

PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Presiding Judge
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

Public Document

**Observations made during the confirmation hearing on behalf of Victims a/0001/06,
a/0002/06 and a/0003/06**

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I. Crimes of conscripting or enlisting children under the age of fifteen years, their participation in hostilities and the principle of legality

1. The Defence is wrong in saying that article 8(c)(vii) of the Statute is not applicable because the Democratic Republic of the Congo had not yet incorporated it into its domestic criminal law at the time of the events.

2. The Rome Statute concerns international crimes. It applies only to *“the most serious crimes of concern to the international community as a whole [which] must not go unpunished.”*¹ Its drafters did not intend to create new crimes, but rather to structure the possibility of prosecuting those crimes which international custom already considered to be violations of humanitarian law.

3. During the establishment of the Special Court for Sierra Leone, the report of the Secretary-General of the United Nations stated that *“[t]he prohibition on the recruitment of children below the age of 15, a fundamental element of the protection of children, was for the first time established in the 1977 Additional Protocol II to the Geneva Conventions, article 4, paragraph 3(c), of which provides that children shall be provided with the care and aid they require, and that in particular: “[c]hildren who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.”* A decade later, the prohibition on the recruitment of children below 15 into armed forces was established in article 38, paragraph 3, of the 1989 Convention on the Rights of the Child; and in 1998, the Statute of the International Criminal Court criminalized the prohibition and qualified it as a war crime. But while the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is

¹ Preamble to the Rome Statute, para. 4.

customarily recognized as a war crime entailing the individual criminal responsibility of the accused.”²

4. The accused standing trial before the Special Court for Sierra Leone are all being prosecuted for crimes of enlistment and conscription of children under the age of fifteen under article 4(c) of the Statute of that Court.³

5. In its “*Decision on preliminary motion based on lack of jurisdiction (Child recruitment)*,”⁴ the Appeals Chamber ruled on a Defence submission that article 4(c) of the Statute of the Special Court violated the principle of *nullum crimen sine lege* because the enlistment and conscription of children under the age of fifteen was not a crime under customary international law at the time the alleged crimes were committed.

6. Following a thorough analysis of international treaties and customary law in this area, the Appeals Chamber held that “[c]hild recruitment was criminalized before it was explicitly set out as a criminal prohibition in treaty law and certainly by November 1996, the starting point of the time frame relevant to the indictment.”⁵

7. By contrast, for Judge Robertson, who appended a dissenting opinion to the Appeals Chamber’s decision, “[t]he Rome Statute was a landmark in international

² Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, Doc. S/2000/915, 4 October 2000.

³ *The Prosecutor v. Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL-03-14-I, Indictment, 4 February 2004. See also *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*; SCSL-2004-15-PT, Corrected amended consolidated indictment, 2 August 2006; *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Case No. SCSL-2004-16-PT, Further amended consolidated indictment, 18 February 2005; *The Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, Amended indictment, 16 March 2006. All these documents are available on the website of the Special Court for Sierra Leone at: <http://www.sc-sl.org>.

⁴ *The Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), *Decision on preliminary motion based on lack of jurisdiction (Child recruitment)*, 31 May 2004.

⁵ *Ibid.*, para. 53, p. 27.

criminal law – so far as children are concerned, participation in hostilities was for the first time spelled out as an international crime in every kind of serious armed conflict”⁶ and that consequently, there was no doubt that “the crime of non-forcible enlistment did not enter international criminal law until the Rome Treaty in July 1998.”⁷ Judge Robertson then concluded his dissenting opinion by stating that he “would grant a declaration to the effect that [the applicant] must not be prosecuted for an offence of enlistment, under Article 4(c) of the Statute, that is alleged to have been committed before the end of July 1998.”⁸ Even Judge Robertson considered his concerns to have been answered by the adoption of the Rome Statute on 17 July 1998, that is, even prior to its entry into force.

8. In any event, the problem of the principle of legality was resolved by the entry into force of the Rome Statute, article 22 of which clearly imposes criminal responsibility as soon as *the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court*. Article 23(1) which concerns the principle of non-retroactivity, also uses the entry into force of the Rome Statute as the threshold.

