressurise [witness P-250]”.<sup>512</sup>

234. In the following months, the Registrar issued several reports on the matter.<sup>513</sup> The further procedural history and, in particular, the various decisions of the Trial Chamber in relation to the matter are summarised below, where relevant to the determination of the Prosecutor’s arguments.

## 2. *Overview of the submissions*

235. Under the third ground of appeal, the Prosecutor submits that the Trial Chamber “committed critical errors in its management of the trial that materially affected the Prosecution’s right to present and prove its case thereby violating the Prosecution’s right to a fair trial under Article 64(2)”.<sup>514</sup> More specifically, the Prosecutor submits that the Trial Chamber “erred in procedure by refusing the Prosecution’s persistent

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<sup>510</sup> [Order of 18 December 2008](#), p. 9.

<sup>511</sup> [Registrar’s Report on Monitoring Procedure](#), para. 26.

<sup>512</sup> [Prosecutor’s Application for an \*Ex Parte\* Hearing](#), para. 1.

<sup>513</sup> See [First Report](#); [Second Report](#), [Third Report](#); [Fourth Report](#), [Fifth Report](#), [First Kilendu Report](#), [Second Kilendu Report](#).

<sup>514</sup> [Document in Support of the Appeal](#), para. 140. See also para. 142.



requests and by failing to exercise its own powers to ensure the fairness of the trial proceedings”.<sup>515</sup>

236. Similarly, Victim Group I submits that the Trial Chamber “committed a procedural error in its failure to take the requisite measures to ensure the integrity of proceedings and in not allowing the Prosecution access to certain documents indispensable for analysing the evidence presented both by the Prosecution and the Defence, or to use these documents at trial”.<sup>516</sup>

237. Victim Group II considers that the Prosecutor’s right to a fair trial was infringed<sup>517</sup> and that “a procedural flaw arose” which “deprived the Prosecution of the possibility [...] to fully perform its duties under Article 54(1) of the Statute”.<sup>518</sup>

238. Mr Ngudjolo’s main submission is that the Trial Chamber’s decisions on the telephone monitoring are *res judicata* and therefore may not be raised in the context of this appeal.<sup>519</sup> Mr Ngudjolo, however, also contends that “there has been no infringement of [the Prosecutor’s] right to a ‘fair trial’”, and that, “in fact, the Prosecution had ample opportunity to present its case”.<sup>520</sup>

239. Mr Ngudjolo further contends that the Prosecutor’s submission that the Trial Chamber treated her “unfairly by refusing to grant [her] access to the contents of [Mr] Ngudjolo’s monitored telephone calls [...] is factually and legally unfounded”.<sup>521</sup>

### 3. *Determination of the Appeals Chamber*

#### (a) **Preliminary issue: whether the Trial Chamber’s decisions on the telephone monitoring are *res judicata***

240. Before considering the merits of this ground of appeal, the Appeals Chamber will address whether the Trial Chamber’s decisions on the telephone monitoring are *res judicata* and therefore may not be raised in the context of this appeal.

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<sup>515</sup> [Document in Support of the Appeal](#), para. 142.

<sup>516</sup> [Observations of Victim Group I](#), para. 159. *See also* para. 174.

<sup>517</sup> [Observations of Victim Group II](#), para. 190.

<sup>518</sup> [Observations of Victim Group II](#), para. 168.

<sup>519</sup> *See infra* para. 241.

<sup>520</sup> [Response to the Document in Support of the Appeal](#), para. 240.

<sup>521</sup> [Response to the Document in Support of the Appeal](#), para. 294.



241. Mr Ngudjolo contends that all decisions by the Trial Chamber on the issue of monitoring Mr Ngudjolo's telephone calls are *res judicata* and that “[r]es judicata constitutes a ground of inadmissibility”.<sup>522</sup> Mr Ngudjolo argues in particular that because the Prosecutor already unsuccessfully requested leave to appeal the Trial Chamber oral rulings on telephone call monitoring, and was specifically denied the right to use this material when examining witness P-250, the Prosecutor “should be barred – given that the judicial rulings made in this respect are now irreversible – from rehashing a matter that has been definitively resolved without providing, in support of this abstruse application, the legal reasoning for its third ground of appeal”.<sup>523</sup>

242. Mr Ngudjolo argues that this Court, similar to other national and international systems, provides remedies against Chambers' decisions while proceedings are ongoing.<sup>524</sup> However, “[o]nce these remedies have been used, or when they have not been taken advantage of within the prescribed time limits, such decisions become irrefragable and *res judicata*”.<sup>525</sup> Mr Ngudjolo submits that this means the unsuccessful party cannot raise these issues again, and that “[t]his is the logical, joint application of the principle of the right of appeal and *non bis in idem*”.<sup>526</sup>

243. Mr Ngudjolo argues further that the issue concerning the monitoring of his telephone calls was never the subject of adversarial proceedings and as such cannot be considered to be evidence discussed at trial for the purposes of article 74 (2) of the Statute.<sup>527</sup> Mr Ngudjolo submits that in any event “[i]t remains to be seen whether at the appeals stage, it is admissible for a party to invoke a ground of appeal which was not subject to adversarial proceedings at the trial stage”.<sup>528</sup>

244. The Prosecutor submits that Mr Ngudjolo's submissions “lack merit” and that Mr Ngudjolo “confuses the notion of *res judicata* with the purpose and characteristics

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<sup>522</sup> [Response to the Document in Support of the Appeal](#), para. 289.

<sup>523</sup> Response to the Document in Support of the Appeal, paras 291, 342. *See also* para. 285.

<sup>524</sup> [Mr Ngudjolo's Response to the Reply](#), para. 59.

<sup>525</sup> Mr Ngudjolo's Response to the Reply, para. 59.

<sup>526</sup> Mr Ngudjolo's Response to the Reply, para. 59.

<sup>527</sup> Response to the Document in Support of the Appeal, paras 286 *et seq.*

<sup>528</sup> Response to the Document in Support of the Appeal, para. 288.



of [...] appeal proceedings”.<sup>529</sup> The Prosecutor contends that *res judicata* “requires identity of parties, subject-matter and cause” and that the “question at issue in those procedural decisions differ from that in the instant appeal proceedings which seek to determine whether the Trial Chamber erred in its acquittal of [Mr Ngudjolo]” (footnote omitted).<sup>530</sup> Accordingly, the Prosecutor requests that Mr Ngudjolo’s arguments be rejected.<sup>531</sup>

245. Victim Group I submits that “the mere fact of not appealing a decision – *a fortiori* an interlocutory appeal – may not be interpreted [...] as a form of acquiescence to that decision”.<sup>532</sup> Victim Group I further submits that “the third ground essentially raises questions that may be examined only during an appeal of the Acquittal Decision in the context of a review of the entire proceedings”,<sup>533</sup> and that the fact that the Prosecutor has not requested leave to appeal certain decisions of the Trial Chamber makes no difference.<sup>534</sup> Victim Group I submits that to consider otherwise “would [...] systematically [deprive the Prosecutor] of the ability to raise procedural errors on appeal.”<sup>535</sup>

246. The Appeals Chamber finds that Mr Ngudjolo’s argument that the decisions the Trial Chamber rendered during the proceedings are, as such, *res judicata*, is not persuasive. The principle of *res judicata*, which is well-established in international law,<sup>536</sup> is defined as “[a] matter that has been adjudicated by a competent court and which therefore may not be pursued further by the same parties”,<sup>537</sup> or as “a thing

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<sup>529</sup> [Prosecutor’s Reply](#), para. 39.

