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TRIAL CHAMBER I

Before: Judge Adrian Fulford, President
Judge Elizabeth Odio Benito, Judge
Judge René Blattmann, Judge

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

Public Redacted Version

PROSECUTION'S CLOSING BRIEF

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1. Introduction

1. Thomas LUBANGA (the Accused) is charged under Articles 8(2)(e)(vii), 8(2)(b)(xxvi) and 25(3)(a) of the Rome Statute with the war crimes of conscripting and enlisting children under the age of 15 years into his armed group and using them to participate actively in hostilities between 1 September 2002 and 13 August 2003.
2. The crimes, as confirmed by the Pre-Trial Chamber, occurred between 1 September 2002 and 2 June 2003 in the context of a conflict of an international character and between 2 June 2003 and 13 August 2003 in the context of a conflict of a non-international character. Further to the Trial Chamber's decision on 13 December 2007,¹ the Prosecution tendered evidence during the trial on the nature of the armed conflict during the entire period of the charges, which may lead the Chamber to modify the legal characterisation of the charges from 1 September 2002 to 2 June 2003.
3. The Accused's criminal responsibility arises through his contribution to a common plan to assume military control of Ituri for which he conscripted, enlisted and used children, including children under the age of 15 years. The Accused implemented this plan jointly with Floribert Kisembo (FPLC Chief of Staff), Bosco Ntaganda (FPLC Deputy Chief of Staff for Military Operations), Chief Kahwa, Rafiki and senior FPLC commanders.

2. Statement of the Case

4. The Prosecution filed an Application for a Warrant of Arrest on 12 January 2006, seeking the arrest of the Accused and Bosco Ntaganda for the war crimes of enlisting and recruiting children under the age of 15 and using children to participate actively in hostilities. On 10 January 2006, Pre-Trial

¹ ICC-01/04-01/06-1084: The Chamber stated that the Prosecution should call and the Defence address evidence on the nature of the armed conflict, and the Chamber might then consider whether to modify the legal characterisation of the conflict, which would affect the first group of charges.

Chamber I issued a warrant for the arrest of the Accused. The Accused, who was in custody in the Democratic Republic of the Congo, was surrendered to the Court on 17 March 2006.

5. Trial commenced on 26 January 2009. During the course of the proceedings, the Prosecution called 30 witnesses between 28 January and 24 May 2010.
6. The Defence bifurcated its case, beginning with an abuse of process challenge that entailed the testimony of 19 defence witnesses and 6 prosecution witnesses (and the recall of one prosecution witness on a discrete issue). Following the Chamber's rejection of the Defence application to stay the proceedings permanently for abuse of process,² the Defence proceeded with the second phase of its case, calling 5 witnesses between 30 March and 18 May 2011.

3. Statement of Facts

7. On 15 September 2000, in Bunia, the Accused became the President of the *Union des Patriotes Congolais* (UPC), a position he held from that point onward. From inception, the Accused was the face and voice of the party. The Accused had grand aspirations of assuming power in Ituri and possibly at a national level; but as with all rebel movements he had no realistic prospect of achieving his goals without a military force. The plan, agreed upon by the Accused and his co-perpetrators, was to take over the governance of Ituri through the recruitment of young persons. Even while he promised an end to the insecurity ravaging the territory caused by years of ethnic fighting, the Accused and his co-perpetrators were building an army.

² The Chamber ruled that certain of the abuse allegations were more appropriately addressed in its final judgement. Accordingly, the Prosecution incorporates by reference its submissions in response to the abuse application where relevant: ICC-01/04-01/06-2678-Conf ('Prosecution Abuse Response').

8. When the opportunity arose to receive military training in Uganda in 2000, the Accused and his co-perpetrators launched the first wave of recruitment of young Hema persons for what would later officially become the armed wing of the UPC. From this time onwards, the Accused's name and that of his co-perpetrators were synonymous with the UPC and the Hema militia. Since its inception, the UPC and the Hema militia were one and the same; the same people using the same children to extend their power throughout Ituri.
9. The Accused cultivated his external profile as a key player in Iturian politics. He sent a declaration to the political authorities of Uganda on behalf of his co-perpetrators (and others) who had revolted from the APC (the army of the then-ruling government, the RCD-K/ML) in the summer of 2000. He used his position of influence within the Hema community and the Hema militia to become Minister of Defence in the RCD-K/ML in 2001. The Accused and his co-perpetrators later broke away from the RCD-K/ML in April 2002.
10. The UPC/FPLC managed to gain control over Ituri in September 2002. At this time, the Accused acknowledged that the UPC/FPLC had a joint military and political nature since 2000. He acknowledged the group's military actions in April and August of 2002. In October 2002, he wrote to the Kinshasa government detailing the extent of his power and territorial control in Ituri and insisting on national recognition for him and his party.
11. In order to remain in power and enlarge the territory over which they exercised control, the Accused and his co-perpetrators needed greater military strength. To achieve this, they recruited more youth into the army, regardless of age, by conducting targeted recruitment drives in schools, in the streets, and through coercive village campaigns. The inevitable consequence of this was the conscription, enlistment, and use of children of

all ages, including those under the age of 15, throughout the period of the charges, by the UPC/FPLC. Although the common plan did not directly target children under the age of 15, the co-perpetrators targeted young persons regardless of age and did not verify the ages of the recruits.

12. The final phase of execution of the common plan to take over Ituri through military means was the formal establishment of the UPC's military wing, the *Force Patriotique pour la Liberation du Congo* (FPLC), in September. The FPLC was not cobbled together in haste by opportunistic militia men. On the contrary, it was a professional military outfit, with professionally trained officers and infantry soldiers. It had an intricate and organised structure including a headquarters in Bunia, three sectors, and several brigades of approximately one thousand soldiers each. The FPLC had an efficient chain of command using state of the art communication systems that were available at the time.
13. During the next 11 months, the Accused – as President of the UPC and Commander-in-Chief of the FPLC – directed the FPLC to pursue full control of the territory of Ituri. He ordered the military to engage in battles in strategic and resource-rich places such as Mongbwalu, Bambi, Lipri and Kobu. By controlling finances, the Accused ensured that the FPLC sectors and brigades had sufficient funding, ammunition, weapons and vehicles to successfully carry out their operations.
14. This was a time for mobilisation, not demobilisation. The brigades needed to fill their ranks with soldiers in order to gain the military advantage in the battle for Ituri. As a result, along with his Chief of Staff and other top military commanders, the Accused put in place an efficient and effective campaign for military recruits of all ages, including children under the age of 15, to be trained and then deployed to the front lines to fight for the UPC/FPLC in some of their strategic battles.

15. The Accused personally drew on the support and influence of old Gegere wise men who were respected amongst the Hema population in order to raise awareness in the villages so that young people would be mobilised and integrated into the army. The FPLC recruited children by abducting them, by pressuring their parents to send them for training, and by accepting those who 'volunteered' as a result of village recruitment campaigns.
16. In tandem, Eric Mbabazi, the head of the morale and discipline division in the FPLC (G5) and one of the Accused's top military commanders, was specifically tasked with the responsibility of recruiting children and rallying them to the cause of the UPC/FPLC. This was sufficiently important to the mission of the co-perpetrators that Mbabazi would bring to his superiors' attention any obstacles that he encountered in carrying out this task.
17. Once recruited, children were brought to one of approximately 20 military training camps. These camps were specifically set up throughout Ituri to prepare young recruits for battle. UPC/FPLC commanders trained the recruits in standard military practices, from the formalistic – marching and saluting, to the actual work of a soldier – assembling and disassembling weapons, and shooting.
18. It was at these camps that the children first experienced the full reality and harshness of military life. They were ill-fed, beaten, whipped, imprisoned, and young girls were raped. They were encouraged to drink alcohol and take drugs, and were regularly intoxicated.
19. The Accused knew that the recruitment drives conducted by the UPC/FPLC into the rank and file of the army resulted in the conscription and enlistment of children under the age of 15, or at at a minimum that this would be the inevitable consequence. Nevertheless he persisted with the execution of the plan, together with his co-perpetrators. Child soldiers were regularly in his presence and his personal protection unit included children aged 13 to 17.

An internal UPC/FPLC political document dated 12 February 2003, sent by one of his national secretaries to Eric Mbabazi and copied to the Accused, expressly referred to the presence of children aged between 10 and 16 years old.

20. The recruitment, training and use of young persons, including children under the age of 15, continued in full force during the entire period relevant to the charges and increased during times of intense fighting. As a consequence, the United Nations (UN) and various non-governmental organisations (NGOs) involved in humanitarian issues related to children protested the recruitment and use of children by the UPC/FPLC. Representatives of the UN in DRC had regular meetings with the Accused to air concerns related to child soldiers. To silence the ever-growing chorus of criticism, the Accused issued several demobilisation orders. However, no demobilisation of child soldiers from the UPC/FPLC ever took place. The orders were a sham meant to deflect attention away from the UPC/FPLC's policy of recruiting children into its ranks and were never implemented. On the contrary, the recruitment and use of child soldiers continued unabated. Only two weeks after the Accused issued one such order he visited the UPC/FPLC training camp in Rwampara to boost morale and encourage the recruits to finish their training so that they could contribute to the war effort. Among the recruits were children visibly under the age of 15 and bodyguards of senior commanders who were also under the age of 15.

4. Context and Background

4.1 The Crimes were Committed in the context of and were associated with a Conflict of a Non-International Character

4.1.1 An Armed Conflict Existed in Ituri During the Relevant Period

21. It is not contested in this case that an armed conflict occurred in Ituri throughout the relevant period: 1 September 2002 and 13 August 2003. An

international armed conflict exists “whenever there is resort to armed force between States”.³ A non-international armed conflict exists where 1) the violence is sustained and has reached a certain degree of intensity, and 2) armed groups with some degree of organisation, including the possibility to impose discipline and the ability to plan and carry out sustained military operations, are involved.⁴ Article 8(2)(f) of the *Rome Statute* requires that the armed conflict be “protracted”.

22. The conflict in Ituri is most often characterised as an inter-ethnic conflict between the Hema and the Lendu.⁵ When newly created, the predominantly Hema UPC fought a series of battles against the RCD-ML,⁶ seemingly because the RCD-ML leadership sought to ally itself with Kinshasa and to integrate both Hema and Lendu into its armed forces.⁷ The UPC then engaged in a series of battles with the predominantly Lendu FNI and its ally, the predominantly Ngiti FRPI, which were sometimes assisted by Ugandan forces.⁸

³ *Prosecutor v. Tadić*, IT-94-1AR72, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

⁴ ICC-01/04-01/06-803-tEN, paras 232 to 234; ICC-01/04-01/07-717, para 239; ICC-01/05-01/08-424, paras. 231, 234; *Prosecutor v. Tadić*, IT-94-1-T, Judgement, 7 May 1997, para. 562; *Prosecutor v. Đorđević*, IT-05-87/1-T, Judgement, 23 February 2011, paras. 1522, 1526; *Prosecutor v. Limaj, Bala and Musliu*, IT-03-66-T, Judgement, 30 November 2005, paras. 84, 94-134; *Prosecutor v. Haradinaj, Balaj and Brahimaj*, IT-04-84-T, Judgement, 3 April 2008, paras. 60, 63-88; *Prosecutor v. Mrkšić, Radić, Šljivančanin*, IT-95-13/1-T, Judgement, 27 September 2007, para. 407.

⁵ The conflict may have political and economic components but is most often defined as having been fought along ethnic grounds, see T.130, p.44 line 14 to p.46 line 3; T.156, p.43, line 22 to p.44, line 4, p.45, line 6 to p.46, line 6, p.48, lines 11-15, p.53, line 15; T.193, p.50, lines 11-13, p.80, line 5 to p.82, line 14; T.194, p.20, lines 6-18, p.23, lines 12-19; EVD-OTP-00405 at p.0020; EVD-OTP-00403 at pp.0091, 0096-0097, 0104; EVD-OTP-00406 at p.0507.

⁶ In Bunia in August 2002: T.114, p.56, line 24 to p.57, line 4; T.126, p.12, lines 10-12; T.199, p.19, lines 14-17; EVD-OTP-00623 at p.0439; in Barriere after October 2002: T.139, p.7, lines 1-6; and in Mongbwalu in November 2002 and March 2003: T.144, p.65, lines 6-8; T.176, p.77, lines 19-21; EVD-OTP-00623 at pp.0451-0452. One witness states that the UPC fought the FNI in Mongbwalu at these times: T.113, p.48, line 24 to p.49, line 13.

⁷ EVD-OTP-00405 at p.0017.

⁸ In Nizi in October 2002: T.291, p.28, line 21 to p.29, line 2; EVD-OTP-00623; in Bogoro in February 2003: T.149, p.9, line 23 to p.10, line 3, p.17, lines 16-21; T.188, p.47, lines 6-18; in Kobu in February 2003: EVD-OTP-00491, p.25, lines 12-19; T.113, p.52, lines 3-9; T.114, p.18, lines 14-17; T.157, p.95, lines 8-14; in Mandro in March 2003: EVD-OTP-00491, p.25, lines 12-19; T.190, p.58, line 25 to p.59,

23. The conflict between the ethnic groups, in their various manifestations, had the requisite degree of intensity during the indictment period: the repeated attacks and battles led to the deaths of combatants and civilians, the displacement of civilians and extensive material destruction.⁹ It was also internationally recognised: the UN Security Council acknowledged the conflict in Ituri on numerous occasions and remained actively seized of the matter throughout the entire indictment period.¹⁰ The requirement that the armed violence be protracted is clearly met here, where the conflict endured for years.¹¹
24. The UPC,¹² RCD-ML,¹³ FRPI¹⁴ and FNI¹⁵ are organised armed groups. They have a sufficient degree of organisation as demonstrated by their leadership

line 6; EVD-OTP-00623; in Bunia in March 2003: EVD-OTP-00490, p.141, lines 4-17; T.149, p.23, lines 3-7, p.40, lines 21-23; T.199, p.45, lines 2-10; and again in May 2003: T.230, p.55, lines 4-19; EVD-OTP-00405 at p.0025; EVD-OTP-00623 at p.0468; and probably in August: EVD-OTP-00405 at p.0025. It is possible that these armed groups fought in Mongbwalu in March 2003: T.113, p.48, line 24 to p.49, line 13; T.198, p.25, line 5 to p.26, line 8; and in May 2003: T.230, p.38, lines 4-13, p.55, line 19; in Songolo in 2003: T.168, p.73, lines 11-17; T.188, p.21, lines 14-19, p.25, lines 1-2; and in Tchomia in July 2003: EVD-OTP-00623 at p.0449.

⁹ See EVD-OTP-00623 at pp.0437-0452; T.193, p.56, lines 13-16.

¹⁰ See for example EVD-OTP-00626; EVD-OTP-00628.

¹¹ See ICC-01/05-01/08-424, paras. 235, 255 where five months was sufficient.

¹² The UPC had a clear command structure with leadership, ranks and objectives: T.130, p.10, lines 13-21, p.14, lines 16-18, p.16, line 22, p.17, line 3, p.17, line 16 to p.18, line 5, p.19, lines 22-25, p.20, lines 9-10, p.91, line 11 to p.92, line 7; T.164, p.13, lines 17-21, T.209, p.69, lines 14-18. It trained and disciplined its troops: T.130, p.12, lines 10-23, p.43, line 22 to p.44, line 13. It received weapons: see footnote 53 below. It controlled territory and carried out sustained military operations.

¹³ The RCD-ML had a command structure: T.156, p.50, lines 16-23; T.168, p.34, lines 4-8; T.188, p.92, lines 2-11; EVD-OTP-00623 at p.0470; it trained its troops: T.156, p.56, lines 4-14, p.65, lines 15-17; EVD-OTP-00623 at p.0435; even if that training was not 'high-level' and questions of discipline remain: T.156, p.55, lines 23-25. The group was in receipt of weapons: EVD-OTP-00491, p.122, line 21 to p.123, line 5; EVD-OTP-00623 at pp.0431-0435. It was sufficiently organised to participate in the inter-Congolese dialogue and its leader is now Minister for Regional Cooperation: EVD-OTP-00623 at p.0470. Prior to August 2002 the group controlled territory and had the ability to carry out sustained military operations; T.193, p.43, line 3 to p.44, line 14.

¹⁴ The FRPI had identified leadership and was sufficiently organised to be identified by the UN as one of the five main armed and political groups involved in the Ituri conflict: EVD-OTP-00623 at p.0470; EVD-OTP-00403 at p.0105; EVD-OTP-00405 at pp.0025-0026; and to participate in the Ituri Pacification Committee: T.164; p.13, lines 6-13. Its troops underwent training: EVD-OTP-00737 at p.0263. It had the ability to plan and carry out sustained military operations, as demonstrated by its takeover of Nyankunde in September 2002 where it committed one of the biggest massacres of the war: EVD-OTP-00405 at p.0017.

structure and participation in political processes. They also have the ability to carry out sustained military operations, as indicated by the provision of military training to their troops and their participation in numerous battles.

4.1.2 There is a Nexus between the Armed Conflict and the Alleged Crimes

25. To satisfy the requirement of a nexus between a criminal act and the armed conflict in question, the Pre-Trial Chamber stated that the conduct must be closely related to the hostilities occurring in any part of the territories controlled by the parties to the conflict.¹⁶ The Prosecution argues that it has established that there is a clear nexus between the UPC's enlistment and conscription of children under the age of 15 years and the armed conflict in Ituri that took place between July 2002 and December 2003.
26. The UPC enlisted and conscripted children under the age of 15 years and subjected them to military training with the aim to use the child soldiers in hostilities. During recruitment and training, children were told that they would be fighting in battle against the Lendu enemy. Children from the Hema/Gegere community were encouraged to join the FPLC to contribute to the protection of their ethnic group against the Lendu.¹⁷ Witness DRC-OTP-WWWW-0011 (W-0011) stated that he was sent to a battle at Barriere, and was told by his commander that the purpose was to combat and drive out the Lendu enemy.¹⁸ Witness DRC-OTP-WWWW-0014 (W-0014) also testified

¹⁵ The FNI had identified leadership and command structure: T.149, p.23, lines 4-7; EVD-OTP-00403 at p.0105; EVD-OTP-00623 at p.0469; EVD-OTP-00405 at p.0025; gave training to its troops: EVD-OTP-00737 at p.0263; EVD-OTP-00623 at p.0469; received arms: EVD-OTP-00623 at p.0469; and was sufficiently organised to be identified by the UN as one of the main five armed and political groups involved in the Ituri conflict: EVD-OTP-00623 at p.0469; EVD-OTP-00405 at pp.0025-0026; and to participate in the Ituri Pacification Commission as the Lendu party representing the entire Lendu community: EVD-OTP-00623 at p.0469. It had the ability to plan and carry out sustained military operations, and it controlled territory: T.149, p.23, lines 3-16.

¹⁶ ICC-01/04-01/06-769-Conf-tEN (the 'Confirmation Decision'), paras. 286-287.

¹⁷ T.174, p.32, lines 8-11.

¹⁸ T.139, p.7, lines 1-12.

that UPC recruits in Bunia were trained to fight the RCD-K/ML and the Lendu.¹⁹

27. Children under the age of 15 received the same military training as older recruits.²⁰ The recruits learned to assemble and disassemble weapons, to shoot at a target, and were also trained in combat tactics.²¹ Upon the completion of training, recruits were provided with military uniforms and weapons.²²
28. Following the completion of military training, child soldiers were deployed to various battles against the Lendu. Witness DRC-OTP-WWWW-0294 (W-0294) testified that he participated in battles at Songolo, Bule, Kasenyi, and Zumbe against the Lendu.²³ Witness DRC-OTP-WWWW-0038 (W-0038) participated in the UPC attack on Mongbwalu in November-December 2002 with the objective to destroy the headquarters of the Lendu.²⁴ Witness DRC-OTP-WWWW-0010 (W-0010) described participating in a battle in Bunia against the Lendu.²⁵
29. On 12 February 2003, the Accused visited the UPC military training camp in Rwampara to boost morale and encourage all the recruits to finish their

¹⁹ T.184, p.60, lines 5-13.

²⁰ T.114, p.10, line 14 to p.11, line 12: "Among the new arrivals, those who were to be trained, there were children under 15 years of age and there was also bigger children. They were children who were mixed in sections, in platoons, in companies on the basis of training. There was no precise form of training for all of them. *Everyone received the same kind of training.* One was trained in how to use AK-47s, light arms, how to deal with prisoners. All the other stages of training were followed. We were taught how to fight against the enemy. *And this was the case for everyone in the training camps.*" [emphasis added]

²¹ T.176, p.24, p.25, lines 19-20, p.26, lines 9-14 (W-0055); T.113, p.66, lines 7-17; T.114, p.10, line 21 to p.11, line 12, p.12, line 20 to p.13, line 17 (W-0038); T.186, p.12, lines 22-25 (W-0157). W-0089 described learning to march, use a weapon, crawl, ambush the enemy and tactical skills (T.196, p.5, line 21 to p.6, line 9). Video EVD-OTP-00570 (minute 00.14.51ff).

²² T.113, p.44, lines 8-12; T.114, p.12, line 12 to p.14, line 2.

²³ T.151, pp.22-26, p.26, lines 10 to p.27, line 9; T.152, pp.14-15 (W-0294 testified that he killed Lendu at the battle in Zumbe).

²⁴ T.113, p.48, line 24 to p.49, line 13.

²⁵ T.144, p.64, lines 1-5.

training so that they could contribute to the war efforts. Among the recruits addressed were children under the age of 15 years.²⁶

4.1.3 The Conflict is Properly Characterised as Non-International

30. This Chamber must also determine the legal character of the conflict. The Prosecution disagrees with the Pre-Trial Chamber's conclusion that the conflict was international until Uganda withdrew from Ituri.²⁷ The Chamber resorted to the crime enshrined in Article 8(2)(b)(xxvi) (international armed conflict), instead of confirming the one that had been originally charged by the Prosecution, namely: Article 8(2)(e)(vii) (non-international armed conflict).
31. With the level of involvement of various governments, it is tempting to simplify the applicable legal framework by concluding, for example, that the fact that Uganda engaged militarily in DRC territory rendered the conflict international; or that support by various governments for different armed groups internationalised the conflict; or that Uganda's possible military occupation rendered the armed conflict in Ituri international in character. The Prosecution submits that making any of these findings would not accurately reflect the current state of the law. The Pre-Trial Chamber based its decision on the latter proposition. The underlying assumption is that there can only be an international or a non-international armed conflict within a particular territory at a particular time. To the contrary, as in this instance, there can be simultaneous conflicts occurring within a particular territory among different forces. The issue in a given case is the nature of the conflict *to which the particular army or militia is a party*. Accordingly, the issue here is the nature of the conflict(s) to which Lubanga's militia was a party during the relevant times.

²⁶ EVD-OTP-00570.

²⁷ ICC-01/04-01/06-803-tEN, para 220.

32. The statement of the ICC's Pre-Trial Chamber III in *Bemba*, that "an international armed conflict exists in case of armed hostilities between States through their respective armed forces or other actors acting on behalf of the State," accurately reflects the law.²⁸ Direct participation by a State's governmental forces, or indirect participation by a State operating through proxy non-State forces, may internationalise an otherwise non-international armed conflict as long as sovereign nation States are opposed to each other.²⁹ Direct and indirect participation, which does not result in two sovereign States opposing each other, will not render a non-international conflict international.³⁰
33. There is no denying the involvement and influence of various States in the Ituri conflict. However, at no stage was there resort to armed force between

²⁸ ICC-01/05-01/08-424, para. 223. The first paragraph of Article 2 common to the Four Geneva Conventions of 1949 states that the Conventions apply to 'all cases of declared war or of any other conflict which may arise between two or more of the High Contracting Parties.'

²⁹ For example see *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, 1 September 2004, para. 144; *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, 3 March 2000, para. 94; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, 31 March 2003, para. 196.

³⁰ ICC-01/05-01/08-424, paras. 212, 246. See also *Prosecutor v. Aleksovski*, IT-95-14/1-T, Joint Opinion of the Majority, Judge Vohrah and Judge Nieto-Navia, on the Applicability of Article 2 of the Statute Pursuant to Paragraph 46 of the Judgement, 25 June 1999, where the majority did not declare the existence of an international armed conflict when Croatian troops remained in Bosnia and Herzegovina after 22 May 1992 in order to protect the latter from Serbian attacks, and only addressed the internationalization of the Bosnian conflict in terms of whether there was a sufficient degree of control over the HVO that it could be construed as acting on Croatia's behalf, para. 27; Moir, *The Law of Internal Armed Conflict* (2002) at pp.50-51; Zegveld, *Accountability of Armed Opposition Groups in International Law* (2002) p.24; Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' (2009) 91 *International Review of the Red Cross* 69, at 71; Schondorf, 'The Targeted Killings Judgement: A Preliminary Assessment' (2007) 5 *Journal of International Criminal Justice* 301 at p.304; Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) 16(2) *European Journal of International Law* 171 at p.195; Carswell, 'Classifying the Conflict: A Soldier's Dilemma' (2009) 91 *International Review of the Red Cross* 143 at p.154; Dinstein, *War, Aggression and Self-Defence* (2001) at p.6; Geneva Academy of International Humanitarian Law and Human Rights, Rule of Law in Armed Conflicts Project, *Qualification of Armed Conflicts*, available at http://www.adh-geneva.ch/RULAC/qualification_of_armed_conflict.php. Cf. ICC-01/04-01/07-717 01-10-2008, para. 240. The major exception to the general proposition here is Article 1(4) of Additional Protocol I of 1977 which applies as a matter of treaty law but not as a matter of custom, and which extends the definition of international armed conflicts to include those in which non-State forces are fighting against 'colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination'.

Congolese, Ugandan or Rwandan governmental or proxy armed forces. In the absence of States opposing each other, the accurate legal characterisation of the armed conflict in Ituri is non-international. Even if Uganda is found to have been in occupation of parts of Ituri during the indictment period, this does not mean there was *ipso facto* an international armed conflict, or that the otherwise non-international armed conflict was internationalised.

4.1.4 The Conflict was not Internationalised by Direct Intervention

a. Direct military intervention by foreign forces only internationalises a conflict if it results in two States opposing each other

34. Direct military intervention by a State in an otherwise internal armed conflict will only internationalise that conflict if it results in two States opposing each other.³¹ The fact that the intervening state is operating across a border will not *per se* internationalise a conflict according to the current state of the law.³² In 1971, States rejected a proposal by the ICRC to apply the whole of international humanitarian law to non-international armed conflicts where one or both of the parties is assisted by the armed forces of a third state.³³ States did not consider the element of extra-territoriality to be an 'internationalising' factor. This lack of *opinio juris* is further demonstrated by the fact that States whose troops are currently deployed in Afghanistan to assist the Afghan Government in its armed conflict with rebel groups, such as the US, UK, Australia and Germany consider themselves to be engaged in

³¹ See Paragraph I.32), above.

³² See Paragraph I.32 and particularly footnote 30, above; Schrijver and van der Herik, *Leiden Policy Recommendations on Counter-terrorism and International Law* (1 April 2010) at para. 63; Shany, 'Extra-territorial Self-help: Between Pragmatism and Legal Doctrine' in Ravasi and Beruto, *International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence* (2005) at p.83; Sassoli, 'The Status of Persons Held in Guantánamo under International Humanitarian Law' (2004) 2 *Journal of International Criminal Justice* 96 at p.99. Cf. *The Public Committee Against Torture in Israel et al v. The Government of Israel et al*, Supreme Court of Israel sitting as the High Court of Justice, Judgement, 11 December 2006, HCJ 769/02 at para. 18.

³³ International Committee of the Red Cross, *Report on the Work of the Conference of Government Experts*, Geneva, 1971, para. 284.

a non-international armed conflict.³⁴ Additionally, the *Statute of the International Criminal Tribunal for Rwanda* (January 2010) Articles 1 and 7 call for the Tribunal to apply, inter alia, the law of non-international armed conflict to the acts of Rwandan nationals outside the physical territory of Rwanda. The character of the conflict is to be determined by reference to the parties involved rather than the territory on which the conflict takes place.

35. Thus, the fact that the UPDF, MONUC and the Interim Multinational Emergency Force (IMEF) were operating extra-territorially is insufficient to render the conflict international. This would only be the case if these bodies opposed State forces.

b. Direct Intervention by Foreign Forces Did Not Result in Two States Opposing Each Other and Therefore Did Not Internationalise the Conflict

36. MONUC was deployed throughout the entire indictment period. IMEF was deployed from June to September 2003. However, there is no evidence that MONUC or IMEF forces engaged in hostilities during this period.³⁵ In the absence of hostilities against State forces, the presence of multi-national forces did not internationalise the conflict.

³⁴ The US Supreme Court arguably made this assessment in *Hamdan v. Rumsfeld et al.*, 548 U.S. 557, at p629 (U.S. Supreme Court, 2006). See also Turns 'Jus ad Pacem in Bello? Afghanistan, Stability Operations and the International Laws Relating to Armed Conflict, 388-410, in *The War in Afghanistan: A Legal Analysis* (Schmitt (ed.), 2009) (Vol. 85, US Naval War College International Law Studies) at p.404: 'from the official point of view of the United Kingdom, the ongoing hostilities in Afghanistan and Iraq are in effect treated as internal conflicts in which UK forces are participating on the side of the governments of those States'; Schaller, 'Military operations in Afghanistan and international humanitarian law', German Institute for International and Security Affairs, SWP Comments, No. 7, March 2010, p.2; and *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Philip Alston, Mission to Afghanistan, A/HRC/11/2/Add.4, para. 1. Additionally in Somalia, the US and UN forces did not regard themselves as parties to an international armed conflict rather, they applied the law of non-international armed conflict: Greenwood, 'International Humanitarian Law and United Nations Military Operations' (1998) 1 *Yearbook of International Humanitarian Law* 3 at p.26.

³⁵ UN Reports reveal a confrontation leading MONUC troops to fire their weapons into the air (EVD-OTP-00620 at p.0394) and that the UPC used inflammatory language and fired at MONUC checkpoints (EVD-OTP-00625 at p.0217). However, neither incident can be said to constitute 'armed violence' or an outbreak of 'hostilities' in the context of armed conflict.

37. Ugandan military forces engaged directly in hostilities in the territory of Ituri during the relevant period. The UPDF engaged in hostilities to install the UPC in Bunia in August 2002³⁶ and then to remove the UPC from Bunia in March 2003.³⁷ W-0157 testified that there were skirmishes between the Ugandans and the UPC at Centrale, Solenyama and the road to Lipri,³⁸ and there is documentary evidence that the Ugandans were involved in hostilities against the Lendu in Zumbe in October 2002³⁹ and fought alongside FNI and FRPI against the UPC in Bogoro in February 2003.⁴⁰ However, the UPDF did not engage in hostilities against the forces of another State, be they Congolese or Rwandan Government Forces. As such, the actions of the UPDF could not have internationalised the conflict, unless it engaged with the proxy forces of another State. This issue is addressed in the following section.

4.1.5 The Conflict was not Internationalised by Indirect Intervention

a. Indirect Intervention, Established through Overall Control, Will Only Internationalise the Conflict if This Results in Two States Opposing Each Other

38. Where a State has overall control of a non-State armed group, and that group opposes the armed forces of another State (or a non-State armed group under overall control of another State), the conflict will be internationalised.⁴¹ Overall control is established where the State: “has a role

³⁶ T.114, p.56, line 24 to p.57, line 4; T.126, p.12, lines 10-12.; T.199, p.19, lines 14-17; EVD-OTP-00623 at pp.0433, 0439. This attack is outside the indictment period: 1 September 2002 to 13 August 2003. However, in *Prosecutor v. Limaj, Bala and Musliu*, IT-03-66-T, Judgement, 30 November 2005, the Trial Chamber examined events preceding the indictment period in order to establish the existence of ‘organised armed groups’ and the intensity of the conflict at paras. 103, 135-141.

³⁷ T.113, p.52, lines 3-9; T.130, p.51, line 1 to p.52, line 12; T.144, p.64, lines 1 to 5; T.149, p.23, lines 4 to 7; T.152, p.21, line 8 to p.23, line 22, p.23, line 10 to p.24 line 5; T.168, p.70, line 20 to p.71, line 22; T.199, p.45, lines 9-10; T.203, p.3, lines 3-4; EVD-OTP-00623 at p.0445; EVD-OTP-00403 at p.0110.

³⁸ T.188, p.31, lines 5-8; it appears that the witness is referring to the period between August 2002 and March 2003.

³⁹ EVD-OTP-00623 at p.0443.

⁴⁰ EVD-OTP-00623 at p.0444.

⁴¹ See Paragraph I.32 above.

in organising, co-ordinating or planning the military actions of the military group, in addition to financing, training and equipping the group or providing operations support to it.”⁴²

39. This test has been adopted by the ICC and ICTY in preference to the direct or effective control test of the ICJ.⁴³ The effective control test additionally requires the State to have directed the group to commit the specific actions to be attributed to the State.⁴⁴ The difference between the two tests is explained by the distinction in purpose: direct control is used to establish State responsibility whereas overall control is used to establish a jurisdictional pre-condition to the exercise of international penal jurisdiction.⁴⁵ The diversion from ICJ jurisprudence is further justified on the grounds that the requirement of specific direction is substantiated in customary international law only in relation to private individuals and not in relation to organised groups.⁴⁶

⁴² ICC-01/04-01/06-803-tEN, paras. 210, 211; *see also Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, paras. 131, 137; *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, 3 March 2000, para 99; *Prosecutor v. Delalić, Mucić, Delić and Landžo*, IT-96-21-T, Judgement, 16 November 1998, para. 231, upheld in IT-96-21-A, Judgement, 20 February 2001, para. 48; *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, paras. 142-145; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, 26 February 2001, paras. 112-115, upheld in IT-95-14/2-A, Judgement, 17 December 2004, para. 361; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, 31 March 2003, para. 198; *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, 1 September 2004, para. 124.

⁴³ Found in: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgement. ICJ Reports 1986, p.14 at paras. 106, 109; subsequently applied in *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007, paras. 391, 392.

⁴⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgement. ICJ Reports 1986, p.14 at para. 115; *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 100.

⁴⁵ *Prosecutor v. Tadić*, IT-94-1-A, Judgement: Separate Opinion of Judge Shahabuddeen, 15 July 1999, paras. 17, 18; *Case Concerning the Application of the convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007, para. 405. Cf. *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, paras. 103, 105.

⁴⁶ *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, paras. 125-136. See also Cassese, ‘The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgement on Genocide in Bosnia’ (2007) 18 *European Journal of International Law* 649 at p.658. See further: *Cyprus v. Turkey*, Appl. No. 25781/94, Eur. Cr. H.R. (10 May 2001); *Ilaşcu v. Moldova and Russia*, Appl. No. 48787/99, Eur. Cr. H.R. (8 July 2004); Report of the Working Group on Arbitrary Detention 2000, UN Doc. A/CN.4/2000/4; UN Secretary-General Reports to the General Assembly on East Timor (*Situation of Human Rights in East*

b. The relevant armed groups were not under the overall control of a Government

40. The alliances between the Ituri militarised groups and the surrounding governments changed over time, as did the level of support given by governments to these groups. To determine which alliances are relevant to the character of the conflict in this case, it is necessary to deconstruct the conflict into its component parts. In the first stage, the UPC and the UPDF fought against the RCD-ML.⁴⁷ Thus, if the RCD-ML was not a proxy force, there were no two States opposing each other during these hostilities. The UPC then allied itself with Rwanda and fought against the FNI and the FRPI on several occasions; the UPDF occasionally fought alongside these groups.⁴⁸ Thus, if the UPC was not under the overall control of Rwanda, then no two States were opposing each other at this second stage of the conflict. In short, the conflict could have been internationalised by indirect intervention only if the RCD-ML or the UPC was under overall Governmental control. This was not the case.
41. There is evidence that the RCD-ML sought to ally itself with Kinshasa around April 2002.⁴⁹ There is also evidence that Kinshasa sent trainers and weapons to the RCD-ML military element, the APC.⁵⁰ However, this falls

Timor, Report of the UN Secretary-General, 10 December 1999, UN Doc. A/54/660; *Report of the International Commission of Inquiry on Darfur to the UN Secretary-General*. 1 February 2005, UN Doc S/2005/60 at paras. 121-123: all cited and discussed in Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgement on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649 at Footnotes 18 and 19. Cf. Milanovic, 'State Responsibility for Genocide' (2006) 17 *European Journal of International Law* 553 at 585-587.

⁴⁷ See Footnote 6.

⁴⁸ See Footnote 8.

⁴⁹ T.156, p.51, line 25 to p.52, line 6; EVD-OTP-00406 at p.0524; EVD-OTP-00403 at p.0103; EVD-OTP-00405 at p.0017. This was certainly the perception of Lubanga and the UPC: T.130, p.46, lines 4-6; EVD-OTP-00672 at p.0069; EVD-OTP-00667 at p.0070; EVD-OTP-00719 at pp.0074, 0077-0078, 0080-0081.

⁵⁰ EVD-OTP-00491, p.122, line 21 to p.123, line 5; T.139, p.123, lines 2-4; T.156, p.68, lines 9-12; EVD-OTP-00624 at p.0049; EVD-OTP-00623 at p.0435. Lubanga reportedly denounced DRC support to the APC in the form of arms and munitions on 10 February 2003: EVD-OTP-00672; EVD-OTP-00513.

far short of any form of control, as is required to establish indirect intervention.

42. The UPC's alliance with Rwanda is also insufficient to hold that the UPC was under the overall control of Rwanda. There is evidence of support from Rwanda to the UPC.⁵¹ W-0014 reports that Rwanda supported the UPC's ideology.⁵² This support manifested itself in the provision of weapons and uniforms⁵³ and military training.⁵⁴ However, "it is not sufficient for the group to be financially or even militarily assisted by a State...there must also be evidence of coordinating or helping in the general planning of its military activity".⁵⁵ There is no such evidence in the present case. The UPC reportedly sent a liaison officer to Rwanda.⁵⁶ There are also reports of Rwandan nationals present in the UPC,⁵⁷ often for the identified purpose of providing military training.⁵⁸ However, this falls short of establishing that Rwanda had any involvement in the planning or directing of UPC military operations.

43. As such, the conflict was not internationalised by indirect intervention.

⁵¹ Lubanga reportedly signed an agreement with the RCD-Goma which was supported by Kigali: T.168, p.64 lines 13 to 18. See also T.162, p.55, lines 14-16.

⁵² T.181, p.91, line 20 to p.92, line 6.

⁵³ T.114, p.18, lines 15-21; T.125, p.71, lines 4-16; T.168, p.44, lines 11-25, p.61, lines 7-10; T.175, p.65, lines 5-15; T.179, p.46, lines 2-12.

⁵⁴ W-0038 and W-0017 reported being sent by the UPC to be trained in heavy weapons by Rwanda: T.113, p.35, lines 7-8, p.50, lines 5-10; T.114, p.6, line 22 to p.8, line 9, p.37 lines 5-11; T.154, p.20, lines 17-23, p.40, lines 4-12. See also T.181, p.90, lines 16-23; T.209, p.65, lines 10-12; T.203, p.17, lines 6-10.