9. Under article 21, the Court may apply general principles of law only if the Statute itself is silent on an issue.

10. Furthermore, the Defence confuses the jurisdiction of Congolese courts with that of the Court. It may be that Congolese law does not recognise the prohibition under international custom as a sufficient basis for prosecution. Pre-Trial Chamber I alluded to this issue in its decision of 24 February 2006.⁹ The inability of a State Party to prosecute a crime under the Statute in no way precludes proceedings before the

⁶ *The Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on preliminary motion based on lack of jurisdiction (Child recruitment), 31 May 2004, Dissenting opinion of Justice Robertson, para. 38, p. 29.

⁷ *Ibid.*, para. 47, p. 35.

⁸ *Ibid.*

⁹ ICC-01/04-01/06-8, paras. 37-38.

International Criminal Court. On the contrary, it may resolve an issue of admissibility.

11. Moreover, if many Congolese are still unaware of the existence of the International Criminal Court, the provisions of the Rome Statute and its ratification by the DRC, a substantial part of the population of Ituri closely followed the Statute's entry into force and it was greeted with relief, particularly by the many victims of war crimes. The Statute's entry into force could not have escaped the attention of Thomas Lubanga, who claims to be a politician and head of state, and who, because of his involvement in an armed conflict, was directly concerned.

II. The appropriate probative value to attach to certain evidence at the confirmation hearing

12. At the confirmation hearing, pursuant to article 61(5) of the Rome Statute, "[...] *the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged*" in order to enable the Pre-Trial Chamber to rule. Consequently, the requisite standard is akin to a *prima facie* standard.

13. The evidentiary threshold is much lower at the confirmation hearing stage than at the trial stage. Indeed, at trial, under article 66 of the Rome Statute, "[i]n order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt."

14. Article 64(9) and rule 63(2) also enshrine the principle that a judge must be convinced beyond reasonable doubt by granting Chambers the discretion to freely assess all evidence adduced in order to determine its relevance or admissibility, and

reject, under article 69(7), evidence obtained by means of a violation of the Statute or internationally recognized human rights.

15. The Representatives of the Victims have reviewed in greater detail the Defence position on certain evidence adduced by the Prosecutor relating directly to the Congolese reality or to the protection of victims and witnesses.

III. Evidence gathered during the search of 17 April 2005 in Kisangani

16. The Prosecution has produced a number of documents which were allegedly seized when Congolese judicial authorities searched the premises of one Tinanzabo on 16 and 17 April 2005. These documents are material in this case, in particular, from the victims' point of view. The Defence submits that the Kisangani Court of appeal held that the search was unlawful; as such, it submits, none of the items seized and adduced by the Prosecutor at the confirmation hearing can be used as evidence.¹⁰

17. Under article 69, the Court may not rule on the application of a State's national law when deciding on the relevance or admissibility of evidence collected by that State. However, whether the judgement is enforceable in the Democratic Republic of the Congo before it can be pleaded before the International Criminal Court is nevertheless of interest.

18. For a Congolese court decision to be enforceable, it must first be final and conclusive. On page 2, paragraph 6 of the judgement, the judge held, by default on appeal, that the civil action of victim Chishibanji was admissible and had merit, and

¹⁰ These include EVD-OTP-00020; EVD-OTP-00021; EVD-OTP-00036; EVD-OTP-00037; EVD-OTP-00038; EVD-OTP-00039; EVD-OTP-00040; EVD-OTP-00041; EVD-OTP-00072 and EVD-OTP-00072.

awarded him damages and ordered the return of his vehicle or payment of the price thereof.

19. A judgement rendered at the second instance is therefore subject to more than one form of appeal:

- an appeal in cassation before the Supreme Court of Justice by the accused, the *partie civile* and the Prosecution
- an objection by the *partie civile*.

20. Proceedings before the Supreme Court of Justice are regulated by Ordinance-Law No. 82-017 of 31 March 1982.¹¹ Article 47 thereof provides that “[t]he time limit for bringing an appeal is forty clear days from the date the judgement or decision appealed from is rendered in adversarial proceedings; ... for the *partie civile* or the party civilly liable, the time limit starts to run from the tenth day following service of the judgement or decision.” Article 49 provides that “[t]he time limit for appealing and the bringing of an appeal shall have suspensive effect on the decision with respect to all parties.”