<sup>530</sup> [Prosecutor’s Reply](#), para. 39.

<sup>531</sup> [Prosecutor’s Reply](#), para. 44.

<sup>532</sup> [Observations of Victim Group I](#), para. 172.

<sup>533</sup> [Observations of Victim Group I](#), para. 173.

<sup>534</sup> [Observations of Victim Group I](#), para. 173.

<sup>535</sup> [Observations of Victim Group I](#), para. 173.

<sup>536</sup> *See e.g.* R. Theofanis, “The doctrine of Res Judicata in International Criminal Law”, 3 *International Criminal Law Review* (2003), p. 195; B. Cheng, *General Principles of International Law as Applied by International Courts and Tribunals* (Cambridge University Press, 2006), pp. 336-372. *See also* Declaration of Judge Rafael Nieto-Navia, para. 20; *Interpretation of Judgements Nos. 7 and 8 Concerning the Case of the Factory at Chorzow* (1927) PCIJ (Ser. A) No. 11 at paras 1-7 (dissenting opinion of Judge Anzilotti).

<sup>537</sup> Oxford University Press, “Oxford English Dictionary”, 17 February 2015, accessed at [Oxford English Dictionary : Res Judicata](#).





adjudicated” meaning that “[o]nce a lawsuit is decided, the same issue or an issue arising from the first issue cannot be contested again.”<sup>538</sup>

247. The Appeals Chamber recalls that, in the context of interlocutory appeals, it has held that procedural errors that may have arisen prior to an impugned decision, but which are “germane to the legal correctness or procedural fairness of the Chamber’s decision” may be raised on appeal.<sup>539</sup> For the reasons that follow, the Appeals Chamber considers that the aforementioned also applies if the impugned decision is a “decision under article 74”. Article 81 (1) (a) (i) of the Statute expressly provides that the Prosecutor may appeal a procedural error in relation to a “decision under article 74 [of the Statute]”. Furthermore, article 83 (2) of the Statute presupposes that a decision pursuant to article 74 of the Statute may be “materially affected by [...] [a] procedural error”. The Appeals Chamber considers that the impugned decision itself will only rarely contain procedural errors. Rather, it is likely that any procedural errors are committed in the proceedings leading up to a decision under article 74 of the Statute. Accordingly, it *must* be possible to raise procedural errors on appeal pursuant to article 81 (1) (a) (i) of the Statute in relation to decisions rendered during trial, and such errors may lead to the reversal of a decision under article 74 of the Statute, provided that it is *materially affected* by such errors. The Appeals Chamber considers that to decide otherwise would indeed, as submitted by Victim Group I,<sup>540</sup> deprive the parties of the ability to raise procedural errors on appeal. In the view of the Appeals Chamber, this is irrespective of whether the proceedings before the Trial Chamber took place on an *ex parte* basis or not – as a consequence, Mr Ngudjolo’s argument that the relevant proceedings were not adversarial need not be further considered.<sup>541</sup>

248. Accordingly, Mr Ngudjolo’s arguments on *res judicata* are rejected.

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<sup>538</sup> Black's Law Dictionary Free 2<sup>nd</sup> Ed. and The Law Dictionary, “The Law Dictionary”, 17 February 2015, accessed at <http://thelawdictionary.org/res-judicata/>.

<sup>539</sup> [Kony OA 3 Judgment](#), paras 46-47.

<sup>540</sup> [Observations of Victim Group I](#), para. 173.

<sup>541</sup> In any event, the Appeals Chamber notes that Mr Ngudjolo appears to concede that the matter was addressed during adversarial hearings. See [Response to the Document in Support of the Appeal](#), para. 292.



**(b) Merits of the Prosecutor's arguments**

*(i) The nature of the alleged error and whether the Prosecutor may raise it on appeal*

249. The Prosecutor submits that the Trial Chamber committed a procedural error “by refusing the Prosecution’s persistent requests and by failing to exercise its own powers to ensure the fairness of the trial proceedings, and that this error violated the Prosecution’s right to a fair trial under article 64(2)”.<sup>542</sup> The Prosecutor further submits that “[d]isregarding the broad powers afforded to it by the Statute, the Trial Chamber took no action during the proceedings to ascertain whether critical witnesses had been intimidated and whether others may have colluded to provide false evidence. In so doing, the [Trial] Chamber disregarded its own authority to manage the trial and, at least as importantly, its obligation to arrive at the truth”<sup>543</sup> and that, “[a]s a result of the cumulative effect of the Chamber’s decisions and its passivity, the Prosecution’s right to a fair trial under Article 64(2) was violated”.<sup>544</sup>

250. In response, Mr Ngudjolo submits that the Prosecutor does not allege any precise procedural error, error of law or error of fact that has been committed by the Trial Chamber.<sup>545</sup> Mr Ngudjolo further submits that “the right to a fair trial does not constitute a ground of appeal for the Prosecution” against a judgment pursuant to article 74 of the Statute.<sup>546</sup> Mr Ngudjolo contends that “[t]he Prosecution may not rely on a violation of the right to a fair trial” under article 81 (1) (a) of the Statute, which “may be relied on only by the convicted person, or the Prosecution, on that person’s behalf” under article 81 (1) (b) of the Statute.<sup>547</sup>

251. The Appeals Chamber recalls that an appellant is obliged to clearly identify the alleged error and “to indicate, with sufficient precision, how this error would have materially affected the impugned decision”.<sup>548</sup> Failure to do so may lead to the

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<sup>542</sup> [Document in Support of the Appeal](#), para. 142.

<sup>543</sup> [Document in Support of the Appeal](#), para. 208.

<sup>544</sup> [Prosecutor’s Reply](#), para. 35.

<sup>545</sup> [Response to the Document in Support of the Appeal](#), para. 2.

<sup>546</sup> [Response to the Document in Support of the Appeal](#), paras 241-242. *See also* para. 357.

<sup>547</sup> [Response to the Document in Support of the Appeal](#), para. 243.

<sup>548</sup> [Bemba OA 4 Judgment](#), para. 69 citing [Kony OA 3 Judgment](#), para. 48. *See also*, [Bemba OA 3 Judgment](#), paras 102, 133, 134; [Kony OA 3 Judgment](#), para. 51; [Ruto OA Judgment](#), para. 87; [Muthaura OA Judgment](#), para. 85.