⁵⁵ *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, paras. 130-131. See also *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, 17 December 2004, para. 372.

⁵⁶ T.154, p.60, lines 19-20.

⁵⁷ T.169, p.41, lines 7-10; EVD-OTP-00624 at p.0047.

⁵⁸ T.184, p.26, lines 1-8; T.209, p.77, line 16 to p.78, line 17.

4.1.6 Even if Uganda is Found to Have Been Occupying Parts of Ituri, this Occupation did not Internationalise the Conflict

a. Uganda was not in Occupation of Ituri as a Whole

44. The International Court of Justice in *Armed Activities on the Territory of the Congo (DRC v. Uganda)* articulated the relevant legal test to determine whether Ugandan Forces occupied part of the physical territory of the DRC:

The Court observes that, under customary international law, as reflected in Article 42 of the Hague Regulations of 1907, territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised (see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 167, para. 78, and p. 172, para. 89)... the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question.⁵⁹

45. The Pre-Trial Chamber examined the factual finding of the ICJ as well as the evidence admitted at the Confirmation Hearing and found that Uganda was in occupation of Ituri until the complete withdrawal of Ugandan troops on 2 June 2003,⁶⁰ after which it is clear that no occupation existed. Despite these findings, the Prosecution submits that the evidence before the Trial Chamber is insufficient to support a finding that Uganda was in occupation of the whole of Ituri between 1 September 2002 and 2 June 2003. First, and as a matter of procedure, the factual findings of the ICJ, a separate court with different procedures and evidentiary rules, should have no bearing on the Trial Chamber's assessment of the evidence before it.⁶¹ In any event, the

⁵⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) Judgement, ICJ Reports 2005*, p. 168 at paras. 172, 173. See also ICC-01/04-01/06-803-tEN, para. 212; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, 31 March 2003, paras. 216-218; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, 26 February 2001, para. 339.

⁶⁰ ICC-01/04-01/06-803-tEN, paras. 214-220.

⁶¹ The ICJ's findings were based on evidence adduced under different rules of procedure and evidence and which was not tested by the parties to the present proceedings. Its conclusions related

ICJ's finding that Uganda was in occupation of Ituri related to a much longer period, seemingly from September 1998 onwards.⁶² Further, such finding was made for the purpose of determining whether Uganda was under particular obligations to the civilian population throughout these five years. In the present case, the question of whether Uganda was in occupation is significantly more limited in time; and it is asked for the purpose of establishing a contextual precondition to the exercise of individual criminal responsibility. It is only necessary to undertake this factual assessment if the Chamber finds that the occupation impacts upon the character of the conflict. The Prosecution argues in the following submission that this is not the case.

46. The number of UPDF troops present in Ituri is the strongest indicator that Uganda was not occupying Ituri during the relevant period. Prunier, DRC-OTP-WWWW-0360, notes that although the UPDF had once deployed 13,000 troops in the Congo, by the time the all inclusive peace agreement was signed on 17 December 2002, 10,000 of those troops had withdrawn.⁶³ The UN reports that between 10 September and 18 October 2002, 2,287 UPDF troops withdrew from Ituri, leaving only a reinforced battalion in Bunia and troops patrolling the Ruwenzori Mountains.⁶⁴ Thus, by the sixth week of the near 12 month indictment period, the number of UPDF troops

to state and not individual criminal responsibility and were likely based on a standard of proof less than proof beyond a reasonable doubt as required by *Rome Statute* Article 66(3): *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* Judgement, ICJ Reports 2005, p.168 at paras. 79, 279; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007, para. 209; *Corfu Channel case*, Judgement of April 9th, 1949: I.C.J Reports 1949, p. 4 at p17. It is therefore submitted that reliance on the factual findings of the ICJ would be wholly inappropriate and was so if this is what the Pre-Trial Chamber did: ICC-01/04-01/06-803-tEN, paras. 214-217. This is particularly so as there is no procedural basis for relying on the factual findings of another Court; the decision is not and has never been in evidence and neither the Pre-Trial nor Trial Chamber have taken judicial notice of it.

⁶² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* Judgement, ICJ Reports 2005, p.168 at paras. 177-178.

⁶³ EVD-OTP-00405 at pp.0017-0018.

⁶⁴ EVD-OTP-00620 at p.0390.

present in Ituri decreased dramatically, leaving a limited number in limited locations. This substantial decrease in the number of troops present in Ituri at the commencement of the indictment period significantly decreases the relevance of any evidence of occupation relating to an earlier period.⁶⁵

47. It may be that the UPDF is properly considered to have been occupying parts of Bunia,⁶⁶ principally the airport,⁶⁷ from 1 September 2002 until their withdrawal on 6 May 2003.⁶⁸ However, it cannot be considered to have been in control of the whole of Bunia as the UPC and MONUC also controlled parts of the territory.⁶⁹ If the UPDF did operate outside Bunia and the Ruwenzori Mountains,⁷⁰ there is no indication that they exercised effective control over the territory as is required for an occupation to be established. Indeed, there are indications of other groups exercising control over territory and facilitating dialogue between the armed groups.⁷¹ Evidence that Uganda assisted in the creation of armed groups during the indictment period⁷² is irrelevant, or at least insufficient, to establish occupation.⁷³

⁶⁵ Such as evidence of convening meetings between groups: T.124, p.81, lines 1-8; T.168, p.39, lines 9-22; providing security: T.156, p.41, line 1 to p.42, line 3; making arrests and transferring prisoners: T.156, p.78, line 18 to p.79, line 6.

⁶⁶ T.164, p.4, lines 18-20; T.184, p.57, lines 4-20.

⁶⁷ T.150, p.59, lines 9-11; T.154, p.68, lines 3-4; T.162, p.53, lines 14-15; T.164, p.12, lines 3-22; T.178, p.26, lines 17-19; T.189, p.10, lines 9-10.

⁶⁸ T.164, p.12, lines 3-5.

⁶⁹ T.150, p.82, lines 18-22; T.174, p.25, lines 17-19; T.184, p.57, lines 4-20. Furthermore, the remaining forces cannot be considered to have been exercising effective control over territory. Uganda failed to provide any security or law enforcement between 6 March and April 2003, and ten massacres were committed in this period: T.157, p.6, line 25 to p.7, line 13.

⁷⁰ As has been suggested: T.130, p.52, line 13; T.149, p.36, lines 11-17; T.188, p.30, line 16 to p.31, line 17; T.209, p.65, line 16 to p.66, line 21; despite Uganda denying UPDF presence outside of Bunia in late 2002: EVD-OTP-00624 at p.0047.

⁷¹ For example Militia groups were making political appointments prior to June 2003: EVD-OTP-00624 at p.0111. In late December, the RCD-N and the MLC fought in Beni, North Kivu. MONUC, not Uganda, brokered a ceasefire agreement, which included the demilitarisation of Mambasa and Komanda, both in Ituri. They were to be under the administrative control of RCD-ML: EVD-OTP-00624 at p.0046. In January 2003, Mahagi was controlled by the UPC and Kpandroma-Lethy was controlled by Lendu combatants: EVD-OTP-00624 at p.0048.

⁷² See EVD-OTP-00672 at p.0071.

⁷³ *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, 31 March 2003, para. 214.

b. Even if Uganda was in Occupation of Parts of Ituri, the Analyses in Parts 4.1.4 and 4.1.5, above, Remain Applicable and the Conflict is Non-International

48. In its Confirmation Decision, the Pre-Trial Chamber held that Uganda's occupation *ipso facto* rendered the conflicts in Ituri international in character.⁷⁴ The Prosecution respectfully submits that, regardless of whether Uganda occupied parts of Bunia or the whole of the territory, the analyses in sections 4.1.4 and 4.1.5 remain applicable and the conflict is properly characterised as non-international.
49. Military occupation and international armed conflict are distinct factual occurrences. The Geneva Conventions contemplate that a military occupation can be established "even if the said occupation meets with no armed resistance";⁷⁵ the requirement of 'hostility' means only that the territorial State has not consented to the loss of territory.⁷⁶ In such circumstances the military occupation is neither constitutive of, nor consequent to, an international armed conflict as there is no resort to armed force between States.⁷⁷ Indeed, the Geneva Conventions themselves contemplate the distinction between military occupation and international armed conflict.⁷⁸

⁷⁴ ICC-01/04-01/06-803-tEN, para. 220.

⁷⁵ Article 2 common to the *Geneva Conventions of 1949*.

⁷⁶ Pictet, *The Geneva Conventions of 12 August 1949: Commentary* (2002).

⁷⁷ *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, 31 March 2003, para. 214; Dinstein, *The International Law of Belligerent Occupation* (2009) at para. 79; Arai-Takahashi, *The Law of Occupation* (2009) at pp.8, 16.

⁷⁸ Article 2, paragraph 1 specifies that the Conventions apply to armed conflict between two or more high contracting parties and paragraph 2 specifies that the Conventions apply to occupation. There would be no need to include the second paragraph if occupation was simply another form of armed conflict. Additionally, Article 6 of the *Fourth Geneva Convention* states that the Convention as a whole will cease to apply to occupied territory 'one year after the general close of military operations' and that, after this point, only specific provisions will apply. Thus, Article 6 also contemplates the distinction between the two situations. The Elements of Crimes contains a note, Footnote 34, that the term 'international armed conflict' includes military occupation and that this applies to the corresponding element in each crime under Article 8(2)(a). The offence in question

50. The presence of substantial numbers of Ugandan troops in Congolese territory commenced in 1998.⁷⁹ Congolese Government armed forces did not oppose the presence of Ugandan troops militarily.⁸⁰ Thus, there was no armed conflict between States. Certainly, the law of international armed conflict applied to any Ugandan forces in occupation of Congolese territory. But the armed conflict between various Congolese armed groups is a separate and unrelated event whose legal character is not altered by any military occupation of Ituri by Ugandan forces.⁸¹ This is particularly so as the rebel groups were not fighting against the occupation on behalf of the territorial government.⁸² Although there is evidence of RCD-ML receiving assistance from Kinshasa immediately preceding RCD-ML's ejection from Bunia,⁸³ there is insufficient evidence to characterise this, or any incident that actually occurred in the indictment period, as armed resistance to the occupation on behalf of the territorial government or in the exercise of a right to self-determination.
51. The Prosecution notes that in the *Targeted Killings Case*, the Supreme Court of Israel held, quoting Cassese, that "an armed conflict which takes place between an Occupying Power and rebel or insurgent groups...in an

here is contained in Article 8(2)(b). Given the preceding exposition of the state of customary law, the application of Footnote 34 should not be expanded beyond that explicitly provided for.

⁷⁹ EVD-OTP-00403 at p.0095.

⁸⁰ EVD-OTP-00623 at p.0435: 'Until 2002, the pre-transition Government in Kinshasa was hardly involved in Ituri. Its first delegation arrived in Bunia in August 2002, after a visit to Kampala [...] Early in 2002, the involvement of the Kinshasa Government centred on military assistance that it provided to RCD-ML in Beni.'

⁸¹ Yutaka Arai-Takahashi, *The Law of Occupation* (2009) at pp.297-298; Kress, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 15 *Journal of Conflict and Security Law* 245 at pp.256-57; Milanovic, 'Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case' (2007) 89 (866) *International Review of the Red Cross* 373 at pp.385-86.

⁸² Article 1(4) *Additional Protocol I* 1977 provides that the law of international armed conflict will apply to peoples fighting against alien occupation in the exercise of their right of self determination. See also *Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation*, University Centre for International Humanitarian Law, Geneva (1-2 September 2005) at pp.28-29.

⁸³ See Paragraph I.41 above.

occupied territory, amounts to an international armed conflict”.⁸⁴ However, it is submitted that this approach, based on the position of one commentator, is controversial and has no firm anchorage in the law as it currently stands. Accordingly, it should not form the basis for the Chamber’s decision. Moreover, the factual scenario in this case is significantly different to that surrounding the Supreme Court’s ruling and the reasons that may be called in support of it can be challenged.⁸⁵

52. Firstly, it has been argued that “[i]nternal armed conflicts are those between a central government and a group of insurgents belonging to the *same State* (or between two or more insurrectional groups belonging to that State)”.⁸⁶ The meaning given to the word ‘internal’ here seemingly derives from Article 1 of *Additional Protocol II*. This Article is not representative of the customary definition of non-international armed conflict.⁸⁷ Furthermore, the argument relies on a negative definition; it defines as international everything that is not ‘internal’. It is customary to adopt this approach in the converse, to define as non-international, everything that is not international.⁸⁸ This is the approach of Articles 2 and 3 of the Geneva Conventions of 1949 and of their Additional Protocols of 1977.

⁸⁴ *The Public Committee Against Torture in Israel et al v. The Government of Israel et al*, Supreme Court of Israel sitting as the High Court of Justice, Judgement, 11 December 2006, HCJ 769/02, at para. 18; this approach is also taken by Dinstein, *The International Law of Belligerent Occupation* (2009), p.100.

⁸⁵ Schondorf, ‘The Targeted Killings Judgement: A Preliminary Assessment’ (2007) 5 *Journal of International Criminal Justice* 301 at p.304; Kretzmer, ‘Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?’ (2005) 16(2) *European Journal of International Law* 171 at p.209; Milanovic, ‘Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case’ (2007) 89 (866) *International Review of the Red Cross* 373 at pp.385-86.

⁸⁶ Cassese, *International Law* (2nd ed., 2005) at p.420.

⁸⁷ ICC-01/04-01/06-803-tEN, para. 233; ICC-01/05-01/08-424, para. 231; *Prosecutor v. Tadić*, IT-94-1, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

⁸⁸ See *Hamdan v. Rumsfeld et al.*, 548 U.S. 557, at p.630 (U.S. Supreme Court, 2006); Paragraphs I.32, I.34.

53. The second reason called in support of the *Targeted Killings* approach is that as belligerent occupation is governed by the Fourth Geneva Convention and customary international law, it would be *contradictory* to subject occupation to norms relating to international conflict while regulating the conduct of armed hostilities between insurgents and the Occupant on the strength of norms governing internal conflict. In fact, it has been judicially recognised that different conflicts on the same territory can be subject to different sets of laws. In the *Nicaragua Case*, the ICJ stated that:

The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character.' The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.⁸⁹

54. Thus, to require Uganda to comply with the fourth Geneva Convention in its role as occupier and with the rules applicable to non-international armed conflict whenever it engaged in hostilities with rebel groups is not at all unusual. The consequence of the *Nicaragua* decision is that the Nicaraguan armed forces were under different rules depending upon the party which they were fighting.
55. The Prosecution further notes that beyond its legal correctness, the principle developed by the Israeli Supreme Court in the *Targeted Killings* case should not be artificially dissociated from the factual scenario that the Court had to address, which involved ongoing hostilities between the armed forces of the *occupying state* and the armed groups resisting the occupation. The factual

⁸⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) Merits, Judgement*, ICJ Reports 1986, p14 at para. 219. See also *Prosecutor v. Fofana*, SCSL-2004-14-AR72(e)), Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Nature of the Armed Conflict, 25 May 2004, para. 27; *Prosecutor v Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 84; ICC-01/04-01/06-803-tEN, para. 209; *Prosecutor v Đorđević*, IT-05-87/1-T, Judgement, 23 February 2011, paras. 1579-1580. The ICRC in its Annual Report for 1988 found that the armed conflict in Angola was international in so far as it involved South Africa but internal in other respects at pp.16-17.

circumstances which form the backdrop of *this case* are substantially different, and involve first and foremost a protracted confrontation between armed groups different to and independent of the occupying force, with limited instances of direct intervention in hostilities by the latter.⁹⁰

4.1.7 Even if Ugandan involvement created an international armed conflict, the UPC remained engaged in a simultaneous non-international armed conflict

56. If the Chamber finds that Uganda's transboundary involvement in hostilities against the UPC confers an international character on the conflict; or that, Uganda's role as an occupier conferred an international character on any hostilities it engaged in; or that, on the facts, two States opposed each other through their official or proxy military forces, this does not mean that the UPC was engaged *only* in an international armed conflict. Consistent with jurisprudence that armed conflicts that occur in the same location at the same time can be characterised differently,⁹¹ it is possible for the UPC to have been engaged in international and non-international armed conflicts simultaneously.

57. In his Declaration in the *Blaškić* Trial Judgement, Judge Shahabuddeen states that "it is difficult to see why an ongoing internal armed conflict should suddenly and necessarily lose that character altogether because of foreign intervention" and found that the ongoing conflict may retain, at least in part, its internal character.⁹² This approach is consistent with the much quoted

⁹⁰ See Paragraph I.37.

⁹¹ See footnote 89 above.

⁹² *Prosecutor v. Blaškić*, IT-95-14-T, Judgement; Declaration of Judge Shahabuddeen, 3 March 2000. This position is supported by Dinstein, *War, Aggression and Self-Defence* (2001) at p.6; Schindler, 'International Humanitarian Law and Internationalized Internal Armed Conflicts' (1982) 22 (230) *International Review of the Red Cross* 255 at p.256; Kress, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 15 *Journal of Conflict and Security Law* 245 at pp.256-257; Geneva Academy of International Humanitarian Law and Human Rights, Rule of Law in Armed Conflicts Project, *Qualification of Armed Conflicts*, available at http://www.adh-geneva.ch/RULAC/qualification_of_armed_conflict.php; Sassoli, 'The Status of Persons Held in Guantánamo under International Humanitarian Law' (2004) 2 *Journal of International Criminal Justice*

statement from *Tadić* that intervention may render an internal armed conflict international *or* may create a conflict “international in character alongside an internal armed conflict”.⁹³ Indeed, this exact finding was implicitly made in *Dorđević*,⁹⁴ where the ICTY Trial Chamber examined the situation on the territory of Kosovo between 24 March 1999 and June 1999. The Chamber found that there was an armed conflict between the Serbian forces and the Kosovo Liberation Army from the end of May 1998 until at least June 1999.⁹⁵ This conflict was not specifically characterised as non-international but this is the undeniable inference: State forces opposed an organised armed group,⁹⁶ and the Chamber’s legal discussion and analysis was applicable in non-international armed conflicts.⁹⁷ The Trial Chamber went on to find that the intervention of NATO on 24 March 1998 created an international armed conflict between NATO and the Federal Republic of Yugoslavia (FRY).⁹⁸ NATO’s intervention created a new international armed conflict rather than completely depriving the existing non-international armed conflict of its character.

58. Thus, even if it is found that the UPC was in an international armed conflict with the UPDF, the UPC can still be considered to have been engaged in a

96 at 99; Pejić, ‘Status of Armed conflicts’, in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007), p.92; Shany, ‘Extra-territorial Self-help: Between Pragmatism and Legal Doctrine’ in Ravis and Beruto, *International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence* (2005) at p.83 and Stewart, ‘Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict’ (2003) 85 *International Review of the Red Cross* 313 at p.332.

⁹³ *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 84.

⁹⁴ *Prosecutor v. Dorđević*, IT-05-87/1-T, Judgement, 23 February 2011. Cf. *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, 31 March 2003, para. 194; the Prosecution submits that reliance on *Prosecutor v. Tadić*, IT-94-1, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 68 was misplaced and the position of Judge Shahabuddeen, supported by *Dorđević* and substantial academic commentary, is to be preferred.

⁹⁵ *Prosecutor v. Dorđević*, IT-05-87/1-T, Judgement, 23 February 2011, para. 1579.

⁹⁶ *Prosecutor v. Dorđević*, IT-05-87/1-T, Judgement, 23 February 2011, paras. 1537-1578.

⁹⁷ *Prosecutor v. Dorđević*, IT-05-87/1-T, Judgement, 23 February 2011, paras. 1521, 1527, 1529-1530.

⁹⁸ *Prosecutor v. Dorđević*, IT-05-87/1-T, Judgement, 23 February 2011, para. 1580.

non-international armed conflict with the FNI and FRPI.⁹⁹ Additionally, and even if the FNI and FRPI are considered to be proxy forces of Uganda, the UPC was also engaged in a non-international armed conflict with the RCD-ML.¹⁰⁰ As such, Article 8(2)(e)(vii) is applicable, even if not exclusively, as the recruitment process was one of recruitment into the UPC generally and not for the purpose of exclusively fighting a specific hostile party.

4.1.8 Conclusion

59. The Prosecution submits that the arguments advanced above demonstrate that the relevant armed conflict for the specific purposes of this case, namely that between the UPC and the FNI and FRPI remained a non-international one during the time-period covered by the charges against the Accused. Accordingly, the legal provision applicable to the conduct attributed to the Accused should remain the one originally charged by the Prosecution: Article 8(2)(e)(vii).¹⁰¹
60. There are no outstanding procedural steps that the Chamber need undertake prior to modifying the legal characterisation adopted by the Pre-Trial Chamber for the purposes of its confirmation decision: the Chamber has already provided the required notice under Regulation 55(2), early on in the proceedings.¹⁰² In fact, the trial has proceeded on the basis and in the understanding that the original legal characterisation charged by the Prosecution remained a live issue and that the Chamber could decide to revert to it in its final determination on the guilt or innocence of the Accused. The Chamber need only analyse the relevant evidence and the factual and legal propositions advanced by the parties. If the Chamber is

⁹⁹ See above, section 4.1.1.

¹⁰⁰ See above, section 4.1.1.

¹⁰¹ Should the Trial Chamber disagree with the Prosecution's conclusion and characterise the conflict as an international armed conflict, the charges remain valid under Article 8(2)(b)(xxvi) as the UPC constitutes a 'national armed group'. See Section 7.3 above.

¹⁰² ICC-01/04-01/06-1084, paras. 48-50.

satisfied that the evidence has established the existence of a non-international armed conflict at the relevant time, and that the Accused is criminally responsible of the conduct attributed to him, it may properly enter a conviction under Article 8(2)(e)(vii).

5. Legal Criteria: the theory of co-perpetration

5.1 Elements of co-perpetration

61. In the present case, the Prosecution pleads that the Accused exercised functional control over the crime as a result of the role assigned to him in the implementation of the common plan and that he made an essential contribution to the implementation of the common plan. In the view of the Prosecution, in a judicial determination of the individual criminal responsibility of an accused, the primary focus is the accused person and his or her role in the crime.¹⁰³ The Accused's individual criminal responsibility under the theory of co-perpetration is comprised of the following elements:

5.1.1 Objective Elements

62. The concept of co-perpetration is based on a division of tasks between the co-perpetrators with a view to implementing an agreement or common plan. Co-perpetration is characterised by the exercise of functional control over the implementation of the common plan by reason of the central task or role assigned to each co-perpetrator.¹⁰⁴

a. Existence of a common plan

63. The Prosecution must establish the existence of a common plan between two or more persons, including the accused, which amounts to or involves the

¹⁰³ The role of other co-perpetrators is relevant only to the extent that it is instrumental to determine the role of the accused. Hence, there is no need to establish the substantial nature of the contribution of other co-perpetrators who do not stand accused or the specifics of their *mens rea*, once it has been established that they entered into a common plan with the accused.

¹⁰⁴ Claus Roxin, *Täterschaft und Tatherrschaft*, Berlin, New York, Walter de Gruyter, Seventh Edition, 2000 ("Roxin"), pp.280, 282. See also Confirmation Decision, paras. 338, 341. *Stakić* Trial Judgement, para. 440.

commission of a crime.¹⁰⁵ It is not necessary that the accused personally enter into the common plan with all other co-perpetrators, as long as they are all part of the common plan.¹⁰⁶ The common plan need not be explicit and can be inferred from the subsequent concerted action of the co-perpetrators.¹⁰⁷

b. The Accused's role in the common plan

64. The Prosecution must establish that the Accused, by way of the function or role assigned to him, could exercise control over the crime. This means that, when conceiving the common plan, the Accused must have been assigned a role that was central to the implementation of the common plan, in the sense that the common plan would not have been carried out in the manner agreed upon without that role being performed. This concept has been labelled as “functional control”.¹⁰⁸
65. Mirroring the requirement for a central role to be assigned to the accused, responsibility under the theory of co-perpetration will clearly be made out where an accused has actually made an essential contribution to the implementation of the common plan.¹⁰⁹ In addition, the theory of co-perpetration also applies to cases where, although the *role* assigned to the accused *ex ante* was central to the implementation of the plan, it appears in retrospect that his or her *contribution* was substantial though not *essential*.¹¹⁰

¹⁰⁵ In this regard, the common plan need not be specifically directed at the commission of a crime, but must at least involve the commission of a crime, i.e. it “must include an element of criminality”: Confirmation Decision, para. 344. See also *Stakić* Trial Judgement, para. 440; *Gacumbitsi* Separate Opinion Schomburg, para. 17.

¹⁰⁶ Cramer/Heine in Schoenke-Schroeder, *Strafgesetzbuch Kommentar*, 26th Edition, 2001, Art. 25, Margin no. 71.

¹⁰⁷ Confirmation Decision, para. 345.

¹⁰⁸ Roxin, p.280: “funktionelle Tatherrschaft”.

¹⁰⁹ A contribution is essential where the accused could at any time have frustrated the commission of the crime by not performing his or her task: Roxin, at p.280 defines as “*unerlässlich*” (*essential*), a contribution which would qualify as a *conditio sine qua non* for the commission of the crime. The *Stakić* Trial Judgement (para. 490) as well as the *Gacumbitsi* Separate Opinion Schomburg (para. 17) appear to limit its consideration to this scenario.

¹¹⁰ Roxin, pp.282-283. According to Roxin, in many instance it is not possible to determine after the commission of a crime whether the contribution of the accused was essential. This would often be

to the implementation of the common plan.¹¹¹ A contribution is “substantial” where the crime might still have occurred absent the contribution of the Accused, but not without great difficulty.¹¹² Thus, functional control remains a requirement for this second scenario, as it is determined *ex ante* and on the basis of the role assigned to the Accused and not on the basis of the actual contribution.

66. It is not necessary that the Accused physically perpetrated any of the elements of the crimes or that he was present at the crime scene.¹¹³ It is also not necessary to establish that the objective elements of an offence have been personally perpetrated by the co-perpetrators, i.e. those having functional control over the crime, as long as it is established that “the objective elements of an offence are carried out by a plurality of persons acting within the framework of a common plan”.¹¹⁴

an abstract and theoretical assessment. See BHGSt 39, 1 – Mauerschützen I, (section III, 1(b), para. 72): <http://www.servat.unibe.ch/dfr/bs039001.html>. In this case, the German Supreme Court examined a case where two former boarder guards of the German Democratic Republic acted pursuant to a common plan to hinder the victim from crossing the boarder and to kill him if that was necessary to achieve the purpose. The accused intentionally shot the victim only in the knee, while the other co-perpetrator shot the victim in the head, causing the death of the victim. The accused was convicted for the killing as a co-perpetrator, although he did not kill the victim himself. The Court found that both co-perpetrators signalled each other through their respective behaviour that they were willing to cause the death of the victim.

¹¹¹ See Roxin pp.280, 282-285: Substantial (*wesentlich*), as opposed to essential (*unentbehrlich* or *unerlässlich*).

The ICTY jurisprudence, based on a more limited description of its modes of liability, covers a range of situations where persons have worked together to achieve the commission of a crimes under the rubric of Joint Criminal Enterprise. Some of these discussions may usefully inform the interpretation of co-perpetration, as it is intended by the drafters of the Rome Statute (see *Gerhard Werle*, Individual Criminal Responsibility in Article 25 ICC Statute, J.I.C.L. 5(2007), p.961). In particular the discussion on the significant (but not necessary or substantial) nature of the contribution of a member of the joint criminal enterprise by the ICTY Appeals Chamber may prove helpful in applying the concept of co-perpetration enshrined in Article 25(3)(a) of the Rome Statute (see *Prosecutor v. Brđanin*, IT.99-36-A, Judgement, 3 April 2007, para. 430).

¹¹² See Tröndle/Fischer, 54th ed, Art 25, para. 12a; Leipziger Kommentar, Vol. I, 12th ed., Art 25, para. 188.

¹¹³ Confirmation Decision, para. 330. See also Roxin p.280; ICTY Jurisprudence on common purpose liability (joint criminal enterprise). See in particular *Tadić* Appeals Judgement, para. 196.

¹¹⁴ Confirmation Decision, para. 347. This scenario is broader than indirect co-perpetration or indirect perpetration under Article 25(3)(a), which is limited to instances where the material

5.1.2 Subjective Elements

67. Article 30 provides that individual criminal responsibility only arises if the material elements of a crime are committed with intent and knowledge. Article 30 further allows for specific subjective requirements in relation to particular crimes, which applies for the crimes charged in this case.¹¹⁵ The subjective elements for co-perpetration in the context of the crimes charged in this case are as follows:

a. The Accused acted with intent

68. The Prosecution must prove that the Accused meant to engage in the relevant conduct,¹¹⁶ and meant to bring about the objective elements of the crime or was aware that they would occur in the ordinary course of events.¹¹⁷

b. The Accused had the requisite knowledge

69. The Prosecution must prove that the Accused was aware of the existence of circumstances relevant to the underlying crimes, and that, in the ordinary course of events, his conduct would bring about the objective elements of the crime.¹¹⁸

elements are carried out by persons who are used by the principal as a mere instrument to carry out the crime and the principal controls the will of the physical perpetrators (see *Katanga* confirmation decision, paras. 495-497). In this context a helpful analogy may be drawn from the jurisprudence of the ICTY in relation to joint criminal enterprise (see in particular, *Brđanin* Appeals Judgement, paras. 418 and 430, taking the approach that “where the person who carried out the *actus reus* of the crime is not a member of the JCE”, it is sufficient to establish “that the crime can be imputed to at least one member of the [JCE] and that this member - when using the principal perpetrator – acted in accordance with the common plan”).

¹¹⁵ Such exceptions must be provided for in the Elements of Crimes. Article 30(1): “Unless otherwise provided”. See also Elements of Crimes, General introduction, para. 2 and General Introduction, para. 7 (second point).

¹¹⁶ See Article 30(2)(a).

¹¹⁷ See Article 30(2)(b). See also Confirmation Decision, paras. 351-352. The Prosecution notes that the Pre-Trial Chamber interpreted the requirement of intent to encompass *dolus eventualis* (see Confirmation Decision, paras. 352-354).

¹¹⁸ Article 30(3).

70. The relevant circumstances for co-perpetration require the Prosecution to establish that a) the Accused was aware that the common plan amounted to or involved the commission of a crime;¹¹⁹ and b) the Accused was aware of the factual circumstances that enabled him to exercise functional control over the crime.¹²⁰
71. Regarding the crimes charged in this case, the Elements of Crimes provide for specific mental elements which differ from the above standard mental elements.¹²¹
72. With respect to the age of the persons conscripted, enlisted or used to participate actively in hostilities, the Elements prescribe that the Prosecution only needs to establish that the Accused “should have known” that such persons were under the age of 15 years.¹²² However in the present case the Prosecution has charged the Accused under the theory of co-perpetration, and therefore in light of the general requirements for co-perpetration above,¹²³ this special subjective element may not be applicable in this case.¹²⁴

¹¹⁹ See Confirmation Decision, paras. 361-365. In the view of the Prosecution, there is no need to establish, in every case, mutual awareness and acceptance by *all* co-perpetrators (including uncharged co-perpetrators) that the Common Plan amounts to or involves the commission of a crime. The elements of the crimes must be assessed from the perspective of the accused.

¹²⁰ Confirmation Decision, paras. 366-367. Contrary to the finding of the Pre-Trial Chamber, the Prosecution is of the view that it is not necessary to establish the accused’s awareness of the factual circumstances that enable him or her to *jointly* control the crime. Proof of the accused’s awareness is limited to the circumstances surrounding his or her own possibility to exercise functional control over the crime.

¹²¹ These specific mental elements apply to the crimes both under Articles 8(2)(e)(vii) and 8(2)(b)(xxvi).

¹²² See also Article 8(2)(b)(xxvi), third element.

¹²³ See the requirements of a common plan and of awareness by the accused that the plan involves the commission of a crime and that the implementation of the plan will bring about the objective elements of the crime in the ordinary course of events. In this case, the Prosecution argues that the Accused *knew* that children under the age of 15 would be conscripted, enlisted or used to participate actively in hostilities as a result of the implementation of the Common Plan.

¹²⁴ See Confirmation Decision, para. 365.

73. With respect to the last two elements of these crimes,¹²⁵ a) there is no requirement for a legal evaluation by the Accused as to the existence of an armed conflict or its character as international or non-international; b) nor is there a requirement for awareness by the Accused of the facts that established the character of the conflict as international or non-international; and c) the Prosecution is only required to prove that the Accused was aware of the factual circumstances that established the existence of an armed conflict.¹²⁶

6. The evidence is sufficient to establish the existence of a common plan

74. There is direct evidence that the Accused and co-perpetrators agreed upon a plan and acted together since 2000, with greater intensity after April 2002, to build an army of predominantly young persons; to create a political movement; using the political and military elements, to take control of Bunia and to assume authority in Ituri with the Accused at the helm and the co-perpetrators in key positions. As a result of the implementation of the common plan, the co-perpetrators conscripted, enlisted and used children under the age of 15 to participate actively in hostilities.¹²⁷

75. The common plan can also be inferred from the evidence that by September 2002 and through to 13 August 2003, the concerted actions of the co-perpetrators resulted in the realisation of these common objectives.

¹²⁵ Article 8(2)(e)(vii), fourth element: "The conduct took place in the context of and was associated with an armed conflict not of an international character". Article 8(2)(e)(vii), fifth element: "The perpetrator was aware of factual circumstances that established the existence of an armed conflict".

¹²⁶ Elements of Crimes, Article 8 War crimes, Introduction. See Article 8(2)(e)(vii), fifth element; Article 8(2)(b)(xxvi), fifth element.

¹²⁷ W-0012 testified that "When we talk about the UPC, automatically everybody recognises that we're talking about the Hemas. Now, of course, on paper there have been many names of people who had responsibilities in various areas, but most of the people that led this movement belonged to the Hema ethnic group." (T.168, p.46, lines 21-25). W-0014 stated that "in concrete terms the fact was that the UPC was essentially the Gegere and Hemas in the beginning, and then later only Gegeres." (T.181, p.27, lines 23-25).

76. Witnesses and documents provide the following evidence of the common plan:

- the co-perpetrators had a political and military alliance since at least mid-2000, centred around the defence of the Hema community;
- the co-perpetrators established training camps, secured weapons, and recruited, trained and used young persons to participate actively in hostilities, including persons under the age of 15;
- between 2 and 9 August 2002, the co-perpetrators used their army to attack and oust the ruling political-military movement in Bunia;
- in September 2002, the co-perpetrators installed themselves in power and assumed control of Bunia and Ituri. The Accused was President and Commander-in-Chief and his co-perpetrators were appointed to the most senior positions in the government and the military; and
- large-scale recruitment of youth into the FPLC continued after September 2002, which included the recruitment and use of children under the age of 15.

6.1 The co-perpetrators

77. The co-perpetrators, acting in concert with the Accused, included Floribert Kisembo, Bosco Ntaganda, Chief Kahwa Panga Mandro, Rafiki Saba Aimable, and other senior FPLC commanders, including Tchaligonza, Bagonza and Kasangaki.¹²⁸

¹²⁸ T.168, p.46, lines 1-18.

78. The Accused, as President and Commander-in-Chief,¹²⁹ coordinated and had the final say on the group's activities.¹³⁰
79. Chief Kahwa, the customary chief of the Mandro *collectivité*,¹³¹ used his position and influence to recruit young persons for the army, to secure weapons from Rwanda,¹³² to establish a training camp near Mandro, and to oversee training at the Mandro camp.¹³³
80. Floribert Kisembo, Bosco Ntaganda and other senior FPLC commanders trained recruits and headed military operations, including the takeover of Bunia in August 2002. Kisembo was UPC/FPLC Chief of Staff.¹³⁴ He was under the Accused's authority and reported to him.¹³⁵
81. Bosco was the Deputy Chief of Staff in charge of operations.¹³⁶ He was the most senior commander responsible for operations.¹³⁷ He reported directly to the Accused¹³⁸ and he and Kisembo regularly met the Accused to discuss military matters.¹³⁹
82. Rafiki was one of the co-founders of the UPC¹⁴⁰ and he became one of the main figures of the FPLC main staff. He was "in charge of security for

¹²⁹ EVD-OTP-00697; EVD-OTP-00734; T.189, p.4, lines 23-24.

¹³⁰ T.168, p.24, lines 12-19, p.25, line 14 to p.26, line 1; T.175, p.22, line 17 to p.23, line 4; T.179, p.82, line 16 to p.83, line 3.

¹³¹ T.114, p.42, lines 3-12.

¹³² T.168, pp.19-25; T.179, p.46, line 2 to p.47, line 3.

¹³³ T.114, p.43, line 13 to p.44, line 3, p.57, lines 12-16; T.113, p.37, lines 7-10, p.38, line 22 to p.40, line 13, p.53, line 16 to p.55, line 13, p.41, lines 5-16, p.56, line 7 to p.58, line 18.

¹³⁴ T.113, p.31, line 24 to p.32, line 3; T.125, p.27, lines 8-9; T.154, p.21-23; T.175, p.17, lines 14-16; T.188, p.95, lines 6-8.

¹³⁵ T.175, p.20, lines 3-4, p.22, line 3 to p.23, line 4, p.33, lines 7-14; T.178, p.48, lines 1-2, p.64, lines 1-13; T.154, p.24, lines 14-19.

¹³⁶ T.175, p.32, line 22 to p.33, line 8, p.81, lines 1-3; T.190, p.8, lines 4-22.

¹³⁷ T.113, p.31, line 24 to p.32, line 3, p.33, lines 4-5; T.154, p.23, line 24 to p.24, line 13; T.189, p.5, lines 17-19;.

¹³⁸ T.189, p.6, lines 2-15, p.64, lines 1-13.

¹³⁹ T.117, p.21, line 22 to p.22, line 8; T.122, p.41, lines 13-21; T.175, p.33, lines 7-14; T.189, p.85, lines 6-17;.

¹⁴⁰ T.174, p.29, lines 20-25; T.343, p.37, lines 19-20. See EVD-OTP-00726.

civilians and also in charge of the security for Lubanga”.¹⁴¹ Rafiki was responsible for the personal security of the Accused,¹⁴² with whom he was “very close”.¹⁴³ He accompanied the Accused during official visits in Ituri and abroad.¹⁴⁴ Witness DRC-OTP-WWWW-0055 (W-0055), [REDACTED],¹⁴⁵ explained that [REDACTED] met the Accused in the company of his “friends” Bosco and Rafiki.¹⁴⁶ Witness DRC-OTP-WWWW-0046 (W-0046), a MONUC child protection officer in Ituri during the period of the charges,¹⁴⁷ testified that during her meetings with the armed groups, members of the UPC attended together with FPLC commanders “like Rafiki”.¹⁴⁸

i. The co-perpetrators’ political and military alliance

83. The co-perpetrators formed a political and military alliance by September 2000. At this time, some of the co-perpetrators had revolted from the armed wing of the existing ruling government, the RCD-Kis. This breakaway group included Bosco Ntaganda,¹⁴⁹ Floribert Kisembo, Tchaligonza, Kasangaki and Bagonza.¹⁵⁰ Witness DRC-OTP-WWWW-0012 (W-0012) described the Accused as their spokesman.¹⁵¹ Defence witness DRC-D01-WWWW-0019 (DW-0019) confirmed that the Accused was part of a delegation sent to meet the Ugandan authorities to dissuade Uganda from attacking the breakaway group.¹⁵²

¹⁴¹ T.174, p.29, line 25 to p.30, line 1.