21. In essence, the judgement rendered by the Kisangani Court of Appeal upon which the suspect’s Defence relies must first be served on the *partie civile* before it is enforceable. As a result, in the absence of any evidence that the judgement was served and in the absence of the filing of an appeal within the time limit, the Defence cannot rely on it as a final and conclusive decision.

22. In its decision of 16 March 2006, the Kisangani Court of Appeal went no further than to state that the suspect, Tinanzabo, who was detained in connection with this matter, was entitled to be present during the search, and that because that right had been infringed “the Court [could] not consider the exhibits found at the home

¹¹ See *Les codes Larquier, République Démocratique du Congo*, volume 1, Civil Law and Procedure, pp. 319 and 321.

and/or residence of the suspect Tinanzabo (...) Accordingly, an order will issue that the goods seized by the judicial police officers be returned to the suspect (...)”¹² The court decision only applies to the parties in the case; it does not extend to Mr Thomas Lubanga Dyilo.

23. The fact that the suspect was not on the premises during the search may possibly constitute a violation of Congolese law for which the aforementioned judgement provides a remedy; it is however not an infringement of article 69(7) of the Statute which provides that “[e]vidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: a) the violation casts substantial doubt on the reliability of the evidence; or b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.”

24. A search which is merely improper in the eyes of Congolese criminal procedure cannot constitute a violation of an internationally recognized human right. Moreover, it does not affect the credibility of the evidence, the authenticity of which does not seem to be disputed. Therefore, admitting it would neither be antithetical to the proceedings, nor would it damage their integrity.

IV. Tendering of summaries and redacted versions of some victim and witness statements

25. With respect to confirmation of charges before trial, article 61(5) of the Rome Statute specifically states that “[a]t the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.”

¹² See the Kinsangani Court of Appeal judgment, Appeal No. 1752, 16 March 2006, p. 31.

26. Moreover, Pre-Trial Chamber I itself ordered the Prosecution to provide the Defence with summaries of witness statements in its *“First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81.”*¹³

27. It is important to the victims that part of the evidence be kept confidential for as long as possible. The rights of the Defence are not violated by the fact that sensitive matters, such as evidence relating to the identity of particular witnesses and victims, are not disclosed at the confirmation of charges stage.

V. Reports of non-governmental and international organisations and confidentiality of some of their sources

28. The Rome Statute specifically allows the Office of the Prosecutor to rely on NGO and United Nations reports. Article 15(2) of the Statute states that *“[t]he Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate,”* while article 44(4) provides that *“[t]he Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court.”* The reports referred to were prepared by the Secretary-General of the United Nations, Human Rights Watch, Amnesty International and Save the Children, which cannot reasonably be considered as unreliable sources.

29. In fact, the Defence itself uses a report of one of these non-governmental organisations as the basis of its submission on the intent to demobilise child soldiers.¹⁴

¹³ See the *“First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”*, No. ICC-01/04-01/06-437, p. 11.

30. Some of the evidence in these reports is protected by a veil of anonymity. Nevertheless, this does not undermine their credibility, although such a report lacks the standing of evidence given under oath. Again, it is important to victims that the authors of particular reports maintain their sources' anonymity, especially where statements from children are concerned. In fact, article 68(5) of the Rome Statute provides for witness anonymity.

VI. Evidence relating to the age of children associated with the UPC

31. In the DRC, the civil status registry system suffered greatly from several decades of mismanagement of public affairs, as well as from looting and destruction caused by wars, particularly in the Ituri region. This well-known sad reality was recalled at the 86th session of the Human Rights Committee held in March 2006. Its report attests that there are many areas in the DRC where there is no civil status registry. The *Association Internationale des Maires Francophones* (International Association of Francophone Mayors) and Belgian Development Cooperation are now working on organising and/or restoring the civil status registry system.