Appeals Chamber dismissing arguments *in limine*, without full consideration of their merits.<sup>549</sup>

252. The Appeals Chamber considers that, in the case at hand, the Prosecutor's submissions are sufficiently substantiated to warrant an analysis. In essence, the Prosecutor submits that the Trial Chamber "erred in procedure" and that "this error violated the Prosecution's right to a fair trial under article 64(2)" (footnote omitted).<sup>550</sup> In support of her contention, the Prosecutor submits that in light of the "clear and probative evidence that [Mr] Ngudjolo and third persons acting on his behalf had disclosed the identity and the evidence of protected Prosecution witnesses, orchestrated a consistent line of defence evidence and [...] exerted pressure over witnesses",<sup>551</sup> the Trial Chamber "committed critical errors in its management of the trial".<sup>552</sup> More specifically, the Appeals Chamber understands the Prosecutor to allege that the Trial Chamber made three errors, namely when it: (i) prevented the Prosecutor from getting full access to Mr Ngudjolo's recorded conversations;<sup>553</sup> (ii) rejected the Prosecutor's request to use the parts of the Registry Reports<sup>554</sup> that she had access to in order to examine Mr Ngudjolo and witness D03-88;<sup>555</sup> and (iii) improperly prohibited the Prosecutor from eliciting explanations from witness P-250 regarding the inconsistencies in his testimony.<sup>556</sup>

253. The Appeals Chamber will address these arguments in turn. First, however, the Appeals Chamber will address Mr Ngudjolo's argument that the Prosecutor is not entitled to raise alleged violations of fair trial rights. In this regard, the Appeals Chamber recalls that the Prosecutor couches her arguments broadly as violations of her fair trial rights. The Prosecutor submits that her "right to a fair trial is guaranteed under Article 64(2) [and that this right] obliges the Court to ensure that neither party is put at a disadvantage when presenting its case" (footnote omitted).<sup>557</sup> The

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<sup>549</sup> [Ntaganda OA Judgment](#), para. 32.

<sup>550</sup> [Document in Support of the Appeal](#), para. 142. *See also* [Prosecutor's Reply](#), para. 35.

<sup>551</sup> [Document in Support of the Appeal](#), para. 207.

<sup>552</sup> [Document in Support of the Appeal](#), para. 140.

<sup>553</sup> [Document in Support of the Appeal](#), para. 208.

<sup>554</sup> The term "Registry Reports" shall hereinafter refer collectively to the [First Report](#); [Second Report](#), [Third Report](#); [Fourth Report](#), [Fifth Report](#), [First Kilendu Report](#), and [Second Kilendu Report](#).

<sup>555</sup> [Document in Support of the Appeal](#), para. 208.

<sup>556</sup> [Document in Support of the Appeal](#), para. 209.

<sup>557</sup> [Document in Support of the Appeal](#), para. 205.



Prosecutor avers that the right to a fair trial involves in particular her right to “exercise the powers and fulfil the duties listed in Article 54, [to have] the genuine opportunity to present [her] case” (footnote omitted),<sup>558</sup> as well as to be in a position “to tender evidence free of any external and/or undue influence and to question witnesses comprehensively” (footnote omitted).<sup>559</sup>

254. The Appeals Chamber notes that article 64 (2) of the Statute reads as follows:

The Trial Chamber shall ensure that a trial is fair and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

255. The Appeals Chamber further notes that article 67 (1) of the Statute provides that, “[i]n the determination of any charge, the accused shall be entitled [...] to a fair hearing conducted impartially [...]”. The Appeals Chamber recalls that the right to a fair trial is a fundamental right protected at the regional and international levels.<sup>560</sup> It is commonly understood that the right to a fair trial/fair hearing in criminal proceedings, first and foremost, inures to the benefit of the accused.<sup>561</sup> Indeed, the

<sup>558</sup> [Document in Support of the Appeal](#), para. 205.

<sup>559</sup> [Document in Support of the Appeal](#), para. 206.

<sup>560</sup> Article 10 of the [Universal Declaration of Human Rights](#); article 14 of the [ICCPR](#); article 6 of the [ECHR](#); article 8 of the [ACHR](#); articles 7, 26 of the [African Charter on Human Rights](#). The right to fair trial is also provided for in all four Geneva Conventions ([Geneva Convention I](#), article 49, fourth paragraph; [Geneva Convention II](#), Article 50, fourth paragraph; [Geneva Convention III](#), articles 102–108; [Geneva Convention IV](#), articles 5, 66–75) and in [Additional Protocol I](#) (article 75 (4)) and [Additional Protocol II](#) (article 6 (2)). The right to fair trial is also provided for in article 17 (2) of the [Second Protocol to the Hague Convention for the Protection of Cultural Property](#). Furthermore, depriving a protected person of a fair and regular trial is a grave breach under the Third and Fourth Geneva Conventions (Geneva Convention III, article 130; Geneva Convention IV, article 147) and under Additional Protocol I (article 85 (4) (e)) and constitutes a war crime pursuant to article 8 (2) (a) (vi) and (c) (iv) of the Court’s [Statute](#), article 2 (f) of the [ICTY Statute](#), article 4 (g) of the [ICTR Statute](#) and article 3 (g) of the [Statute of the Special Court for Sierra Leone](#).

<sup>561</sup> [Uganda Decision of 19 December 2007](#), para. 27; [Kony Decision of 10 July 2006](#), para. 24; article 67 of the Statute, “[i]n the determination of any charge, the accused shall be entitled [...] to a fair hearing conducted impartially”. It is noted that there is no corresponding provision for the Prosecutor. *See also* article 14 (1) of the ICCPR, “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”; article 6 (1) of the ECHR (“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”); articles 20/21 of the ICTR/ICTY Statutes (“Rights of the accused”). *See also* Y. McDermott, “Rights in Reverse: A Critical Analysis of Fair Trial Rights Under International Criminal Law”, in W. Schabas *et al.* (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate, 2013), p.165, at p. 172: “If the prosecutorial right to a fair trial is to be recognised as a rule of international criminal procedure, with the possibility of it moving toward a principle of same, then serious questions need to be addressed as to the scope of operation of that right and its limitations”; A. Cassese, *et al.* (eds.), *Cassese’s International Criminal Law* (Oxford University



specific rights entrenched in article 67 (1) of the Statute are specifically tailored to the needs of the accused person.

256. The Appeals Chamber does not consider it necessary to determine whether and to what extent the Prosecutor has a “right to a fair trial” in the abstract. What is at issue is not the overall fairness vis-à-vis the Prosecutor. Rather, at issue is a fundamental aspect of the trial, which touches upon the core functions of both the Prosecutor and the Trial Chamber, namely the objective of establishing the truth as well as the Prosecutor’s ability to present evidence in order to prove the charges against the accused. In regard to the latter, article 69 (3) of the Statute provides that “[t]he parties may submit evidence relevant to the case, in accordance with article 64”. The Appeals Chamber further notes that the principle that the parties must be afforded an adequate opportunity to present their case has been adopted by Pre-Trial Chambers I<sup>562</sup> and II,<sup>563</sup> and the *ad hoc* Tribunals.<sup>564</sup> The Appeals Chamber considers that this principle must be seen in the context of article 54 (1) (a) of the Statute, which enjoins the Prosecutor “to establish the truth”. The establishment of the truth is one of the principal objectives of the Statute, to which the Trial Chamber must actively contribute.<sup>565</sup> In this context, the Appeals Chamber notes that article 69 (3) of the Statute gives the Court the power “to request the submission of all evidence that it considers necessary for *the determination of the truth*” (emphasis added).