¹⁴² T.199, p.70, lines 6-7.

¹⁴³ T.175, p.44, lines 1-5.

¹⁴⁴ See the following videos where the Accused appears in the company of Rafiki: EVD-OTP-00570, EVD-OTP-00571, EVD-OTP-00576, EVD-OTP-00578 and EVD-OTP-00579.

¹⁴⁵ T.174, p.48, lines 3 -5.

¹⁴⁶ T.175, p.8, line 22 to p.9, line 5.

¹⁴⁷ T.205, pp.22-25.

¹⁴⁸ See EVD-OTP-00491, p.65, line 16 to p.66, line 1.

¹⁴⁹ T.168, p.21, lines 11-17.

¹⁵⁰ T.168, p.21, lines 2-25; T.343, p.4, lines 5-11, p.6, lines 9-10.

¹⁵¹ T.168, p.16, line 22 to p.17, line 14, p.19, lines 15-17.

¹⁵² T.343, p.6, line 14 to p.7, line 14. See also T.168, p.17, lines 9-13, p.19, lines 15-17. See ‘Déclaration des parents des militaires de l’armée du peuple congolais (APC) retranchés dans la brousse de l’Ituri’, 27 July 2000 (letter by the Accused and others regarding the mutineers): EVD-OTP-00669.

84. Chief Kahwa arranged for military training in Uganda.¹⁵³ Bosco Ntaganda, Floribert Kisembo, Tchaligonza, Kasangaki and Bagonza attended the military training in Uganda.¹⁵⁴
85. The Accused was involved in recruiting youth for this training and he was associated with the group sent to Uganda.¹⁵⁵ Witness DRC-OTP-WWWW-0116 (W-0116) was told that this militia was “managed by Mr. Thomas” to “set up an army”.¹⁵⁶ Children under the age of 15, predominantly Hema, were sent to be trained.¹⁵⁷

ii. Creation of the UPC

86. In parallel with the recruitment and training for the militia, on 15 September 2000 the Accused and Rafiki, with others, signed the constituting documents for the UPC, the political and military group into which these soldiers would be incorporated and which would eventually take control of Ituri.¹⁵⁸
87. The Accused was the President of the UPC; in his *curriculum vitae*, he asserts that he has been the UPC President since its creation in 2000.¹⁵⁹
88. The UPC statutes refer to the need for an army, revealing its intention to use military force to achieve its goals.¹⁶⁰ W-0012 described the UPC as a *military* organisation from 2000 until 2002 rather than as a political one.¹⁶¹ The UPC’s origins were linked to the military men who rebelled in 2000 and who

¹⁵³ T.168, p.19, lines 9-14; T.343, p.13, lines 7-16.

¹⁵⁴ T.168, p.19, lines 11-12, p.33, lines 23-25; T.340, p.55, lines 19-23.

¹⁵⁵ T.203, p.43, lines 10-13, p.44, lines 6-8; T.209, p.44, lines 19-23.

¹⁵⁶ T.203, p.43, line 5 to p.44, line 8.

¹⁵⁷ T.203, p.32, line 9; T.170, p.47, lines 5-7. The age range of the children targeted by UPC/FPLC recruitment campaigns was 9-16 years: T.199, p.7, lines 21 to p.8, line 3.

¹⁵⁸ EVD-OTP-00726. See also EVD-OTP-00661; EVD-OTP-00715; T.125, p.14, line 10 to p.15, line 18. W-0041 recalled that it was in July 2000 when the Accused brought together a group of people who were to become the signatories to the founding document, at the same time as the mutiny against Wamba.

¹⁵⁹ EVD-OTP-00621, p.0379.

¹⁶⁰ EVD-OTP-00715; EVD-OTP-00661. See also EVD-OTP-00662, p.1, para.4, pp.3-4: “UPC Programme”.

¹⁶¹ T.168, p.14, lines 23-24, p.17, lines 1-10, p.19, lines 3-23.

organised to defend the Hema community.¹⁶² The witness explained that “as an ethnical organisation, soldiers at the time were valued more because they were able to defend the population”.¹⁶³

89. The Accused was appointed Minister of Defence in the RCD-K/ML in 2001,¹⁶⁴ after the leader of the RCD-Kis was dislodged by the same breakaway group who had revolted in the summer of 2000, including Bosco, Kisembo and others.¹⁶⁵ The appointment reflected his influence and lead role within the UPC. DW-0019 testified that the Accused represented “a significant force”¹⁶⁶ and acknowledged that this important position was given to him because Mbusa Nyamwisi, President of the RCD-K/ML, needed the Accused *and the UPC* as an ally.¹⁶⁷

90. As Minister of Defence, the Accused carried out general deployment of commanders of major units in the APC army.¹⁶⁸ The Accused appointed Bosco Ntaganda as assistant commander of operations.¹⁶⁹

iii. April-August 2002: the co-perpetrators prepare to assume power in Ituri through military and political means

91. By 2002, a rivalry and rift had developed between the Accused, backed by his loyal base of Hema soldiers and supporters, and President Nyamwisi of the RCD-K/ML.¹⁷⁰

92. On 17 April 2002, the Accused and others issued a declaration demanding the departure of Mr Nyamwisi and Mr Lompondo from Ituri.¹⁷¹ Of the 13 persons who signed the declaration, at least 11 held positions within the

¹⁶² T.168, p.19, lines 3-5.

¹⁶³ T.168, p.25, lines 19-21.

¹⁶⁴ EVD-OTP-00621; T.124, p.78, lines 11-14; T.168, p.27, lines 9-24.

¹⁶⁵ T.168, p.20, lines 11-14, p.34, lines 2-14, p.35, lines 16-19. EVD-OTP-00663; T.344, p.2, lines 15-18.

¹⁶⁶ T.343, p.44, lines 12-13.

¹⁶⁷ T.343, p.44, lines 5-7. T.343, p.46, lines 2-15.

¹⁶⁸ T.344, p.8, lines 11-18.

¹⁶⁹ T.344, p.8, lines 19-24.

¹⁷⁰ T.124, p.80, line 20 to p.81, line 3. See also T.343, p.50, lines 12-18, p.51, line 8.

¹⁷¹ EVD-D01-00050; T.343, p.69, line 12 to p.70, line 3.

UPC.¹⁷² DW-0019 thus described the declaration as “a political declaration of *the UPC*” and explained that it related to “the split between the two political organisations, namely *the UPC* on the side and RCD-K/ML on the other hand.”¹⁷³ DW-0019 described the significance of the declaration as a “landmark event *for the UPC*”¹⁷⁴ that was referred to in all subsequent UPC decrees.¹⁷⁵

93. Within days of the UPC declaration withdrawing from the RCD-K/ML,¹⁷⁶ Hema soldiers in the APC revolted against President Nyamwisi.¹⁷⁷ The very same persons who had orchestrated the first mutiny within the APC in 2000 (namely, Kisembo, Bosco, Tchaligonza, Kasangaki and Bagonza) acted together again to organise this second revolt against President Nyamwisi and the RCD-K/ML in 2002.¹⁷⁸
94. Bunia was divided into two parts at this time, with the mutineers on one side and the troops loyal to President Nyamwisi on the other.¹⁷⁹ DW-0019 agreed with the division of Bunia along these lines but rejected the suggestion that the mutineers were in any way connected to or loyal to the Accused,¹⁸⁰ a position contradicted by other evidence. A draft document entitled “Histoire de l’Union des Patriotes Congolais (U.P.C.)”,¹⁸¹ bearing the Accused’s handwritten comments,¹⁸² explains that in April 2002 Bunia was

¹⁷² T.343, pp.57-62.

¹⁷³ T.344, p.4, lines 15-18 [emphasis added].

¹⁷⁴ T.343, p.66, lines 8-9 [emphasis added].

¹⁷⁵ T.343, p.63, lines 6-14.

¹⁷⁶ T.344, p.4, lines 13-18.

¹⁷⁷ T.168, p.29, line 6 to p.30, line 17; T.343, p.49, lines 14-24.

¹⁷⁸ T.343, p.76, lines 13-20.

¹⁷⁹ T.343, p.82, lines 11-20, p.84, lines 4-17.

¹⁸⁰ T.340, p.47, lines 8-20, p.59, lines 11-23.

¹⁸¹ EVD-OTP-00672.

¹⁸² T.343, pp.78-79.

“carved up into two zones of influence, one held by partisans of Thomas Lubanga and the other by men of Governor Mulondo”.¹⁸³

95. The document also stated that on 17 April 2002, the UPC publicised its political-military status by acknowledging that part of the APC army (the mutineers) were incorporated into the Accused’s ranks, and that these soldiers constituted the nucleus of the armed unit of the UPC:

On the 17th of April, through a political statement, the UPC withdrew its trust from Mbusa, and the UPC turned itself into a military political movement. This is because part of the army joined Lubanga’s ranks and created the nucleus of the armed unit of the UPC.¹⁸⁴

96. Towards the end of April 2002, the Accused presented himself as the head of his group¹⁸⁵ in meetings in Kasese, Uganda. The Accused’s delegation was composed of Bosco Ntaganda, Floribert Kisembo and persons who had signed the 17 April 2002 declaration or were otherwise part of the UPC.¹⁸⁶
97. In June 2002, the Accused and his group attended a meeting in Kampala, Uganda.¹⁸⁷ Once again, the Accused led the delegation,¹⁸⁸ which included Chief Kahwa, Richard Lonema, Jean-Pascal Ndukute, Etienne Nembe, Nestor Bamaraki, Mafuta Savo¹⁸⁹ and Dieudonné Mbuna, all of whom were associated with or were part of the UPC. In fact, DW-0019 referred to the group as “the UPC delegation”.¹⁹⁰ Months later, in a letter to the Kinshasa government, the Accused referred to the detention of his group in the summer of 2002 as the detention *of the UPC/RP delegation*.¹⁹¹

¹⁸³ T.343, p.81, line 8 to p.82, line 7 (as interpreted by the Court interpreters).

¹⁸⁴ T.343, p.81, line 8 to p.82, line 7 (as interpreted by the Court interpreters).

¹⁸⁵ T.124, p.80, line 18, p.81, lines 13-15.

¹⁸⁶ T.125, p.2, lines 20-24.

¹⁸⁷ T.125, p.4, lines 18-19.

¹⁸⁸ T.125, p.5, line 3-12.

¹⁸⁹ T.130, p.91, line 25 to p.92, line 7; T.131, p.18, lines 12-23; T.153, p.84, lines 5-19; T.181, p.24, lines 15-23, p.25, lines 3-25, p.26 to p.27, line 4; T.182, p.12, lines 24-25, p.13, lines 1-16, p.15, lines 14-15.

¹⁹⁰ T.344, p.16, lines 17-18, p.17, line 1.

¹⁹¹ EVD-OTP-00664.

98. W-0014, [REDACTED], stated that “it was always Thomas Lubanga who took the decision...who had the final word on everything while he was there. If he said no, then it would be no; and if he gave his approval, then what he approved had to be carried out”.¹⁹² By leading his delegations in meetings in Kasese and Kampala, Uganda, the Accused was establishing himself externally as the leader of the UPC.
99. While in Kampala, the Accused carried out internal leadership functions. For example, he assigned military and political tasks to members of his delegation in furtherance of the plan to oust President Nyamwisi and promote the UPC as the governing power.¹⁹³ W-0014 stated that “it was the UPC that was leading the fight”.¹⁹⁴
100. The Accused also referred to the need to use force to oust President Nyamwisi. W-0014 explained that “the only way to deal with soldiers is to fight with other military soldiers. So right from the start Thomas Lubanga [...] referred to the fact that there needed to be an organised army in order to fight against Mbusa’s military resistance”.¹⁹⁵
101. On 13 June 2002, the Accused and other members of his delegation were detained and transferred to Kinshasa.
102. According to W-0014 [REDACTED], once the Accused learned that he and others would be detained in Kinshasa, he assigned tasks to the few persons who could leave.¹⁹⁶ He sent Chief Kahwa and Beiza to Rwanda for weapons, and Richard Lonema and Dieudonné Mbuna to Bunia¹⁹⁷ to raise awareness and mobilise the population.¹⁹⁸ The Accused appointed Richard Lonema to

¹⁹² T.184, p.43, lines 16-19.

¹⁹³ T.179, p.39, lines 8-25, p.41, lines 12, lines 1-16, p.43, lines 5-8, p.45, lines 8-13.

¹⁹⁴ T.179, p.43, lines 12-25, p.44, lines 1-10.

¹⁹⁵ T.179, p.45, lines 16-21.

¹⁹⁶ T.179, p.78, lines 6-7.

¹⁹⁷ T.344, p.17, lines 8-11.

¹⁹⁸ T.179, p.78, line 7 to p.79, line 5.

represent him in Bunia during his absence.¹⁹⁹ W-0014 stated that between July and August 2002 Mr Lonema - in his capacity as interim President in Bunia - supervised the activities of the army, namely recruitment, military rations and equipment.²⁰⁰

103. In early July 2002, the Accused was transferred from the DEMIAP²⁰¹ to the Grand Hotel in Kinshasa.²⁰² He remained in Kinshasa until the end of August 2002 but was able to communicate with those in Bunia. W-0014 testified that Richard Lonema, interim President in Bunia during the Accused's detention, told him before 9 August 2002 and once after, that he had been in contact with the Accused.²⁰³ On [REDACTED] August 2002, Richard Lonema told W-0014 that he had spoken with the Accused the day before.²⁰⁴ This evidence is corroborated by witness DRC-OTP-WWWW-0041 (W-0041), who was with the Accused in Kinshasa and who learned about the Bunia takeover from the Accused, confirming that "there had necessarily been communication with Bunia and that is how [the Accused] would have learnt at that time that Bunia had been occupied by the RCD/ML dissidents".²⁰⁵

104. When the Accused was moved to the Grand Hotel, he gave W-0041's group a phone so that they could stay in touch with him.²⁰⁶ W-0014 confirmed that without cell phone network in Bunia at the time the only means of communication was by satellite phone (Iridium or Thuraya) and that UPC

¹⁹⁹ T.125, p.24, lines 12-17, p.25, lines 3-18; T.179, p.67, lines 23-25. W-0031 described Lonema and Litsha as "a managing group" at the time of the takeover of Bunia in August 2002 (T.199, p.18, lines 24-25).

²⁰⁰ T.179, p.82, line 2 to p.83, line 3. W-0031 testified that Lonema "was acting as interim president in August when they took power" (T.199, p.41, lines 4-5).

²⁰¹ T.126, p.9, lines 1-8.

²⁰² T.344, p.19, lines 10-17.

²⁰³ T.179, p.75, lines 20-25, p.76, lines 1-25, p.77, lines 1-9.

²⁰⁴ T.181, p.24, lines 2-6.

²⁰⁵ T.125, p.14, lines 16-18, p.12, lines 1-3.

²⁰⁶ T.125, p.10, lines 18-19, p.11, lines 12-21; T.179, p.80, lines 6-20.

members in Bunia would go to a communications centre to use these satellite phones.²⁰⁷

105. The co-perpetrators in Bunia in the summer of 2002 each contributed to the implementation of the common plan by establishing training camps, recruiting young persons including children under the age of 15, securing weapons and uniforms for the recruits and leading the operation to oust the RCD-K/ML and take control of Bunia in the name of the Accused and the UPC/FPLC.
106. The UPC/FPLC needed training camps to prepare recruits for combat. W-0038 testified that UPC training began late in 2001, first at a provisional site near Katoto; in 2002 the Mandro training camp was established as a proper training site and run by Chief Kahwa.²⁰⁸
107. Between May and August 2002, large-scale recruitment, voluntary and forcible, and the training of recruits took place in advance of the August 2002 takeover of Bunia.²⁰⁹ Chief Kahwa and Bosco Ntaganda assembled villagers throughout Ituri and warned that if the youth did not join the army, the villages would be unprotected.²¹⁰ Village traders lent vehicles to commanders to transport young recruits,²¹¹ including some under the age of 15,²¹² to the Mandro camp for training.²¹³
108. Defence witness DRC-D01-WWWW-0006 (DW-0006), a Hema, ²¹⁴ acknowledged that he “joined the UPC in 2002, towards the end of May” ²¹⁵

²⁰⁷ T.184, p.51, lines 2-9. DW-0019 confirmed that there was satellite phone coverage and “people who could afford it ... could communicate with the entire world if they wanted.” T.344, p.20, line 22 to p.21, line 11.

²⁰⁸ T.114, p.42, line 19 to p.43, line 8.

²⁰⁹ W-0116 testified that after May 2002, the recruitment of children continued “because the UPC was striving to consolidate its position as a strong political movement in the Ituri region [...] there was a lot of military confrontation.” (T.203, p.96, lines 13-20).

²¹⁰ T.113, p.39, lines 3-18.

²¹¹ T.113, p.39, lines 21-23; T.181, p.14, lines 23-25, p.15, lines 1-20.

²¹² T.113, p.40, lines 7-10.

²¹³ T.113, p.39, lines 21-23.

²¹⁴ T.254, p.78, lines 10-11.

because “our tribe was being persecuted” and “we had to defend ourselves [...] that is why we had to join a military group”.²¹⁶ He was trained at Mandro.²¹⁷ Defence witness DRC-D01-WWWW-0037 (DW-0037) similarly testified that he “joined a group, a group that was being organised in Mandro to ensure the defence or the protection of the Hema community”; for that purpose Chief Kahwa had set up the training centre in Mandro that Commander Bosco visited.²¹⁸ DW-0037 testified that he joined the FPLC under the command of Bosco “in the middle or the end of June 2002”.²¹⁹ DW-0037 stated that “everyone” went to the Mandro training centre as it “was a time when the war against the Hemas targeted the entire community, hence everyone came to join the group”.²²⁰

109. Witness DRC-OTP-WWWW-0017 (W-0017) testified that he joined the UPC in or about early August 2002, just before “the UPC” took over Bunia²²¹ W-0017 had first belonged to a village self-defence group in [REDACTED] but then he was incorporated into the UPC.²²²
110. W-0046 received information in the course of her work about Hema community recruitment campaigns in March and April 2002 in Boga and Marabo and in July 2002 in Bunia.²²³ W-0046 identified prominent Hema or UPC persons who mobilised the Hema community to join the UPC army.²²⁴

²¹⁵ T.254, p.71, line 8.

²¹⁶ T.254, p.80, lines 15-18.

²¹⁷ T.254, p.71, lines 11-12.

²¹⁸ T.349, p.5, lines 9-18.

²¹⁹ T.349, p.21, lines 8-12.

²²⁰ T.349, p.7, lines 9-14.

²²¹ T.154, p.16, lines 18-24, p.32, lines 12-15.

²²² T.160, p.38, lines 18-21.

²²³ EVD-OTP-00489, p.51, line 13 to p.53, line 19.

²²⁴ EVD-OTP-00489, p.51, line 13 to p.53, line 19. The witness was told in the course of her work that in or about April 2002, certain Hema intellectuals close to the UPC launched a recruitment campaign, as a result of which many students from the *Institut Supérieur Pédagogique* in Mudzipela joined the UPC army (T.206, p.45, line 1 to p.47, line 9).

111. DW-0019 confirmed that in July 2002 the mutineers withdrew from Bunia to set up in Mandro, where military training was being given.²²⁵ He identified Kisembo, Bosco and Kahwa as being in Mandro.²²⁶ DW-0019 also confirmed that he heard at the time that new soldiers were being recruited and trained at Mandro.²²⁷
112. W-0014 testified that the UPC was headquartered in Bunia in the summer of 2002. He went to the UPC offices [REDACTED] during this period²²⁸ and personally saw military training being undertaken at the headquarters between [REDACTED] 2002.²²⁹ He [REDACTED] Richard Lonema, Daniel Litsha and Floribert Kisembo at the UPC headquarters.²³⁰ W-0014 explained that the recruits²³¹ were being trained in the name of the UPC and at its base in Bunia to fight the RCD-K/ML and the Lendu, which was the plan of the UPC.²³²

iv. The UPC takes over Bunia in August 2002

113. On 2 August 2002, fighting between the UPC and the RCD began, culminating on 9 August 2002 in the departure of the RCD from Bunia and the installation of the UPC.²³³
114. There is no doubt that the takeover of Bunia was done by and on behalf of the UPC.
115. Witness DRC-OTP-WWWW-0024 (W-0024) explained that when the UPC took control of Bunia, its soldiers were Hema forces that had been fighting

²²⁵ T.344, p.18, lines 5-9.

²²⁶ T.344, p.18, lines 10-15.

²²⁷ T.344, p.18, lines 16-18.

²²⁸ T.179, p.66, line 19 to p.67, line 11, p.74, lines 3-7, 21 to p.75, line 9.

²²⁹ T.179, p.62, lines 21-24, p.65, lines 13-20. See also EVD-OTP-00462 and EVD-OTP-00463.

²³⁰ T.179, p.67, line 23 to p.68, line 3.

²³¹ The recruits ranged from 5 years to 18 years: T.179, p.84, lines 1-2, p.85, lines 6-17.

²³² T.184, p.60, lines 8-13.

²³³ T.343, p.84, lines 21-24.

on behalf of the Hema community.²³⁴ Although DW-0037 stated that he was not aware of the arrangements made between the UPC party and “its military group that was in Mandro”, after the departure of Lompondo the group to which he belonged went to Bunia with Commander Bosco and became the military force of the UPC, known as the FPLC.²³⁵

116. On 11 August 2002, two days after the 9 August takeover of Bunia, W-0041, the Accused (in Kinshasa) and others signed a declaration pronouncing themselves as the group in charge of Ituri.
117. This declaration demonstrates that the group was aware of events in Bunia and that the armed units who fought to take over Bunia were working with the Accused. The declaration proclaimed that “our armed units, dissidents of the RCD/ML and aligned behind the ex-Minister of Defence of the RCD/ML, Thomas Lubanga, have taken effective control of Bunia and areas around it during the 9 August 2002 battle which ousted the RCD/ML”.²³⁶ W-0041 stated that these RCD/ML “dissidents” included the guards of the Minister of Defence (Bosco Ntaganda and Floribert Kisembo).²³⁷ The declaration announced that the RCD/ML no longer held power in Ituri and declared that the UPC/FPLC, led by the Accused, were in charge of the political, economic and military management of Ituri.
118. The 11 August 2002 declaration thus expressly aligned the Accused with the armed units who took control of Bunia and ousted the RCD/ML. The Accused could act in concert with these persons, notwithstanding his physical separation from them, because the plan had been rooted long before and each co-perpetrator knew what he had to accomplish in order to further the group’s common goals. The 11 August 2002 declaration set out

²³⁴ T.171, p.29, line 22 to p.30, line 13.

²³⁵ T.349, pp.3-20.

²³⁶ EVD-OTP-00663.

²³⁷ T.125, p.14, lines 1-2.

the common objectives of the Accused and his group: to take charge of Ituri following the ouster, by force, of the ruling military regime.²³⁸

119. A photograph of the Accused with Kitembo, Bosco, Rafiki, Kasangaki, and others²³⁹ appeared in the 1 August 2002 edition of a local newspaper.²⁴⁰ All persons in the photograph, except the Accused and Rafiki, were in military attire and carried weapons; Rafiki held a communication device. This photograph shows that the Accused was associated with these persons – and also signals their intention to use military force – before the August takeover of Bunia.
120. The common plan is also revealed in several documents drafted after the UPC came into power. These documents confirm that the movement was established in September 2000 as a political and military group to rid Ituri of the RCD (and its armed branch, the APC) and take political, military, and economic control of Ituri, which it eventually achieved.
121. First, in an official UPC written statement dated 22 October 2002 and signed by him,²⁴¹ the Accused set out the history of the UPC and stated that the UPC/RP “is a political-military movement that saw its inception since the 15th of September 2000”.²⁴² When confronted with this document as evidence of the political-military nature of the UPC since 2000, DW-0019 contended that the document was “an outline” and that “a minor error” had been introduced by the term “political-military movement”.²⁴³ This contention

²³⁸ EVD-D01-00050. See also, T.202, p.65, lines 7-13.

²³⁹ EVD-OTP-00529; T.343, p.14, lines 18-21; T.252, p.34, line 5 to p.36, line 1.

²⁴⁰ Newspaper article: EVD-OTP-00670 at p.15; T.343, p.21, lines 8-11.

²⁴¹ EVD-OTP-00665.

²⁴² T.342, p.25, line 23 to p.26, line 5 (as interpreted by the Court interpreters).

²⁴³ T.342, p.26, lines 6-10.

lacks any force given that the Accused himself signed the document, thereby attesting to the accuracy of its content.²⁴⁴

122. The same document, signed by the Accused, also stated that

UPC/RP has taken up arms against RCD/ML because of the mismanagement and the mediocrity that characterise it as well as the irrefutable and proven involvement of that body in a targeted and prepared massacre on a large scale that it knowingly organised in Ituri.²⁴⁵

123. DW-0019 agreed with the statements made in that passage.²⁴⁶

124. Second, another letter also dated 22 October 2002 and signed by Professor Dhetchuvi, an ally of the Accused in the UPC, stated that the “UPC/RP, under the direction of Mr. Thomas Lubanga, is a political and military movement that was created on the 15th of September 2000”.²⁴⁷

125. In the document, Professor Dhetchuvi added that:

From the 9th of August, 2002, UPC/RP has the political, administrative and military control of Ituri, which has a population of more than 5 million inhabitants, representing about 15 percent of the population of the Democratic Republic of the Congo. UPC/RP restored or ensured the safety of persons and of property.²⁴⁸

126. This document, stating that the UPC/RP has been in control of the political, military and administrative management of Ituri since 9 August 2002, contradicts DW-0019’s assertion that the UPC had no military objectives before September 2002.²⁴⁹ Also contradicting DW-0019’s position is the draft UPC document referred to above setting out the history of the UPC which states:

²⁴⁴ DW-0011 explained that once the Accused approved a draft, he would date, print and sign it himself (T.347, p.33, lines 9-22).

²⁴⁵ EVD-OTP-00665.

²⁴⁶ T.342, p.33, lines 13-21.

²⁴⁷ EVD-D01-00078; T.342, p.35, lines 1-4 (as interpreted by the Court interpreters).

²⁴⁸ T.342, p.37, lines 18-22 (as interpreted by the Court interpreters).

²⁴⁹ T.342, p.36, lines 19 to p.37, line 25.

The armed unit still on the ground chased Mulondo [sic] from Ituri, starting off with Bunia, although Thomas Lubanga was not there, as well as eight of his political associates. At that point, the UPC started to manage Ituri as the de facto power on the 2nd of August 2002.²⁵⁰

127. Although the Accused made corrections to other parts of the document, he did not make any written corrections to this paragraph, from which the Chamber should infer that its contents accurately reflect events at the time.²⁵¹
128. DW-0019 acknowledged that the UPC/RP's objectives were accurately reflected in a document signed by the Accused on behalf of the UPC/RP on 14 September 2002;²⁵² that the UPC had "taken arms to remove all the forces that contribute to the destruction of Ituri" and "put an end to the management of Ituri by the RCD-K/ML".²⁵³ Yet his adamant and repeated denial that the armed dissidents who ousted President Nyamwisi were aligned with the Accused is not credible. His version was that the Accused, whose return to Bunia he claims was "accidental",²⁵⁴ inherited the armed dissidents and that the UPC became a military force "by accident" and "happenstance".²⁵⁵ His position is untenable, particularly given his own evidence that "he who has military power has power".²⁵⁶ Describing events in the August-September 2002 timeframe, DW-0019 acknowledged that civilians without military might were "quite simply unable to do anything".²⁵⁷
129. Immediately following the takeover of Bunia and the return of the Accused, the UPC/FPLC emerged officially as the movement assuming power in Ituri. On 2 and 3 September 2002, only a few weeks after the takeover and only

²⁵⁰ EVD-OTP-00672.

²⁵¹ T.343, p.84, lines 21-24.

²⁵² EVD-OTP-00674.

²⁵³ T.344, p.36, lines 16-23.

²⁵⁴ T.342, p.42, lines 12-13.

²⁵⁵ T.344, p.37, lines 1-13; T.342, p.23, lines 5-8.

²⁵⁶ T.340, p.66, lines 20-25.

²⁵⁷ T.340, p.66, lines 24-25.

several days after his return to Bunia, the Accused, as President, officially set up his government. On official UPC letterhead, with official UPC stamps and seals, he appointed Floribert Kisembo and Bosco Ntaganda as Chief of Staff and Deputy Chief of Staff, respectively. He appointed Chief Kahwa as Minister of Defence, and placed Rafiki in charge of security and head of the AGS. He appointed his full Executive. The fact that the Accused could make these arrangements only days after his return provides the final confirmation that this plan with these people had been rooted long before.

130. Based on the evidence presented at trial, the Chamber should find that these were co-perpetrators acting in concert to implement a common plan.

6.1.2 The Accused is President and Commander-in-Chief

131. After the UPC/FPLC acquired power in September 2002, the Accused retained the same leadership role that he enjoyed previously. As its President and Commander-in-Chief, the Accused sat at the helm of the political and military structure.
132. Article 36 of the UPC Statute provides that the President of the UPC “is the leader and the guarantor of the continuity and existence of the movement”. He ensures the proper functioning of the movement’s structures, makes appointments, convenes meetings of the Political Bureau and the Congress, manages the movement’s finances, and consults with the Political Bureau regarding all decisions “which affect the movement in a particular manner.”
133. In accordance with this provision, the Accused issued a number of official decrees appointing or re-assigning National Secretaries and Deputy National Secretaries to oversee the functioning of various ministries within the UPC/FPLC. The National Secretaries of the various ministries within the UPC/FPLC reported directly to him.²⁵⁸

²⁵⁸ T.125, p.31, line 11 to p.33, line 8, p.33, lines 15-19; T.345, p.47, lines 7-11.

134. According to W-0041, as President of the UPC/FPLC, the Accused issued orders concerning the UPC/FPLC; ²⁵⁹ administrative decisions were addressed to ministers who, in turn, disseminated them to their respective departments.²⁶⁰ The Accused's decisions were immediately complied with by other members of the movement.
135. The Accused issued a direction reminding his National Secretaries that they were no more than technical advisors and that he held ultimate authority.²⁶¹ The witness related how one "executive" in the UPC/FPLC had complained to the witness that "at the meetings of the executive they no longer had any discussions. Mr. Lubanga would come and only give orders".²⁶²
136. DW-0019 described how the Accused regularly convened and presided over weekly meetings of the Executive Committee, which was comprised of the National Secretaries and the Deputy National Secretaries.²⁶³ On occasion, members of the military,²⁶⁴ and notables from the local community²⁶⁵ also attended these Executive Committee meetings. These meetings were held at the offices of the President, and the Accused himself proposed the items that were to be discussed.²⁶⁶
137. By September 2002, the first phase of the common plan had been successfully coordinated and implemented: the UPC/FPLC was in power in Ituri, the Accused was the President and Commander-in-Chief, the co-perpetrators held senior positions in the movement and the military wing was officialised and had a base of recruits. Now the UPC had to remain in

²⁵⁹ T.125, p.40, lines 17-19; T.181, p.78, lines 6-9.

²⁶⁰ T.125, p.41, lines 1-4.

²⁶¹ EVD-OTP-00505.

²⁶² T.181, p.78, lines 23-25.

²⁶³ T.345, p.44, lines 1-6. See also T.125, p.41, line 5 to p.42, line 9.

²⁶⁴ T.345, p.49, lines 14-25, p.51, line 1 to p.53, line 1; T.181, p.96, lines 4-25.

²⁶⁵ T.345, p.53, line 16 to p.54, line 20.

²⁶⁶ T.345, p.46, lines 1-20.

power and extend its territorial control. For this, it needed a bigger and stronger army.

7. Legal Criteria: Elements of the Crimes

7.1 Conscription and Enlistment

138. As the Pre-Trial Chamber held in its confirmation decision, conscription is forcible recruitment and enlistment is voluntary recruitment.²⁶⁷ That both forms of recruitment of under-age minors are prohibited is well-established in customary international law, meaning that the child's consent is not a valid defence.²⁶⁸ Both crimes are of a continuing nature, and only cease to be committed when the children leave the groups or reach the age of 15.²⁶⁹

7.2 Active Participation

139. The term 'child soldiers' commonly refers to children under the age of 18 who partake in an armed group or force, regular or irregular, in any capacity.²⁷⁰ It is not restricted to children who actively fight. It also includes children whose roles are essential to the functioning of the armed group, such as those working as cooks, porters, messengers, as well as girls recruited for sexual purposes and forced marriage.²⁷¹

²⁶⁷ Confirmation Decision, paras. 242-248. The Prosecution notes that the Appeals Chamber of the Special Court for Sierra Leone has interpreted enlistment (in that case meaning recruitment, whether voluntary or compulsory) as also "including any conduct accepting the child as a part of the militia [...] such conduct would include making him participate in military operations": *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14 ('CDF Case'), App.Ch., Judgement, 28 May 2006, para. 144. In certain circumstances therefore, the act of 'recruitment' may coincide with the act of using the child to participate in military operations.

²⁶⁸ Confirmation Decision, paras. 242-248.

²⁶⁹ Confirmation Decision, para. 248.

²⁷⁰ In the Rome Statute the relevant crimes are committed in respect of children under the age of 15. Nevertheless, the concepts of 'use' or 'active participation', as internationally understood and accepted for child soldiers under the age of 18, are also applicable here.

²⁷¹ See 'The Role of United Nations Peacekeeping in Disarmament, Demobilization and Reintegration', Report of the Secretary-General to the Security Council, S/2000/101, 11 February 2000; Cape Town Principles and Best Practices, 27-30 April 1997; UN Integrated Disarmament, Demobilization and Reintegration Standards (1 August 2006).

140. The Pre-Trial Chamber held that “active participation in hostilities” means not only direct participation in combat but also participation in combat-related activities such as scouting, spying, sabotage, and the use of children at military check-points or as decoys and couriers.²⁷² Additionally, active participation would include the use of children to guard military objectives or to safeguard military commanders (as bodyguards).²⁷³ The term does not apply if the “activity in question is clearly unrelated to hostilities”.²⁷⁴
141. The Special Court for Sierra Leone (SCSL) has embraced a broad interpretation of “active participation in hostilities”: in *Prosecutor v. Fofana and Kondewa*²⁷⁵ the SCSL considered inter alia the presence of children armed with knives, cutlasses and guns in an active combat zone and the use of children to dance in front of the ‘Kamajors’ as they went into battle, as also constituting the use of children to participate actively in hostilities.²⁷⁶ In *Prosecutor v. Brima, Kamara and Kanu*,²⁷⁷ in addition to adopting Justice Robertson’s ruling that “use” entails putting children’s lives directly at risk in combat,²⁷⁸ the SCSL held that even the mere presence of children, regardless of their specific duties, in locations where crimes had been committed was found to constitute the use of children to participate actively in hostilities.²⁷⁹ In determining that participation in hostilities entails not only acts that put children’s lives directly at risk in combat, but also any labour or support that gives effect to or helps maintain operations in a

²⁷² Confirmation Decision, para. 261.

²⁷³ Confirmation Decision, para. 263.

²⁷⁴ Confirmation Decision, para. 262. The Pre-Trial Chamber held that activities clearly unrelated to hostilities would include food deliveries to an airbase and the use of domestic staff in officers’ quarters.

²⁷⁵ CDF Case.

²⁷⁶ CDF Case, SCSL-04-14-T, Trial Chamber I, Judgement, 2 August 2007, para. 688.

²⁷⁷ Case No. SCSL-04-16 (‘AFRC Case’).

²⁷⁸ CDF Case, SCSL-2004-14-AR72(E), Decision on preliminary motion based on lack of jurisdiction (child recruitment), 31 May 2004, Dissenting Opinion of Justice Robertson, paras. 1, 5.

²⁷⁹ AFRC Case, SCSL-04-16-T, Trial Chamber II, Judgement, 20 June 2007, para. 1267.

conflict, the SCSL was apparently guided by the interpretation note added to the draft ICC Statute by the ICC Preparatory Commission in 2002.²⁸⁰

142. This wider interpretation is also supported by the testimony of the UN Special Representative of the Secretary General on Children and Armed conflict who stated that children performing roles as cooks, porters, nurses, translators and for sexual exploitation were considered essential support, and that the Court must reject any interpretation which excludes girls.²⁸¹
143. The Prosecution notes that while it is correct that the use of child soldiers in activities “clearly unrelated to the hostilities” falls outside the scope of the provision,²⁸² the use of children in a “direct support function” is considered to be included in the prohibition.²⁸³ The Prosecution accordingly submits that in order to afford wider protection to child soldiers and to prevent any use of children in activities closely related to hostilities, the Chamber should approach the notion of “direct support” broadly, and include within the meaning of the term activities such as the ones described by the UN Special Representative.

²⁸⁰ CDF Case, SCSL-04-14-T, Trial Chamber I, Judgement, 2 August 2007, para. 193 and AFRC Case, SCSL-04-16-T, Trial Chamber II, Judgement, 20 June 2007, para. 736. See Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Part One, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, p.21, n.12.

²⁸¹ ICC-01/04-01/06-1229-AnxA, Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict: Submitted in application of Rule 103 of the Rules of Procedure and Evidence, paras. 17-26.

²⁸² See ICRC, Customary International Humanitarian Law. Volume I: Rules, Cambridge, 2005, p.487-488, commenting on the ICC Draft Statute (n.15).

²⁸³ Ibid. Examples include acting as bearers to take supplies to the front line, or activities at the front line itself.

7.3 National Armed Forces

144. The war crime of conscripting and enlisting children under article 8(2)(b)(xxvi) of the Rome Statute is qualified by the use of the term “national armed forces”.²⁸⁴ The provision reads as follows:

2. For the purpose of this Statute, ‘war crimes’ means:

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

145. The Pre-Trial Chamber held that “national armed forces” is not limited to the armed forces of a State.²⁸⁵ Both jurisprudence and commentary support the position that the ordinary meaning of ‘national’ within the terms of Art. 8(2)(b)(xxvii) is not restricted to governmental armed forces.²⁸⁶

146. Some scholars have suggested that “national” emphasizes that the armed forces “must be those of a State”, but proceed to distinguish between

²⁸⁴ The Prosecution notes that the crime of using persons under the age of 15 years to participate actively in hostilities is not limited to use within a ‘national armed group.’ This is clearly established in the Elements of Crimes which defines the crime as conscription or enlistment of persons under the age of 15 years into the national armed forces *or* as the use of persons under the age of 15 years to participate actively in hostilities.