32. In the DRC, proof of a person's age and identity can generally be made by any legal process, including by testimony or declaration on the person's honour. Identity cards are obtained on the basis of a simple statement by the applicant. Hence, the United Nations or non-governmental organisations cannot be faulted for having proceeded in the same way.

33. The Defence is wrong in asserting that a child's physical appearance is not a relevant factor in assessing evidence suggesting that the crime of enlisting children

¹⁴ See the cross-examination of the witness, EVD-D01-00001 [Report "Going Home: Demobilising and reintegrating child soldiers in the Democratic Republic of Congo", 1 February 2003, by the NGO "Save the Children"].

under the age of fifteen has been committed. Indeed, it is for the military recruiting officer or his superior to ensure that the rules of international humanitarian law are respected.

34. If there are reasonable grounds to believe that a child may be under the age of fifteen, the responsible person cannot simply rely on the lack of written proof of age to enlist him or her in an armed group. In case of doubt, the very young appearance and diminutive stature of some recruits must, therefore, lead a commander to refuse to enlist them, just as the risk of killing a disproportionate number of civilians must lead a commander to avert a military attack.

35. This reasoning is generally adopted by national courts when dealing with crimes or offences for which age is a determining factor, such as in the case of rape of a minor below a certain age or the sale of drugs, tobacco or alcohol to minors.

VII. Individual criminal responsibility of Thomas Lubanga Dyilo

36. In the view of the Representatives of Victims 001 to 003, the Office of the Prosecutor has produced sufficient evidence to indicate that Thomas Lubanga Dyilo was President of the UPC and commander-in-chief of the FPLC, that he exercised authority within the party and movement,¹⁵ and that he therefore committed the crimes charged either directly, or jointly with others, or by giving orders to them.¹⁶

¹⁵ See, *inter alia*, EVD-OTP-00001; EVD-OTP-00026 ; EVD-OTP-00027 ; EVD-OTP-00035 ; EVD-OTP-00036 ; EVD-OTP-00037 ; EVD-OTP-00038 ; EVD-OTP-00039 ; EVD-OTP-00040; and various witness statements and summaries)

¹⁶ See the "Document Containing the Charges, Article 61(3)(a)", No. ICC-01/04-01/06-356-Anx1, 28 August 2006, paras. 20-24. See also the transcript of the hearing of 14 November 2006, No. ICC-01/04-01/06-T-34-EN (Realtime) pp. 60-91.

37. According to the Prosecutor, “*in the case of crimes committed through organised structures of power, the person who controls the organisation should be considered as a co-perpetrator as a result of his functional control of the crime.*”¹⁷ The Prosecution bases its argument on Thomas Lubanga Dyilo’s *de facto* and *de jure* authority over the UPC and the FPLC and recalls the evidence submitted in this respect.

38. According to the Prosecutor, co-perpetration would seem to imply an *actus reus* constituted by the *de facto* and *de jure* control over the military structure that was behind the crimes committed, and a *mens rea* resulting from the intent to pursue the common goal.

39. However, the theory of co-perpetration does not necessarily imply control as posited by the Prosecutor. To appreciate this, one may look to the theory of joint criminal enterprise developed by the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (“the ICTY”) and the International Criminal Tribunal for Rwanda (“the ICTR”).¹⁸ The *Stakic* Trial Judgment had already held that the crucial element in certain forms of joint criminal enterprise equivalent to co-perpetration is the shared intent to pursue the common goal,¹⁹ meaning that even if the accused is not in a position of authority over the direct perpetrator of the crime, where there was a shared common purpose and one of those involved commits the agreed crime, criminal liability may attach to anyone who subscribed to the common goal. This therefore constitutes a joint criminal enterprise or co-perpetration. Accordingly, evidence of Thomas Lubanga Dyilo’s *de facto* or *de jure* authority is not required to establish his responsibility for crimes committed jointly with other

¹⁷ See transcript of the hearing of 14 November 2006, *op. cit. supra*, p. 90.

¹⁸ In *Rasevic*, the Chamber indicated 4 elements: the plurality of persons, the existence of a common plan to commit the crime or which led to its commission, the participation of the accused in the plan. See *The Prosecutor v. Mitar Rasevic*, Case No. IT-97-25/1-PT, *Decision Regarding Defence Preliminary Motion on the Form of the Indictment* (Trial Chamber 2), 28 April 2004, paras. 14-15.