257. Given the Trial Chamber’s duty to contribute to the establishment of the truth, the Appeals Chamber considers that the Prosecutor may raise errors alleging that her ability to present her case has been violated as procedural errors under article 81 (1) (a) (i) of the Statute.

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Press, 3<sup>rd</sup> ed., 2013), p. 353: “[e]ither party may claim inequality, although such assertions by the prosecution are founded not on an individual right to equality, but the public interest in an intrinsically fair proceeding” (footnotes omitted).

<sup>562</sup> [Lubanga Decision of 6 November 2006](#), p. 7.

<sup>563</sup> [Uganda Decision of 19 December 2007](#), para. 27.

<sup>564</sup> [Haradinaj Appeal Judgment](#), para. 49; [Partially Dissenting Opinion of Judge Patrick Robinson](#), para. 15; see also Y. McDermott, “General Duty to Ensure the Right to a Fair and Expeditious Trial” in G. Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013), p. 770, at pp. 777-780.

<sup>565</sup> [Katanga OA 13 Judgment](#), para. 104. See also [Non-Compliance Decision of 3 December 2014](#), para. 79; [Disclosure Decision of 31 July 2008](#), paras 8-9.



258. The Appeals Chamber will therefore consider the Prosecutor's arguments (as it set out above at paragraph 252) in turn.

(ii) *Full access to the recorded conversations*

259. In relation to the Prosecutor's argument that the Trial Chamber did not provide her with a "genuine opportunity to present [her] case",<sup>566</sup> when it refused her full access to the recorded conversations, the Appeals Chamber notes that by a series of decisions issued by the Registrar, the post-factum listening of all non-privileged communications was ordered of both Mr Katanga and Mr Ngudjolo from the Court's detention centre as of 1 October 2008 and thereafter during intermittent periods until 28 January 2010.<sup>567</sup> In parallel, the Registrar produced numerous reports analysing the recorded conversations and alerted the Trial Chamber to possible witness intimidation and disclosure of confidential information concerning witnesses by Mr Ngudjolo *via* his outside contacts.<sup>568</sup> The Trial Chamber reacted by notifying these reports to Mr Ngudjolo and the Prosecutor (in redacted form)<sup>569</sup> and by taking measures to protect witnesses who may have been at risk, as well as prohibiting, on a provisional basis, all contact between Mr Ngudjolo and the outside and separating him from other detained persons.<sup>570</sup>

260. On 11 June 2009, the Prosecutor filed the Prosecutor's First Disclosure Request, requesting, *inter alia*, that the Trial Chamber grant her access to the full recorded conversations that were summarised in the First Report, the annex to the First Report and the list of Mr Ngudjolo's telephone contacts in order to enable the Prosecution to better assess its witness protection obligations under article 68 of the Statute.<sup>571</sup> The Prosecutor further submitted that the information may constitute incriminating evidence and therefore "form part of determining the truth in this case".<sup>572</sup>

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<sup>566</sup> [Document in Support of the Appeal](#), para. 205.

<sup>567</sup> [Registrar's First Monitoring Decision](#); [Registrar's Second Monitoring Decision](#); [Registrar's Third Monitoring Decision](#).

<sup>568</sup> See [First Report](#), para. 24.

<sup>569</sup> The Appeals Chamber notes that only the First Report was provided in an unredacted form to Prosecutor. Thereafter, all subsequent reports were provided to the Prosecutor with redactions proposed by the Registry and Mr Ngudjolo and authorised by the Trial Chamber. See [Decision of 19 August 2011](#), para. 26.

<sup>570</sup> See [Decision of 24 June 2009](#), paras 33-36.

<sup>571</sup> Prosecutor's First Disclosure Request, paras 28-35.

<sup>572</sup> Prosecutor's First Disclosure Request, para. 33.



261. In the Decision of 24 June 2009, the Trial Chamber denied the Prosecutor's First Disclosure Request. The Trial Chamber held, *inter alia*, that "the requested recordings [...] were ordered by the Registry [...] for the sole purpose of ensuring that the communication facilities provided to the [A]ccused were being used appropriately"<sup>573</sup> and that "at this stage of the proceedings, the Prosecutor cannot use the content of these conversations to make a determination of the truth".<sup>574</sup> Moreover, the Trial Chamber stated that "the recordings of the conversations need not be fully disclosed to the Office of the Prosecutor for their possible use as incriminating or exonerating evidence".<sup>575</sup>

262. The Decision of 24 June 2009 later gave rise to a request by both Mr Ngudjolo and the Prosecutor for leave to appeal, which the Trial Chamber granted in part only to the Prosecutor on the following specific issue:

[W]hether the parties or the Chamber can refer to or use all the information contained in the recordings of telephone conversations made by Mathieu Ngudjolo and in his list of contacts during the hearing on the merits.<sup>576</sup>

263. The Appeals Chamber addressed this appeal in the *Ngudjolo OA 9 Judgment*, where it construed the issue on appeal as being limited to whether the Prosecutor's request for full access to the recorded conversations should have been granted. In this regard, the Appeals Chamber, by majority, reversed the Decision of 24 June 2009 "to the extent that the Trial Chamber rejected the Prosecutor's request for full access to the information"<sup>577</sup> and remanded it to the Trial Chamber "for a new decision under regulation 92 (3) of the Regulations of the Court".<sup>578</sup> In the Appeals Chamber's view, "the Trial Chamber's rejection of the Prosecutor's request for [full] access was based on an erroneous determination as to the inadmissibility of the information as evidence [at trial] and the Trial Chamber's decision was therefore materially affected by an error of law".<sup>579</sup> The Appeals Chamber further held that when faced with a request for access to monitored information, the Trial Chamber must strike a balance between, on

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<sup>573</sup> [Decision of 24 June 2009](#), para. 40.

<sup>574</sup> Decision of 24 June 2009, para. 40.

<sup>575</sup> Decision of 24 June 2009, para. 40.

<sup>576</sup> [Decision of 14 July 2009](#), p. 13.

<sup>577</sup> [Ngudjolo OA 9 Judgment](#), para. 51.

<sup>578</sup> *Ngudjolo OA 9 Judgment*, para. 52.