²⁸⁵ Confirmation Decision, paras. 268-285. Having identified Article 8(2)(b)(xxvi) as deriving from Article 77 of Additional Protocol I, and citing the definition of armed forces found in Article 43, the Pre-Trial Chamber found that Additional Protocol I does not require that the “armed forces” be governmental forces. It also cited the commentary on the Protocol as authority for the proposition that the Protocol had extended its application to entities which are not States, although the authority representing them must have certain characteristics of a government, at least in relation to its armed forces. The Pre-Trial Chamber further noted that the commentary on Article 43 describes the term ‘party to the conflict’ broadly, encompassing not just resistance movements and governments in exile, but also those fighting for self-determination or national liberation.

²⁸⁶ The Pre-Trial Chamber noted the ICTY Appeals Chamber as having construed ‘national’ as also encompassing ‘belonging to the opposing party in an armed conflict’ and holding that to interpret ‘national’ as ‘governmental’ would undermine the object and purpose of the Statute: Confirmation Decision, para. 279. An overly restrictive definition “would be incoherent with the broad scope of application” of Article 8(2)(e)(vii), which criminalizes the conscription or enlistment of children into *any* armed forces or groups in non-international armed conflicts: Michael Cottier, in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edition) (2008) p.473.

“nation” and “State” by suggesting that a “national armed force” extends beyond a State’s armed force and includes the armed forces of national liberation movements, governments in exile, and possibly rebels recognized as having belligerent status.²⁸⁷ Others state that a national armed force may include those of a non-State entity, provided the entity has certain characteristics of a government.²⁸⁸ These align with the resolution of the issue by the Pre-Trial Chamber, which found that parties to the conflict must have certain governmental characteristics at least with regard to its armed forces.²⁸⁹

147. The issue of whether the definition of “national armed group” extends beyond armed forces under the control of a State does not arise if the Trial Chamber accepts the Prosecution’s submissions that international armed conflict is limited to conflict between two States, whether through their *de jure* armed forces or non-State armed forces under their overall control.²⁹⁰ However, if the Trial Chamber does not accept these submissions, the Prosecution submits that “national armed group” should be subject to the broad interpretation of the Pre-Trial Chamber.
148. This interpretation notes that to maintain a strict distinction between ‘armed forces’, as used in Article 8(2)(b)(xxvi), and ‘armed groups’ in Article 8(2)(e)(vii), would essentially limit the former to include only the national army or forces under the overall control of a State (or authorities connected to self-determination or national liberation) while including *any* organized armed group in the latter term. If such a constrictive view is taken, unless the fighting group is recognized or commanded by the State or related to

²⁸⁷ Matthew Happold, “Child Recruitment as a Crime under the Rome Statute of the International Criminal Court”, in *The Legal Regime of the International Criminal Court* (José Doria, Hans-Peter Gasser and M. Cherif Bassiouni) (2009), p.588.

²⁸⁸ William A. Schabas, *The International Criminal Court : A Commentary on the Rome Statute* (2010), p.255, citing the *Katanga* Confirmation Decision as authority for this statement, fn. 487.

²⁸⁹ Confirmation Decision, para. 272.

²⁹⁰ See sections 4.1.3, 4.1.6 and 4.1.7.

national liberation, criminalisation of the recruitment of children in international armed conflict would be beyond the scope of Article 8(2)(b)(xxvi). This, as the Pre-Trial Chamber found, would lead to a paradox in which “an alleged perpetrator can be held responsible if he or she belongs to a party to a conflict which is linked to a State (the armed forces of a State, such as the UPDF), but would escape prosecution if he or she belonged to a party to the same conflict described as an armed group (such as the FPLC).”²⁹¹

149. No consensus appears to exist on why the two articles differ in their wording, nor does an analysis of customary law, international jurisprudence, or academic writings reach any conclusive results. Following a narrow reading of The Hague Regulations, the Geneva Conventions, and the Additional Protocols it is suggested that any references to a Party’s armed forces are actually references to States, as the treaties were contracted between States.²⁹² Conversely, it is argued that the inclusion of the adjective “national” is irrelevant, and that the use of the term “armed forces” should be considered to be the result of a compromise in negotiations,²⁹³ an intentional attempt not to limit the application,²⁹⁴ or an unintended omission by the drafters.²⁹⁵
150. Notably, recent interpretations of the crime of recruitment under customary law by the International Committee of the Red Cross and the Special Court

²⁹¹ Confirmation Decision, para. 282.

²⁹² See 1907 Hague Regulations, Geneva Convention of 1906, Geneva Conventions of 1949, Article 2. See also ICRC commentary on the Additional Protocols, 1987, para. 1661: “[t]he texts of the Conventions [...] are limited, as far as international conflicts are concerned, to clashes arising between two or more contracting Parties, i.e. States.”

²⁹³ Von Hebel, H. et al, “Crimes within the Jurisdiction of the Court,” in *The International Criminal Court, the making of the Rome Statute: issues, negotiations, results*, (Lee: Kluwer Law International) 2002, p.118.

²⁹⁴ Cottier, M., “War Crimes”, in *Commentary of the Rome Statute of the International Criminal Court: observer’s notes article by article* (Triffterer) 1999, p.261.

²⁹⁵ Bureau Discussion Paper, Part 2. Jurisdiction, Admissibility and Applicable Law, UN Doc. No. A/CONF. 183C.1/L.53, 6 July 1998, art. 5(B)(t) and 5(D)(f).

for Sierra Leone make no reference to “national” armed forces. Instead they treat the crime of enlisting or conscripting children as equally applicable in either non-international or international conflicts.²⁹⁶ This is also found in the Pre-Trial Chamber’s own analysis of the framework of international law.²⁹⁷

8. The Crimes of Conscription, Enlistment and Use of Children under the Age of 15 in hostilities by the UPC/FPLC

8.1 The scale of the conscription and enlistment and use of children by the UPC/FPLC

151. The co-perpetrators orchestrated large-scale recruitment of youth, both voluntary and forcible, with particular intensity between September 2002 and 13 August 2003. There was even a special term for the under-age recruits – ‘kadogos’.
152. All recruited persons regardless of age were subjected to the same military training and were used to participate actively in combat, to act as bodyguards to senior political and military officials or to perform other functions within the military.
153. Nearly every fact witness for the Prosecution testified to direct knowledge that children under the age of 15 had been recruited, trained or used by the UPC/FPLC. These witnesses covered a broad range of actors in Ituri at the relevant time: UPC/FPLC insiders, UPC/FPLC child soldiers, parents of child soldiers, individuals working for or close to the UPC/FPLC in Bunia and persons who worked with NGOs that dealt with child soldiers in Ituri.
154. The sheer number of children recruited, trained and used by the UPC/FPLC throughout the period of the charges, including children under the age of 15,

²⁹⁶ Customary International Humanitarian Law, Vol. I: Rules, ICRC 2005, Rule 136, pp.482-484; CDF Case, SCSL-04-14-AR72(E), Decision on preliminary motion based on lack of jurisdiction (child recruitment), App. Ch., 31 May 2004, paras. 52-53; CDF Case, SCSL-04-14-PT-101, Decision on preliminary motion on lack of jurisdiction - nature of the Armed Conflict, App. Ch., 25 May 2004, para. 31.

²⁹⁷ Confirmation Decision, paras. 268-685.

demonstrates that the co-perpetrators intentionally cast a wide net in their recruitment campaigns and intended (or at least accepted) that as a result they were recruiting, training and using children under the age of 15. Indeed, that some recruitment was effected by apprehending persons in or near schools, or on their way home from school, at times and places in which one could expect to find multiple child recruits at one time, reflects that child recruitment was knowing and intentional.

155. UPC/FPLC insiders W-0041, W-0055, W-0038, W-0017, witness DRC-OTP-WWWW-0016 (W-0016), witness DRC-OTP-WWWW-0299 (W-0299) and witness DRC-OTP-WWWW-0089 (W-0089) in their respective roles within the political and military structure each testified to the pervasive recruitment and/or use of child soldiers under the age of 15 by the UPC/FPLC. W-0041 testified that all UPC/FPLC officials, including the Accused, used children between “13 or 10 to 22” as bodyguards, as did all UPC/FPLC commanders.²⁹⁸ W-0055 reiterated that all commanders in the UPC/FPLC main staff used child soldiers as bodyguards.²⁹⁹
156. W-0016 testified that three quarters of the recruits at Mandro camp were children between the ages of 13 and 17 years old.³⁰⁰ Approximately 50% of these were under 14 years old.³⁰¹ To give an idea of the scale of this figure, W-0038 stated that there were about 2500 recruits at the Mandro camp.³⁰²
157. W-0017, W-0038, W-0299 and W-0089 all confirmed and provided specific instances of the conscription, enlistment, training and use of children under 15 by the UPC/FPLC, as set out in specific detail below.³⁰³ Witness DRC-OTP-WWWW-0298 (W-0298), witness DRC-OTP-WWWW-0213 (W-0213),

²⁹⁸ T.125, p.54, line 15 to p.57, line 7.

²⁹⁹ T.176, p.47, line 22 to p.48, line 24, p.50, line 14 to p.51, line 13.

³⁰⁰ T.189, p.15, lines 17-21, p.16, lines 1-3.

³⁰¹ T.189, p.25, lines 1-15. W-0016 was asked whether those under 14 comprised 20%, 40% or 80% of the group of three-quarters between 13 and 17 and he answered “less than 50%”.

³⁰² T.113, p.42, line 4.

³⁰³ See paras. 167-236.

witness DRC-D01-WWWW-0008 (W-0008), W-0011, W-0010, W-0157, W-0007, W-0294 and witness DRC-OTP-WWWW-0297 (W-0297) each testified that they and other children under the age of 15 were conscripted and enlisted by the UPC/FPLC, trained and used to participate actively in hostilities.³⁰⁴ Even defence witness DRC-D01-WWWW-0004 (DW-0004) admitted that children from his neighborhood in Simbiliabo who were 12 years of age voluntarily enlisted at the UPC/FPLC training camp in Mandro in 2002; “anyone who came was welcomed”.³⁰⁵

158. Witnesses who were in Bunia during relevant periods and who worked closely with the UPC/FPLC provided evidence of the scale of the UPC/FPLC’s recruitment, training and use of children under 15. W-0014 [REDACTED] the UPC/FPLC headquarters in Bunia between [REDACTED] 2002 and estimated that 30% of the recruits he saw were children aged 15 and under.³⁰⁶ Witness DRC-OTP-WWWW-0030 (W-0030), [REDACTED], went to the Accused’s residence two – three times per week and regularly saw children standing guard to protect the President and his offices.³⁰⁷ The youngest guard was 9 or 10 years old.³⁰⁸ These kadogos asked him [REDACTED].³⁰⁹
159. Witnesses who worked with demobilised child soldiers in and around Bunia also testified to the large-scale of recruitment and use of children, including those under 15, by the UPC/FPLC. Witness DRC-OTP-WWWW-0031 (W-0031) spoke of the “massive presence of children in armed groups” in

³⁰⁴ The evidence from these witnesses is set out in detail in Part 10.

³⁰⁵ T.243, p.20, line 12 to p.22, line 3.

³⁰⁶ T.179, p.65, lines 13-24, p.85, line 18 to p.86, line 20.

³⁰⁷ T.128, p.21, line 6 to p.23, line 2; T.131, p.6, line 23 to p.9, line 9.

³⁰⁸ T.128, p.21, lines 3-4.

³⁰⁹ T.129, p.57, lines 14-18.

Ituri.³¹⁰ He testified that over 80% of approximately 168 children, between 9 and 17 years old, [REDACTED], had been soldiers in the UPC/FPLC.³¹¹

160. W-0046 confirmed that the UN reported up to 40% of the UPC/FPLC forces were children, including under the age of 15.³¹² Of the child soldiers she interviewed in Ituri, 167 children had served with the UPC/FPLC and 71 of the 167 were recruited when under the age of 15.³¹³ Twenty-six of the 71 UPC/FPLC child soldiers recruited under the age of 15 expressly indicated that they had participated in combat between mid-2002 and mid-2003.³¹⁴
161. During a separate mission in March 2003, W-0046 met with 34 UPC/FPLC child soldiers ranging in age from 11 to 16 years.³¹⁵ Nine of the children had been recruited before they reached 15 years and four were still under the age of 15 at the time of the interview.³¹⁶
162. Contemporaneous logbooks recording the entry and exit of child soldiers from a demobilisation centre shed light on the volume of children under 15 years of age in the UPC/FPLC.³¹⁷ The logbooks demonstrate the systematic nature of the plan to conscript, enlist and use children into the UPC/FPLC. According to the logbook, within two months of the centre's opening (i.e. prior to 13 August 2003), 24 children arrived at the centre.³¹⁸ Nineteen of the 24 children were 17 or younger at the time of registration and were members of the UPC/FPLC. Twelve of the 19 were under the age of 15 during this period. This shows that 50% of all children who arrived at the centre during this period were UPC/FPLC child soldiers under the age of 15. In the month

³¹⁰ T.199, p.80, lines 3-6.

³¹¹ T.199, p.25, line 2 to p.26, line 6, p.27, lines 1-8.

³¹² EVD-OTP-00489, pp.88-90, 120-121; EVD-OTP-00623; EVD-OTP-00480; EVD-OTP-00737.

³¹³ T.205, pp.72-73; T.206, pp.2-3.

³¹⁴ T.207, p.12, lines 18-22.

³¹⁵ T.206, p.48, line 24 to p.49, line 13, p.50, line 14 to p.51, line 8; T.207, p.13, lines 5-14.

³¹⁶ T.206, p.50, lines 18-23.

³¹⁷ EVD-OTP-00739; EVD-OTP-00476.

³¹⁸ EVD-OTP-00476, p.0194.

that followed (i.e. up to 13 September 2003), an additional 27 children arrived at the centre, 24 of whom were from the UPC/FPLC. Fifteen of these 24 children were under 15 years old.³¹⁹ Since these additional children arrived at the demobilisation centre within a month, or even within days, of August 13, 2003, it is highly likely that many of the children were enlisted or used prior to August 13, 2003; in any event, the numbers illustrate the presence of children in the UPC/FPLC, including a significant number under the age of 15.

163. The logbook recorded each child's village of origin as well as the child's base at the time he or she left the armed group.³²⁰ In the period between June and 13 August 2003, the entry logbook recorded that nine of the 12 children who were under 15 years old (equalling approximately 75%) were based in an area different from their place of origin. The same holds true for 13 of the 15 children under 15 years of age who arrived between 14 August and 13 September 2003, bringing this figure to 80%.³²¹ The Trial Chamber may infer having regard to this and other evidence that a high mobility trend existed that is indicative of a systematic plan requiring a level of coordination to mobilise troops across areas of operations and beyond their original villages. The logbook records that these are UPC/FPLC child soldiers.
164. Lastly and of particular significance is the Prosecution's video evidence depicting UPC/FPLC recruits visibly under the age of 15. One video shows a visit by the Accused (along with Bosco Ntaganda, John Tinanzabo, Rafiki, and other senior UPC/FPLC commanders) to the UPC/FPLC training camp at Rwampara in February 2003.³²² Among the group of recruits standing directly in front of the Accused and to whom he addressed a lengthy speech to boost morale were children who are visibly under the age of 15. W-0010, a

³¹⁹ EVD-OTP-00476 at pp.0194-0195.

³²⁰ See EVD-OTP-00476 at p.0194 "*Adresse d'origine*" and "*Provenance*".

³²¹ EVD-OTP-00476 at pp.0194-0195.

³²² Rwampara video EVD-OTP-00570.

child soldier bodyguard³²³ present during this official visit [REDACTED], testified at trial and identified children under the age of 15 in the video, [REDACTED].³²⁴

165. Other videos, some in which the Accused is present, also show children visibly under the age of 15, armed and in uniform.³²⁵ W-0030, [REDACTED], testified to the presence of kadogos:

Q. But concerning the kadogos, to use the term you used during your meeting with the investigators, concerning the kadogos you saw at the headquarters – I understood that you hadn’t seen them all – but with regard to those you had seen, is that assessment, 14 or 15 years of age, consistent with what you remember?

A. Well, I can say, I can justify myself, *but the images also speak. If you doubt what I say, I think that by looking at the image that the image can help you see that there were kadogos.*³²⁶

166. The evidence of the conscription, enlistment, training and use of children under the age of 15 by the UPC/FPLC is discussed in detail below.

8.2 UPC/FPLC Conscription and Enlistment of Children under the age of 15

167. UPC/FPLC recruitment campaigns took place throughout Ituri.³²⁷ W-0055 testified that recruitment in the UPC/FPLC was a “practice”; UPC/FPLC commanders or village elders would recruit persons, who would be brought to the training camps.³²⁸ The practice was known as “shuguli,” which W-0055 described as the process of conscripting young people to fill the army’s needs. The UPC/FPLC commanders “did everything they could to have as great a number of such soldiers among their ranks as possible”.³²⁹ According

³²³ T.144, p.15, lines 5, 22-23, p.12, line 14 to p.13, line 1.

³²⁴ T.145, p.10, line 14 to p.26, line 14.

³²⁵ EVD-OTP-00416; EVD-OTP-00461; EVD-OTP-00487; EVD-OTP-00488; EVD-OTP-00573; EVD-OTP-00575; EVD-OTP-00577; EVD-OTP-00584 and EVD-OTP-00585.

³²⁶ T.131, p.8, line 2 to p.9, line 9 [emphasis added].

³²⁷ T.175, p.60, line 16 to p.62, line 2; T.182, p.15, line 2 to p.17, line 12.

³²⁸ T.175, p.62, line 10 to p.63, line 13; T.176, p.63, lines 9-19.

³²⁹ T.176, p.63, lines 12-19.

to W-0055, this practice was entrenched within the UPC/FPLC philosophy and was an established procedure.³³⁰

168. No official procedure existed to verify the ages of the recruits. Defence witness DRC-D01-WWWW-0011 (DW-0011) acknowledged that he was not aware of such procedure: “As to their being under the age of 15, no one actually verified that. No one actually did a cross-checking.”³³¹ Despite evidence that some form of registration existed upon arrival at the training camp,³³² child soldier witnesses testified that they were never asked about their age.³³³ W-0014 testified regarding recruitment campaigns that “[the UPC/FPLC] took just anybody, irrespective of age”.³³⁴
169. In fact, the evidence establishes that the UPC/FPLC – as is the case in many rebel groups – deliberately targeted children in their recruitment campaigns because children are obedient and fearless.³³⁵ Witnesses confirmed that children were preferred because they are subordinate, they respect the authority of adults and they have no family commitments.³³⁶
170. The UPC/FPLC used three primary recruitment methods: (i) abduction or forced recruitment, (ii) pressurised village recruitment campaigns, and (iii) voluntary enlistment.

³³⁰ T.175, p.62, line 11 to p.63, line 13.

³³¹ T.347, p.41, lines 17-22; T.348, p.2, lines 10-12.

³³² T.176, p.24, lines 14-17.

³³³ T.138, p.69, lines 15-18; T.148, p.30, lines 6-13; T.132, p.28, lines 3-12; T.150, p.84, lines 11-14; T.186, p.18, lines 1-3. W-0012 testified that “At any age they were allowed to join the army” (T.168, p.23, lines 14-15).

³³⁴ T.182, p.36, lines 10-15.

³³⁵ T.113, p.36 lines 18-23; T.114, p.14, line 24 to p.15, line 17; T.171, p.22, lines 4-19; T.182, p.20, line 25 to p.21 line 20, p.39, lines 9-18; T.166, p.42, line 25 to p.43, line 7; T.223, p.11, line 19 to p.12, line 7, p.23, lines 5-23.

³³⁶ T.124, p.32, lines 15-24; T.125, p.56, lines 15-25; T.126, p.51, line 24 to p.52, line 7; T.166, p.12, lines 10-23.

8.2.1 Conscription of children under the age of 15 into the UPC/FPLC

171. The evidence shows that the UPC/FPLC routinely conscripted children from schools, in the marketplace and in the street.³³⁷ Former child soldier witnesses testified about their forced recruitment into the UPC/FPLC's military ranks, including from school or school routes.³³⁸
172. In choosing schools and school zones as conscription locations, the UPC/FPLC targeted school-aged children.
173. W-0055 recounted that [REDACTED] came to UPC/FPLC headquarters because [REDACTED], a school boy, had been taken with other children from [REDACTED] and brought to the UPC/FPLC training camp in [REDACTED].³³⁹ Due only to this [REDACTED] insistence - and luck that [REDACTED] happened upon W-0055, who made an effort to address [REDACTED] concerns - was this particular child released. W-0055 explained that he requested that the child be sent to him from the training camp and, upon seeing the child, he determined that the child was too young or too small for training. Notwithstanding the child's apparent youth and size, none of the UPC/FPLC recruiters had rejected him at the time of recruitment, which can only lead to the conclusion that nobody cared enough to apply a policy of excluding children or questioned the ages of recruits.³⁴⁰
174. W-0031 testified that in the course of his work with demobilised child soldiers, he learned that the UPC/FPLC regularly forcibly enlisted children.³⁴¹ Based on her interviews of child soldiers in 2003, W-0046 corroborated W-0031's account that children joined the UPC/FPLC in

³³⁷ T.199, p.28, lines 1-12; T.207, p.17, line 20 to p.18, line 24, p.19, line 13 to p.20, line 21, p.22, line 24 to p.23, line 17, p.43, line 18 to p.45, line 13.

³³⁸ See Part 10.

³³⁹ T.177, p.53, line 15 to p.56, line 7.

³⁴⁰ T.177, p.54, line 11 to p.56, line 7.

³⁴¹ T.199, p.18, line 7 to p.19, line 17, p.27, line 23 to p.29, line 20, p.30, line 21 to p.32, line 16.

different ways: in the Mahagi zone, recruitment was often carried out by gathering youth together, by “rounding them up” in streets, markets or schools and forcibly transferring them to training camps.³⁴²

175. W-0014 explained that he witnessed UPC/FPLC forced recruitment of youth without regard to their age:

Well, in short what I can say is that as far as I know there was actually no age limit in the recruitment of children in the villages or anywhere else as far as I know. I can give you an example. [REDACTED] in our village, and I can confirm this to you, your Honour, amongst the children who were recruited they took just anybody, irrespective of age, irrespective of their health situation so on and so forth.

And still to answer this question, I would like to cite an event which I witnessed and which unfortunately I did not mention earlier. When I was there on site at that time what I noticed is that certain children were taken from the streets. There were many war-displaced people in the town of Bunia and in other neighbouring centres or areas.³⁴³

8.2.2 Village Recruitment Drives

176. W-0055, W-0017, W-0038, W-0014, W-0031, W-0046 and witness DRC-OTP-WWWW-0043 (W-0043) all testified about the UPC/FPLC’s village recruitment drives or “mobilisation” campaigns.³⁴⁴ Their evidence, along with other evidence, demonstrated that the UPC/FPLC leadership systematically pressured Hema families in UPC/FPLC controlled territories to provide children for military service,³⁴⁵ a recruitment method it had been using since 2000.³⁴⁶

³⁴² T.207, p.17, line 20 to p.18, line 19. W-0046 provided other examples of UPC/FPLC forced recruitment: EVD-OTP-00489, p.45, line 1 to p.47, line 7; T.199, p.27, line 23 to p.29, line 20.

³⁴³ T.182, p.36, line 1 to p.37, line 6.

³⁴⁴ T.199, p.28, lines 5-22. “Because we were occupying more and more terrain, we needed more and more soldiers to be trained to occupy that terrain” (T.114, p.29, lines 1-7). See also T.114, p.76, line 13 to p.77, line 12. W-0014 noted that recruitment after the takeover of Bunia continued on a larger scale: T.179, p.60, lines 6-20.

³⁴⁵ EVD-OTP-00489, p.95, lines 6-24; T.113, p.53, lines 16-22, p.54, lines 15-21; EVD-OTP-00480.

³⁴⁶ T.168, p.22, lines 13 to p.23, line 5.

177. Chief Kahwa and Kitembo were involved in village recruitment campaigns on behalf of the UPC/FPLC.³⁴⁷ W-0038 attended a UPC/FPLC village recruitment campaign in Mabanga led by Chief Kahwa, in which children under 15 were recruited.³⁴⁸
178. W-0017 recounted an occasion when Kitembo spoke to a wise man requesting that the villagers in Kilo contribute to the UPC/FPLC force so that they would be protected.³⁴⁹ After this talk, the witness noted that recruits arrived at the training camp from Kilo and its surrounding areas.³⁵⁰ W-0089 confirmed Kitembo's role in recruitment in Mongbwalu whereby Kitembo assembled the villagers; when the villagers said that the soldiers were making them suffer, Kitembo responded that "it was because they didn't want to enrol in the army".³⁵¹ When Kitembo then asked for volunteers for the army, "[a]ll those who raised their hands, well, Kitembo asked them to come forward, and once they had gathered, he asked the soldiers to make a circle around these individuals and to take them to the camp. These people thought that they should volunteer, but they wanted to return home first to prepare themselves, but they suddenly had to leave to be trained as soldiers".³⁵²
179. The UPC/FPLC also employed emissaries to encourage Hema youth to join the UPC/FPLC military.³⁵³ These emissaries were typically influential businessmen, village elders/wise men, or religious leaders who used their influence, affluence and position in the community to exert pressure on

³⁴⁷ T.113, p.38, line 22 to p.39, line 10, p.54, line 15 to p.55, line 1, p.57, line 15 to p.58, line 6; T.203, p.75, line 15 to p.76, line 18.

³⁴⁸ T.113, p.39, line 11 to p.40, line 13.

³⁴⁹ T.157, p.83, line 15 to p.84, line 3.

³⁵⁰ T.157, p.83, line 9 to p.84, line 15.

³⁵¹ T.196, p.43, line 17 to p.44, line 21.

³⁵² T.196, p.43, line 19 to p.44, line 21.

³⁵³ T.199, p.27, line 23 to p.33, line 10: W-0031 testified that the UPC/FPLC organised "mobilisation" campaigns within villages and that Hema families were obliged to send their children to the UPC/FPLC.

Hema families to provide children for protection of the community.³⁵⁴ W-0055 elaborated that “Gegere wise men” such as Eloy Mafuta³⁵⁵ convinced people to “make youth available for the army so that they would contribute to the protection of their ethnic group against the Lendu”.³⁵⁶

180. The wise men and Hema traders involved in recruitment campaigns were referred to as “cadres”.³⁵⁷ W-0038 and W-0055 described the pressure placed on villagers to send young recruits, under threat that their villages would be left unprotected during the next attack if they did not provide recruits to the UPC/FPLC.³⁵⁸ According to W-0038, Chief Kahwa and other officers warned the assembled villagers that “[i]f you do not join the army, you will find that your village will be razed down and that will be your problem. You can't leave your brothers die like that. You have to return to the army in order to fight back”.³⁵⁹ After the meeting village traders lent vehicles to take young people to Mandro.³⁶⁰ Defence witness DRC-D01-WWWW-0007 (DW-0007) confirmed that villagers sent young persons to train with the UPC/FPLC in order to protect their villages.³⁶¹ The Accused was provided with reports of villages that refused to provide recruits.³⁶²

181. Within the FPLC structure, Eric Mbabazi, the G5 in the UPC/FPLC, oversaw the awareness-raising campaigns to persuade villagers to send their children for training.³⁶³ W-0038 also testified that the G5 was responsible for “holding

³⁵⁴ T.206, p.45, line 1 to p.47, line 9; T.113, p.54, line 15 to p.55, line 1; T.177, p.44, line 9 to p.45, line 12, p.47, line 22 to p.49, line 20.

³⁵⁵ T.174, p.33 to p.34, line 3.

³⁵⁶ T.174, p.32, lines 1-11; T.174, p.34, lines 1-3; T.176, p.21, line 10 to p.23, line 5; T.181, p.24, lines 15-23, p.25, lines 3-25, p.26, line 1 to p.27, line 4; T.182, p.12, line 14 to p.13, line 16, p.15, lines 14-15.

³⁵⁷ T.175, p.58, line 16.

³⁵⁸ T.113, p.39, lines 3-18; T.175, p.60, line 16 to p.62, line 2; T.176, p.21, line 10 to p.23, line 18.

³⁵⁹ T.113, p.38, line 22 to p.39, line 10.

³⁶⁰ T.113, p.39, line 19 to p.40, line 1.

³⁶¹ T.348, p.36, line 20 to p.38, line 9, p.39, line 25 to p.40, line 25, p.47, line 16 to p.48, line 7.

³⁶² T.176, p.21, line 10 to p.23, line 18.

³⁶³ T.114, p.27, lines 11-21. See also EVD-OTP-00457.

meetings in the area that was occupied by our brigade so that parents might send their young people for training”.³⁶⁴

8.2.3 Enlistment

182. As the third prong of recruitment, the UPC/FPLC increased its military capacity by enlisting youth voluntarily, including youth under the age of 15 years.³⁶⁵

183. The UPC/FPLC accepted into its ranks children who were orphans, some of whom were pursuing a desire for revenge for such loss.³⁶⁶ Other youth joined as a result of social pressure brought to bear on them by family, peers, influential leaders or the community as a whole.³⁶⁷ Children also volunteered to ensure their own protection,³⁶⁸ for the allure of a military role,³⁶⁹ or for the simple prospect of being fed.³⁷⁰ Court expert Radhika Coomaraswamy explained that in the context of an ethnic war, where survival depends to a large extent upon association with an armed group, the vulnerability of children is increased as children under the age of 15 are more likely to be manipulated by the pressure of their families or communities.³⁷¹ For them, joining an armed group is merely a “choice of survival.”³⁷²

³⁶⁴ T.114, p.27, line 22 to p.28, line 7

³⁶⁵ T.150, p.82, line 24 to p.84, line 21; T.153, p.47, line 19 to p.49, line 3; T.207, p.17, line 20 to p.18, line 19. See also, T.182, p.12, lines 1-7. W-0031 testified that the recruitment of children *increased* after 9 August 2002 (T.199, p.18, lines 7-21).

³⁶⁶ T.189, p.81, lines 6-25; T.177, p.51, line 12 to p.52, line 22. EVD-OTP-0489, p.93; T.243, p.20, line 19 to p.23, line 25.

³⁶⁷ EVD-OTP-00489, pp.113, 114; T.207, p.17, line 20 to p.18, line 24; T.199, p.29, lines 16-20, pp.32-33, line 10; T.179, p.53, line 23 to p.54, line 6, p.60, lines 6-20; T.125, p.64, line 21 to p.65, line 12, p.67, line 24 to p.68, line 15.

³⁶⁸ T.157, p.85, lines 10-21.

³⁶⁹ T.125, p.64, line 21 to p.65, line 12; T.223, p.22, lines 2-7.

³⁷⁰ EVD-OTP-00489, pp.113-114; T.223, p.12, lines 13-17, p.21, lines 12-23.

³⁷¹ T.223, p.12, lines 8-17, p.13, lines 8-16, p.21, lines 15-23, p.24, lines 1-13, p.26, lines 7-15. See EVD-CHM-00007, para.13; T.166, p.43, line 25 to p.45, line 23.

³⁷² T.223, p.13, line 7.

8.3 UPC/FPLC training camps

184. The UPC/FPLC established 20 training camps throughout Ituri, with the major camps closest to its base in Bunia.³⁷³

8.3.1 Training activities

185. The military insiders W-0055, W-0038, W-0017, W-0016, W-0089 and W-0299, some of whom were trainers themselves,³⁷⁴ each provided detail on UPC/FPLC military training. Recruits, including children under 15 years of age,³⁷⁵ were brought to the UPC/FPLC military training camps.³⁷⁶ There, they were divided into different groups and placed under the orders of a UPC/FPLC commander.³⁷⁷

186. Officers in the UPC/FPLC training camps recorded information about the daily activities at the camps. According to W-0055, these military records would capture all the basic information on the recruits, including their names and dates of arrival at the camp.³⁷⁸ The records enabled the Main Staff to monitor the number of recruits.³⁷⁹ [REDACTED] Bosco consulting these records.³⁸⁰

187. Once registered, recruits were divided into groups³⁸¹ and assigned to leaders.³⁸² They were taught that the Accused was the head of the organisation and the Supreme Chief. The other commanders in the camp always referred to him as such.³⁸³ They were also told that, under the

³⁷³ See para. 247.

³⁷⁴ T.113, p.40, line 14 to p.41, line 4.

³⁷⁵ T.175, p.59, lines 5-19. Video EVD-OTP-00574 (minutes 36.07-36.28).

³⁷⁶ See para. 247.

³⁷⁷ T.148, p.31, line 16 to p.32, line 3.

³⁷⁸ T.175, p.78, lines 17-25.

³⁷⁹ T.175, p.78, lines 10-15.

³⁸⁰ [REDACTED]

³⁸¹ T.123, p.5, lines 12-14; T.148, p.31, line 25 to p.32, line 3.

³⁸² T.140, p.24, lines 17-23.

³⁸³ T.137, p.65, lines 5-14; T.144, p.39, line 19 to p.40, line 21; T.148, p.50, line 11 to p.51, line 7.

Accused, Bosco Ntaganda and Floribert Kisembo were the next two most important commanders.

188. Military training immediately followed.³⁸⁴ W-0157 recalled that every morning, the first exercise was to attend a parade in order for the officers to ensure that everyone was present:³⁸⁵ “All the officers had a list of members of their group, and it was possible to know that in such and such group there were such and such individuals.”³⁸⁶
189. Children under the age of 15 received the same training as older recruits.³⁸⁷ Witnesses described the stages of training. When training was completed, the recruits became UPC/FPLC soldiers and were issued weapons and uniforms.³⁸⁸
190. The military insiders explained that the UPC/FPLC military training programme included a general introduction to military life,³⁸⁹ weapons training,³⁹⁰ marching,³⁹¹ saluting,³⁹² and physical exercises including jogging and gymnastics.³⁹³ The recruits learned how to assemble and disassemble weapons, to shoot at targets, learned combat tactics and to obey their commanders.³⁹⁴ They were also taught how to receive senior officers who visited the camp:³⁹⁵ how to salute the President upon his arrival, how to hold

³⁸⁴ T.135, p.11, lines 6-20; T.144, p.21, lines 14-17.

³⁸⁵ T.186, p.13, lines 16-20.

³⁸⁶ T.186, p.17, lines 20-25.

³⁸⁷ T.114, p.10, line 15 to p.11, line 14.

³⁸⁸ T.114, p.12, line 3 to p.14, line 1; T.117, p.12, lines 4-17, p.15, line 20 to p.16, line 12; T.113, p.44, lines 8-12. EVD-OTP-00489, p.45; Video EVD-OTP-00570 (minute 00.14.51ff).

³⁸⁹ T.113, p.40, line 22 to p.41, line 4; T.176, p.24, lines 21-23, p.25, lines 14-20.

³⁹⁰ T.176, p.24, lines 24-25.

³⁹¹ T.176, p.24, line 24; T.186, p.24, lines 20-24.

³⁹² T.114, p.7, lines 17-18.

³⁹³ T.119, p.82, line 2 to p.83, line 14; T.113, p.65, line 24 to p.66, line 6.

³⁹⁴ T.176, p.24, line 18 to p.26, line 14; T.113, p.66, lines 7-17; T.114, p.10, line 21 to p.11, line 13, p.12, line 20 to p.14, line 1; T.186, p.12, lines 22-25; T.196, p.5, line 21 to p.6, line 9.

³⁹⁵ T.113, p.40, line 22 to p.41, line 4, p.65, line 24 to p.66, line 6.

oneself during the visit, how to salute the other senior commanders.³⁹⁶ They were taught to sing military songs³⁹⁷ and military ideology.³⁹⁸

191. The recruits were not allowed to leave the camp during the training.³⁹⁹ Deserters could be punished by execution.⁴⁰⁰ According to W-0299, Kisembo and Bosco ordered the execution of deserters.⁴⁰¹ Even for the children who initially enlisted of their own volition, they were thereafter not free to leave.
192. W-0038 testified that instructors at Mandro camp would teach the recruits using a blackboard to draw weapons and diagrams.⁴⁰² W-0298 also testified that he was taught using a blackboard.⁴⁰³
193. W-0038 described a typical day at the Mongbwalu training camp: "We got up every morning at 4.00 a.m., and we had to run round the centre because it was very big, and we would run from 7.00 to 9.00 a.m., running all the time and singing military songs as we run".⁴⁰⁴ In the evening, W-0038 stated that "from 7.00 p.m., we will sing songs, what we call 'Likalamadili' in Swahili. These were military songs, and we would sing right up to about 10.00 p.m. or 11.00 p.m. we would spend all that time singing. And we would end activities at about 10.00 p.m. or 11.00 p.m. That was the routine."⁴⁰⁵ At the military training camp in Bule, W-0299 described how he and the other soldiers would lead the recruits with military gymnastics and with songs.⁴⁰⁶

³⁹⁶ T.113, p.66, line 18 to p.67, line 2; T.114, p.7, lines 16-18.

³⁹⁷ T.113, p.66, lines 13-16; T.189, p.19, line 24 to p.20, line 6; EVD-OTP-00489, p.45, lines 12-21; Video EVD-OTP-00570 (minute 00.00.05ff).

³⁹⁸ T.189, p.18, lines 7-20.

³⁹⁹ T.113, p.68, lines 12-20; T.186, p.8, lines 10-11; T.119, p.83, lines 5-18.

⁴⁰⁰ T.122, p.9, line 4 to p.13, line 6; EVD-OTP-00489, p.71, lines 3-11.

⁴⁰¹ T.122, p.12, lines 21-25. W-0046 testified that Bosco personally executed one of them: T.207, p.21, line 22 to p.22, line 23.

⁴⁰² T.113, p.66, lines 6-17.

⁴⁰³ T.123, p.8, lines 16-21.

⁴⁰⁴ T.113, p.65, line 24 to p.66, line 5.

⁴⁰⁵ T.113, p.66, lines 7-17.

⁴⁰⁶ T.119, p.54, lines 7-18.

194. The descriptions of these insider witnesses on the training given at the UPC/FPLC camps corroborate the descriptions given by the child soldier witnesses.
195. W-0010 described that the recruits were up at 4:00 a.m. to run, then they were instructed to crawl, do push-ups and jump into holes.⁴⁰⁷ In the evening they sang songs until about 11:00 pm.⁴⁰⁸ Witness DRC-OTP-WWWW-0007 (W-0007) was also taught songs, he described rising at 4:00 am, running, learning to crawl, doing drills, marching and welcoming a group of soldiers.⁴⁰⁹ W-0157 described the songs they were taught to sing at the training camp,⁴¹⁰ marching,⁴¹¹ and the firearms and heavy weapons they were taught to use.⁴¹² W-0011 described learning to shoot, to crawl and combat tactics.⁴¹³ W-0213 described doing running exercises while at the training camp⁴¹⁴ and that he was taught to shoot.⁴¹⁵ W-0008 described his training at the UPC/FPLC camp in shooting, crawling, running, and in how to identify the enemy and how to flee.⁴¹⁶ W-0157 said that the recruits were woken up “very early”, they assembled for parades and then learned how to use firearms and military ideology.⁴¹⁷ W-0294 stated that recruits first learned running,⁴¹⁸ singing⁴¹⁹ and how to use weapons, how to fight soldiers, how to hold oneself and how to salute.⁴²⁰ W-0298 described how training evolved each day, first he learned songs, then they were shown the

⁴⁰⁷ T.144, p.21, line 12 to p.23, line 5.