¹⁹ See *The Prosecutor v. Milomir Stakic*, Case No. IT-97-24-T, *Judgement* (Trial Chamber 2), 31 July 2003, para. 440.

members of his group. To the contrary, any such authority would tend to establish direct responsibility.

40. A review of the evidence submitted by reference to articles 25(3)(a), 25(3)(b), 25(3)(c) and 25(3)(d) of the Rome Statute shows that some acts may fall under several forms of participation. For example, as commander-in-chief of the FPLC, Thomas Lubanga Dyilo, in wielding his authority and giving orders to his subordinates, could have given the order to recruit child soldiers. In this case, his conduct may amount to indirect perpetration (article 25(3)(a) of the Statute), but it could also fall within article 25(3)(b) which implies a superior-subordinate relationship between the person giving the order and the person carrying it out.

41. If the Court were to consider that certain acts did not come under article 25, paragraph 3, sub-paragraph a, but rather under a different paragraph of the same article, it would be at liberty to specify that certain evidence corresponds to other even less significant forms of participation such as forms of complicity. Besides, this would be in the interest of the Defence.

42. Thus, the videotape of the visit to Rwampara camp²⁰ could be considered as evidence of a joint enterprise and, in any event, indicates that the suspect encouraged the recruitment of children (para. (3)(b)).

43. The Court could also consider that certain other evidence indicates that Thomas Lubanga at the very least contributed to the actions of his officers (article 25(3)(d)) or furthered their criminal activity, failing proof that their criminal activity resulted from an order or concerted action.

²⁰ EVD-OPT-067.

44. Thomas Lubanga could even be charged with certain forms of failure to act, in particular, if subordinates were found to have committed crimes whilst their superior did not exercise proper control over his forces or subordinates.

45. It will be recalled that article 28 of the Rome Statute does not limit responsibility for failure to act or negligence to military commanders, but extends it to all superiors in a position to exercise effective control. This makes the discussion on the military or civilian status of Thomas Lubanga largely pointless.

46. The child soldier demobilisation decree referred to by the Defence is not sufficient to absolve from all responsibility, given that article 28 requires the superior to also repress the commission of the crime or submit the matter to the competent authorities for investigation and prosecution.

47. The Representatives of the Victims respectfully submit that the Pre-Trial Chamber is not bound by the terms of the Document Containing the Charges pertaining to the specific forms of participation in the crimes committed.

48. Indeed, in determining whether there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo committed each of the crimes charged, the Pre-Trial Chamber may specify the related forms of responsibility on the basis of its inherent power to assess the evidence tendered and its discretion to make findings, having regard to the evidentiary threshold.

49. At the hearing of 24 November 2006, the Defence submitted that “[...] *if the Prosecution intended to elaborate on the requirements to invoke liability under Article 25, it should do so in written form prior to the confirmation hearing, otherwise the Defence would*

*be unable to determine which acts or conduct the Prosecution was relying on to ground individual liability and to organise its preparation in advance of the hearing accordingly.”*²¹

50. In support of this statement, the Defence referred only very partially to the jurisprudence of the *ad hoc* tribunals. In fact, in the *Semanza* Appeal Judgement, the Appeals Chamber held that the Prosecutor’s obligation to plead the specific form of participation is relative and not imperative and that the lack of specificity may be cured by reference to other documents.²²

51. Further, in *The Prosecutor v. Sylvestre Gacumbitsi*, the Appeals Chamber held that the chapeau of the count was sufficient to put the Defence on notice that all the forms referred to applied to each specific act which followed, even if the specific forms of participation with respect to that act did not include all the components of the chapeau.²³

²¹ See transcript No. ICC-01/04-01/06-T-44-EN, 24 November 2006, lines 14-20, p. 29.