<sup>579</sup> *Ngudjolo OA 9 Judgment*, para. 50.



the one hand, the rights of the accused under article 67 of the Statute, including the right to privacy and to conduct a defence and, on the other hand, the Prosecutor's duties under article 54 (1) of the Statute, specifically the duty to establish the truth.<sup>580</sup>

264. Following the *Ngudjolo OA 9 Judgment*, the Prosecutor filed the Prosecutor's Second Disclosure Request requesting, *inter alia*, full access to the recorded conversations and the Registry Reports on the basis that:

10. The conversations may substantially bear on the willingness of proposed Prosecution witnesses to testify and the substance of their evidence. This is particularly important now, given the increasing frequency of reports that Prosecution witnesses are being threatened and the inescapable facts that witnesses are suddenly balking at testifying or providing different versions inconsistent with their prior statements. Access to these transcripts of the conversations will enable the Prosecution to better assess the situation since the Prosecution has maintained contact with its witnesses over the years and has acquired a unique knowledge of their ties to the accused, or to other members of the militias involved in this case, as well as of their environment and personal situation.<sup>581</sup>

265. In its Decision of 10 June 2010, the Trial Chamber rejected the Prosecutor's Second Disclosure Request and determined that:

61. In general, the information which the Registrar did not consider necessary to include in her reports [...] mainly concerns matters such as the private life of [Mr Ngudjolo] or the conduct of his defence. Moreover, the Prosecutor has not argued that the disclosed reports of the Registrar had provided him with material to suggest that the transcripts concerned could contain information which is material to the determination of the truth and could not be obtained from other evidence gathered in the course of his investigations. In other words, he did not argue that a lack of access to such information would, in this instance, deprive him of any possibility of achieving the objective prescribed by article 54(1) of the Statute. In the view of the Chamber, the mere fact that one or more transcripts could *potentially* provide information of interest or, as the case may be, evidence necessary to the determination of the truth does not, *per se*, render their disclosure indispensable or, in any event, necessitate an interference with the rights of [Mr Ngudjolo]. [Emphasis in original.]<sup>582</sup>

266. Ultimately, the Trial Chamber concluded that:

<sup>580</sup> [Ngudjolo OA 9 Judgment](#), paras 50, 52.

<sup>581</sup> [Prosecutor's Second Disclosure Request](#), para. 10.

<sup>582</sup> Decision of 10 June 2010, para. 61.





[T]he exercise of balancing the rights of the Accused (article 67 of the Statute) and prosecutorial duties (article 54(1)(a) of the Statute) which the Appeals Chamber directed the Chamber to perform has led the Chamber to favour the rights of Mathieu Ngudjolo in this instance, since, moreover, the security of witnesses who must also be protected (article 68 of the Statute) is not at risk.<sup>583</sup>

267. For the reasons set out below, the Appeals Chamber is not persuaded by the Prosecutor's argument that the Trial Chamber erred by denying her full access to Mr Ngudjolo's recorded conversations. The Appeals Chamber recalls that a Trial Chamber's decision to grant or deny full access to monitored information pursuant to regulation 92 (3) of the Regulations of the Court is a discretionary decision.<sup>584</sup> Accordingly, the Appeals Chamber will consider whether the Trial Chamber erred against the standard of review for discretionary decisions. According to that standard, "the Appeals Chamber will interfere with a discretionary decision only under limited conditions, [namely] [...]: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion."<sup>585</sup>

268. The Appeals Chamber notes that the Trial Chamber refrained from providing full access to the recorded conversations on the basis that such information fell "within the purview of article 8 of the European Convention on Human Rights or the right to mount [a] defence", which could only be interfered with "in accordance with the law and [if] necessary and proportionate to the legitimate aim pursued" (footnote omitted).<sup>586</sup>

269. In this regard, the Trial Chamber concluded that the "necessity requirement" was not met given, *inter alia*, that the Prosecutor had not demonstrated how a "lack of access to such information would, in this instance, deprive [her] of any possibility of achieving the objective prescribed by article 54 (1) of the Statute".<sup>587</sup> Thus the Trial Chamber considered that the Prosecutor already had access through the Registry Reports "to all the information of relevance to [her] and which potentially impacts on

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<sup>583</sup> Decision of 10 June 2010, para. 71.

<sup>584</sup> [Ngudjolo OA 9 Judgment](#), paras 41-43.

<sup>585</sup> *See supra* para. 21.

<sup>586</sup> Decision of 10 June 2010, para. 59.

<sup>587</sup> Decision of 10 June 2010, paras 61, 70.



witnesses".<sup>588</sup> The Appeals Chamber notes that the Registry Reports which contain analyses of many hours of non-privileged conversations between Mr Ngudjolo and his outside contacts were, with the exception of the First Report, provided to the Prosecutor in redacted form.<sup>589</sup> The reports were redacted to safeguard information pertaining to Mr Ngudjolo's private life and/or defence strategy, but contained detailed and explicit excerpts from the actual transcripts of the recorded conversations.<sup>590</sup> Furthermore, the Appeals Chamber observes that the conversations were at times so closely linked to Mr Ngudjolo's defence strategy that the Registrar was in doubt as to whether they should be disclosed to the Prosecutor. In these instances, the Registrar included the information for the Trial Chamber's evaluation.<sup>591</sup>

270. In view of the above, the Appeals Chamber is not persuaded that the Trial Chamber acted unreasonably when it refused to grant the Prosecutor *full* access to the recorded conversations. Rather, the Trial Chamber balanced the interests of both Mr Ngudjolo and the Prosecutor. As such, no error in the Trial Chamber's decision may be discerned.

*(iii) The use of the Registry Reports to cross-examine  
Mr Ngudjolo and witness D03-88*

271. On 8 July 2011, the Prosecutor requested the reclassification of five of the Registry Reports in order to use them in the cross-examination of, *inter alia*, Mr Ngudjolo, and witness D03-88.<sup>592</sup> Relying in particular on the First Report, the Prosecutor indicated that it was necessary to refer to the excerpts of the recorded conversations: (i) to assess the credibility of, *inter alia*, Mr Ngudjolo;<sup>593</sup> (ii) to cross-examine Mr Ngudjolo on his statement reflected in the recorded conversations

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<sup>588</sup> Decision of 10 June 2010, para. 57.

<sup>589</sup> [Second Report](#), [Third Report](#); [Fourth Report](#), [Fifth Report](#), [First Kilendu Report](#), [Second Kilendu Report](#). See Decision of 10 June 2010, para. 2 and [Decision of 19 August 2011](#), para. 26. See also *infra* para. 272.

<sup>590</sup> See Decision of 10 June 2010, paras 57-58.

<sup>591</sup> See e.g. [First Kilendu Report](#), paras 5-6.

<sup>592</sup> [Request of 8 July 2011](#), paras 1-2 and 18.

<sup>593</sup> [Request of 8 July 2011](#), paras 18 *et seq.*



concerning Mr Katanga's possible participation in the attack on Bogoro;<sup>594</sup> and (iii) to prove that witness D03-88 was in collusion with Mr Ngudjolo and was biased.<sup>595</sup>

272. In the Decision of 19 August 2011, the Trial Chamber rejected the Prosecutor's request, noting that:

[O]nly the first report was disclosed unredacted to the Office of the Prosecutor, pursuant to an oral decision of 9 June 2009, without any opportunity for the Defence for Mathieu Ngudjolo to propose redactions. Therefore this report, more so than the others, is likely to contain information on the Defence strategy over which the Chamber must exercise particular vigilance. In this regard, the Chamber must emphasise that in his Request for Reclassification [Request of 9 July 2011], the Prosecutor relies heavily on this report.