⁴⁰⁸ T.144, p.23, lines 2-4.

⁴⁰⁹ T.148, p.37, line 24 to p.39, line 12.

⁴¹⁰ T.186, p.23, line 20 to p.24, line 7.

⁴¹¹ T.186, p.24, line 18 to p.25, line 3.

⁴¹² T.186, p.20, line 7 to p.21, line 12.

⁴¹³ T.138, p.69, line 23 to p.70, line 12.

⁴¹⁴ T.133, p.3, line 21 to p.4, line 1.

⁴¹⁵ T.133, p.4, line 24 to p.5, line 7.

⁴¹⁶ T.135, p.11, line 4 to p.12, line 1.

⁴¹⁷ T.186, p.12, line 22 to p.14, line 12, p.18, line 4-14.

⁴¹⁸ T.150, p.74, line 14 to p.75, line 19.

⁴¹⁹ T.150, p.74, p.75, lines 5-16.

⁴²⁰ T.150, p.66, lines 12-15.

weapons, then taught gymnastics, parades and how to salute superiors, and then how to load and dismantle a weapon and how to shoot.⁴²¹

196. W-0016 and W-0089 testified that recruits practiced shooting using a piece of wood rather than a real weapon.⁴²² This corroborates the evidence of the child soldier witnesses who testified about learning to manipulate weapons by first using sticks or pieces of wood before being given weapons at the end of training.⁴²³
197. W-0016 explained that recruits were given weapons and uniforms at the end of their training.⁴²⁴ Child soldier witnesses described the same process.⁴²⁵ W-0008 and W-0010 stated that during training the recruits wore civilian clothes.⁴²⁶

8.3.2 Punishment and Discipline

198. Child soldiers in the UPC/FPLC training camps were subjected to strict and sometimes brutal military discipline, which included detention, corporal punishment, including torture,⁴²⁷ and even execution. They never received a salary or medical care, and those who claimed to be ill were beaten. W-0298 recounted: "They made us sleep [sic] and asked the soldiers to jump on us. And you were beaten. The soles of your feet were beaten. You were beaten a lot. Your legs, everywhere. We even have scars from the whips because we claimed to be ill."⁴²⁸

⁴²¹ T.123, p.5, line 19 to p.6, line 7.

⁴²² T.189, p.40, line 14 to p.41, line 25; T.196, p.6, line 10 to p.7, line 5.

⁴²³ T.123, p.7, line 21 to p.8, line 2; T.124, p.24, line 21 to p.25, line 16; T.138, p.33, line 6 to p.34, line 5; T.148, p.40, line 5 to p.41, line 10, p.56, lines 14-21; T.186, p.18, line 15 to p.20, line 3, p.21, line 3 to p.22, line 20, p.34, line 5 to p.36, line 2; T.150, p.74, line 14 to p.75, line 19.

⁴²⁴ T.189, p.57, line 10 to p.58, line 14.

⁴²⁵ T.134, p.30, lines 9-13; T.135, p.22, line 21 to p.23, line 25; T.137, p.55, line 25 to p.56, line 12; T.144, p.42, line 25 to p.45, line 5.

⁴²⁶ T.135, p.23, lines 18-21; T.144, p.35, lines 1-4.

⁴²⁷ T.189, p.44, lines 13-20.

⁴²⁸ T.123, p.9, lines 4-15.

199. Punishments were arbitrary and depended largely upon the superior.⁴²⁹ W-0157 said that those who failed to wake up would be woken with cold water or whipping.⁴³⁰ They were beaten if they could not recall the lyrics to military songs.⁴³¹ In Mandro, there were daily punishments.⁴³² W-0007, W-0008 and W-0010 testified that when they failed to do the exercises correctly, they were beaten or flogged.⁴³³ W-0007 explained: "if you're being whipped, it's just the commander who can ask the whipping to stop."⁴³⁴ W-0016 said that a child soldier who was about 14 years old lost his arm as a result of flogging.⁴³⁵ Losing a weapon could lead to death,⁴³⁶ and if a child soldier expressed fear, he would be put on the front line of the battle.⁴³⁷ Several witnesses underlined the perversity of the disciplinary system put in place in the camps. W-0014 witnessed harsh discipline:

One of the forms of punishment I witnessed was whipping, punishment through whipping. The recruits who committed any errors were whipped on their buttocks. They made them lie on the ground or their colleagues would hold their hands and others would hold their legs and then they were whipped on the buttocks. That's the way they were whipped. Now, if I can also talk about another form of punishment. One of them who had committed an error was asked to lie down on his back, lie still without moving for a certain number of minutes. And another form of punishment was to have them leap about like frogs over a certain distance for as long as the instructor required. Those were the forms of punishment I witnessed.⁴³⁸

200. Sometimes, punishment meant killing a friend, as described by W-0008:

"[t]he principle was the following: if you committed a violation, a close

⁴²⁹ T.158, p.67, line 15 to p.68, line 6.

⁴³⁰ T.186, p.12, line 22 to p.14, line 12.

⁴³¹ EVD-OTP-00491, p.5, line 16 to p.7, line 10.

⁴³² T.148, p.48, lines 10-11; T.120, p.14, lines 13-24.

⁴³³ T.148, p.43, line 20 to p.45, line 20; T.135, p.16, lines 1-25; T.144, p.29, line 11 to p.31, line 12.

⁴³⁴ T.149, p.41, lines 5-6.

⁴³⁵ T.189, p.47, lines 3-4.

⁴³⁶ T.135, p.18, lines 13-21; T.137, p.56, line 15 to p.57, line 8, p.59, line 4 to p.60, line 6.

⁴³⁷ T.145, p.38, lines 20-25.

⁴³⁸ T.181, p.17, lines 6-16.

friend of yours will kill you.”⁴³⁹ Asked whether the punishments applied equally to children, W-0007 answered: “In the army, there are no young or adults.”⁴⁴⁰

201. Some recruits tried to flee, but if they were caught, they would be flogged, severely beaten,⁴⁴¹ or even executed.⁴⁴² W-0213 testified that he was locked up in a hole dug in the ground as a punishment for having deserted.⁴⁴³ He stayed in the hole for more than a week, and was given food only in the evening.⁴⁴⁴ The holes were covered, and one could barely breathe.⁴⁴⁵ W-0157 refused to recount what happened to him when he tried to escape.⁴⁴⁶

8.3.3 Conditions at the training camps

202. The difficult training and living conditions in the UPC/FPLC camps were described by all the child soldier witnesses and observers, including W-0046.⁴⁴⁷ Child soldiers were exhausted, starving, and lived in constant fear. They suffered from forced participation in physical exercises, lack of care and from inhumane forms of punishment.⁴⁴⁸ Upon his arrival at Mandro camp, W-0157 was beaten and told: “You’ve just arrived at a training centre.”⁴⁴⁹ Boys and girls had their heads shaved with pieces of broken glass or a razor blade, often resulting in injuries on their very first day at the

⁴³⁹ T.135, p.20, lines 14-15.

⁴⁴⁰ T.148, p.47, lines 17-18.

⁴⁴¹ T.113, p.68, line 12 to p.70, line 11; T.117, p.37, line 11 to p.38, line 1; T.124, p.35, line 12 to p.36, line 10; T.135, p.10, line 16 to p.11, line 3; T.186, p.8, lines 10-11.

⁴⁴² T.132, p.11, line 16 to p.12, line 6; T.133, p.3, lines 6-10; T.122, p.9, line 4 to p.13, line 6; T.144, p.31, lines 13-22; T.209, p.27, line 9 to p.28, line 21; EVD-OTP-00489, p.71, lines 3-11.

⁴⁴³ T.132, p.40, lines 4-24.

⁴⁴⁴ T.132, p.41, lines 20-24.

⁴⁴⁵ T.148, p.57, lines 14-15; T.158, p.32, line 15 to p.33, line 3.

⁴⁴⁶ T.186, p.36, line 15 to p.37, line 11.

⁴⁴⁷ T.205, p.72, lines 22-24; EVD-OTP-00489, p.49, line 23 to p.51, line 6.

⁴⁴⁸ T.195, p.38, line 18 to p.39, line 1; T.123, p.31, lines 7-19.

⁴⁴⁹ T.185, p.80, line 12 to p.81, line 16; T.186, p.7, line 16 to p.8, line 11.

camp.⁴⁵⁰ Children and adults were mixed together and lived in the same conditions.⁴⁵¹

203. The quality of the food, if there was any, was appalling.⁴⁵² W-0017 spoke about the “suffering” of the soldiers “because there was no food.”⁴⁵³ According to W-0046, child soldiers often had to fight with an empty stomach and to fetch their own rations.⁴⁵⁴ This was confirmed by W-0008 who said: “[n]ormally, the principle in the army is when you finish a battle you loot because that’s how you get food.”⁴⁵⁵ W-0014 recalled a situation in the military headquarters in Bunia of a child who was crying out, calling his mother; “apparently the child was hungry.”⁴⁵⁶
204. Other conditions were equally appalling. According to W-0017, the recruits could hardly ever wash and had no access to medicine.⁴⁵⁷ They were not always provided with clothes,⁴⁵⁸ or only with clothes infested with fleas,⁴⁵⁹ and they were given shoes that did not fit them.⁴⁶⁰ Some had to dig holes or build a shelter to sleep in;⁴⁶¹ others could not sleep as they had to stand guard.⁴⁶² W-0298 testified that people got sick because of the lack of sleep.⁴⁶³

⁴⁵⁰ T.144, p.21, lines 22-23; T.150, p.74, lines 9-13.

⁴⁵¹ T.194, p.38, lines 3-17.

⁴⁵² T.149, p. 25, lines 11-12, p.40, lines 16-19; T.190, p.70, lines 6-15. See also T.123, p.5, lines 21-24; T.145, p.34, lines 2-7; T.276, p.74, line 25 to p.75, line 1.

⁴⁵³ T.158, p.22, lines 3-7.

⁴⁵⁴ T.207, p.19, line 13 to p.20, line 21.

⁴⁵⁵ T.137, p.76, lines 1-4.

⁴⁵⁶ T.181, p.19, lines 10-20.

⁴⁵⁷ T.158, p.23, lines 10-19.

⁴⁵⁸ T.145, p.32, line 3 to p.34, line 1; T.207, p.20, line 22 to p.21, line 5.

⁴⁵⁹ T.123, p.19, lines 17-23.

⁴⁶⁰ T.123, p.8, line 22 to p.9, line 3.

⁴⁶¹ T.207, p.19, line 13 to p.20, line 21; T.189, p.23, line 18 to p.24, line 5; T.138, p.66, line 6 to p.67, line 13.

⁴⁶² T.201, p.76, line 18 to p.77, line 3.

⁴⁶³ T.123, p.9, lines 4-5.

205. For the girls, the situation was even worse. In addition to their training, they were assigned domestic chores⁴⁶⁴ and became the sexual slaves of the commanders.⁴⁶⁵ Sexual abuse was “systematic” throughout the training camps.⁴⁶⁶ Pregnancy resulted, and abortion was an option only if the commanders decided so.⁴⁶⁷ Miscarriages were a consequence of the poor living conditions.⁴⁶⁸ W-0046 described their psychological and physical state as “quite catastrophic.”⁴⁶⁹
206. The use of drugs was a common practice.⁴⁷⁰ Child soldiers were even encouraged to smoke hemp, being told that it would make them stronger.⁴⁷¹ W-0010 recounted: “Everybody had a cigar before going to war. Everybody.”⁴⁷² Child soldiers were also manipulated and encouraged to fight and kill with the promises of a better life.⁴⁷³

8.4 Use of children under the age of 15 in combat and other military activities

207. Upon completion of an intensive “short-term training”,⁴⁷⁴ the recruits “would be ready for combat”,⁴⁷⁵ given a weapon and a military uniform,⁴⁷⁶ and incorporated into military units (brigades, companies, battalions, or platoons).⁴⁷⁷ The trained soldiers were deployed by the UPC/FPLC as bodyguards or in military operations no differently from any other soldier,

⁴⁶⁴ T.209, p.10, lines 4-11; T.135, p.14, lines 11-25; T.148, p.39, line 13 to p.40, line 4; T.160, p.60, lines 13-22.

⁴⁶⁵ T.207, p.30, line 24 to p.31, line 1; T.144, p.36, line 5 to p.38, line 18; T.145, p.6, line 17 to p.8, line 23; T.154, p.28, line 9 to p.29, line 23; T.148, p.49, lines 11-22.

⁴⁶⁶ T.207, p.31, lines 4-7.

⁴⁶⁷ T.150, p.34, line 12 to p.36, line 15.

⁴⁶⁸ T.207, p.31, lines 2-4.

⁴⁶⁹ T.207, p.31, lines 16-18.

⁴⁷⁰ T.114, p.85, lines 16-24.

⁴⁷¹ T.145, p.37, line 9 to p.38, line 2.

⁴⁷² T.145, p.38, line 1.

⁴⁷³ T.135, p.29, lines 6-24; T.202, p.6, lines 9-13.

⁴⁷⁴ T.176, p.26, lines 11-14; T.148, p.56, lines 11-13.

⁴⁷⁵ T.176, p.26, lines 11-14.

⁴⁷⁶ T.113, p.44, lines 8-12; T.114, p.12, lines 15-24; T.186, p.34, lines 15-25.

⁴⁷⁷ T.113, p.44, lines 13-20.

with complete disregard for their age.⁴⁷⁸ W-0055 explained how kadogos were deployed after their training:

[L]et me tell you how things happened. When they finished their training, they're deployed to a number of different military functions that will take a group to go to such and such a sector, another one to the staff, to the main staff. That's how it happens. So when a recruit becomes a soldier, he will be deployed within the army of the Union de Patriotes Congolais. There will be a group going to the staff, there'll be another group going to a platoon, another one within the training camp where they'll have to carry out certain duties [...] If a kadogo finishes his training, he's deployed, he joins a brigade, he's given a weapon, and obviously he's going to go and fight. He wouldn't be given a weapon if he were then to withdraw.⁴⁷⁹

208. W-0038 corroborated W-0055's evidence that recruits were used for military purposes once they completed training:

First of all, they were deployed to companies, to battalions, to brigades, or to a platoon. They were sent to other companies or other brigades. And so they were taken first and foremost as soldiers, and then the commanders who were in charge of them would then take them to serve as bodyguards.⁴⁸⁰

209. After March 2003, Kisembo created a "kadogo unit" comprised of child soldiers who had been bodyguards of commanders. After the UPC/FPLC was forced out of Bunia in March 2003, the kadogo unit was incorporated in the troops.⁴⁸¹ W-0017 was with Kisembo during the period that the kadogo unit existed. He testified that the unit had been created in Mamedi and Maitulu.⁴⁸² The kadogo unit was comprised of nearly an entire platoon, slightly less than 45 children under the age of 15. W-0017 estimated that the youngest child in the unit was approximately 12 years old.⁴⁸³ The children in the kadogo unit sang, attended the military parades, learned to march

⁴⁷⁸ EVD-OTP-00489, pp.72, 73.

⁴⁷⁹ T.176, p.44, line 7 to p.45, line 17.

⁴⁸⁰ T.113, p.44, lines 13-20.

⁴⁸¹ T.158, p.21, line 16 to p.22, line 22.

⁴⁸² T.158, p.21, line 16 to p.22, line 22.

⁴⁸³ T.158, p.22, line 23 to p.23, line 9.

militarily,⁴⁸⁴ and were disciplined.⁴⁸⁵ The children were sent to loot the property of the local community for food.⁴⁸⁶ W-0017 stated that the punishment for improper conduct amongst kadogos was most commonly whipping but could also include imprisonment⁴⁸⁷ in holes in the ground.⁴⁸⁸

210. The kadogo unit was eventually incorporated into the main staff headquarters in Bunia.⁴⁸⁹ W-0017 also testified to the presence of child soldiers in the brigade and battalion at Lalo,⁴⁹⁰ while W-0055 testified that there were kadogos at [REDACTED].⁴⁹¹

8.4.1 Battles

211. W-0038 testified that UPC/FPLC child soldiers under the age of 15 participated in combat.⁴⁹² He gave specific instances of children, 13 or 14 years old, participating in battles in November 2002 and May 2003 on behalf of the UPC/FPLC.⁴⁹³ Other evidence shows that children fought at the front lines.⁴⁹⁴ During battles, they were incited to pillage and to steal money from the population and sometimes to rape.⁴⁹⁵ If they refused, they were killed or beaten.⁴⁹⁶

⁴⁸⁴ T.158, p.24, lines 6-24.

⁴⁸⁵ T.158, p.31, line 18 to p.32, line 14.

⁴⁸⁶ T.158, p.28, line 22 to p.29, line 2.

⁴⁸⁷ T.158, p.31, lines 18-22.

⁴⁸⁸ T.158, p.32, line 15 to p.33, line 3; T.123, p.19, lines 17-22.

⁴⁸⁹ T.158, p.24, lines 2-5, p.45, lines 7-10, p.47, lines 1-3.

⁴⁹⁰ T.157, p.62, line 12 to p.63, line 22.

⁴⁹¹ T.174, p.39, lines 13-14.

⁴⁹² T.113, p.37, lines 14-18, p.44, line 21 to p.46, line 5, p.51, line 22 to p.53, line 3; T.114, p.17, line 7 to p.18, line 4. See Video EVD-OTP-00572 (minutes 00.04.55-00.10.06).

⁴⁹³ T.113, p.44, line 21 to p.46, line 5, p.51, line 22 to p.53, line 3; T.114, p.17, line 17 to p.18, line 4.

⁴⁹⁴ T.125, pp.50-54.

⁴⁹⁵ T.138, p.21, line 7 to p.22, line 1; T.201, p.68, line 24 to p.70, line 23.

⁴⁹⁶ T.123, p.14, line 8 to p.15, line 1.

212. Just as recruits of all ages participated in the same training, the newly trained soldiers were deployed to combat irrespective of their age. Children fought alongside the adults. As W-0294 explained:

Q. And during those battles, the group of soldiers on your side, were they composed in a similar way as the composition that went to Songolo, meaning were the ages similar?

A. You're asking about the age. It was not an issue in the army. It was not a problem. Some were younger, others were older. If you were chosen to become a soldier, you had to do whatever you were told to do. If you asked -- if someone asked a child to do something, they did it. You couldn't choose who was going to fight on the basis of their ages. And therefore, you could be mixed up amongst adults and children. You didn't have a group of young people, on the one hand, and another group of adults.⁴⁹⁷

213. When he was first appointed to his position, W-0041 was given 12 bodyguards, two or three of whom were 13 or 14 years of age. The witness testified that all of them were young and none had attained the fourth year of secondary school. One week after they had been posted as bodyguards to W-0041, a UPC/FPLC commander (either Tchaligonza or Bagonza) removed them and they were sent "to the front" for combat duty.⁴⁹⁸

214. Witnesses testified to the use of child soldiers by the UPC/FPLC in the following combat operations:

- a. **Zumbe:** W-0294 participated in a battle in Zumbe during which he killed the Ngiti and the Lendu.⁴⁹⁹ He stated that the battle took place some time after Lompondo was chased out of Bunia.⁵⁰⁰

⁴⁹⁷ T.151, p.26, line 10 to p.27, line 9. W-0038 confirmed that once deployed, children and adults received the same orders: T.113, p.44, line 21 to p.45, line 9.

⁴⁹⁸ T.125, pp.50-53. [REDACTED] The episode with the 12 bodyguards was most likely at the time of his first nomination in September 2002 given that he first described a bodyguard of 12 years of age that he had in December 2002 and then he stated 'in the beginning, however, when I was appointed to my position, I was given 12 bodyguards.' (T.125, p.50, lines 5-8).

⁴⁹⁹ T.151, p.26, line 10 to p.27, line 9.

- b. **Mongbwalu** (November-December 2002): W-0038 participated in the UPC/FPLC attack on Mongbwalu in November-December 2002 with the objective to destroy the headquarters of the Lendu.⁵⁰¹ He witnessed children fighting in the battle and shooting at the enemy. Children also were shot by the enemy.⁵⁰² Some of those children died.⁵⁰³
- c. **Lipri** (February/March 2003)⁵⁰⁴: W-0017 testified that the UPC/FPLC attacked Lipri⁵⁰⁵ and W-0011 described taking part in battles in Lipri.⁵⁰⁶ W-0008 also stated that he took part in this battle [REDACTED] Commander Pitchen⁵⁰⁷ and that the salary for the soldiers came from looting the community.⁵⁰⁸ The commander first ordered that he would select the best goods and thereafter W-0008 and others could keep what he did not take.⁵⁰⁹ W-0007 testified that he took part in the battle of Lipri and that the UPC/FPLC commanders committed acts of sexual violence.⁵¹⁰ He stated that after a battle in enemy villages such as Lipri, then “we went and looted everything, goats, chickens, and we ate everything”.⁵¹¹

⁵⁰⁰ T.152, p.15, lines 15-22. W-0213 mentioned a battle in Zumbe between the UPC/FPLC and the Lendu: T.134, p.37, lines 6-11. Human Rights Watch reported that the Hema militia attacked Zumbe in October 2002: EVD-OTP-00623, para. 63.

⁵⁰¹ T.113, p.48, line 24 to p.49, line 13.

⁵⁰² T.113, p.44, line 25 to p.45, line 20.

⁵⁰³ T.114, p.18, lines 1-4.

⁵⁰⁴ W-0046 confirmed that there was a battle in Lipri in at or about the end of February 2003 (EVD-OTP-00491, p.25, line 12 to p.26, line 3). EVD-OTP-00623 at p.23, para 69: between February and March 2003, UPC/FPLC militias carried out a large-scale military operation against the villages located between Lipri and Nyangaraye. Page 60: the UPC/FPLC attacked the Lendu in Lipri in February, March 2003.

⁵⁰⁵ T.157, p.96, line 3-12.

⁵⁰⁶ T.139, p.11, line 19 to p.12, line 20, p.15, line 16 to p.17, line 21, p.20, lines 2-25.

⁵⁰⁷ T.135, p.34, lines 2-25.

⁵⁰⁸ T.135, p.35, lines 1-12.

⁵⁰⁹ T.137, p.69, lines 9-22.

⁵¹⁰ T.149, p.26, line 10 to p.28, line 5.

⁵¹¹ T.149, p.26, lines 17-18.

- d. **Kobu** (February/March 2003)⁵¹²: W-0038 took part in the Kobu battle⁵¹³ and indicated that his entire brigade, which included children under the age of 15, went to fight in Kobu.⁵¹⁴
- e. **Bogoro**: W-0157 took part in the battle of Bogoro which he recalled occurred on 24 February 2003.⁵¹⁵ W-0297 took part in the Bogoro battle and he recalled that it took place at the end of 2002 or beginning of 2003.⁵¹⁶
- f. **Bunia** (March 2003)⁵¹⁷: W-0294 took part in the battle of Bunia with the UPC/FPLC in 2003.⁵¹⁸ He specified that the battle was against the Ugandans and that he fought under a commander known as '[REDACTED]'.⁵¹⁹ W-0010 described participating in a battle in Bunia against the Lendu, Ugandans and French.⁵²⁰
- g. **Songolo**: W-0294 participated in a battle in Songolo to kill Ngiti and Lendu.⁵²¹
- h. **Barriere**: Both W-0008 and W-0011 participated in a battle in Barriere.⁵²² W-0008 confirmed that he killed the enemy and that he looted the property of the defeated community.⁵²³ W-0008 testified that looting after a battle is "the principle of the army" and that even

⁵¹² EVD-OTP-00623, p.60: the UPC/FPLC attacked the Lendu in Kobu in February, March 2003. W-0046 confirmed that there was a battle in Kobu "near the end of" February 2003 (EVD-OTP-00491, p.25, lines 12 to p.26, line 3); T.175, p.8, lines 9-19; T.157, p.95, line 7 to p.96, line 12.

⁵¹³ T.114, p.22, lines 18-25.

⁵¹⁴ T.114, p.14, lines 2-23.

⁵¹⁵ T.188, p.47, lines 6-15.

⁵¹⁶ T.287, p.24, lines 17-24.

⁵¹⁷ EVD-OTP-00623, p.60.

⁵¹⁸ T.152, p.21, line 8 to p.23, line 9.

⁵¹⁹ T.152, p.22, line 15 to p.24, line 5.

⁵²⁰ T.144, p.64, lines 1-5. W-0038 took part in a battle in Bunia against the Ugandans and the French (T.113, p.52, lines 3-9).

⁵²¹ T.151, p.26, line 10 to p.27, line 9; T.152, p.14, lines 4-9.

⁵²² W-0008 participated in the Barriere battle. He described that he looted and killed the enemy (T.135, p.35, line 17 to p.36, line 16). W-0011 participated in Barriere battle (T.138, p.75, lines 19-25; T.139, p.6, line 12 to p.8, line 18; T.140, p.46, line 7 to p.48, line 1).

⁵²³ T.135, p.35, line 17 to p.36, line 16.

in Hema villages such as Barriere, after a battle “it’s your right to loot things like property, like goats, and other things to help you”.⁵²⁴ W-0011 also confirmed that they went into the village to look for food.⁵²⁵

- i. **Kasenyi:** W-0294 participated in a battle at Kasenyi fighting against the Ngiti and Lendu.⁵²⁶
- j. **Dele:** Both W-0213 and W-0007 fought at Dele, just outside of Bunia.⁵²⁷
- k. **Tchomia:** W-0010 participated in a battle in Tchomia.⁵²⁸
- l. **Bule:** W-0294 participated in the battle of Bule to kill Ngiti and Lendu.⁵²⁹

215. As a result of the fighting, some of the child soldiers in the UPC/FPLC sustained injuries.⁵³⁰ Others died in the battle.⁵³¹ Indeed, W-0038 said that children were more likely to be wounded or killed; compared to adults, they run more slowly and could therefore be more easily shot at by the enemy.⁵³² Children were also often put in the front line during combat.⁵³³ According to the witnesses present on the battlefields, “[a] lot of children died.”⁵³⁴

⁵²⁴ T.137, p.75, line 12 to p.76, line 4.

⁵²⁵ T.140, p.46, lines 7-21.

⁵²⁶ T.151, p.26, line 10 to p.27, line 9. W-0007 testified that he was aware of a battle in Kasenyi: T.149, p.53, lines 6-9.

⁵²⁷ T.134, p.53, line 16 to p.54, line 9. T.149, p.18, lines 12-15. Document refers to a battle at Dele in April 2003: EVD-OTP-00737, p.10.

⁵²⁸ T.144, p.63, lines 3-4. W-0012 stated that there had been an attack on Tchomia on 31 May 2003: T.168, p.78, lines 19-20. See also EVD-OTP-00623, p.27, para.85.

⁵²⁹ T.151, p.26, line 10 to p.27, line 9. W-0031 testified that there was fight in Bule between the UPC/FPLC and Ugandans in about June 2003: T.203, p.16, line 23 to p.17, line 13.

⁵³⁰ T.138, p.24, line 19 to p.25, line 5, p.32, line 18 to p.33, line 5; T.153, p.48, lines 4-5; T.149, p.21, lines 5-7; T.144, p.53, line 5 to p.54, line 13.

⁵³¹ T.114, p.17, line 7 to p.18, line 4; T.144, p.53, lines 14-17; T.151, p.23, line 15 to p.25, line 20; T.149, p.40, lines 7-10.

⁵³² T.113, p.45, lines 10-20.

⁵³³ T.168, p.74, lines 1-6.

⁵³⁴ T.149, p.13, lines 19-24, p.23, line 15; T.144, p.53, lines 18-20; T.151, p.38, lines 7-8; T.135, p.30, lines 7-25.

216. W-0014 said that he saw some children aged below 15 who were injured.⁵³⁵ Battle casualties, including dead and injured children, were recorded in the UPC/FPLC logbook: “chez nous un seul enfant a reçu une balle mais il est encore vivant et il n'est pas gravement blessé”.⁵³⁶
217. Following a victory, the battle dead would be buried in mass-graves, on the site.⁵³⁷ Following a defeat, they were left behind.⁵³⁸ Injuries were not systematically treated,⁵³⁹ and wounded children still had to participate in the looting at the end of the battle; otherwise they “would have no booty.”⁵⁴⁰ W-0010 said that after the treatment of her injury, she returned to provide security for her commander.⁵⁴¹ W-0007 recalled that when he was wounded he did not receive medical care, instead his commander poured gunpowder into the wound.⁵⁴²
218. Some child soldiers still suffer from their injuries.⁵⁴³ W-0031 described how children arrived [REDACTED] with serious medical problems because they had not been treated.⁵⁴⁴ Their participation in combat also left them with psychological trauma.⁵⁴⁵ W-0007 recalled: “we also saw people dying. We had to climb over corpses. That caused me suffering. [...] it was later, when I

⁵³⁵ T.182, p.39, line 25 to p.40, line 3.

⁵³⁶ EVD-OTP-00409 at page DRC.0017.093. Additional logbook entries regarding the use of children in battles can be found at pages DRC.0017.048, DRC.0017.071, DRC.0017.093, DRC.0017.095, DRC.0017.119, DRC.0017.154, DRC.0017.132, DRC.0017.161, DRC.0017.167, DRC.0017.208 and DRC.0017.210.

⁵³⁷ T.144, p.53, line 23 to p.54, line 3.

⁵³⁸ T.149, p.16, lines 17-23.

⁵³⁹ EVD-OTP-00489, p.21, lines 8-15.

⁵⁴⁰ T.137, p.70, lines 13-15.

⁵⁴¹ T.144, p.59, line 5.

⁵⁴² T.149, p.24, lines 3-19.

⁵⁴³ T.135, p.55, lines 13-15; T.144, p.59, lines 7-8; T.145, p.28, lines 22-23.

⁵⁴⁴ T.200, p.6, line 25 to p.7, line 3.

⁵⁴⁵ T.135, p.55, lines 19-23.

went back home, that's when I started to have problems."⁵⁴⁶ W-0010 said:
 "My life is destroyed. My life is completely destroyed."⁵⁴⁷

8.4.2 Use of children under 15 as bodyguards

219. W-0038 described the role of UPC/FPLC bodyguards under the age of 15, who were armed and in military uniform:

Well, they were responsible for watching over the commander, ensuring the security of his residence, and if you had to see the commander, you had to go through the children and other bodyguards who were there. And when he goes to war, the children will act as his bodyguard and will move around with him wherever he went.⁵⁴⁸

220. All UPC/FPLC commanders had kadogos and this was widely known.⁵⁴⁹ W-0010 was a bodyguard to [REDACTED] and she testified that both she and [REDACTED], were under the age of 15.⁵⁵⁰

221. [REDACTED] stated that he personally had kadogos serving in his escort who had been posted to him by Bosco Ntaganda.⁵⁵¹ W-0041, himself assigned a bodyguard who was under the age of 15,⁵⁵² confirmed that all UPC/FPLC military commanders had bodyguards under the age of 15, as did officials from the national secretaries to the President.⁵⁵³

⁵⁴⁶ T.149, p.41, lines 10-18; T.137, p.70, lines 2-3.

⁵⁴⁷ T.145, p.29, line 12.

⁵⁴⁸ T.113, p.37, lines 14-18.

⁵⁴⁹ T.113, p.36, line 24 to p.37, line 10; T.174, p.39, line 10 to p.41, line 15; T.175, p.81, line 23 to p.82, line 5; T.176, p.47, line 5 to p.48, line 24; T.177, p.32, lines 16-19; T.189, p.20, lines 19-20. W-0055 defined a kadogo as being a child under the age of 15 (T.174, p.40, line 21 to p.41, line 2) and W-0038 also says that in the UPC/FPLC, the term "kadogos" was often applied to children under the age of 15 (T.114, p.39, lines 23-25).

⁵⁵⁰ T.144, p.15, lines 19-23, p.45, line 12 to p.46, line 5, p.38, lines 1-2.

⁵⁵¹ [REDACTED]

⁵⁵² T.125, p.48, line 18 to p.49, line 14.

⁵⁵³ T.125, p.54, line 15 to p.56, line 14.

222. W-0046 also testified that child soldiers were regularly used as escorts/bodyguards for National Secretaries, Command Staff and UPC/FPLC members, informants and as guards for UPC/FPLC facilities.⁵⁵⁴
223. W-0031 testified that children between 12-16 years of age, and even as young as 9 or 10, were on guard at the residences of those in charge of the UPC/FPLC in Bunia.⁵⁵⁵ At the end of 2002 or early 2003, W-0031 [REDACTED] Mr [REDACTED], who for a time was [REDACTED] of the UPC, at his office, where he saw bodyguards some of whom were under 15.⁵⁵⁶
224. W-0031 stated that he watched UPC/FPLC officials walking around Bunia with children in their escort, including the Accused, Lola Lapi, Kisembo, Daniel Litsha, Lonema.⁵⁵⁷
225. W-0024 described his detention by the UPC/FPLC in October 2002 in “one of the official houses where usually the official representatives lived”.⁵⁵⁸ There were kadogos aged 10, 11 or 12, “no more than that”, around the premises.⁵⁵⁹ The kadogos were armed and dressed in either full or partial military uniform.⁵⁶⁰
226. W-0017 stated that children served as bodyguards at the camp in Lalo.⁵⁶¹ These children were around the ages of 10, 11, and 12 years.⁵⁶² The witness stated that children often served as bodyguards within the UPC/FPLC⁵⁶³ as “they were not very demanding, they were not asking for money to buy what they wanted [...] A child-as long as he can wash and eat, that’s all he

⁵⁵⁴ EVD-OTP-00489, pp. 59-60.

⁵⁵⁵ T.201, pp.64-67.

⁵⁵⁶ T.199, pp.39-42.

⁵⁵⁷ T.201, p.67, line 16 to p.68, line 14.

⁵⁵⁸ T.170, p.77, lines 11-20.

⁵⁵⁹ T.170, p.76, lines 1-8.

⁵⁶⁰ T.170, p.77, lines 3-8.

⁵⁶¹ T.154, p.81, lines 18-24.

⁵⁶² T.154, p.82, lines 1-3.

⁵⁶³ T.154, p.83, lines 7-8.

needs, while adults-older soldiers, want more than that".⁵⁶⁴ W-0038 confirmed that commanders preferred children as bodyguards as "they did not ask much of the commanders",⁵⁶⁵ and also because the children were fearless.⁵⁶⁶

8.4.3 Use of girl child soldiers in the UPC/FPLC

227. W-0017, W-0055, W-0038, W-0299, W-0016, W-0089, W-0010, W-0007 testified to the presence of girls in the UPC/FPLC army. W-0055 testified about *Personnel Militaire Féminin* (PMFs) in the UPC/FPLC, who were mainly bodyguards, armed and in uniform.⁵⁶⁷ W-0010 testified that male children of small size were called kadogos while girl soldiers were PMFs.⁵⁶⁸

228. W-0017 recalls that there were two girls, aged 13 or 14, in the kadogo unit.⁵⁶⁹ The two young girls, named little Mave and Francine, were later removed and the witness saw them with commanders, such as Eric Mbabazi.⁵⁷⁰ W-0017 stated that these girls generally were bodyguards or assigned household tasks.⁵⁷¹ They wore uniforms and carried arms.⁵⁷²

229. W-0038 confirmed that he trained girls under the age of 15 in the UPC/FPLC training camp in Mongbwalu.⁵⁷³ The girls were used as bodyguards and to prepare food and provide sexual services to the commanders.⁵⁷⁴ Commanders Abelanga and Njdabu used girls under 15 as bodyguards, as did other brigade commanders.⁵⁷⁵ At the commanders' houses, the witness saw young girls preparing food, and stated that at night the girls could be

⁵⁶⁴ T.154, p.83, lines 8-12.

⁵⁶⁵ T.113, p.36, lines 22-23.

⁵⁶⁶ T.113, p.36, lines 19-23.

⁵⁶⁷ T.176, p.50, line 15 to p.51, line 5; T.178, p.77, lines 4-15.

⁵⁶⁸ T.144, p.27, line 21 to p.28, line 10. W-0010 stated that PMF stood for *Personnel Militaire Féminin*.

⁵⁶⁹ T.158, p.26, line 8 to p.27, line 16.

⁵⁷⁰ T.158, p.26, line 8 to p.27, line 16.

⁵⁷¹ T.160, p.60, lines 8-25.

⁵⁷² T.176, p.50, lines 2-6.

⁵⁷³ T.114, p.81, line 22 to p.82, line 5 to p.83, line 16.

⁵⁷⁴ T.113, p.36, lines 11-23; T.114, p.23, lines 13-19.

⁵⁷⁵ T.114, p.23, line 16 to p.24, line 1.

heard saying “I don’t want to.”⁵⁷⁶ W-0017 told the Court that Commander Abelanga had young girls in his bodyguard and that he was criticised for abusing a young girl.⁵⁷⁷ He also testified that girls under 15 were in the Salumu Mulenda brigade of the UPC/FPLC.⁵⁷⁸ W-0055 indicated that he received complaints regarding rapes of the PMFs.⁵⁷⁹

230. W-0010 testified that when she was in [REDACTED]’s bodyguard, he would “usually take PMF’s as his wives”.⁵⁸⁰ She confirmed that he had taken her as one of his wives.⁵⁸¹ W-0041 confirmed that both [REDACTED] and [REDACTED] had boys and girls under the age of 15 as bodyguards.⁵⁸²
231. W-0016 testified that the UPC/FPLC trainers and guards in the Mandro training centre took advantage and raped the girl recruits, whom he said were of “all ages”.⁵⁸³ He also testified to the presence of PMFs within the Presidential Guard.⁵⁸⁴
232. As to their other duties, W-0055 said that the PMFs often cooked for their commanders or did laundry; if they were not assigned to a commander then they had other duties,⁵⁸⁵ “[a]fter all, they were soldiers like others and they had numerous different tasks”.⁵⁸⁶
233. W-0299 testified that the PMFs were girl soldiers of all ages.⁵⁸⁷ He stated that the PMFs carried the commanders’ bags, guarded the commanders’ property when they went to war, prepared food for the commanders, and

⁵⁷⁶ T.114, p.27, lines 2-7.

⁵⁷⁷ T.154, p.28, line 9 to p.29, line 23.

⁵⁷⁸ T.154, p.81, line 7 to p.82, line 8.

⁵⁷⁹ T.178, p.78, line 18 to p.79, line 7.

⁵⁸⁰ T.145, p.79, lines 4-5.

⁵⁸¹ T.145, p.78, line 23 to p.79, line 8.

⁵⁸² T.125, p.63, line 22 to p.64, line 20.