²² See *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Appeal Judgement (Appeals Chamber), 20 May 2005, para. 259: “The Appeals Chamber notes that it has long been the practice of the Prosecution to merely quote the provisions of Article 6(1) of the Statute in the charges, leaving it to the Trial Chamber to determine the appropriate form of participation under Article 6(1) of the Statute. The Appeals Chamber reiterates that, to avoid any possible ambiguity, it would be advisable to indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged. Nevertheless, even if an individual count of the indictment does not indicate precisely the form of responsibility pleaded, an accused might have received clear and timely notice of the form of responsibility pleaded, for instance in other paragraphs of the indictment. In the case at hand, the Appeals Chamber is satisfied that the Appellant had clear and timely notice that he was being charged with, *inter alia*, complicity in genocide and aiding and abetting extermination”.

²³ See *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, para. 123: “In considering whether the Appellant received clear and timely notice, the Indictment must therefore be considered as a whole. In this case, the Appeals Chamber finds, by majority, Judge Güney and Judge Meron dissenting, that the reference to aiding and abetting in the preamble to Count 4, taken in combination with the allegations of material facts sufficient to support a conviction under that mode of liability, was sufficient to put the Appellant on notice that he was charged with aiding and abetting the murders of Marie and Béatrice. Specifically, paragraph 36 of the Indictment states that the Appellant ordered his tenants to leave their home and made an announcement that, in the context of the ongoing genocide, made clear that he was doing so because he did not want the home to serve as a refuge for Tutsi. Other paragraphs of the Indictment detail the context of the genocidal campaign, which ensured that in expelling the tenants under these circumstances, the Appellant was exposing them to a high probability of death. Taken together -- and independently of the allegation at the end of paragraph 36 that the Appellant subsequently ordered the tenants’ murder, which pleads the alternative

52. Regulation 55 of the Regulations of the Court, which vests the Chamber with authority to change the legal characterisation of facts, does not extend to the definition of forms of participation, which is left to the discretion of the Chambers.

53. Accordingly, the Representatives of the Victims do not agree with the Defence argument that the hearing should be adjourned under article 61(6)(c), if confusion as to the forms of participation persists. On the contrary, this provision provides only for the adjournment of the hearing in order to amend a charge *“because the evidence submitted appears to establish a DIFFERENT CRIME.”* In the case at hand, it is still all about different forms of participation in the commission of the same crime.

54. To conclude, the legal Representatives of the Victims submit that Thomas Lubanga Dyilo should be tried by a Trial Chamber for his direct participation in the commission of the alleged crimes, and, alternatively, for indirect participation. The Legal Representatives also submit that his status and related *de facto* and *de jure* authority should be taken into account when determining his responsibility.

VIII. The risk of genocide as a possible ground for excluding responsibility

55. Without really expanding on its argument, the Defence also uses the risk of genocide against the Hema as a possible ground for excluding responsibility. This is of direct concern to the victims that are members of the Hema community.

56. However, whether factually or legally, this argument is not convincing. The Defence submitted very little evidence to document the existence of a planned genocide. The fact that family members and other relatives of Victims 001 to 003 were

“ordering” theory – these paragraphs allege the necessary material facts in support of a conclusion that the Appellant aided and abetted their murder.”

murdered because of their ethnicity and that the victims themselves may have had reason to fear extermination at a certain time, does not mean that the victims consider that recruiting children under the age of fifteen was the only means of averting genocide.

57. Pursuant to article 31(c) of the Statute, the defence of others cannot be used as a ground for excluding responsibility, unless such reaction is reasonably proportionate to the degree of danger; this is consistent with the theory of self-defence and its related jurisprudence.

58. In reality, the UPC's military operations are in no way limited to the defence of a community and, had this been the case, participation in a purely defensive operation does not in itself constitute a ground for excluding responsibility within the meaning of article 31(c).

59. Certainly, at the confirmation of charges stage, the Pre-Trial Chamber would not be open to the existence of a ground for excluding responsibility.

FOR THESE REASONS,

MAY IT PLEASE THE PRE-TRIAL CHAMBER

To confirm the charges brought by the Prosecution.

Luc Walley and Franck Mulenda (absent when signed), Counsel for Victims
a/0001/06, a/0002/06 and a/0003/06

Done on 4 December 2006

At Brussels