27. In the instant case, having analysed the relevant passages of the reports and in light of how the Prosecutor specifically intends to use them in cross-examination, the Chamber considers that such information does not, to use the words of the Appeals Chamber, seem "of great importance" to the determination of the truth. [Footnote omitted].<sup>596</sup>

273. More specifically, with respect to the use of the reports to test Mr Ngudjolo's credibility, the Trial Chamber held that "the use of these excerpts for that sole purpose does not, in the view of the Chamber, justify the breach it would entail of the exercise of his right to mount his defence and freely define its [*sic*] strategy".<sup>597</sup> The Trial Chamber held further that "other material obtained during the course of the Prosecutor's investigations" may be used to invite Mr Ngudjolo to clarify his statement with regard to Mr Katanga's involvement in the attack on Bogoro.<sup>598</sup> As to the cross-examination of witness D03-88, the Trial Chamber opined that:

32. The material concerned is not factual information "related to the case at hand". Here again, while the Prosecutor's intended use of such material may actually be essential to the assessment of the witness's credibility, recourse to such excerpts for this sole purpose does not justify the ensuing breach of the Accused's exercise of his right to mount [a] defence.

33. Ultimately, the Chamber cannot accept the Prosecutor's argument that the "[TRANSLATION] nature, subject-matter, source, authenticity, variety, volume and context" of the information contained in the excerpts of the telephone

<sup>594</sup> [Request of 8 July 2011](#), para. 19, referring to First Report, para. 7, footnote 13.

<sup>595</sup> Request of 8 July 2011, para. 20.

<sup>596</sup> [Decision of 19 August 2011](#), paras 26-27.

<sup>597</sup> Decision of 19 August 2011, para. 28.

<sup>598</sup> Decision of 19 August 2011, para. 29.



conversations, as set out in the Registry's reports, renders it indispensable to the determination of the truth. On the contrary, the analysis of its content, considered in light of the very specific context of the circumstances in which the information surfaced and the Prosecutor's intended use thereof, is what impels the Chamber to find that the information is of no "great importance", as construed by the Appeals Chamber, to the determination of the truth. [Footnotes omitted.]<sup>599</sup>

274. In this regard, the Prosecutor argues that since she was prohibited from using the reports to cross-examine Mr Ngudjolo she was unable to question him "on his (and his associates) efforts" to locate protected Prosecution witnesses and their family members "in order to pressure them to recant or refuse to cooperate" or on "his efforts to ensure that Defence witnesses presented a consistent and approved line when testifying on his behalf".<sup>600</sup> With regard to witness D03-88, the Prosecutor argues that she was prohibited from demonstrating that the witness lied when he testified that he had only spoken to Mr Ngudjolo once when Mr Ngudjolo was in the detention centre.<sup>601</sup>

275. As noted above,<sup>602</sup> the Appeals Chamber considers that the determination of the truth is a central aspect of any criminal trial to which not only the Prosecutor, but also a Trial Chamber is under an obligation to actively contribute. The Appeals Chamber further considers that a Trial Chamber's role in this regard is heightened in circumstances where the Chamber is aware of possible efforts to distort witness testimony or the truth finding process.

276. The Appeals Chamber observes that, in the case at hand, the Prosecutor was seeking to use the Registry Reports, in particular, the unredacted First Report, the disclosure of which the Trial Chamber had authorised,<sup>603</sup> to elicit from Mr Ngudjolo and witness D03-88 whether witnesses had been intimidated, coached or otherwise induced to testify in a certain way. The Appeals Chamber considers that the fact that the information contained in the Registry Reports was obtained for another purpose, namely the protection of witnesses and safe-guarding the non-disclosure orders of the Trial Chamber, through the monitoring of Mr Ngudjolo's non-privileged telephone

<sup>599</sup> [Decision of 19 August 2011](#), paras 32, 33.

<sup>600</sup> [Document in Support of the Appeal](#), para. 224.

<sup>601</sup> Document in Support of the Appeal, paras 221-222; 224.

<sup>602</sup> *Supra* para. 256.

<sup>603</sup> Oral Decision of 9 June 2009. *See also* Decision of 19 August 2011, para. 26.



conversations from the detention centre, does not *per se* preclude its use during the trial.<sup>604</sup> The Appeals Chamber notes in this context that the Registry Reports, as mentioned above,<sup>605</sup> had previously been screened as regards their content and information considered to relate to Mr Ngudjolo's private life or his defence strategy was withheld from the Prosecutor and consequently could therefore not have been used during cross-examination. In addition, the Trial Chamber could have resorted to closed session if it considered that there were legitimate reasons as to why some or all of the information should not be in the public domain. In that case, only the other parties and participants, who would have been legally obliged to respect the classification of the information, would have become privy to such information. In these circumstances, the Appeals Chamber finds that, by denying the Prosecutor the opportunity to use the Registry Reports in the trial to cross-examine Mr Ngudjolo and witness D03-88, the Trial Chamber placed undue weight on the need to protect Mr Ngudjolo's rights as opposed to the need to establish the truth. Accordingly, the Trial Chamber exercised its discretion unreasonably and therefore erroneously.

(iv) *Witness P-250's testimony*

277. Witness P-250 testified from 27 January to 23 February 2010 and was, according to the Prosecutor, key in demonstrating the "existence of an organised Bedu-Ezekere *groupement* under the leadership of [Mr] Ngudjolo as well as the involvement of [Mr] Ngudjolo and this group in the Bogoro attack" (emphasis in original, footnote omitted).<sup>606</sup>

278. The Prosecutor submits that during his testimony, witness P-250 "retracted several confined but critical statements contained in his pretrial statements such as the presence and deaths of civilians during the Bogoro attack; the presence of child soldiers under the age of 15; the existence and the content of songs that the Bedu-Ezekere group sang before attacking Bogoro; and the destruction of properties during the Bogoro attack" (footnotes omitted).<sup>607</sup> The Prosecutor recalls that she requested an opportunity to refresh the witness's memory and to put his prior statements to him in

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<sup>604</sup> See also [Ngudjolo OA 9 Judgment](#).

<sup>605</sup> *Supra* para. 269.

<sup>606</sup> [Document in Support of the Appeal](#), para. 212.