⁵⁸³ T.191, p.15, line 15 to p.16, line 13; T.189, p.26, line 8 to p.28, line 12.

⁵⁸⁴ T.189, p.34, lines 1-12.

⁵⁸⁵ T.178, p.77, line 22 to p.78, line 10.

⁵⁸⁶ T.178, p.79, line 8 to p.80, line 15.

⁵⁸⁷ T.117, p.16, line 20 to p.17, line 8.

were their wives.⁵⁸⁸ Although W-0299 stated that the PMFs did not go to fight, W-0010 testified that she and other girl soldiers under the age of 15 participated in combat.⁵⁸⁹

234. W-0007 and W-0089 also spoke of the presence of girl soldiers in the UPC/FPLC.⁵⁹⁰ W-0089 testified that some of these young girls were 14 years old⁵⁹¹ and he spoke of PMFs who participated in combat during the first attack on Mongbwalu.⁵⁹²

8.5 Child soldiers were continually recruited and used between September 2002 – 13 August 2003, and demobilisation efforts were shams

235. Children under the age of 15 were recruited and used throughout the entire indictment period, as illustrated in visual timeline, attached in Annexes 3A and 3B.⁵⁹³ This fact, coupled with the high number of youth, including children under the age of 15 years, who were trained and used actively in hostilities by the UPC/FPLC continually over this entire period and over much of the territory of Ituri demonstrates: (i) that these were not isolated cases but were rather the result of large-scale coordination, (ii) that these children were indeed recruited by the UPC/FPLC and used by that group, (iii) that the co-perpetrators intended or were aware of the consequent recruitment of under 15 year olds, and (iv) that there was never an intention to cease recruitment of under 15 year olds or to effect their demobilisation from the army.

236. W-0024 confirmed the difficulties that his NGO faced in carrying out its demobilisation project in autumn 2002, due in large part to the fact that once

⁵⁸⁸ T.122, p.26, line 20 to p.27, line 21.

⁵⁸⁹ T.144, p.49, line 12 to p.51, line 13.

⁵⁹⁰ T.149, p.14, line 15 to p.15, line 17; T.198, p.48, line 15 to p.50, line 6.

⁵⁹¹ T.196, p.9, line 7 to p.10, line 2.

⁵⁹² T.196, p.27, line 17 to p.28, line 16.

⁵⁹³ The text in the Annex has been taken into account and does not exceed the Prosecution's total word count (75,000 words). See also T.199, p.35, lines 2-5, p.38, lines 5-11, p.42, lines 10-16, pp.47-48, p.48, lines 20-25; T.170, pp.50-51, p.52, line 15 to p.53, line 21, p.54, lines 3-11, p.55, line 15 to p.57, lines 11-24.

demobilised children went back into the UPC/FPLC.⁵⁹⁴ He explained that the situation was getting “worse and worse” after the UPC took control of Bunia whose “leaders for the most part were Hema. So those children were sought after, because they were supporters of the Hema group [...] if you didn’t go back to the Army, it was you, yourself or your family that would be threatened or attacked”.⁵⁹⁵ The children he saw with the UPC/FPLC in Bunia were armed and were aged between 9 and 18.⁵⁹⁶

9. Criminal Responsibility of the Accused for period September 2002 to 13 August 2003

9.1 UPC’s Military Wing – the FPLC

237. The FPLC was established in September 2002.⁵⁹⁷ Its Chief of Staff and direct military head was Floribert Kisembo,⁵⁹⁸ appointed by the Accused.⁵⁹⁹ It rapidly evolved into a fully-functioning army comprising a main staff headquarters in Bunia.⁶⁰⁰ This was no ragtag army with a handful of soldiers and officers arbitrarily and spontaneously put together. Far from it. The Accused ensured that it was highly structured with sectors, brigades, battalions, companies, platoons and sections throughout Ituri.⁶⁰¹ Each brigade or sector could contain between 400 to 2000 soldiers.⁶⁰² It operated according to a chain of command where reports and orders were relayed down from headquarters to the field,⁶⁰³ and up the chain of command,⁶⁰⁴

⁵⁹⁴ T.170, pp.50-51.

⁵⁹⁵ T.170, p.51, lines 2-24.

⁵⁹⁶ T.170, p.54, lines 3-11.

⁵⁹⁷ T.340, p.68, lines 14-17.

⁵⁹⁸ T.154, p.21, lines 21-23.

⁵⁹⁹ T.125, p.27, lines 3-9.

⁶⁰⁰ EVD-OTP-00512 (document signed by Chief of Staff in Bunia, 30 November 2002); T.113, p.38, lines 6-8; T.154, p.21, lines 10-20.

⁶⁰¹ EVD-OTP-00396; EVD-OTP-00452. See also UPC/FPCL logbook EVD-OTP-00409.

⁶⁰² T.154, p.34, line 20 to p.35, line 4; T.175, p.31, lines 3-9; EVD-OTP-00396.

⁶⁰³ EVD-OTP-00725.

⁶⁰⁴ EVD-OTP-00502.

directly to the Accused.⁶⁰⁵ It had an effective communications system that used satellite communications and radio-phonies (manpacks)⁶⁰⁶ and most officers and commanders had individual military call signs for their Motorola communications.⁶⁰⁷

238. The Accused utilised the organisation and efficiency of the FPLC to execute the common plan to take over Ituri using military means that included children under the age of 15.

a. FPLC Organisation

i. Structure

239. W-0055, [REDACTED],⁶⁰⁸ described the main staff structure by reference to a military flow chart that he prepared. The Chief of Staff, Kisembo, was number 1. His deputy, Bosco Ntaganda, was number 2⁶⁰⁹ and served as the Chief of Staff responsible for operations.⁶¹⁰ There was another General Chief of Staff for Administration and Logistics at the same hierarchical level of Bosco Ntaganda.⁶¹¹ On the same military flow chart W-0055 also indicated how the sectors were incorporated in to the hierarchy.⁶¹²
240. The FPLC's Main Staff comprised five divisions ⁶¹³ dealing with administration (G1), intelligence (G2), operations (G3), logistics (G4) and morale and discipline (G5).⁶¹⁴ During the period September 2002 to 13 August 2003 the persons who officially occupied the chief position of the

⁶⁰⁵ T.175, p.7, lines 10-16; EVD-OTP-00710 (a report from Commander of South-East Sector, copied to President and Secretary-General of the UPC); EVD-OTP-00502.

⁶⁰⁶ T.175, p.44, line 15 to p.45, line 23.

⁶⁰⁷ T.175, p.24, lines 9-25.

⁶⁰⁸ T.174, p.47, line 3 to p.48, line 7. See also EVD-OTP-00512 as an example of the appointment letter received by W-0055.

⁶⁰⁹ EVD-OTP-00452; T.175, p.17, lines 13-23.

⁶¹⁰ T.174, p.29, lines 20-24.

⁶¹¹ T.189, p.76, line 9 to p.77, line 10.

⁶¹² EVD-OTP-00452; T.175, p.29, line 22 to p.31, line 8.

⁶¹³ T.349, p.22.

⁶¹⁴ T.349, p.22. See also T.154, p.21, lines 10-20, p.24, lines 8-13.

specific Main Staff divisions at some point in time were as follows:

[REDACTED],⁶¹⁵ [REDACTED],⁶¹⁶ [REDACTED],⁶¹⁷ [REDACTED],⁶¹⁸ and [REDACTED].⁶¹⁹

241. W-0055 provided detailed evidence regarding the structure of the FPLC with reference to several diagrams. One diagram showed the number of sectors, their commanders and how they were part of the FPLC.⁶²⁰ He said there were four sectors in Ituri, with sector 4 having been created later, after the Mongbwalu battles.⁶²¹ A second diagram showed how a sector was organised, namely the Aru sector,⁶²² commanded by Jerome Kakwavu (until March 2003).⁶²³ The final diagram showed the structure of the Ariwara Brigade in the UPC/FPLC.⁶²⁴ It comprised three battalions each with a commander, and an administration, operations and intelligence division,⁶²⁵ mirroring to a great extent the structure at the Main Staff.⁶²⁶
242. W-0017, an UPC/FPLC soldier and [REDACTED]⁶²⁷ from sometime in August 2002 to August 2003,⁶²⁸ stated that each brigade had its own staff at Brigade Headquarters (T1 to T5) and was further divided into battalions, three companies per battalion, three platoons per company and finally three sections per platoon.⁶²⁹ He said that there would be 11 soldiers per section,

⁶¹⁵ EVD-OTP-00680; T.189, p.80, lines 1-6.

⁶¹⁶ T.189, p.5, line 25 to p.6, line 1.

⁶¹⁷ T.188, p.94, line 23. [REDACTED]

⁶¹⁸ T.189, p.80, lines 12-13.

⁶¹⁹ EVD-OTP- 00457; T.154, p.24, line 4.

⁶²⁰ EVD-OTP-00452.

⁶²¹ T.175, p.30, lines 1-7.

⁶²² EVD-OTP-00453.

⁶²³ EVD-OTP-00490, p.149, lines 10-25.

⁶²⁴ EVD-OTP-00454.

⁶²⁵ EVD-OTP-00454.

⁶²⁶ W-0038 corroborates the evidence on the FPLC structure at T.113, p.34.

⁶²⁷ T.154, p.23, lines 6-11.

⁶²⁸ T.154, p.16, line 22 to p.17, line 15.

⁶²⁹ T.154, p.21, lines 10-20.

45 per platoon, 120 per company, 380 per battalion and up to 2000 soldiers per brigade.⁶³⁰

243. W-0038, a UPC/FPLC soldier in a brigade and trained in Rwanda,⁶³¹ said that there were “very clear structures” in the UPC/FPLC military. “There were brigades with majors, commanders, lieutenants and captains. There was a very clear structure.”⁶³²

ii. Communication and hierarchy

244. The FPLC’s communications system included satellite phones, mobile phones, Motorola radios and other radios.⁶³³ Commanders and the Accused⁶³⁴ used Motorola radios, or phonies⁶³⁵ to communicate long range with each other.⁶³⁶ Each had individual call signs. The Accused’s call sign was “No.1”,⁶³⁷ the Chief of Staff was “Zulu Mike”,⁶³⁸ and Bosco was “Tango Romeo”.⁶³⁹ W-0055 said that he would use the Motorola to communicate with “everyone.”⁶⁴⁰ According to W-0016, “Bosco and Kisembo had phonies. The Presidency also had a phonie [...] The president’s phonie was right next to his office,”⁶⁴¹ Several videos show commanders holding radios.⁶⁴²
245. Phonies were used during military operations⁶⁴³ to relay orders⁶⁴⁴ and to communicate with the main staff. W-0038 testified that during battles, the brigade commanders used Motorolas and (satellite) Thurayas to inform the

⁶³⁰ T.154, p.34, line 7 to p.35, line 4; EVD-OTP-00396.

⁶³¹ T.113, p.35, lines 1- 8.

⁶³² T.113, p.34, lines 4-8.

⁶³³ T.190, p.18, lines 13-16.

⁶³⁴ T.175, p.26, lines 8-19.

⁶³⁵ T.190, p.18, line 3.

⁶³⁶ T.154, p.31, lines 3-4; T.175, p.24, lines 15-18.

⁶³⁷ T.175, p.25, lines 18-19.

⁶³⁸ T.175, p.25, lines 16-17.

⁶³⁹ T.175, p.25, lines 14-15.

⁶⁴⁰ T.175, p.25, lines 23-25.

⁶⁴¹ T.190, p.18, lines 5-16, p.22, line 1 to p.24, line 10.

⁶⁴² See EVD-OTP-00572 at 00:02:45; at 00:33:28.

⁶⁴³ T.157, p.81, lines 12-21; T.158, p.74, lines 21-25.

⁶⁴⁴ T.114, p.20, lines 6-8.

Chief of Staff, the Headquarters, and other commanders about the progress of the operations.⁶⁴⁵ W-0017 recounted how he often heard conversations between Commander Salumu and the Chief of Staff, during which Salumu submitted situation reports.⁶⁴⁶ These means of communication allowed UPC/FPLC officers to report to the Accused and maintain contact with each other, and permitted effective ordering and reporting within the UPC/FPLC chain of command.

246. Manpacks were used for communications over long distances only, via signals.⁶⁴⁷ These signals were recorded as sitreps and transcribed in a logbook.⁶⁴⁸ W-0055 recognised the UPC/FPLC logbook, which provides a contemporaneous record of radio communications sent on a daily basis between UPC/FPLC units in the field and the main staff headquarters between 19 November 2002 and 22 February 2003.⁶⁴⁹ Several references to children can be found in the logbook,⁶⁵⁰ as well as references to the Accused, or “Number 1”, in his position as the President of the UPC.⁶⁵¹

iii. FPLC training and military camps

247. During the period September 2002 to 13 August 2003, the UPC/FPLC, in preparation for the execution of the military take over of Ituri, established several training/military camps within the Ituri region.⁶⁵² These camps were rapidly populated by new recruits,⁶⁵³ many of which were children, including those under the age of 15.⁶⁵⁴ The camps were operated by mid to

⁶⁴⁵ T.113, p.46, line 6 to p.47, line 25.

⁶⁴⁶ T.158, p.12, lines 2-13.

⁶⁴⁷ T.175, p.45 line 10 to p.46, line 6; T.158, p.72, lines 14-25.

⁶⁴⁸ T.175, p.46, lines 21-22, p.48, lines 4-9. See also T.190, p.23, lines 8-15.

⁶⁴⁹ EVD-OTP-00409.

⁶⁵⁰ T.176, p.78, lines 11-17.

⁶⁵¹ T.176, p.82, lines 16-22; T.177, p.8, lines 10-12; p.11, lines 14-25.

⁶⁵² See DW-0019's evidence at T.345, p.20, lines 16-18.

⁶⁵³ With a very large capacity, Mandro camp could receive thousands of recruits. See for example T.113, p.41, lines 5-16; T.117, p.16; T.185, p.79, lines 19-20; T.122, p.40, lines 10-14.

⁶⁵⁴ T.114, p.10, line 21 to p.11, line 14; T.128, p.48, line 6 to p.49, line 14.

high level military commanders and trainers,⁶⁵⁵ who ran a regimented training program.⁶⁵⁶ There were up to 20 training military camps throughout the region, the major ones being located within less than 15 km from the UPC/FPLC headquarters in Bunia.⁶⁵⁷ These were: Centrale,⁶⁵⁸ Rwampara,⁶⁵⁹ Mandro,⁶⁶⁰ Bule,⁶⁶¹ Mongbwalu,⁶⁶² Irumu,⁶⁶³ Barriere,⁶⁶⁴ Fataki,⁶⁶⁵ Largu,⁶⁶⁶ Sota,⁶⁶⁷ Lopa,⁶⁶⁸ Nizi,⁶⁶⁹ Katoto,⁶⁷⁰ Aru,⁶⁷¹ Nyoka,⁶⁷² Ndrele Mahagi,⁶⁷³ Joo,⁶⁷⁴ and Bunia camps (Ndromo,⁶⁷⁵ Epo⁶⁷⁶ and Mudzipela⁶⁷⁷). The Accused and his co-perpetrators visited some of the camps to inspect the recruits and boost morale.⁶⁷⁸ Video footage shows the Accused in military uniform on 12 February 2003, encouraging recruits at Rwampara camp (a large number of

⁶⁵⁵ T.119, p.57, lines 16-25, p.83, lines 4-5; T.137, p.49, line 2 to p.51, line 5; T.144, p.24, line 22 to p.27, line 3; T.190, p.66, lines 2-10.

⁶⁵⁶ T.114, p.7, lines 16-18; T.119, p.82, line 2 to p.83, line 14; T.176, p.24, lines 21-25, p.25, lines 14-19; T.186, p.13, lines 12-25.

⁶⁵⁷ See the maps annotated by W-0038: EVD-OTP-00375 and EVD-OTP-00376.

⁶⁵⁸ T.123, p.26, lines 21-22; T.188, p.12, line 7.

⁶⁵⁹ See video EVD-OTP-00570. See also T.144, p.21, line 12 to p.23, line 5.

⁶⁶⁰ See video EVD-OTP-00466. See also T.117, p.13, line 21 to p.14, line 4; T.154, p.36, line 20 to p.37, line 6; T.148, p.55, lines 15-17; T.189, p.13, line 10 to p.14, line 18; T.243, p.38, lines 13-19.

⁶⁶¹ T.120, p.26, line 19 to p.27, line 4; T.124, p.24, lines 21-25; T.132, p.8, line 18-20; T.140, p.27, line 7 to p.29, line 23.

⁶⁶² T.154, p.44, lines 21-23.

⁶⁶³ T.135, p.9, lines 12-16; T.148, p.28, line 23.

⁶⁶⁴ T.140, p.44, lines 14-19; T.128, p.31, line 21 to p.32, line 1.

⁶⁶⁵ T.175, p.68, lines 5-10.

⁶⁶⁶ T.120, p.31, lines 4-10.

⁶⁶⁷ T.152, p.2, lines 19-24.

⁶⁶⁸ T.132, p.11, lines 16-25.

⁶⁶⁹ T.201, p.63, lines 22 to p.64, line 5.

⁶⁷⁰ T.201, p.63, lines 22 to p.64, line 5.

⁶⁷¹ T.175, p.68, lines 5-10; T.276, p.73, line 24 to p.74, line 3.

⁶⁷² T.276, p.73, line 24 to p.74, line 3.

⁶⁷³ T.276, p.73, lines 21-23.

⁶⁷⁴ T.128, p.31, line 21 to p.32, line 1.

⁶⁷⁵ T.135, p.41, line 4; T.182, p.14, lines 10-17.

⁶⁷⁶ T.149, p.28, lines 17-24; T.154, p.50, lines 20-25.

⁶⁷⁷ T.149, p.29, lines 12-14.

⁶⁷⁸ T.113, p.42, line 5 to p.43, line 21, p.56, lines 14-22; T.175, p.82, lines 6-14; T.196, p.11, line 14 to p.12, line 16.

who are child soldiers under the age of 15).⁶⁷⁹ Mandro centre, “the real training centre where everybody was brought to,”⁶⁸⁰ was supervised by Bosco Ntaganda.⁶⁸¹ In the camp, the UPC/FPLC authorities had a brick house at their disposal which the Accused himself used during his visits to the camp.⁶⁸²

248. In sum, the FPLC was not an army merely cobbled together once the UPC took control over Bunia in August 2002. Its complex structure showed that it was not an army created by happenstance, rather it had to have been meticulously planned by the Accused and his co-perpetrators during the period before August 2002 in order to execute the common plan to vanquish Ituri, using all available means, including children under 15.

9.2 The Accused’s Authority over the FPLC

249. The Accused had overall command and responsibility over the FPLC. Whether *de jure* or *de facto*, the Accused wielded his authority over the FPLC Main Staff and its brigades. He was the FPLC Commander-in-Chief. He issued orders down the chain of command; convened regular meetings with his top military staff, most notably Kitembo and his Deputy, Bosco Ntaganda; appointed military commanders; made tactical and operational decisions in relation to major battles or brigade formations (or at least was informed of them by his military commanders); visited the troops; was personally involved in and informed of military recruitment campaigns, and, military documents were almost always copied to the Accused. Those

⁶⁷⁹ EVD-OTP-00570, on which W-0030 commented at T.128, p.33, lines 20-21 (recognising the Accused), and p.37, lines 2-7 (establishing the date as 12 February 2003). See also video EVD-OTP-00578.

⁶⁸⁰ T.114, p.43, lines 2-3.

⁶⁸¹ T.125, p.52, lines 1-7; T.189, p.17, lines 15-20; T.122, p.12, lines 21-23.

⁶⁸² See video EVD-OTP-00587 at the minute 00:05:10-00:05:13. DRC-OTP-WWWW-0002 (W-0002) identified the scene as having been filmed at Mandro training camp and confirmed that “[w]hen you enter [the brick house], you will see the authorities there, UPC authorities” there (T.162, p.22, lines 6-12). W-0016 testified that the Accused used to live in Mandro (T.190, p.47, lines 1-5).

within the UPC and FPLC unambiguously viewed the Accused as the person ultimately responsible for the UPC/FPLC. The FPLC was the UPC's army.⁶⁸³

a. The Accused was the FPLC's Commander-in-Chief, the final decision-maker

250. As President of the UPC, the Accused was head of the FPLC. He was known as the Commander-in-Chief. W-0016 said that FPLC was commanded by the UPC⁶⁸⁴ and the Accused was the "chief commander", the "commander-in-chief of the army".⁶⁸⁵ An FPLC document dated 21 November 2002, signed and stamped by the Chief of Staff Kisembo,⁶⁸⁶ was copied to the Accused, who W-0016 explained was referred to as "son excellence Monsieur le Président de l' UPC/RP et Commandant en chef des FPLC".⁶⁸⁷ Another document, signed by Bosco Ntganda on 6 December 2003, referred to the Accused as the "Supreme Commander of the FPLC".⁶⁸⁸
251. W-0055 stated: "as far as I know, our head, the head of all of us, was his Excellency President Lubanga, and Kisembo was under the orders of President Lubanga [...] there was nobody who was outside his sphere of authority [...] we were all under the authority of President Lubanga".⁶⁸⁹ [REDACTED] was responsible to the Accused and provided daily reports to the Accused's secretary or to his office.⁶⁹⁰ W-0017 said that the Chief of Staff Kisembo was the supreme chief of the army and that the President was above him.⁶⁹¹ As noted previously, the Accused's Motorola call sign was "Number One", signifying his rank as Commander-in-Chief. [REDACTED]

⁶⁸³ See EVD-OTP-00693 where Kisembo refers to the "L'UPC/RP (FPLC)".

⁶⁸⁴ T.188, p.94, lines 6-8.

⁶⁸⁵ T.189, p.4, lines 23-24.

⁶⁸⁶ EVD-OTP-00465.

⁶⁸⁷ T.190, p.37, line 24 to p.38, line 5.

⁶⁸⁸ EVD-OTP-00500. Even though it is outside the period of the charges, it is evidence of past practice and thus on point.

⁶⁸⁹ T.175, p.22, line 17 to p.23, line 4.

⁶⁹⁰ [REDACTED]

⁶⁹¹ T.154, p.24, lines 14-19.

recalled an occasion when the Chief of Staff [REDACTED], saying “number one needs [REDACTED] at his residence”.⁶⁹² The Accused is also referred to by his call sign, Number One, in the UPC/FPLC log book at entry 123.⁶⁹³

252. Further demonstrating the Accused’s supremacy, [REDACTED] said that when sectors or brigades were established by Chief or Deputy Chief of Staff, this would typically be conveyed to the Accused and if he agreed with the decision, he would confirm it.⁶⁹⁴ In the same vein, [REDACTED] said that he received monthly reports from his subordinates [REDACTED]. If the reports raised matters beyond his capabilities, he would refer them to the Chief of Staff and if necessary, to the President.⁶⁹⁵
253. W-0016 said that “everything that was done, militarily, the Chief of Staff had to report to him [the Accused], because all reports were submitted to him”.⁶⁹⁶ He explained that once (military) plans were made they would be suggested, not proposed, to the President because the most important thing was for the President to be informed.⁶⁹⁷
254. While W-0017 stated that he did not know about the Accused giving military orders nor did he witness the influence of the Accused over the Chief of Staff,⁶⁹⁸ he was not in the best position to know or be directly involved in the Accused’s orders, as he was in a brigade in the field. To illustrate this point, describing one occasion when W-0017 did travel to Bunia he noted that his

⁶⁹² [REDACTED]

⁶⁹³ EVD-OTP-00409 at p.-0123, under reference number 251545B, bottom entry; [REDACTED]

⁶⁹⁴ [REDACTED]

⁶⁹⁵ [REDACTED]

⁶⁹⁶ T.189, p.64, lines 3-5.

⁶⁹⁷ T.189, p.64, lines 1-15. Although the witness said that there would be operations that the Accused wasn’t aware of (T.189, p.84, lines 17-24), given the totality of the evidence of the Accused’s role, including the balance of W-0016’s evidence, this evidence does not undermine the claim that the Accused was ultimately responsible for the FPLC.

⁶⁹⁸ T.160, p.45, lines 1-4.

brigade commander, Salumu, went to the Accused's residence for a meeting, just after the battles in Kobu and Lipri.⁶⁹⁹

b. The FPLC Chief of Staff Floribert Kisembo and other top level UPC/FPLC commanders and staff, notably Bosco Ntganda, and Rafiki were subordinate to the Accused

255. The Chief of Staff ensured, through his staff, the day to day functioning of the UPC/FPLC's army. In order to fully acquaint himself with military developments, the Accused convened meetings and regularly communicated with his Chief of Staff and other co-perpetrators; met with other top level FPLC commanders in relation to military matters; and issued orders and instructions to the Chief of Staff and other military officers. He regularly received reports from his military officers. In sum, the Accused kept himself abreast of the developments in the common plan to control and manage Ituri.

i. Meetings and Briefings

256. The Chief of Staff reported to the Accused. He lived only a hundred metres from the Accused in Bunia.⁷⁰⁰ W-0299, a soldier in the FPLC and one of Accused's bodyguards,⁷⁰¹ verified that the Accused and Kisembo lived close to each other and that Kisembo would "constantly", almost "every day" visit the President.⁷⁰² W-0017 indicated the proximity of the Accused's residence to that of the Chief of Staff, the General Main staff and the military camp EPO by marking a map.⁷⁰³

257. W-0016 said that the Accused would hold military meetings at his residence and invite the staff of the military headquarters to his office.⁷⁰⁴ The military staff was in the "habit" of going to the residence of the President, especially

⁶⁹⁹ T.158, p.13, line 17 to p.14, line 17.

⁷⁰⁰ T.189, p.86, lines 11-14.

⁷⁰¹ T.117, p.11, lines 2-6.

⁷⁰² T.122, p.41, lines 13-21.

⁷⁰³ EVD-OTP-00407; EVD-OTP-00408.

⁷⁰⁴ T.189, p.85, lines 2-6.

the two Chiefs of Staff, Kisembo and Bosco; Bosco could “come and go as he pleased”.⁷⁰⁵ W-0016 clarified that the staff meetings were primarily reserved for the two Chiefs of Staff whom the Accused met often, sometimes on his invitation.⁷⁰⁶

258. W-0030 [REDACTED] the UPC/FPLC such as political speeches and press conferences,⁷⁰⁷ most notably the Rwampara visit of the Accused.⁷⁰⁸ He would visit the residence of the Accused, two or three times a week.⁷⁰⁹ He said that military officers, such as Kisembo and Bosco,⁷¹⁰ would come to see the President and had “immediate access to the home, the residence of the President All the officers did.”⁷¹¹ In fact, sometimes, Chief of Staff Kisembo would attend the weekly government, UPC executive meetings,⁷¹² and meetings convened and initiated by the Accused at the Presidency where all the national secretaries attended.⁷¹³

259. W-0017 testified that after the UPC/FPLC returned to Bunia in June 2003, Kisembo “frequently” visited the Accused.⁷¹⁴ He was part of the escort that took Kisembo to the President. Sometimes the meetings would last almost up to an hour.⁷¹⁵ W-0017 stated that Kisembo had a major role in the UPC/FPLC for military matters,⁷¹⁶ so it made good military sense for the President to regularly meet with him.

260. [REDACTED] also met with the Accused to report on specific military matters. On one occasion he was asked by the Accused to brief him about

⁷⁰⁵ T.189, p.85, lines 2-17.

⁷⁰⁶ T.190, p.5, line 21 to p.6, line 11.

⁷⁰⁷ T.128, p.8, lines 12-24.

⁷⁰⁸ T.128, p.28, line 25 to p.30, line 14.

⁷⁰⁹ T.128, p.20, lines 2-7.

⁷¹⁰ T.128, p.23, lines 14-16.

⁷¹¹ T.128, p.23, lines 23-25.

⁷¹² T.345, p.51, line 10 to p.53, line 19; EVD-OTP-00496.

⁷¹³ T.345, p.46, line 10 to p.47, line 11.

⁷¹⁴ T.158, p.41, lines 20-22.

⁷¹⁵ T.158, p.42, line 15 to p.43, line 3.

⁷¹⁶ T.160, p.43, lines 4-11.

reports of civilians being killed by UPC/FPLC troops in [REDACTED], where a military operation against the Lendu had taken place.⁷¹⁷ At the time, [REDACTED] Bosco and Rafiki, and explained that they were ordered to [REDACTED] and to brief the Accused on progress.⁷¹⁸ On another occasion, [REDACTED] briefed the Accused about the battle against the UPDF, advising against the UPC/FPLC going into battles against the Ugandans. The Accused listened, then reaffirmed his decision for the UPC/FPLC to continue the fight.⁷¹⁹

261. [REDACTED] identified Rafiki as belonging to the “UPC’s army” hierarchy, under Bosco.⁷²⁰ Described as part of the main command,⁷²¹ he was involved in the organisation of the military and was kept abreast of appointments of high-ranking officers.⁷²² [REDACTED] Rafiki, together with the Chief of Staff, Bosco, and other FPLC commanders at the Accused’s residence where they were discussing military strategies, including preparing a “combat plan”.⁷²³ The Accused himself convened meetings with members of the main staff, including Rafiki, “when there was fighting”.⁷²⁴ He led the discussions and gave orders to commanders.⁷²⁵ [REDACTED] meetings organised by the Accused to discuss the issues related to the UPDF.⁷²⁶ As regards the decisions adopted at that time, Kisembo told [REDACTED] that he had been “given orders”.⁷²⁷

⁷¹⁷ [REDACTED]

⁷¹⁸ [REDACTED]

⁷¹⁹ [REDACTED]

⁷²⁰ [REDACTED]

⁷²¹ [REDACTED]

⁷²² [REDACTED]

⁷²³ [REDACTED]

⁷²⁴ [REDACTED]

⁷²⁵ [REDACTED]

⁷²⁶ [REDACTED]

⁷²⁷ [REDACTED]

262. [REDACTED] recounted an incident where Kisembo and Bosco were reprimanded for [REDACTED] without informing the Accused.⁷²⁸ This event established that, as the military Chiefs understood, the Accused was in charge.
263. As well as meetings with Kisembo, Bosco and other officers, the Accused convened meetings with military commanders deployed in the field at his residence or the Presidency. W-0017 testified that after the military operation in Kobu, Bambi and Lipri, the Accused met with the commander of the brigade involved in the military operation, Salumu.⁷²⁹ After the meeting with the Accused, Salumu stated that “the orders were to take the camp”.⁷³⁰ [REDACTED] confirmed that the Accused would convene meetings with Bosco, Kisembo and Rafiki.⁷³¹
264. The Accused also visited the military staff and recruits at HQ and in the training camps. W-0016 recalled an occasion where the Accused visited Main Staff headquarters to boost morale. A unit of guards paraded and the Accused came with his military entourage⁷³² to see how the Main Staff was functioning. The visit lasted for about half-an-hour, with the Chief of Staff speaking first, the Accused after. Military songs were sung as morale boosters.⁷³³ Children under the age of 15 were also in the parade.⁷³⁴ As W-0016, said in relation to the visits, “that was a duty of a president, to speak to his troops, and that was normal”.⁷³⁵

⁷²⁸ [REDACTED]

⁷²⁹ T.158, p.13, line 17 to p.14, line 17.

⁷³⁰ T.158, p.16, line 20 to p.17, line 7. It is noted that W-0017 did not know whether the order came from the Accused.

⁷³¹ [REDACTED]

⁷³² T.190, p.14.

⁷³³ T.190, p.15, line 3 to p.16, line 9.

⁷³⁴ T.190, p.16, lines 10-19.

⁷³⁵ T.190, p.13, lines 13-15.

265. W-0017 testified about a meeting between the Accused and 107 soldiers when they returned to Bunia from military training in Rwanda. The 107 soldiers were met at the airport by Kisémbó and taken to EPO camp where they were billeted. At some moment they were asked to assemble in preparation for a visit from Accused, who arrived in a jeep with Kisémbó. The President was wearing military uniform. He inspected the troops, spoke to his Chief of Staff and left.⁷³⁶
266. W-0038, who was also sent to Rwanda for military training, had the same recollection. The Accused visited the troops, arriving in a jeep with his bodyguards and Kisémbó by his side. He addressed the troops, informing them that they would be deployed to different brigades in the field, to take care of weapons and that they must obey combat instructions.⁷³⁷
267. In describing a visit to the Mandro camp by the Accused, W-0299 explained that the Accused was “surrounded by many people”, the “generals, right down to the foot soldiers”, notably Floribert Kisémbó and Bosco Ntaganda.⁷³⁸ W-0038 also recalled a visit of the Accused to the Mandro camp, along with Chief Kahwa, Kisémbó and Bosco Ntaganda. There was a parade and the Accused spoke to the recruits in order to boost morale. After the speech, the recruits sang military songs.⁷³⁹ DW-0019 appears to confirm that the Accused was in Mandro sometime early September 2002 for a UPC executive meeting.⁷⁴⁰
268. The Accused’s visit to the Rwampara camp on 12 February 2003 is well-documented.⁷⁴¹ He went there to visit the military recruits (which included

⁷³⁶ T.154, p.69 to p.71, line 8.

⁷³⁷ T.114, p.7 to p.10, line 7.

⁷³⁸ T.117, p.21 to p.22, line 8.

⁷³⁹ T.113, pp.42-43.

⁷⁴⁰ T.345, p.23, lines 11-17.

⁷⁴¹ EVD-OTP-00570.

children under the age of 15), with Bosco, Tinanzabo, Rafiki and Kasangaki.⁷⁴²

269. The foregoing reveals that the Accused was an active Commander-in-Chief of the FPLC, in addition to his function as President of the UPC. He visited and inspected the recruits, soldiers, officers and generals, whether at his residence or the Presidency, or at the Main Staff HQ and military training camps.

ii. Orders and Reports

270. The evidence reveals that information flowed both up and down the chain of command. The Accused knew what was happening in the FPLC no matter how trivial the information.
271. For example, in a presidential letter on 10 December 2002 by the Accused, Kisembo was instructed to take specific steps concerning weapons once a town had been taken by the UPC. He ordered timely feedback on the implementation of his instruction.⁷⁴³ Another example is a service note from 11 August 2003, emanating from the President's Cabinet office and copied to the Accused, concerning the re-structuring of the FPLC military units in the interior.⁷⁴⁴
272. The Accused also took charge of the putative demobilisation of children. He issued demobilisation orders (see EVD-OTP-00696 and EVD-OTP-00697). However insincere those orders may have been, they nonetheless came directly from the Accused, reflecting his authority and readiness to order his top military brass, such as the Chief of Staff.
273. The Chief of Staff also ensured that the Accused was copied in his reports to the military units in the field. An order signed by the Chief of Staff and

⁷⁴² T.128, pp.30-31.

⁷⁴³ EVD-OTP-00712.

⁷⁴⁴ EVD-OTP-00497.

issued from his cabinet office in October 2003 to all Brigade Commanders of the FPLC relating to the recovery of public assets, 60% of which was provided to the military, was copied for information to the Accused.⁷⁴⁵

274. [REDACTED] explained that during his time in the FPLC ([REDACTED]) the Accused asked him to submit reports on specific issues.⁷⁴⁶ [REDACTED] Idris Bobale, also submitted reports and requests directly to the Accused. EVD-OTP-00666, a specific request from December 2002 for the re-opening of a training centre, was addressed to the Accused and also copied to the Chief of Staff, underlining that Accused, not Kisembo, was in charge. Even sector commanders, a level below main staff officers at Bunia, ensured that the Accused was informed of key developments related to critical military operations, such as the takeover of Mongbwalu and the establishment of youth committees in the town.⁷⁴⁷ On one occasion, the Accused called [REDACTED] and personally ordered him, via the Motorola, to liaise with [REDACTED] to stop the fighting.⁷⁴⁸

275. Clearly, it was important that the Accused be kept informed on matters related to military operations or FPLC structure and re-organisation, since he was Commander-in-Chief. However, such was the Accused's authority over the FPLC that even trivial information made its way up the chain to him. For example, EVD-OTP-00510 was sent on 16 December 2002 and signed by the Justice Secretary, to inform the Accused about the appropriation of a motorbike by an FPLC soldier.

iii. Accused's role in military operations

276. As the Accused regularly received reports from his commanders, both orally and in written form, he was integrally involved in military operations and

⁷⁴⁵ EVD-OTP-00725.

⁷⁴⁶ [REDACTED]

⁷⁴⁷ EVD-OTP-00710.

⁷⁴⁸ [REDACTED]

tactics. Whether it related to funding, securing vehicles for operations or deciding whether to proceed with a battle,⁷⁴⁹ the Accused was involved.

277. According to [REDACTED], the complex military operation in [REDACTED]⁷⁵⁰ was planned at the Accused's residence.⁷⁵¹ [REDACTED] said that in principle, when military operations were planned or carried out, the Accused would be present and would make arrangements for "logistics, vehicles, the fuel, the food for the military who would fight on the front".⁷⁵² The money for this would come from private business men, other wise men (who were involved in mobilisation of young people to join the army) and through customs taxes.⁷⁵³

278. [REDACTED] a meeting at the Accused's residence where the Accused met with Kisembo, Bosco, Rafiki and other brigade commanders to discuss combat plans.⁷⁵⁴

iv. The Accused's role in the procurement of weapons and ammunitions

279. The Accused and the other co-perpetrators contributed to the procurement of arms and ammunitions according to their respective functions and powers within the FPLC military structure and the UPC. The Accused, in his capacity as both President of the UPC and Commander-in-Chief of the FPLC,⁷⁵⁵ was instrumental in securing arms and ammunitions, and providing the logistical framework for the UPC/FPLC. He used his contacts and position to obtain funds and other advantages which were directly allocated to the military,⁷⁵⁶ and repeatedly negotiated the provision of

⁷⁴⁹ [REDACTED]

⁷⁵⁰ [REDACTED]

⁷⁵¹ [REDACTED]

⁷⁵² [REDACTED]

⁷⁵³ [REDACTED]

⁷⁵⁴ [REDACTED]

⁷⁵⁵ See for example EVD-OTP-00691; EVD-OTP-00465.

⁷⁵⁶ T.125, p.73, lines 4-15.

weapons and military equipment.⁷⁵⁷ On 12 July 2003, he wrote directly to a General in the '*Force Multinationale Intérimaire*', requesting the restitution of weapons seized during a disarmament operation.⁷⁵⁸

280. More generally, according to W-0055, all requests for equipment for an operation, that is "whatever had to do with the logistics that were required for the operation," were sent to the Accused.⁷⁵⁹
281. In an interview at his residence in Bunia on 5 June 2003,⁷⁶⁰ the Accused stated that the UPC/FPLC army was well-equipped and that he was directly involved in international negotiations to secure weapons.⁷⁶¹ Several child soldier witnesses testified that their weapons came from the Accused.⁷⁶²
282. Asked how they requested weapons, W-0055 explained the FPLC chain of command: "There's a procedure to be followed. If a brigade requires weapons, they would order them to the Chief of Staff in charge of operations."⁷⁶³ Deliveries were coordinated through a sophisticated system of communication.⁷⁶⁴ Commanders would ask the Chief of Staff for ammunition⁷⁶⁵ and, according to W-0055, Bosco was responsible for distributing weapons to the troops.⁷⁶⁶ W-0011 likewise recalled that when his Commander asked for additional weapons, he had to ask Bosco, "and Commander Bosco sent the weapons."⁷⁶⁷ [REDACTED] Bosco during the

⁷⁵⁷ In June 2002, the Accused led the delegation that went to Kampala in June 2002 to secure Ugandan government backing (T.179, p.41, line 20 to p.46, line 12). See also T.181, pp.90-91; T.184, p.39, line 19 to p.43, line 25; T.189, p.43, line 22 to p.44, line 9.