<sup>607</sup> [Document in Support of the Appeal](#), para. 212.



order to clarify the inconsistencies in his testimony.<sup>608</sup> By an oral ruling of 8 February 2010, the Trial Chamber rejected the Prosecutor's request, stating that:

[Witness P-250] expresses himself clearly. When he wants to answer in a precise way [...] he answers in a precise way, and sometimes he chooses another type of answer, but the Chamber does have the feeling that the modalities with which he answers aren't due to a lack of memory but a concern which is personal to him to express himself in a particular manner.<sup>609</sup>

279. On 9 February 2010, based on paragraph 67 of the Trial Chamber's Rule 140 Decision, the Trial Chamber rejected the Prosecutor's request to be granted leave to ask witness P-250 leading questions.<sup>610</sup> The Trial Chamber stated in this regard that the witness could not be described as hostile because he had answered with precision a great majority of the questions put to him by the Prosecutor, and that evasive answers or answers minimising previous statements did not justify a declaration of hostility.<sup>611</sup>

280. The Prosecutor submits that as a result of these rulings, in respect of which she had unsuccessfully sought leave to appeal, the "Trial Chamber improperly prohibited the Prosecution to show [witness] P-250's prior statements or to ask him leading questions without declaring him hostile, in order to enable him to explain the reasons underlying his inconsistencies – whether his retractions were mistakes, true changes in recollection or the result of threats or other improper pressure exerted upon him and his family" (footnote omitted).<sup>612</sup>

281. The Appeals Chamber finds merit in the Prosecutor's argument in so far as she argues that in circumstances where witness P-250 expressed fear for the safety of his family, the Trial Chamber, at a minimum, should have allowed the witness to be examined by the Prosecutor in order to ascertain whether his demeanour and retractions were due to threats or other improper pressure exerted on him or his family.

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<sup>608</sup> [Request of 4 February 2010](#), p. 46, lines 17-25.

<sup>609</sup> [Oral Decision of 8 February 2010](#), p. 63, lines 23-25 to p. 64, lines 1-2.

<sup>610</sup> Oral Decision of 9 February 2010.

<sup>611</sup> Oral Decision of 9 February 2010, p. 19, lines 2-25 to p. 20, lines 1-19.

<sup>612</sup> [Document in Support of the Appeal](#), para. 215.



282. In this regard, the Appeals Chamber observes that during the trial and under cross-examination by Defence counsel, witness P-250 stated that he had told the Prosecutor in prior statements that persons close to him were dead because he was afraid for their lives.<sup>613</sup> The witness explained further that he had only said that to avoid the possibility that someone would be sent subsequently to kill them.<sup>614</sup> The Appeals Chamber notes that the witness did not substantiate why he believed that his family could be in danger, but offered this explanation as to why he was contradicting his prior statements.

283. In these circumstances, the Appeals Chamber considers that, had the Trial Chamber allowed the Prosecutor to put leading questions to witness P-250, the Trial Chamber would ultimately have been enlightened as to whether the discrepancies between the witness's pre-trial statements and his oral evidence were indeed due, as suggested by the Trial Chamber, to "such factors as the lack of familiarisation procedures by the parties themselves at the Court (witness proofing), the witnesses' travel to The Hague, the formality of the hearings and the ordeal of cross-examination"<sup>615</sup> or, potentially, the passage of time, or whether, in fact, other factors may account for those discrepancies. Accordingly, the Appeals Chamber finds that the Trial Chamber should have allowed the Prosecutor an opportunity to put witness P-250's prior statements to him and allowed her to ask the witness leading questions to elicit the effect, if any, of any interference or pressure that may have been exerted on him. By failing to do so, the Trial Chamber exercised its discretion unreasonably and, therefore, erred.

(v) *The material effect of the errors on the Acquittal Decision*

284. The Appeals Chamber recalls that, for the Appeals Chamber to reverse or amend a decision under article 74 of the Statute, or to order a new trial before a different Trial Chamber, it is not sufficient for the appellant to establish that an error occurred. In accordance with article 83 (2) of the Statute, it must also be demonstrated

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<sup>613</sup> Transcript of 15 February 2010, ICC-01/04-01/07-T-102-CONF-ENG, p. 46, lines 17-18.

<sup>614</sup> Transcript of 15 February 2010, ICC-01/04-01/07-T-102-CONF-ENG, p. 49, line 25 to p. 50, lines 1-3. *See also* [Document in Support of the Appeal](#), para. 216.

<sup>615</sup> Decision of 10 June 2010, para. 62.



that “the decision [...] appealed from was materially affected by [that] error”.<sup>616</sup> In this regard, the Appeals Chamber has stated that as part of the reasons in support of a ground of appeal, an appellant is obliged not only to set out the alleged error, but also to indicate with sufficient precision, how this error would have materially affected the impugned decision.<sup>617</sup> In the view of the Appeals Chamber, this requirement is explained by the fact that a Trial Chamber’s decision, at the end of what will often have been a lengthy trial, should not be disturbed lightly. In particular in the case of an acquittal, it is not justifiable to put the person through the ordeal of a new trial or even to reverse the acquittal and enter a conviction, unless it is shown that the error indeed materially affected the decision under review.

285. In relation to an error of law, the Appeals Chamber has held that “[a] decision is materially affected by an error of law if the Pre-Trial or Trial Chamber would have rendered a decision that is substantially different from the decision that was affected by the error, if it had not made the error”.<sup>618</sup> The Appeals Chamber has held that the same standard is applicable to alleged procedural errors.<sup>619</sup> The Appeals Chamber notes that this standard is high – it must be demonstrated that, had the Trial Chamber not erred in procedure, the decision under article 74 of the Statute *would* (as opposed to “could” or “might”) have been *substantially* different. In the circumstances of this case, it has to be established that there is a high likelihood that the Trial Chamber, had it not committed the procedural errors, would not have acquitted Mr Ngudjolo.

286. The Appeals Chamber recalls that it has determined that the Trial Chamber committed a procedural error when it refused to allow the Prosecutor to use the Registry Reports to impeach Mr Ngudjolo and witness D03-88. The Appeals Chamber has further determined that the Trial Chamber erred by not allowing the Prosecutor to put witness P-250’s prior statements to him or to ask the witness leading questions in order to enable him to explain the reasons underlying the inconsistencies between his pre-trial statements and his in-court testimony.

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<sup>616</sup> See also [Kony OA 3 Judgment](#), para. 48; [Bemba OA 3 Judgment](#), paras 103-104; [Bemba OA 4 Judgment](#), paras 69-71; [Mbarushimana OA Judgment](#), para. 18; [Gbagbo OA 2 Judgment](#), para. 44.

<sup>617</sup> [Gbagbo OA 2 Judgment](#), para. 44 citing to [Kony OA 3 Judgment](#), para. 48. See also [Bemba OA 4 Judgment](#), para. 69; [Bemba OA 3 Judgment](#), para. 102.

<sup>618</sup> [DRC OA Judgment](#), para. 84. See *supra* para. 21.

<sup>619</sup> [Gbagbo OA 2 Judgment](#), para. 44.





287. With respect to the first error, the Prosecutor submits that the error materially affected the Acquittal Decision because she was prevented from showing collusion between Mr Ngudjolo and witness D03-88.<sup>620</sup> The Appeals Chamber notes that the Prosecutor's argument does not actually address the *material effect* that the error had on the Acquittal Decision, in the manner described above. Rather, the Prosecutor's argument merely refers to the consequences of the procedural error on the proceedings. Regardless, for the reasons that follow, the Appeals Chamber finds that it cannot be said that the Trial Chamber's error materially affected the Acquittal Decision.