⁷⁵⁸ EVD-OTP-00685.

⁷⁵⁹ T.178, p.63, lines 9-16.

⁷⁶⁰ Video EVD-OTP-00584 (interview with the Accused) at minutes 01:03:00 - 01:04:00.

⁷⁶¹ Video EVD-OTP-00584 (interview with the Accused) at minutes 01:16:25 - 01:17:00.

⁷⁶² T.135, p.18, lines 1-21; T.144, p.69, lines 12-16.

⁷⁶³ T.175, p.65, line 25 to p.66, line 2.

⁷⁶⁴ T.117, p.23, lines 6-20; T.139, p.13, lines 19-20.

⁷⁶⁵ T.158, p.12, lines 5-8.

⁷⁶⁶ T.175, p.66, lines 13-19.

⁷⁶⁷ T.139, p.12, lines 14-20.

delivery of weapons.⁷⁶⁸ The role played by Bosco in this regard was further confirmed by several witnesses, including W-0017.⁷⁶⁹

v. Appointments and dismissals

283. The Accused made personnel decisions. He selected his core military team that would implement his plan and that of his co-perpetrators. [REDACTED]. He described the letter of appointment signed by the Accused and copied to the Chief of Staff, his deputy and Rafiki. The letter included the notification that [REDACTED] had been appointed as [REDACTED].⁷⁷⁰
284. W-0016 said Kisémbó told him of his appointment and gave him an office. W-0016 said that the Chief of Staff had a list that he had signed where the ranks of the Chiefs of Staff, the main staff and their deputies were stipulated, with the names of persons assigned to the relevant posts.⁷⁷¹ This list was distributed to the main staff and it “must have been forwarded to the office of the minister in charge of defence and to the office of the president”,⁷⁷² because [...] all reports had to be submitted to him”.⁷⁷³
285. It is beyond doubt that the Accused was in effective control of the FPLC. His own national secretary underscores this.⁷⁷⁴ In fact, the Accused himself does not contest his commanding role over the FPLC, as further evidence from DW-0019 demonstrates.⁷⁷⁵ Confirming the supremacy of the Accused, DW-0011 explained that “the armed unit of the FPLC was historically under the *orders* of the UPC/RP”.⁷⁷⁶

⁷⁶⁸ [REDACTED]

⁷⁶⁹ T.139, p.12, lines 19-20; T.144, p.43, lines 13-16; T.157, p.72, lines 24-25.

⁷⁷⁰ [REDACTED]

⁷⁷¹ T.189, p.60, line 23 to p.63, line 13.

⁷⁷² T.189, p.63, lines 20-25.

⁷⁷³ T.189, p.64, lines 3-5.

⁷⁷⁴ T.340, p.71, lines 4-22.

⁷⁷⁵ T.340, p.72.

⁷⁷⁶ T.347, p.50, lines 6-7 [emphasis added].

9.2.2 The Accused's Commission of the Crimes of Conscription, Enlistment and Use of Child Soldiers under the Age of 15

286. The Accused was aware of and encouraged the recruitment of child soldiers and their use in combat. The Accused's position atop the UPC/FPLC and his tight control over the military meant that he either intended that the recruitment activities and awareness campaigns would target children under the age of 15, or that he accepted the substantial likelihood that children under the age of 15 would be recruited. Children made up an essential pool of potential soldiers, and replenishing and expanding the ranks of the UPC/FPLC was critical to the plan to dominate Ituri. The Accused used children as bodyguards, observed them in training camps, and received numerous complaints from the UN and other groups about the presence of children in the UPC/FPLC. Indeed, the demobilisation letters demonstrate the Accused's knowledge by feigning to end the practice through demobilisation decrees and to institute a policy that forbade continued recruitment of minors including children under the age of 15.⁷⁷⁷

287. As Court expert Coomaraswamy said in her report, "in the interest of ensuring the greatest protection to conflict-affected children, the Court should recognise that enlistment, recruitment and use of children under the age of 15 is a highly predictable consequence of a purpose or plan to recruit minors, but not necessarily children under 15 years of age".⁷⁷⁸

a. Accused's involvement in recruitment (conscription and enlistment) of children under the age of 15

i. Awareness and recruitment drives

288. In the execution of the common plan, young people from the Gegere community were encouraged to join the FPLC by "old Gegere wise men".⁷⁷⁹

⁷⁷⁷ EVD-OTP-00518.

⁷⁷⁸ EVD-CHM-00007, para. 5.

⁷⁷⁹ T.174, p.32, lines 8-11.

The most influential of these wise men was Mafuta,⁷⁸⁰ one of the founding members of the UPC.⁷⁸¹ He organised people to be sent out to the villages so that young people could be mobilised, integrated in to the army and trained.⁷⁸² The Accused would often meet with Mafuta. On one occasion, when [REDACTED] went to inform the Accused about the incident in [REDACTED] where civilians had been killed, he found Mafuta present. After hearing the news, Mafuta and the Accused appeared to suggest that this happened because the villagers had refused to provide young people for the FPLC.⁷⁸³ W-0030 also confirms that Mafuta was a key individual within the UPC/FPLC, explaining that he was a special advisor to the Accused and military advisor to the UPC/FPLC.⁷⁸⁴ Mafuta is seen on video excerpt EVD-OTP-00582 stating his function as the presidential and military advisor and giving an address about the contribution of children in the UPC/FPLC.⁷⁸⁵

289. In addition to the old wise men, young people from the villages would also mobilise other young people to join the army. Also, there were “cadres” trained for the purpose of mobilising people wherever the UPC/FPLC was deployed in Ituri. These people were trained by the Accused.⁷⁸⁶ DW-0037 explained⁷⁸⁷ that Eric Mbabazi, the G5 in the FPLC Main Staff,⁷⁸⁸ responsible for establishing relations between civilians and soldiers⁷⁸⁹ and for morale within the army,⁷⁹⁰ was responsible for recruiting young people, trying to “rally”⁷⁹¹ them to join the army. In carrying out the task of recruiting the

⁷⁸⁰ T.174, p.34, lines 1-3.

⁷⁸¹ T.174, p.35, lines 3-5.

⁷⁸² T.174, p.34, lines 1-12.

⁷⁸³ [REDACTED]

⁷⁸⁴ T.130, p.15, lines 1-10.

⁷⁸⁵ T.130, p.14, lines 3-18.

⁷⁸⁶ T.175, p.77, lines 5-19.

⁷⁸⁷ T.349, p.64, lines 13-18. See also video excerpts EVD-OTP-00676 and EVD-OTP-00677.

⁷⁸⁸ EVD-OTP-00457, on second page; T.154, p.24, line 4; T.345, p.69, line 24 to p.70, line, 1.

⁷⁸⁹ T.345, p.70, lines 13-14.

⁷⁹⁰ T.189, p.77, lines 14-19.

⁷⁹¹ T.349, p.64, line 14.

young people into the army, Mbabazi supervised the “cadres”. This task required him to meet with Chief of Staff and the Accused to “see whether or not the people in the villages were willing to allow the children to come or not. These were among the duties of the G5.”⁷⁹²

290. The attempts to recruit children into UPC/FPLC are starkly shown in an internal, monthly report compiled by Mbabazi, submitted on 6 November 2002 to Kisembo⁷⁹³ about events in October 2002.⁷⁹⁴ This FPLC monthly report contained sections on the morale of officers, troops, the interaction between the population and the army, health and intelligence and ended with a series of suggestions.⁷⁹⁵ It is a report that would have been written with the “utmost care.”⁷⁹⁶ Under the section “inter-troop, troop-officer, inter-officer and troop civilian relations”, the G5 states: “there are officers who treat soldiers by marking them out, and this has certain consequences, the following consequences: desertion, displacement of troops within units, afterthoughts and so on and so forth. On the other hand, this mismanagement has the following results: the deserters go back, go home, demoralised. Their friends and these deserters are discouraged, and therefore we *no longer have the means of obtaining more children for the army*” [emphasis added].

291. This document reveals the full picture of the recruitment drives for children early on in the army’s existence as the FPLC. DW-0037, the private secretary to Bosco Ntaganda,⁷⁹⁷ stated that the use of the term “children” in military reports in the FPLC at least referred to children under the age of 18.⁷⁹⁸

⁷⁹² T.175, p.76, lines 16-25.

⁷⁹³ EVD-OTP-00457.

⁷⁹⁴ T.346, p.13, lines 2-3.

⁷⁹⁵ EVD-OTP-00457; T.346, p.14, lines 4-19.

⁷⁹⁶ T.346, p.14, lines 1-3.

⁷⁹⁷ T.349, p.8, lines 22-23.

⁷⁹⁸ T.349, p.29, lines 7-10.

292. Following the 6 November 2002 report, the pattern of recruitment and raising awareness continued. In February 2003, Eric Mbabazi gave an address at a UPC/FPLC rally.⁷⁹⁹ He talked about young people having joined the army.⁸⁰⁰ An assessment of the evidence of Mbabazi's role in recruiting children and the presence of children in the UPC/FPLC suggests beyond doubt that in this video-clip Mbabazi is referring at the very least to children under 18, with the high likelihood that such campaigns would result in the recruitment of children under 15. In this regard, DW-0019's evidence that "young people" could refer to persons aged between 15 and 59 defies logic.

293. Finally, W-0038's evidence reveals that Kisembo, Bosco and the Accused were aware of such recruitment campaigns.⁸⁰¹

ii. Consequence of the recruitment drives – children under 15 in the UPC/FPLC

294. The Accused knew that the recruitment drives resulted in the conscription and enlistment of children under the age of 15 into the UPC/FPLC army. Nothing demonstrates this more conclusively than the video footage of the Accused's visit to the Rwampara training camp on 12 February 2003.⁸⁰² W-0030, [REDACTED], when asked about the age of the soldiers and recruits that the Accused addressed, stated that they were all ages, the youngest being nine years old.⁸⁰³

295. Other witnesses corroborated that there were child soldiers under the age of 15 at Rwampara. [REDACTED] Rwampara camp [REDACTED] Bosco in early 2003 to inspect the recruits.⁸⁰⁴ When they arrived the recruits organised

⁷⁹⁹ T.346, p.22, lines 18-22, p.25, lines 6-10.

⁸⁰⁰ T.346, p.28, line 7 to p.29, line 4; EVD-OTP-0677.

⁸⁰¹ T.113, p.56, lines 7-22.

⁸⁰² EVD-OTP-00570.

⁸⁰³ T.128, p.48, lines 12-14.

⁸⁰⁴ [REDACTED]

in a line-up.⁸⁰⁵ [REDACTED] testified that there were children, a few kadogos, in this line-up.⁸⁰⁶ W-0046 testified that during her visit to Rwampara training camp in March 2003, she and her colleagues spoke to children aged between 13 to 18 years old.⁸⁰⁷

296. Lastly, there is the evidence of W-0010, who herself was present amongst the child soldiers during the Accused's address at Rwampara on 12 February 2003.⁸⁰⁸ Upon viewing the video of the visit, W-0010 identified [REDACTED], a child soldier of less than 12 years old,⁸⁰⁹ and one of Bosco's bodyguards aged 10.⁸¹⁰

297. The visit to Rwampara was only two weeks after the Accused issued a letter purporting to follow-up on an earlier demobilisation order. Had the Accused been sincere in his interest in demobilising children, he would have been sensitive to the issue of child soldiers and would have noticed the children around him and at a minimum enquired into their age and status.

298. Equally damning, the Accused had children under the age of 15 in his own protection unit, his Presidential Guard. W-0016, who [REDACTED] from the Protection Unit camp where the Presidential Guard slept, said that the guard included children: out of 60 persons in the guard, there were 10 children, four of whom were between 13 and 14 years old.⁸¹¹ The unit had weapons⁸¹² and the children, both boys and girls, were in uniform.⁸¹³

⁸⁰⁵ EVD-OTP-00454

⁸⁰⁶ [REDACTED]

⁸⁰⁷ EVD-OTP-00489; T.206, p.49-51. T.207, p.13.

⁸⁰⁸ T.145, p.13 re. EVD-OTP-00570.

⁸⁰⁹ T.145, p.18.

⁸¹⁰ T.145, p.23 to p.24, line 2.

⁸¹¹ T.189, p.23, lines 22-25, p.36, lines 1-4.

⁸¹² T.189, p.33, lines 11-12.

⁸¹³ T.189, p.36, lines 5-8.

299. W-0055 confirmed that, as with the officers at the main staff,⁸¹⁴ the Accused also had a “large number of escorts. Perhaps a battalion.”⁸¹⁵ They numbered somewhere between 150 to 200 soldiers, and included children – kadogos – which also included two girls (PMFs).⁸¹⁶ They wore uniform and carried arms.⁸¹⁷
300. In early October 2002, [REDACTED] visited the Accused’s residence and saw many soldiers, including children between the ages of 9 and 15.⁸¹⁸ The child soldiers were armed with Kalashnikovs.⁸¹⁹ Although [REDACTED] was unable to give a precise number of the soldiers he saw at the Accused’s residence on that occasion who were 14 or under, he did say that there was more than one child soldier of that age range.⁸²⁰ In relation to one of these children, [REDACTED] said he heard him being beaten and from the cries assessed that he was younger than 15 years of age.⁸²¹ W-0030 [REDACTED] went to the Accused’s residence two to three times a week and saw children guarding buildings and protecting the President, with the youngest in the group being nine or ten years old.⁸²²
301. The Accused’s use of children as bodyguards was not new. In his previous position as Minister of Defence in the RCD-K/ML, he also had used children under the age of 15 as bodyguards. W-0299, one of the Accused’s bodyguards when he was Minister of Defence, testified that there were female bodyguards “from 25 to 15, even younger than 15 [...] at the residence”.⁸²³

⁸¹⁴ T.176, p.48, lines 1-3.

⁸¹⁵ T.176, p.48, lines 5-12.

⁸¹⁶ T.176, p.48, line 14 to p.49, line 18.

⁸¹⁷ T.176, p.50, lines 2-6.

⁸¹⁸ [REDACTED]

⁸¹⁹ [REDACTED]

⁸²⁰ [REDACTED]

⁸²¹ [REDACTED]

⁸²² T.128, p.21.

⁸²³ T.122, p.25, line 20 to p.26, line 8.

302. Set against the evidence of children serving as bodyguards to the Accused, DW-0011's contrary evidence⁸²⁴ is not to be believed. Furthermore, in cross-examination, DW-0011 qualified⁸²⁵ his earlier unequivocal evidence that he was "by Mr Lubanga's side practically on a daily basis".⁸²⁶
303. The presence of children in the UPC/FPLC was also contemporaneously noted in an internal UPC political report.⁸²⁷ The report was signed and stamped by the National Secretary for Education and Youth, and addressed to Mbabazi, with a copy to the Accused. It pertained to the selection of 13 officers from the army, clearly the FPLC army, to be trained on a demobilisation programme (DDRRR).⁸²⁸ The report specifies that the programme is to be applied to those child soldiers aged between 10 to 15 or 16 years who are "*willing*" [emphasis added] to return to civilian life. DW-0019 appears to validate the document⁸²⁹ and indeed the Accused has not challenged its authenticity.
304. This document confirms the presence of children under the age of 15 in the FPLC and that the fact was told to the Accused.⁸³⁰ This is corroborated by DW-0011, the Accused's private secretary, who confirmed that the internal report from the National Secretary for Education and Youth would have referred to children within the FPLC, saying: "As far as I understand events, given the context in which we found ourselves at the moment, the child soldiers concerned referred to in this document were soldiers in this region

⁸²⁴ T.347, p.69, lines 15-19.

⁸²⁵ T.347, p.58, lines 17-25.

⁸²⁶ T.347, p.29, line 19 to p.30, line 3.

⁸²⁷ EVD-OTP-00518.

⁸²⁸ Demobilisation, Disarmament, Rehabilitation, Resettlement and Reintegration Programme.

⁸²⁹ T.346, p.37, line 23 to p.39, line 2.

⁸³⁰ The assertion of DW-0019 (T.346, p.45, lines 16-18, p.46, lines 10-12) that the reference to children under 15 pertains to self-defence forces is unlikely and irrelevant. The report is from a UPC national secretary. It is specifically addressed to the very officer in charge of recruitment and troop issues, the G5 of the FPLC. In any event, those "self-defence forces", if they existed, were within the chain of command of the FPLC and were incorporated within the UPC. Even if DW-0019's construction were believable, this document would still demonstrate that there were children under the age of 15 within the UPC/FPLC.

who could only – who could be only assimilated into the FPLC, because it was the only power place”.⁸³¹

305. Daily messages up and down the FPLC chain of command from the period November 2002 to February 2003 also recorded the presence of children in the UPC/FPLC. A contemporaneous UPC/FPLC logbook of daily radio communications from the units in the field to the main staff headquarters,⁸³² contains many entries that refer expressly and unequivocally to “children” (in contrast with other terms used, such as “soldats,” “militaires,” “recrues,” “éléments,” etc.).⁸³³ Through a detailed description of the situation on the ground, FPLC commanders, the FPLC Chief of Staff and his Deputy Chief of Staff were informed of the fact that children were participating in hostilities and playing an integral part of the military operations.
306. Examples of the use of children read as follow: “After being caught in an ambush, the children from Nyangarayi have taken 5 enemies,”⁸³⁴ “Fataki: the children have hit the target,”⁸³⁵ “people can’t plan the war to come to an end with Kpandruma (-) therefore it would be good to send these children from Fataki to Aru,”⁸³⁶ “this child who is fighting with this weapon has returned to their HQ in Blukwa.”⁸³⁷ Some children were also reported injured, or dead: “with us only one child has received a bullet but he is still alive and is not seriously wounded,”⁸³⁸ two of our children stayed with the enemy, four fell.”⁸³⁹ Of note is that the Accused’s Minister of Defence is mentioned in

⁸³¹ T.347, p.53, lines 15-19.

⁸³² See EVD-OTP-00409; T.176, p.68 *et seq*, and in particular p.70, lines 16-17.

⁸³³ DW-0037 testified that the use of the term “children” in military reports in the FPLC referred to children at least under the age of 18 (T.349, p.29, lines 7-10).

⁸³⁴ EVD-OTP-00409: see the first entry at page DRC.00017.048.

⁸³⁵ EVD-OTP-00409: see the second entry at page DRC.00017.071.

⁸³⁶ EVD-OTP-00409: see the first entry at page DRC.00017.119.

⁸³⁷ EVD-OTP-00409: see the entry at page DRC.00017.161

⁸³⁸ EVD-OTP-00409: see the first entry at page DRC.00017.093; T.176, p.77, lines 16-17.

⁸³⁹ EVD-OTP-00409: see the first entry at page DRC.00017.095.

communications containing references to the “children” fighting in the FPLC.⁸⁴⁰

307. This evidence shows beyond reasonable doubt that the Accused knew that his recruitment programmes and awareness campaigns resulted in the conscription, enlistment and use of children into the UPC/FPLC, or at the very least that the recruitment policies would likely lead to the enlistment and conscription of children, including children under the age of 15, for use in combat. Nobody, including the Accused personally, cared to question or check ages of the recruits. At the same time as he was purporting to demobilise children under the age of 18, he never questioned his bodyguards or the children he observed on his morale-building visits.

b. Sham nature of demobilisation orders

308. The evidence shows that there were numerous complaints from the United Nations, other third parties and the media about the continuing recruitment and presence of child soldiers in the UPC/FPLC. Reacting to this pressure, the Accused issued what purported to be demobilisation letters. These letters were intended only to quell the mounting international criticism; there was no sincere interest in actually accomplishing the separation of children from the FPLC. Insiders and NGOs alike confirmed that the orders were not disseminated or implemented; to the contrary, recruitment and use of under-age children as soldiers in combat continued in the period following the orders.
309. None of the orders were relayed down the full chain of command of the UPC/FPLC and there is at best only scant evidence that they were enforced as a matter of policy. Consequently, the orders are highly significant as proof of the presence of children in the UPC/FPLC and of the Accused’s awareness

⁸⁴⁰ EVD-OTP-00409: see for example the first entry at pages DRC.00017.071, DRC.00017.119, DRC.00017.0157 and DRC.00017.172.

of that. In fact, their ineffectiveness confirms that the UPC/FPLC's policy of recruiting and using children was deliberate, served the interests of the army and for that reason was not abandoned.

Evidence of UPC/FPLC insiders and UN/NGO staff of no demobilisation

310. [REDACTED] was unequivocal. He never had discussions with the Accused about demobilisation of kadogos.⁸⁴¹ Given that [REDACTED] had regular access to the Accused during the period he was in the UPC/FPLC,⁸⁴² if the Accused's assertions regarding demobilisation of child soldiers are to be believed, then surely the Accused would have had discussions about it with [REDACTED]. Nor did [REDACTED] discuss demobilisation with Kisembo or other staff at the Main Staff, notably Mbabazi, Rafiki, or Bosco. "I never had any discussions with them concerning demobilisation of kadagos within the UPC. The matter was never discussed with them".⁸⁴³
311. [REDACTED] also categorically stated that he had never seen or come to know of the existence of the alleged 21 October 2002 and 27 January 2003⁸⁴⁴ demobilisation letters.⁸⁴⁵ Certainly, [REDACTED] was not part of the FPLC in October 2002, but in January 2003 he was in position as [REDACTED]. Had the Accused intended that the October 2002 and January 2003 demobilisation letters be implemented, [REDACTED] would have surely seen or come to know about them during the course of his work and during his meetings with the Accused.
312. [REDACTED] explained that very small children in the army were not sent to the front lines. Neither were they demobilised. They remained in the

⁸⁴¹ [REDACTED]

⁸⁴² [REDACTED]

⁸⁴³ [REDACTED]

⁸⁴⁴ EVD-OTP-00696; EVD-OTP-00697.

⁸⁴⁵ [REDACTED]

army, performing other military duties, subject to the discretion of the commander.⁸⁴⁶

[T]his was what the commanders wanted to do, it was their will. If they saw a child that was too young, they could take that child; but this did not mean that there was a programme to demobilise the children who were too young that one found in the army.⁸⁴⁷

313. He gave an example of children taken to headquarters, and at Bosco's camp.⁸⁴⁸ The children were not demobilised, they were just transferred to staff HQ. They remained in the UPC/FPLC. W-0046 described the UPC/FPLC's demobilisation efforts as a "masquerade", ⁸⁴⁹ because the recruitment of children continued throughout Ituri by the UPC. As she explained, the leaders of the UPC/FPLC met with MONUC several times a week and thus could have affected demobilisation, but they did not do so.⁸⁵⁰
314. [REDACTED] added to the chorus of witnesses that showed that the Accused's demobilisation efforts were insincere. In a meeting with the Accused, [REDACTED] and [REDACTED],⁸⁵¹ in the beginning of October 2002,⁸⁵² [REDACTED] addressed the concerns about child soldiers and raised the issue of demobilisation. The Accused responded with reasons as to why children were present, explained that they had developed a "taste for it"⁸⁵³ and it was difficult to make them leave.⁸⁵⁴ Because "nothing had changed", the "children hadn't been demobilised",⁸⁵⁵ after the October 2002 attempts, [REDACTED] scheduled further meetings to continue to push the issue.

⁸⁴⁶ T.177, p.54 to p.58, line 2. He clarifies that the "kalogos in the army were kalogos who could bear weapons. They could carry weapons" (T.178, p.68, lines 22-25).

⁸⁴⁷ T.178, p.70, lines 16-19.

⁸⁴⁸ T.177, p.54, lines 21-25.

⁸⁴⁹ EVD-OTP-00489, pp.106-107.

⁸⁵⁰ EVD-OTP-00489 pp.106-107.

⁸⁵¹ [REDACTED]

⁸⁵² [REDACTED]

⁸⁵³ [REDACTED]

⁸⁵⁴ [REDACTED]

⁸⁵⁵ [REDACTED]

Accordingly, [REDACTED] met in early January 2003 with [REDACTED],⁸⁵⁶ [REDACTED], [REDACTED], and [REDACTED].⁸⁵⁷ [REDACTED] said that [REDACTED] had four bodyguards between the ages of 12 and 15. They guarded the office at the time of the meeting.⁸⁵⁸

315. The demobilisation efforts in which [REDACTED] was involved also incorporated initiatives from other bodies engaged in child protection, notably the clergy and women's groups. This cooperation resulted in a joint petition letter requesting demobilisation which was given to the President of the UPC and his minister for youth. The minister started to participate in the meetings sometime early in 2003.⁸⁵⁹ Upon receiving the letter, the minister explained that the Presidency needed to address the problem (of demobilisation). At the end of all the attempts to institute demobilisation action with the Accused, his minister and the UPC Secretary-General, no reply or follow-up to the letter was received.⁸⁶⁰ Far from children being demobilised, [REDACTED], on account of his work experience with children, noticed that the "number of children was increasing all the time".⁸⁶¹
316. W-0024, who worked for the local NGO SOS Grand Lacs in defence of children's rights⁸⁶² and who was present in Bunia during October 2002,⁸⁶³ said that the UPC/FPLC "pretended to demobilise certain children", but "we found that those children were still present, for instance, as bodyguards".⁸⁶⁴ He described demobilisation as a "sham"; "nothing happened". "Nothing

⁸⁵⁶ [REDACTED]

⁸⁵⁷ [REDACTED]

⁸⁵⁸ [REDACTED]

⁸⁵⁹ [REDACTED]

⁸⁶⁰ [REDACTED]

⁸⁶¹ [REDACTED]

⁸⁶² T.170, p.37, lines 14-21.

⁸⁶³ T.170, p.55, lines 18-23.

⁸⁶⁴ T.170, p.52, lines 18-23.

changed”.⁸⁶⁵ He said that the demobilisation only concerned a limited number of children.

317. W-0024 explained that the UPC/FPLC had “expansionist ambitions”⁸⁶⁶ and “needed more people in its armed ranks.”⁸⁶⁷ This goal was incongruous with the activities of NGOs such as SOS Grand Lacs who advocated demobilisation.⁸⁶⁸ He summarised, saying that “humanitarian helpers and people moving in human rights events had different aims from UPC/FPLC who was out for enrolling children. Therefore, they didn’t support at all our activities in Bunia”.⁸⁶⁹

318. After May 2002, SOS Grands Lacs sought to meet the Accused to discuss the continued recruitment of children into the ranks of the UPC/FPLC, but the Accused refused to meet with the NGO’s representatives.⁸⁷⁰ Although one UPC/FPLC representative did meet with the organisation, W-0116 testified that the UPC/FPLC was not receptive to the issues of the demobilisation of children.⁸⁷¹

c. Demobilisation Letters of 21 October 2002 and 30 October 2002

319. The Prosecution contends that this letter was a sham and never intended to be implemented. This is because i) it was issued due to pressure and complaints from the international and NGO community at the time, ii) it was compiled irregularly, and in violation of UPC administrative rules, iii) no demobilisation actually took place – on the contrary, recruitment continued necessitated by military activity.

⁸⁶⁵ T.170, p.53, lines 3-6.

⁸⁶⁶ T.170, p.57, line 11.

⁸⁶⁷ T.170, p.57, lines 11-12.

⁸⁶⁸ T.170, p.57, lines 11-15.

⁸⁶⁹ T.170, p.57, lines 22-24.

⁸⁷⁰ T.208, p.58, lines 19 to p.59, line 12.

⁸⁷¹ T.208, p.69, lines 15-16.

Pressure and complaints from UN and NGOs

320. In the period leading up to the alleged 21 October 2002 demobilisation letter, pressure was mounting on the Accused from the UN and other international organisations over the recruitment of children under the age of 15 within the UPC/FPLC.
321. W-0046 recalled that her second mission to Bunia on or about 10 September 2002, coincided with the visit of the deputy military commander of MONUC. He had arranged a meeting with the Accused to discuss, amongst other issues, the issue of children associated with the UPC/FPLC, following a briefing on the issue by military observers.⁸⁷² A second meeting also took place between the deputy commander and the Accused.⁸⁷³ That was part of the pressure mounting on the Accused and his military.⁸⁷⁴
322. DW-0011 confirmed that “such accusations have always been levelled”, “such accusations were made”.⁸⁷⁵ Similarly, DW-0037 acknowledged that in the period of October and November 2002 and early 2003, he received correspondence that referred to complaints by the UN and other international organisations over the recruitment of children in the FPLC.⁸⁷⁶
323. As a result of the pressure, the Accused purportedly issued a demobilisation directive on 21 October 2002.⁸⁷⁷ For a document – a Presidential decree – this significant, the process of issuance was inexplicably irregular, its contents

⁸⁷² T.206, p.34, lines 10-25.

⁸⁷³ EVD-OTP-00489, pp.35-36.

⁸⁷⁴ DW-0019 also admitted that there were complaints from MONUC or from other members of the international community all the time and that the President “thought that it was also necessary to try and take action in order to protect the FPLC from such accusations” (T.345, p.63). After the Accused carried out a mission to a training centre, or at least after the Accused received complaints, he decided that the FPLC ought to be protected from accusations of “such misdemeanours” (T.345, p.63, lines 3-8).

⁸⁷⁵ T.347, p.64, lines 4-10.

⁸⁷⁶ T.349, p.64, lines 1-6.

⁸⁷⁷ Not surprisingly, Defence witnesses disputed that the order was issued to stave off complaints or that it was a sham that nobody ever intended would be implemented: T.345, p.64, lines 1-5; T.347, p.68, lines 10-25.

apparently not widely disseminated, and there was little effort to follow-up. The same is true of a letter dated nine days later, allegedly emanating from the Chief of Staff. It is the Prosecution's submission that the letters were a sham from creation, possibly backdated and thus not even created at the purported time, and the Accused never intended that demobilisation be carried out.

The October demobilisation letters were irregularly compiled

324. The letters do not bear an appropriate reference number. In the absence of this, it is impossible to conclude that they were issued at the time asserted. Moreover, the casual way that the letters were treated reflects, at a minimum, that they were not taken seriously.
325. UPC administrative regulations for documents and administrative correspondence required that documents include reference numbers, and that they increase in sequence. This was confirmed by DW-0019,⁸⁷⁸ the deputy national secretary for internal affairs,⁸⁷⁹ and the Accused's private secretary, DW-0011, responsible for filing Presidency documents,⁸⁸⁰ who said that the sequencing would start afresh at the end of the year, not month.⁸⁸¹ This meant that a document issued in October ought to be identified by a reference number lower than one affixed to a document issued in November or December.
326. The 21 October 2002 letter is out of sequence. Its reference number is "287", yet a document issued from the same department, the Presidency, on 10 December 2002 bore the reference number "179"⁸⁸² and a document issued on 29 November 2002 from the Presidency bore the reference number

⁸⁷⁸ T.346, p.47, lines 3-22.

⁸⁷⁹ EVD-OTP-00721.

⁸⁸⁰ T.347, p.33, lines 1-4.

⁸⁸¹ T.347, p.34 to p.35, line 10.

⁸⁸² T.347, p.70, line 4 to p.71, line 13; EVD-OTP-00712.

“146”.⁸⁸³ According to the regulations, the 21 October 2002 reference number should have been lower, not higher, than documents 146 and 179.

327. There is no legitimate explanation. DW-0011 attempted, claiming that there were two registers that dealt with Presidency documents, one for documents originating from the private secretary and one for documents originating from the cabinet, and that each would have its own registration and referencing system. Documents originating from the private secretary would be laid out in such a way that all the “ccs”, the signature and heading would be on the left-hand side.⁸⁸⁴ Documents originating from the cabinet would be laid out on the right hand side. Both 29 November and 10 December 2002 documents were laid out on the right hand side. Therefore this demobilisation document, on which the signature and heading was on the left side, would be subject to a different numbering sequence. This theory changed with the presentation of a document dated 30 November 2002 affixed with a reference number of “190”, and laid out to the left hand side,⁸⁸⁵ Though he offered a new explanation.⁸⁸⁶ In fact it was equally inept.

328. DW-0019’s evidence on the October letter also does not assist.⁸⁸⁷ Firstly, he evades answering whether he saw the document,⁸⁸⁸ but alleges he heard it over Radio Candip.⁸⁸⁹ Secondly, he incorrectly⁸⁹⁰ stated that the order made a reference to the NGO Save the Children.⁸⁹¹ Thirdly, when pressed, the witness could not recall when in October 2002 the letter was purportedly read out over Radio Candip, initially providing the date of 13 October, then

⁸⁸³ T.347, p.72, lines 1-11; EVD-OTP-00684.

⁸⁸⁴ T.347, pp.73 to p.75, line 19; T.348, p.13, line 10 to p.14, line 11.

⁸⁸⁵ EVD-OTP-00505.

⁸⁸⁶ T.348, p.14, line 17 to p.16, line 10.

⁸⁸⁷ T.345, p.40-42; EVD-OTP-00740. It is also noted that DW-0019 provided mistaken information about his function in the UPC.

⁸⁸⁸ T.345, p.60, line 8 to p.61, line 11. The Defence omitted to show DW-0019 the document.

⁸⁸⁹ T.345, pp.60-61.

⁸⁹⁰ EVD-OTP-00696.

⁸⁹¹ T.345, p.61, line 11.

backtracking saying it was sometime in October and could not recall with certainty.⁸⁹²

329. Slightly more than a week after this purported 21 October order, the Chief of Staff issued an order on 30 October demobilising children from the self-defence forces.⁸⁹³ This order inexplicably did not refer to the prior Presidential Decree, even though it was specifically addressed to the Chief of Staff. The 30 October order also was given an impossible internal reference number,⁸⁹⁴ was not signed⁸⁹⁵ by the Chief of Staff,⁸⁹⁶ and bore an incorrect stamp.⁸⁹⁷
330. A new demobilisation order (re self-defence forces) issued on 16 February 2003⁸⁹⁸ purported to be the follow up to October 2002 and 27 January 2003 demobilisation order so the October order was written at least by that date, but the 16 February order omits the reference number “287” allegedly assigned to the 21 October 2002. There is no apparent explanation for this omission – DW-0037, when pushed, could only say it was a mistake.⁸⁹⁹ Furthermore, DW-0037 admitted that its reference number was

⁸⁹² T.345, p.65.

⁸⁹³ EVD-D01-01096.

⁸⁹⁴ Further, the reference number of “061” on the document is higher than reference numbers from other reports emanating precisely the same division (FPLC/EMG/COMDT/2002) issued after October 2002 (EVD-OTP-00409: see top entry on page DRC.00017.208, from December 2002, which bears the reference number No.13/FPLC/EMG/COMDT/2002), when according to military rules, it should be higher, a principle that DW-0037 confirms (T.349, p.47, line 10 to p.48, line 1). His explanation that the war situation led to reference numbers skipping by “one or two”, even if accepted, would not account for a discrepancy of 50, for instance, as in the case of log book entry at page DRC.00017.208.

⁸⁹⁵ Pressed, DW-0011 eventually agreed that the order is not signed by the Chief of Staff (T.349, p.43, line 23). He then offers another, inexplicable, explanation – it was signed by the head of the G1 (T.349, p.44, line 3). Not only does he not indicate where on the order this is apparent (T.349, pp.44-45), he also undermines his evidence by agreeing that the reference number on the document bears no connection to the G1 division (T.349, p.44, lines 10-13). See also EVD-D01-01096 where the term “P.O” is contained in the stamp above Kisembo’s name.

⁸⁹⁶ T.349, p.43, line 23.

⁸⁹⁷ T.349, p.46, line 21 to p.47, line 1.

⁸⁹⁸ EVD-D01-01097.

⁸⁹⁹ T.349, p.56, lines 11-25.

inappropriately crafted to indicate that it emanated from the G1 division when in fact it purports to emanate from the Chief of Staff for operations.⁹⁰⁰

Continued recruitment despite alleged demobilisation order

331. Even assuming the letters were “authentic” – i.e. prepared by the Accused and his Chief of Staff, on the dates signified on the face of the documents – they were in any event meaningless. Recruitment of children and the attempts to recruit children continued openly and unabated, starkly demonstrating the sham nature of these directives.⁹⁰¹ Indeed, Mbabazi’s internal report relayed up the chain of command complained about the difficulties of recruiting children.⁹⁰²
332. Tellingly, there is no reference in this 6 November 2002 monthly FPLC report to the demobilisation letter of 21 October 2002.⁹⁰³ This demonstrates the sham nature of that 21 October 2002 letter and alleged efforts to demobilise. DW-0019’s evidence that the term ‘enfants’ does not refer to children but to the Swahili term ‘watoto’ is not credible because it is not corroborated by DW-0037, a military person, and indeed by the other internal reports⁹⁰⁴ and demobilisation documents⁹⁰⁵ that employ the term “enfants”.

d. Demobilisation Letter of 27 January 2003⁹⁰⁶

333. This purported demobilisation letter was in fact not an order for demobilisation, but a directive for follow-up information on the implementation of the order allegedly issued three months previously, on 21 October 2002. The very fact that an order appears to be issued related to

⁹⁰⁰ T.349, p.55, lines 9-23.

⁹⁰¹ The UPC/FPLC log book (EVD-OTP-00409) records the use of children in combat in December 2002; see entries at pages DRC.00017.048, DRC.00017.071.

⁹⁰² EVD-OTP-00457.

⁹⁰³ EVD-OTP-00696.

⁹⁰⁴ EVD-OTP-00518.

⁹⁰⁵ EVD-OTP-00696; EVD-OTP-00697.

⁹⁰⁶ EVD-OTP-00697.

demobilisation at the end of January 2003 demonstrates that the October order was a sham and never intended to be implemented. If demobilisation had been seriously intended, it is expected that an order for a follow up report would have been issued soon after October 2002 and not three months later. At the same time, it would support the proposition that the October order was drafted later and backdated; under that scenario it would be understandable that the follow-up order would take so long to be issued.

334. In any event, this order was also a sham, never intended to be implemented but issued because of the continued pressure by the UN and international community. Following the sustained pressure on the UPC/FPLC and Accused from MONUC and other NGOs from September to November 2002, Save the Children and other religious leaders and women's groups initiated a concrete proposal for demobilisation in early 2003. This resulted in a joint petition letter requesting demobilisation which was given to the President of the UPC and his minister for youth, who then started to participate in the meetings, sometime early in 2003.⁹⁰⁷
335. As with the first order in October 2002, the 27 January 2003 follow up order was not implemented. Indeed, the order appears not even to have been relayed down the chain of command. Top military commanders, [REDACTED], never saw the order nor became aware of demobilisation efforts at that time.⁹⁰⁸ For an important order that would have had strategic and military consequences during a time of mobilisation and military operations, [REDACTED] ought to have seen it and would most probably been involved in the compilation of any follow up report. Similarly, DW-0037, the private secretary to the Deputy Chief of Staff, said he saw the letter

⁹⁰⁷ T.199, p.44, line 8 to p.45, line 6.