288. The Appeals Chamber recalls that the Trial Chamber made the following findings in relation to the testimony of witness D03-88 and Mr Ngudjolo, and with regard to the question of how often witness D03-88 spoke to Mr Ngudjolo whilst the latter was in the detention centre:

The Prosecutor also recalled that telephone contact took place between D03-88 and Mathieu Ngudjolo from the Detention Centre, which, in his view, demonstrated their collusion and that D03-88's objective was to protect [him]. [Footnote omitted.]<sup>621</sup>

[...]

311. Relying on a prior statement made by the witness, the Prosecutor attempted to determine whether Mathieu Ngudjolo had communicated with him regularly from the Detention Centre in The Hague. [Witness] D03-88 confirmed that the Accused [Mr Ngudjolo] had called him in 2009 regarding a vehicle accident, but he denied having been in contact with him since. On this point, whilst noting the apparent good faith of [witness] D03-88 when he answered the question put to him by the Prosecution, *the Chamber would emphasise the defensive attitude that he adopted when he stated that he had had no contact with Mathieu Ngudjolo. Examined on the same subject, Mathieu Ngudjolo also admitted that a telephone call had taken place between him and the witness in 2009, and he then stated that he did not remember having any further conversations with him. The Chamber noted however, that the Accused [Mr Ngudjolo] also replied with irritation to the Prosecutor's questions concerning contact made with [witness] D03-88. In the Chamber's view, a degree of caution is therefore required, given the behaviour demonstrated by both the witness and Accused [Mr Ngudjolo].* [Emphasis added, footnotes omitted].<sup>622</sup>

<sup>620</sup> [Document in Support of the Appeal](#), para. 224.

<sup>621</sup> [Acquittal Decision](#), para. 307.

<sup>622</sup> [Acquittal Decision](#), para. 311.



312. Lastly, the Prosecution averred that [witness] D03-88's credibility was affected by the fact that he had tried to evade the question regarding the sudden transition of Mathieu Ngudjolo from nurse to soldier. On reading the transcript, the Trial Chamber notes that, on the one hand, [witness] D03-88 gave reasons as to why he was reticent to advance an opinion about a question that he had asked himself, but that, on the other hand, he propounded the theory that Mathieu Ngudjolo's level of education had convinced senior members of the FNI, who were looking for a spokesperson able to represent Walendu-Tatsi *collectivité*. On this point, the [Trial] Chamber notes that, in answering that question, the witness specified that he was giving his personal opinion, and, where necessary, will therefore consider its probative value accordingly. [Emphasis in original, footnote omitted.]<sup>623</sup>

[...]

313. It is the Chamber's view that [witness] D03-88's testimony is credible in the main. Nevertheless, it considers that *the sections which directly deal with Mathieu Ngudjolo's liability must be treated with a great deal of caution*. [Emphasis added, footnotes omitted.]<sup>624</sup>

289. From the above, it is clear that the Trial Chamber made observations regarding witness D03-88's and Mr Ngudjolo's behaviour when questioned about their contact with each other while Mr Ngudjolo was in the detention centre. The Trial Chamber concluded that, given their behaviour, "a degree of caution" had to be applied when assessing their evidence.<sup>625</sup> Furthermore, the Appeals Chamber notes in particular that the Trial Chamber emphasised that a "great deal of caution" had to be applied to those parts of witness D03-88's testimony concerning Mr Ngudjolo's liability.<sup>626</sup> By applying caution in its assessment of their testimony, the Appeals Chamber finds that the Trial Chamber addressed the impact of any possible collusion between Mr Ngudjolo and witness D03-88. It is clear from the above-cited passage of the Acquittal Decision that the Trial Chamber did not attach much, if any, weight to witness D03-88's testimony as far as Mr Ngudjolo's liability is concerned. In other words, witness D03-88's testimony appears not to have had any impact on the Trial Chamber's finding that Mr Ngudjolo's individual criminal responsibility for the attack on Bogoro has not been established beyond reasonable doubt.

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<sup>623</sup> [Acquittal Decision](#), para. 312.

<sup>624</sup> Acquittal Decision, para. 313.

<sup>625</sup> Acquittal Decision, para. 311.

<sup>626</sup> Acquittal Decision, para. 313.



290. With respect to the error concerning witness P-250, the Prosecutor submits that the Acquittal Decision was materially affected because the Trial Chamber rejected the evidence of witness P-250 as not credible without considering that the witness and/or his family had been threatened or pressured and the effect that such pressure had on his testimony.<sup>627</sup>

291. The Appeals Chamber considers that the Trial Chamber's failure to allow the Prosecutor to elicit the effect of any interference or pressure that may have been exerted on witness P-250 may indeed have substantially affected the Trial Chamber's observations concerning the witness's demeanour and many contradictions in his testimony.<sup>628</sup> However, the Appeals Chamber notes that, ultimately, the Trial Chamber's rejection of witness P-250's testimony as unreliable was based on other findings of the Trial Chamber that were independent of its observations on the witness's demeanour.

292. After analysing documentary evidence as well the testimony of other witnesses, the Trial Chamber arrived at the following conclusion with respect to witness P-250's testimony:

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

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

159. Having taken the view that it is highly unlikely that [witness] P-250 could have been *simultaneously a militia member in Zumbe and a student in Kagaba*, and given that his testimony was based specifically on his status as a militia member the [Trial] Chamber finds itself unable to rely on his testimony in this case. [Emphasis added].<sup>629</sup>

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<sup>627</sup> [Document in Support of the Appeal](#), para. 223.

<sup>628</sup> [Acquittal Decision](#), para. 141.

<sup>629</sup> [Acquittal Decision](#), paras 157-159.



293. From the above extracts, it is clear that the Trial Chamber, while acknowledging the inconsistencies in witness P-250's testimony, rejected his testimony on the basis of *other* evidence, which cast doubt as to whether the witness was a member of the militia between September 2002 and July 2003. More specifically, the Trial Chamber concluded that the witness could not have been "simultaneously a militia member in Zombe and a student in Kagaba".<sup>630</sup> The witness's testimony was therefore deemed to be unreliable for this reason, and not because of his demeanour. Thus, the Appeals Chamber considers that the Trial Chamber's finding as to the witness's lack of credibility would not have changed, because its decision not to rely on the witness was based on other evidence.

294. Accordingly, the Appeals Chamber finds that the Trial Chamber's errors had no material impact on the Acquittal Decision.

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<sup>630</sup> [Acquittal Decision](#), para. 159.



## VI. APPROPRIATE RELIEF

295. Article 83 (2) of the Statute reads, in relevant parts, as follows:

If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

- (a) Reverse or amend the decision or sentence; or
- (b) Order a new trial before a different Trial Chamber.

296. In the present case, the Appeals Chamber finds that the Acquittal Decision was not materially affected by an error of fact, law or procedure and as such it is appropriate to reject the appeal and confirm the Acquittal Decision.

Judge Cuno Tarfusser and Judge Ekaterina Trendafilova append a joint dissenting opinion to this judgment.

Done in both English and French, the English version being authoritative.



**Judge Sanji Mmasenono Monageng**  
**Presiding Judge**

Dated this 7<sup>th</sup> day of April 2015

At The Hague, The Netherlands