⁹⁰⁸ [REDACTED]

at the time but provided no information regarding Bosco's dissemination or follow up.⁹⁰⁹

336. More importantly, children continued to be recruited and used in combat in the UPC/FPLC in February 2003. This is amply demonstrated by the presence of child recruits under the age of 15 at the Rwampara camp on 12 February 2003. At Rwampara, the Accused saw first hand how the demobilisation of child soldiers was a ruse. Yet, he did not admonish his staff, he did not discourage the child recruits and troops – on the contrary, he gave a morale rousing speech and acted in a manner that condoned the use of children in the UPC/FPLC.
337. Further, the UPC/FPLC log book contemporaneously recorded the use of children in combat in February 2003⁹¹⁰ In another entry copied to the Minister of Defence and the Chief of Staff, the deployment arrangements of children within specific brigades was discussed.⁹¹¹
338. The fact that children continued to be used and recruited is of no surprise. As DW-0011 said, this was a period when the UPC/FPLC was fighting on the periphery of Bunia,⁹¹² and the Accused would have wanted to as many troops as possible. As he said, “if there are a lot of attacks on the outskirts of the town and the power that is established feels threatened, it's quite normal that one would want to mobilise troops in order to face up to the situation”.⁹¹³
339. In sum, there was no follow up report because an honest report would not have indicated demobilisation; to the contrary, it would have detailed the continued use and recruitment of children despite the October 2002 order, as

⁹⁰⁹ T.349, p.12, lines 1-5.

⁹¹⁰ EVD-OTP-00409: see the entry at page DRC.00017.161.

⁹¹¹ EVD-OTP-00409: see the bottom entry at page DRC.00017.167.

⁹¹² T.347, p.60, lines 20-23.

⁹¹³ T.347, p.61 to p.62, line 3.

originally planned. Ultimately, it was not seen as important, as DW-0011 says, it was an order that was issued because it was usual for requests for follow up to be issued.⁹¹⁴ There appeared to be no urgency to this.

e. Demobilisation Decree of 1 June 2003⁹¹⁵

340. This decree was also a sham and was not implemented. If anything, it demonstrated the existence of children in the UPC/FPLC almost a year after the FPLC was created. It showed the recruitment strategy was successful. DW-0011 testified that indeed, at that time, there was an “abundant presence of child soldiers in the ranks of the FPLC.”⁹¹⁶

341. W-0046 also testified seeing child soldiers guarding the Accused’s residence on 20 May 2003.⁹¹⁷

Complaints from the UN and Media

342. The June decree was issued as a result of the complaints and criticisms by the UN and media. In fact, two days only before signing the decree⁹¹⁸ the Accused had been warned about his responsibility in the recruitment and use of child soldiers,⁹¹⁹ especially in the context of the ratification of the Rome Statute by the DRC.⁹²⁰ On 30 May 2003, a MONUC delegation, including the head of the mission, showed him international instruments prohibiting the use of child soldiers and told him that they were “carrying out detailed documentation of this phenomenon”⁹²¹ as well as “recording the

⁹¹⁴ T.347, p.10, line 24 to p.11, line 6.

⁹¹⁵ EVD-OTP-00728.

⁹¹⁶ T.347, p.17, lines 9-10; T.348, p.3, lines 5-6.

⁹¹⁷ EVD-OTP-00489, p.100, lines 3-6.

⁹¹⁸ This sequence of events was confirmed by W-0017 (T.158, p.52, lines 13-23).

⁹¹⁹ EVD-OTP-00489, p.102, lines 2-4. See also T.206, p.39, line 13 to p.41, line 19.

⁹²⁰ T.206, p.41, lines 13-19.

⁹²¹ T.206, p.41, lines 8-12.

actions of the commanders.”⁹²² It is thus of no surprise that the June decree referred to the Universal Declaration of the Rights of the Child.⁹²³

343. W-0017 testified that at this time, in addition to the complaints from the international community, “the media was there”⁹²⁴ and “their presence was threatening.”⁹²⁵ He recalled an incident where a female journalist interviewed an armed child soldier at staff HQ, the child being “at the most 13.”⁹²⁶ The presence of child soldiers became “embarrassing.”⁹²⁷ W-0017 stated:

When the UPC had them [child soldiers], well, it wasn’t felt to be a crime, but when the media arrived, this was disseminated, there was a pressure that was exerted. It had more to do with crime, killings in Ituri, but apparently they weren’t that interested in everything. They were interested more in the child soldiers. There was a sort of a concern. Why these child soldiers? Well, the answer was that it was a crime. I think it was more the influence of the media which meant that this decision was therefore taken, *but throughout that period of time, I lived there, I saw the child soldiers, and they had never been concerned.*⁹²⁸

344. It was such complaints that prompted concerted action by the UPC/FPLC to ensure that only those officers- the G3 and G5- who were able to protect the reputation of the UPC/FPLC were permitted to speak to journalists, to spin the pretence that children were being demobilised, when in fact there were not. This is amply demonstrated in a 16 June 2003 FPLC minutes of a meeting, where it states: “we find anyone at the microphone of journalists, who are very numerous lately. No one should speak to the journalists except from the G3 and G5 who know our philosophy and our language”.⁹²⁹ As

⁹²² EVD-OTP-00489, p.102, lines 4-7.

⁹²³ The demobilisation decree also makes reference to the “will of the International Community to pursue its Programme for the Demobilisation and Reintegration of Child-Soldiers.”

⁹²⁴ T.158, p.48, line 5.

⁹²⁵ T.158, p.52, line 5.

⁹²⁶ T.158, p.48, line 8 to p.51, line 9.

⁹²⁷ T.158, p.52, lines 1-3.

⁹²⁸ T.158, p.61, lines 3-11 [emphasis added].

⁹²⁹ See EVD-D01-01098, second page.

DW-0037 admitted, it was not within the responsibility of the G3 to speak to the press.⁹³⁰

345. Within this context, witness attested at trial to the insincere nature of the June decree. W-0046 said: “[i]t is very easy to publish documents. However, that does not always mean that what is ordered in the papers is executed.”⁹³¹ According to her, the decree was “absolutely not sincere.”⁹³² Demobilisation requires careful planning and takes time.⁹³³ Although some child soldiers were instructed to approach NGOs specialised in child protection, “at the same time, recruitment continued.”⁹³⁴ No cooperation followed the publication of the decree despite the fact that the UPC/FPLC was meeting MONUC’s representatives “several times a week.”⁹³⁵
346. Although some child soldiers were indeed disarmed⁹³⁶ after the publication of the decree, they did not leave the UPC/FPLC, but remained at the UPC/FPLC headquarters.⁹³⁷ After “not more than ten days,” child soldiers were given weapons again,⁹³⁸ and by mid-June 2003, child soldiers, many of whom were “very young”, “reappeared in significant numbers.”⁹³⁹ W-0046 confirmed that “of course” they were UPC soldiers.⁹⁴⁰ She said that while she was responsible for the region of Ituri, the recruitment of children continued throughout that time.⁹⁴¹ The MONUC weekly report from 15 June 2003 contained the demobilisation decree in annex (as transcribed from the

⁹³⁰ T.350, p.4, lines 21-23.

⁹³¹ EVD-OTP-00491, p.109, lines 21-23.

⁹³² See EVD-OTP-00489, p.107, line 11; EVD-OTP-00490, p.33, lines 9-13; EVD-OTP-00491, p.109, lines 3-4.

⁹³³ EVD-OTP-00490, p.33, lines 9-13.

⁹³⁴ EVD-OTP-00489, p.107, lines 2-8. See also DW-0019’s evidence at T.341, p.34, lines 18-20.

⁹³⁵ EVD-OTP-00489, p.102, lines 10-21, p.107, lines 10-25.

⁹³⁶ After the visit of a journalist to the UPC/FPLC camp, see T.158, p.51, lines 14-17.

⁹³⁷ T.158, p.47, lines 17-19, p.45, lines 7-9.

⁹³⁸ T.158, p.53, line 18 to p.55, line 21.

⁹³⁹ EVD-OTP-00489, p.108, line 15 to p.109, line 5.

⁹⁴⁰ EVD-OTP-00489, p.109, line 10.

⁹⁴¹ T.206, p.55, lines 16 to 18.

broadcast on Radio CANDIP) while also reporting on the “on-going” recruitment of children.⁹⁴²

347. The Accused, in fact, did not dispute that child soldiers in UPC/FPLC uniforms were visible. He responded, instead, through testimony from DW-0011 and DW-0019 that, incredibly, these child soldiers “wearing the UPC uniforms” had been armed by the UPDF and either belonged to the PUSIC or were abandoned children who took up the arms.⁹⁴³ In other words, the Accused issued a decree relating to an issue that, if DW-0011 and DW-0019’s evidence is to be believed, he was not responsible for. Secondly, the theory is contradicted by the evidence of W-0017, that the children were part of Kisémbó’s “kadago unit,” a near-platoon strength unit created by the Chief of Staff in Mamedí from the bodyguards of the commanders and composed of child soldiers under the age of 15.⁹⁴⁴ DW-0019 confirmed seeing children in Kisémbó’s surroundings in Mamedí.⁹⁴⁵ At the end of May, when the UPC/FPLC was set up again in Bunia, the kadago unit was present.⁹⁴⁶
348. Additionally, DW-0019 admitted that he saw child soldiers in Bunia,⁹⁴⁷ without distinguishing easily between members of the PUSIC and the UPC/FPLC.⁹⁴⁸ The child soldiers composing the kadago unit were active in Bunia at that time: “they were armed [...] would carry out their tasks and [...] had the full uniform.”⁹⁴⁹ And when the fighting started at the time ARTEMIS arrived, the kadago unit was immediately operational.⁹⁵⁰

⁹⁴² See EVD-OTP-00741.

⁹⁴³ T.347, p.17, lines 1-19; T.341, p.34, lines 4-20.

⁹⁴⁴ T.158, p.22, line 17 to p.23, line 9.

⁹⁴⁵ T.341, p.29, lines 12-16. DW-0019 also confirmed that the commanders in Mamedí came with their bodyguards (T.345, p.5, lines 2-4).

⁹⁴⁶ T.158, p.47, lines 2-3.

⁹⁴⁷ T.341, p.34, lines 18-20.

⁹⁴⁸ T.341, p.33, lines 6-19.

⁹⁴⁹ T.158, p.47, lines 6-9.

⁹⁵⁰ T.158, p.54, line 19 to p.55, line 19.

Moreover, a daily SITREP from MONUC dated 1 June 2003 indicates the presence of “UPC troops including the child soldiers” in Bunia.⁹⁵¹

f. Self-Defence Forces

349. Given the wealth of evidence of the recruitment and use of children under the age of 15 within the UPC/FPLC, the question whether the self-defence forces were outside the control of the UPC/FPLC or incorporated into the UPC/FPLC does not impact upon the guilt or innocence of the Accused. Further, the assertion that if there were child soldiers in Ituri they were in the self-defence forces, not the UPC/FPLC, is untenable and contrary to the evidence, notably from UPC/FPLC insiders.
350. Having said this, an assessment of the evidence in fact reveals that if these self-defence forces existed by name before the period of the charges, they were incorporated into the UPC/FPLC when the latter was created. DW-0037, Bosco’s secretary,⁹⁵² stated that the alleged self-defence force to which he belonged in Mandro was incorporated into the UPC/FPLC.⁹⁵³ W-0017 also claimed that he had been a member of a self-defence committee but later joined the UPC/FPLC as it was better organised and structured.⁹⁵⁴ DW-0006, a Hema, stated that he had to join a military group at the end of May 2002 in order to defend and protect his community during the war between ethnic groups.⁹⁵⁵ He did not once refer to the existence of organised self-defence forces as a separate and independent entity ensuring the protection or defence of the Hema community. Even DW-0019 explained, in relation to self-defence groups, that once the UPC/RP became influential and had power, it did not want to share that power with such groups.⁹⁵⁶

⁹⁵¹ See EVD-OTP-00486.

⁹⁵² T.349, p.8, lines 21-23.

⁹⁵³ T.349, p.7 to p.8, line 20.

⁹⁵⁴ T.160, p.38, line 8 to p.39, line 7.

⁹⁵⁵ T.254, p.80, lines 5-18.

⁹⁵⁶ T.341, p.4, lines 13-17.

351. The Defence omitted to ask W-0017 about the relationship between the self-defence forces and the UPC/FPLC, when they might have existed, or whether the groups had child soldiers. Accordingly, W-0017's evidence on this issue is helpful because it tends to show that persons in the self-defence forces were incorporated into the UPC/FPLC once it was established, as DW-0037's evidence was.
352. In reality, the UPC/FPLC had full control over these former village defence forces. It is inconceivable that within the territory controlled by the UPC/FPLC, with its sectors and brigades throughout the region,⁹⁵⁷ independent vigilante militias would have been permitted to operate, especially when their interests and goals coincided as they were both fighting against the Lendu.⁹⁵⁸ The orders issued by the FPLC relating to the self-defence forces show this.⁹⁵⁹
353. A closer look at the evidence of the defence witnesses on this issue reveals that their evidence is flawed. DW-0007 explained that all available persons were used,⁹⁶⁰ regardless of age, to protect Hema villages;⁹⁶¹ it was a matter of life and death.⁹⁶² DW-007 said he sent young boys to be trained with the UPC/FPLC in Mandro.⁹⁶³ Although they wanted those youths to return to villages upon completion of training, these recruits were integrated into the UPC/FPLC army and did not return.⁹⁶⁴ Yet, he denies that that the villagers sent children under the age of 15 for training with the UPC/FPLC.⁹⁶⁵ If, as DW-0007 conceded, Hema villages were being attacked with such frequency and intensity that all persons regardless of age were needed to protect

⁹⁵⁷ T.348, p.44, lines 21-25.

⁹⁵⁸ T.348, p.33, lines 17-19.

⁹⁵⁹ See EVD-D01-01096.

⁹⁶⁰ T.348, p.33, lines 20-24.

⁹⁶¹ T.348, p.34, lines 3-6.

⁹⁶² T.348, p.37, lines 18-22.

⁹⁶³ T.348, p.36, lines 15-25.

⁹⁶⁴ T.348, p.36, line 23 to p.37, line 1.

⁹⁶⁵ T.348, p.40, lines 8-11.

villagers, and children under 15 were given weapons for that purpose,⁹⁶⁶ it is inconceivable that these self-defence groups would have limited the age of persons who could be formally trained to ensure better protection of Hema villages.

354. DW-0007 testified that he did not meet with the Accused or receive any other orders from the Accused or FPLC,⁹⁶⁷ until February 2003, which he contends was the first time he was advised that children under 15 should not be armed.⁹⁶⁸ Having never had any limits imposed on the age of children who could be armed or trained before this time (if the Chamber accepts DW-0007's evidence on this meeting), and having used children under 15 in hostilities both before and after this meeting without even the slightest hesitation or moral remorse, it is highly unlikely that he or the Hema village leaders would have restricted the age of youth only at the point when they were being sent to train with the UPC/FPLC. Moreover, DW-0007 was not present at villages when youth were sent to the UPC/FPLC for training and he is not in a position to assert definitely that children under the age of 15 were never trained or used by the UPC/FPLC.⁹⁶⁹

355. In sum, these forces sent children of all ages to be trained by the UPC/FPLC, including children under the age of 15, and they could only have come under the umbrella of the UPC/FPLC once it assumed the economic, military and political control of Ituri. Both DW-0019⁹⁷⁰ and DW-0007⁹⁷¹ confirm there were children under the age of 15 in the self-defence forces.

⁹⁶⁶ T.348, p.60, lines 1-6.

⁹⁶⁷ T.348, p.60, lines 10-14.

⁹⁶⁸ T.348, p.39, lines 7-16.

⁹⁶⁹ T.348, p.40, lines 12-25.

⁹⁷⁰ T.340, p.70, lines 5-13.

⁹⁷¹ T.348, p.34, lines 1-6.

10. Illustrative examples: child soldier witnesses

356. The Prosecution's case in respect of the former child soldiers is that they are illustrative examples of the crimes with which the Accused is charged. The wealth of evidence from witnesses who were in the UPC at the time and who served in its military, the FPLC, the witnesses involved in child protection and demobilisation during the period of the charges, and the scores of internal, contemporaneous UPC/FPLC documents all demonstrate beyond reasonable doubt that children under the age of 15 were recruited into the UPC/FPLC and used in hostilities throughout the period of the charges. Even absent the evidence of the former child soldiers, the evidence against the Accused is compelling and overwhelming.
357. The individual case stories of former child soldiers show in graphic detail how the UPC/FPLC abducted and forced children into military training where they would be subjected to strict discipline and punished for infractions, and eventually sent out to the front lines, forced to kill the enemy, or used as bodyguards to top military commanders, and even to the Accused.

10.1 Age

358. In order to determine the age of its former child soldier witnesses, the Prosecution obtained x-rays of their teeth and wrists which were analysed by medical experts DRC-OTP-WWWW-0358 (W-0358) and DRC-OTP-WWWW-0359 (W-0359) respectively. By obtaining and presenting scientific data, the Prosecution proffered the most objective and universally accepted method to determine the age of these witnesses,⁹⁷² and submits that this

⁹⁷² EVD-OTP-00420, Radiographic Atlas of Skeletal Development of the Hand and Wrist, by William Walter Greulich and S. Idell Pyle ('Greulich and Pyle Atlas'). W-0358 and W-0359 relied on the following materials to demonstrate to the Court the method used in assessing a person's age with reference to the Greulich and Pyle Atlas; EVD-OTP-00421, EVD-OTP-00422, EVD-OTP-00423, EVD-OTP-00424, EVD-OTP-00425, EVD-OTP-00448 and EVD-OTP-00449.

evidence should therefore be considered by the Trial Chamber as a reliable guide on this issue.

359. Acknowledging that this is not a “precise science”,⁹⁷³ the experts were nevertheless able to evaluate the ages of the former child soldier witnesses W-0294, W-0298, W-0011, W-0010, W-0007, W-0008, W-W-0297, W-0213 and W-0157⁹⁷⁴ as at the date of the x-rays as follows:

- a. W-0294 – bone age between 18 and 19 years as of 4 December 2007;⁹⁷⁵
- b. W-0298 – bone and dental age between 15½ and 16 years as of 11 January 2008;⁹⁷⁶
- c. W-0011 – bone and dental age between 16 and 17 years as of 5 December 2007;⁹⁷⁷
- d. W-0010 – bone and dental age over 18 years as of 5 December 2007;⁹⁷⁸
- e. W-0007 – bone and dental age over 18 years as of 5 December 2007;⁹⁷⁹
- f. W-0008 – bone and dental age over 18 years as of 5 December 2007;⁹⁸⁰

⁹⁷³ T.172, p.34, line 16. W-0359 testified that the conclusions from literature are that the Greulich and Pyle Atlas method can be applied to multi-ethnic populations, it is safe to say that it has universal application, and that there is no scientific evidence to suggest that the method is affected by distinctions in ethnicity or nationality of populations (T.172, p.35, line 9 to p.37, line 18).

⁹⁷⁴ The Prosecution notes that although W-0358 and W-0359 did not testify about W-0297 in court, the witness’ mandible (jaw) and wrist x-rays, the expert report containing the results of their analysis, and an affidavit attesting to the date the x-rays were taken, were all admitted into evidence in ICC-01/04-01/06-2588-RED.

⁹⁷⁵ See EVD-OTP-00441 (wrist x-ray), EVD-OTP-00440 (Expert Report) and EVD-OTP-00635 (Hospital Certificate indicating the date of the x-ray).

⁹⁷⁶ See EVD-OTP-00444 and EVD-OTP-00746 (wrist and mandible (jaw) x-rays), EVD-OTP-00443 (Expert Report) and EVD-OTP-00638 (Affidavit attesting to the date of the x-ray).

⁹⁷⁷ See EVD-OTP-00433 and EVD-OTP-00745 (wrist and mandible (jaw) x-rays), EVD-OTP-00432 (Expert Report) and EVD-OTP-00636 (Affidavit attesting to the date of the x-ray). W-0359 further explained that it can be assumed that there has been fusion in the invisible rays of the metacarpals of W-0011, meaning that the person “could be younger but not older” (T.172, p.52, lines 12-16).

⁹⁷⁸ See EVD-OTP-00431 and EVD-OTP-00743 (wrist and mandible (jaw) x-rays), EVD-OTP-00430 (Expert Report) and EVD-OTP-00631 (Hospital Certificate indicating the date of the x-ray).

⁹⁷⁹ See EVD-OTP-00450 and EVD-OTP-00427 (wrist and mandible (jaw) x-rays), EVD-OTP-00426 (Expert Report) and EVD-OTP-00633 (Hospital Certificate indicating the date of the x-ray).

⁹⁸⁰ See EVD-OTP-00429 and EVD-OTP-00744 (wrist and mandible (jaw) x-rays), EVD-OTP-00428 (Expert Report) and EVD-OTP-00637 (Affidavit attesting to the date of the x-ray).

- g. W-0297 – bone and dental age between 16 and 17 years as of 18 January 2008;⁹⁸¹
- h. W-0213 – maximum bone age of 15 years as of 3 December 2007;⁹⁸² and
- i. W-0157 – bone and dental age equal to or over 19 years as of 5 December 2007.⁹⁸³

360. The scientific expert assessments of the bone age of all the former child soldiers, taking into account the one year margin for inter and intra-variation,⁹⁸⁴ placed all the child soldier witnesses as being under 15 years of age during the period of the charges.⁹⁸⁵

10.2 Evidence of the Child Soldier Witnesses

10.2.1 Witness W-0294

The detailed account of W-0294's enlistment, training and use by the UPC/FPLC

361. W-0294 “went into military service” with the APC armed group at the end of primary school in the month of June 2000.⁹⁸⁶ At the time he was 10 years old.⁹⁸⁷ The witness eventually ended up in Mandro training camp, which he later found out belonged to the UPC/FPLC.⁹⁸⁸ He escaped,⁹⁸⁹ but then “returned to the army” as a bodyguard to Commander [REDACTED] when

⁹⁸¹ See EVD-OTP-00614 and EVD-OTP-00615 (wrist and mandible (jaw) x-rays), EVD-OTP-00618 (Expert Report) and EVD-OTP-00616 (Affidavit attesting to the date of the x-ray).

⁹⁸² See EVD-OTP-00438 (wrist x-ray), EVD-OTP-00437 (Expert Report) and EVD-OTP-00634 (Hospital Certificate indicating the date of the x-ray).

⁹⁸³ See EVD-OTP-00436 and EVD-OTP-00742 (wrist and mandible (jaw) x-ray), EVD-OTP-00435 (Expert Report) and EVD-OTP-00632 (Hospital Certificate indicating the date of the x-ray).

⁹⁸⁴ T.172, p.48, lines 7-8. W-0359 testified to an ‘inter-individual variability’ of about one year (T.172, p.35, line 1; T.173, p.44, lines 10-16) and ‘intra-individual variability’ of less than one year (T.172, p.35, lines 4-8).

⁹⁸⁵ It is noted that W-0359 said that if the x-rays were of a better quality, the age determination would only be lower since the cartilage lines would have been more visible (T.173, p.11, lines 1-8).

⁹⁸⁶ T.150, p.46, lines 7-18.

⁹⁸⁷ T.150, p.52, line 6.

⁹⁸⁸ T.150, pp.70-72.

⁹⁸⁹ T.150, p.81, lines 4-22.

the battle broke out between the Hemas and the APC during which the UPC/FPLC chased Lompondo out of Bunia and thereafter occupied the town together with the Ugandans (August 2002).⁹⁹⁰

362. Once he arrived at Mandro camp, W-0294's training involved various physical activities, such as "chaka" (meaning jogging or running), learning how to fight with "bits of wood," and singing songs insulting the Lendu and Ngiti.⁹⁹¹ Both male and female recruits had their heads shaved.⁹⁹² The witness served as a bodyguard to Commander [REDACTED], code-named [REDACTED],⁹⁹³ and tried to flee, but was caught, punished and redeployed to guard the Accused's residence and then as a member of the platoon for '[REDACTED]'.⁹⁹⁴
363. W-0294 participated in battles at Songolo,⁹⁹⁵ and at Bule and Kasenyi, all the time fighting against the Ngiti and the Lendu.⁹⁹⁶ The witness was also involved in the UPC/FPLC's unsuccessful battle against the Ugandans in Bunia in 2003:⁹⁹⁷ "We fought, and many people died on those battlefields".⁹⁹⁸ His evidence on the use of call-signs / code-names and the means of communication in the field ⁹⁹⁹ (Motorola radios) is corroborated by UPC/FPLC military insiders.

⁹⁹⁰ EVD-OTP-00663; T.150, p.82, lines 6-22.

⁹⁹¹ T.150, pp.71-78; T.152, p.4, lines 10-16. See particularly T.150, p.75, lines 7-19, p.77, lines 7-9. For corroboration of these details see *inter alia* W-0213 who spoke about "muchaka" (T.133, p.4, line 1).

⁹⁹² T.150, p.74, lines 11-13. T.144, p.21, lines 22-23; T.170, p.76, line 14 to p.77, line 2; T.128, p.56, lines 13-15) also gave evidence about recruits' heads being shaved.

⁹⁹³ T.150, pp.48-58, 85-87.

⁹⁹⁴ T.151, pp.32-36; T.152, p.16, lines 8-12, pp.18-20. [REDACTED]

⁹⁹⁵ T.151, pp.22-26; T.152, pp.14-15.

⁹⁹⁶ T.151, p.21, lines 20-23, p.22, lines 12-21, p.26, lines 14-24.

⁹⁹⁷ T.151, pp.37-38; T.152, pp.22-24.

⁹⁹⁸ T.151, p.38, lines 1-2.

⁹⁹⁹ T.150, p.48, lines 7-8, T.151, p.15, lines 14-16, p.25, lines 24-25. W-0294 testified *inter alia* that the code-name/call-sign for Kisembo, the Chief of Staff, was 'Zulu-Mike' (T.151, p.15, lines 2-16). W-0017 corroborates this (T.154, p.32, lines 3-4), as does W-0055 (T.175, p.25, lines 16-17) and W-0089 (T.195, p.31, lines 11-12).

364. Fleeing from the battle in Bunia where the UPC/FPLC was defeated by the Ugandans, W-0294 was separated from the UPC/FPLC soldiers in Kasenyi and enlisted in PUSIC.¹⁰⁰⁰ Shortly thereafter, he rejoined the UPC/FPLC.¹⁰⁰¹ The witness was demobilised [REDACTED], received assistance from [REDACTED] and [REDACTED], and thereafter went to the centre [REDACTED].¹⁰⁰²

W-0294's age and schooling

365. W-0294 testified that he was born on [REDACTED] 1991 and that he was told this by family members.¹⁰⁰³ His mother, witness DRC-OTP-WWWW-0293 (W-0293), confirmed this.¹⁰⁰⁴ W-0294 said in cross-examination that he was 18 years old at the time of his testimony¹⁰⁰⁵ (March 2009), which is consistent with the birth date he gave in examination in chief, thereby making him under the age of 15 in 2002-2003.¹⁰⁰⁶ Expert witness W-0358 said she could detect the presence of a thin line at the lower end of the ulna which meant that his bones had not quite fused at the time of x-ray.¹⁰⁰⁷

366. The defence sought to challenge the witness' evidence on his age and schooling with two different – and inconsistent – schools records. Although

¹⁰⁰⁰ T.151, p.38, lines 22-25.

¹⁰⁰¹ T.151, p.42, lines 7-9.

¹⁰⁰² T.151, pp.44-45; T.152, pp.31-45.

¹⁰⁰³ T.150, p.44, lines 13-19. W-0294 testified that his mother told him he was born in 1991 (T.150, p.44, lines 17-19; T.151, p.57, lines 23-25) and that it was his older brother [REDACTED] who told him the day and month (T.151, p.54, lines 4-7).

¹⁰⁰⁴ T.150, p.44, lines 13-19; T.153, p.34, lines 6-16. See also paras. 8-12 of EVD-OTP-00392 (original witness statement), EVD-OTP-00393 (Swahili translation) and EVD-OTP-00394 (English translation), read into evidence at T.153, p.66, line 25 to p.67, line 23.

¹⁰⁰⁵ T.151, p.62, lines 22-25.

¹⁰⁰⁶ W-0294 explained the discrepancy between this evidence and the age written in his [REDACTED] reunification certificate (EVD-D01-00069, which indicates an age of [REDACTED] 2004), by explaining that he went to the [REDACTED] with a friend who was supposed to be 2 years older than him, and this friend said he was born in 1986, so they both decided that W-0294 would have to say he was born in 1998. In fact, he didn't know his year of birth at that time (T.151, p.57, line 10 to p.58, line 3, pp.61-62).

¹⁰⁰⁷ T.172, p.70, lines 6-11, p.71, line 7. W-0358 and W-0359 assessed W-0294 as being between 18 and 19 years of age at the date his x-rays were taken (see above). According to this assessment, W-0294 would still have been under the age of 15 in 2002-2003.

W-0294 recognised 'Attestation Tenant Lieu Du Certificat De Fin D'Etudes Primaires' with the name '[REDACTED]' as 'his certificate', W-0294 was adamant that the date of birth written on it ([REDACTED] 1988) was incorrect.¹⁰⁰⁸ When shown a register from the [REDACTED] primary school in 2000 for '[REDACTED]' indicating a different date of birth ([REDACTED] 1988),¹⁰⁰⁹ W-0294 indicated that he did not recognise this document and reiterated that he finished primary school in [REDACTED], not [REDACTED].¹⁰¹⁰

367. As regards the attestation, defence witness DRC-D01-WWWW-0029 (DW-0029) acknowledged that he did not issue this document,¹⁰¹¹ that he could not attest to the significance of the figures contained therein, or when it was produced.¹⁰¹² The witness explained that the inspector who issued the document would have referred to a register to complete the document,¹⁰¹³ registers which the witness admitted through the course of questioning by the Prosecution that these registers are full of mistakes and were inaccurately compiled,¹⁰¹⁴ both before and after the war because "some of the principals were not very serious fellows and so they would do their work poorly".¹⁰¹⁵ Against this background, W-0294 and W-0293's evidence should be preferred over these documents.

368. Finally, although an electoral card bearing the witness' name was admitted into evidence from the bar table,¹⁰¹⁶ the Prosecution submits that no weight ought to be given to it since W-0294 was unable to comment on it and it does

¹⁰⁰⁸ EVD-D01-00071; see T.151, p.85, line 24 to p.86, line 12.

¹⁰⁰⁹ EVD-D01-00072, [REDACTED].

¹⁰¹⁰ T.151, p.86, line 21 to p.88, line 7.

¹⁰¹¹ T.296, p.43, line 21, p.49, lines 4-5.

¹⁰¹² T.296, p.44, line 10 to p.46, line 6, p.49, lines 4-14.

¹⁰¹³ T.296, p.44, lines 2-4, line 13 to p.45, line 1, p.46, lines 2-6.

¹⁰¹⁴ T.296, p.8, lines 6-10.

¹⁰¹⁵ T.296, p.9, lines 15-17.

¹⁰¹⁶ EVD-D01-01006.

not undermine the wealth of evidence that places W-0294 under 15 during the time he was in the UPC/FPLC.¹⁰¹⁷

W-0294's credibility

369. W-0294 was honest and sincere in his testimony. He indicated that he joined the APC, UPC/FPLC and PUSIC of his own volition: "I wasn't taken forcibly. I've already said that. I went. When I was looking for somewhere to go, I went there of my own volition."¹⁰¹⁸ He gave very detailed evidence about his military experience and the conflict in Ituri at the time.¹⁰¹⁹ Significantly, the fact that he was a child soldier was confirmed by his mother, W-0293,¹⁰²⁰ and by W-0031, who recalled that W-0294 was demobilised [REDACTED], and that verifications in respect of his identity and age were carried out by MONUC.¹⁰²¹
370. Two contemporaneous documents relevant to W-0294's demobilisation bear out the truthfulness of his, and W-0031's, evidence: a reunification certificate from [REDACTED]¹⁰²² and a list of 'children associated with armed forces and groups' prepared by a social worker at [REDACTED] centre.¹⁰²³ W-0294

¹⁰¹⁷ Moreover, it is known that children provided false information to obtain electoral cards for different purposes, including their own safety and security; see W-0007, W-0008 and W-0010 and ICC-10/04-01/06-2501-conf, paras. 16-21.

¹⁰¹⁸ T.151, p.92, lines 19-21.

¹⁰¹⁹ W-0294 testified about the battle between the Hemas and the APC when Lompondo ("a soldier and a governor and part of the APC") was chased away, and after which the UPC ('the Hemas'), together with the Ugandans, occupied Bunia" (T.150, p.82). The witness was also familiar with the fact that "the UPC and PUSIC were in conflict" following the Ugandans chasing the UPC/FPLC out of Bunia, that "[t]here was a dispute or a misunderstanding between Kisembo and MONUC officials" around this same time (T.151, p.40, lines 8-9, 16-17), and that the UPC split into "a UPC of Lubanga, the UPC of Kisembo, and UPC PUSIC" (T.151, p.41, lines 13-22).

¹⁰²⁰ T.153, p.48, line 16 to p.49, line 3, p.51, line 15 to p.52, line 1.

¹⁰²¹ T.202, p.78, line 25 to p.79, line 8.

¹⁰²² EVD-D01-00069.

¹⁰²³ T.200, p.89 to p.90, line 8. EVD-OTP-00474: 'LISTE DES EAFGAS A PLACER (FAT)' at pp.4-5. 'EAFGA' stands for 'enfant associé aux forces et groupes armés' (T.200-FR, p.70, lines 8-9). The English translation is 'children associated with armed forces and groups' (T.200, p.68, lines 18-20).

explained that the name '[REDACTED]', which appears on both documents, is a tribal name that people sometimes called him.¹⁰²⁴

The evidence of defence witness [REDACTED] is flawed

371. Although defence witness [REDACTED] initially stated categorically that [REDACTED] was never a soldier,¹⁰²⁵ he later conceded that everyone in Ituri said W-0294 was a soldier, and that he did not really know whether [REDACTED] was a member of an armed group:¹⁰²⁶ "If I am not mistaken, in Ituri there was fighting and everyone said that he was a soldier. However, I really do not know, however, whether [REDACTED] really was a member of any movement at all."¹⁰²⁷
372. [REDACTED] was not present at the relevant time to know if W-0294 was in the UPC/FPLC or not. He also refused to answer questions in cross-examination, which the Prosecution submits further undermines his reliability.¹⁰²⁸

10.2.2 Witness W-0298

The detailed account of W-0298's conscription, training and use by the UPC/FPLC

373. W-0298 and five friends of the same age were recruited by UPC/FPLC soldiers while walking home from school one day.¹⁰²⁹ The abduction took place prior to Christmas 2002, while the witness was in his fifth year of primary school.¹⁰³⁰ He was around 11 years old at this time.¹⁰³¹ The UPC/FPLC soldiers stopped W-0298 and his friends, and said "[y]ou children, we're going to take you for training so that you can become

¹⁰²⁴ T.151, p.61, lines 19-21.

¹⁰²⁵ [REDACTED]

¹⁰²⁶ [REDACTED]

¹⁰²⁷ [REDACTED]

¹⁰²⁸ (Prosecution Abuse Response, para. 108.

¹⁰²⁹ T.123, pp.4-5, p.25, lines 10-14.

¹⁰³⁰ T.123, p.4, lines 2-3.

¹⁰³¹ T.123, p.22, lines 9-12.

soldiers and ensure the security of our country”.¹⁰³² W-0298 responded, “Listen, I’m a schoolboy, so it’s difficult for me to go to the training because we’re children.”¹⁰³³ The soldiers proceeded to take the children to a training centre in Bule.¹⁰³⁴

374. The witness spent three to five months at the camp in Bule,¹⁰³⁵ during which time he and the other recruits were taught songs,¹⁰³⁶ shown how to load, dismantle, and shoot weapons,¹⁰³⁷ and subjected to frequent beatings.¹⁰³⁸ W-0298 still has scars from being whipped.¹⁰³⁹ Airplanes delivered uniforms and rubber boots, and later large quantities of weapons which were distributed amongst the soldiers.¹⁰⁴⁰ W-0298 participated in fighting and massacres in Bule and Fataki.¹⁰⁴¹
375. W-0298 moved from Bule to a camp in Largu,¹⁰⁴² and fled the UPC/FPLC after running into his father one day at the market in Largu.¹⁰⁴³ He returned to school in Bunia, and made it to the first grade of secondary school before being recognised by a UPC/FPLC soldier while on vacation and being abducted again.¹⁰⁴⁴ W-0298 was then taken to a camp, beaten, put in a cell, and shortly thereafter taken to the Mabanga camp.¹⁰⁴⁵ Someone sent by his father came to find and take W-0298 to meet his father, with whom he

¹⁰³² T.123, p.4, lines 19-21.

¹⁰³³ T.123, p.4, lines 21-23.

¹⁰³⁴ T.123, p.4, line 24 to p.5, line 3.

¹⁰³⁵ T.124, p.24, lines 21-25.

¹⁰³⁶ T.123, p.5, lines 19-20, p.14, lines 4-7.

¹⁰³⁷ T.123, p.6, lines 5-7.

¹⁰³⁸ T.123, p.6, lines 8-12, p.8, lines 1-10, line 24 to p.9, line 1, p.9, lines 7-15, p.10, p.14, lines 8-14, p.19, lines 11-18, p.20, lines 11-13.

¹⁰³⁹ T.123, p.9, lines 13-14.

¹⁰⁴⁰ T.123, p.8, lines 13-16, p.9, lines 23-24. W-0017 corroborated that there was an airstrip in Bule (he gave evidence about an incident that took place there after a plane was unloaded; T.158, p.36, line 23 to p.37, line 3).

¹⁰⁴¹ T.123, p.15, line 21 to p.16, line 17.

¹⁰⁴² T.123, p.12, line 17 to p.13, line 1.

¹⁰⁴³ T.123, p.18; T.124, p.32.

¹⁰⁴⁴ T.123, p.18, lines 21-23, p.19.

¹⁰⁴⁵ T.123, p.19, lines 11-22, p.20, lines 15-16.

returned to Bunia.¹⁰⁴⁶ After hearing that [REDACTED] was looking for child soldiers,¹⁰⁴⁷ the witness found a weapon to hand over to the organisation and was demobilised.¹⁰⁴⁸

376. W-0298's father, W-0299,¹⁰⁴⁹ corroborated W-0298's account of his abductions and escapes from the UPC/FPLC. He stated that W-0298 did not finish the fifth grade because he was abducted by UPC/FPLC soldiers just before Christmas of 2002 and taken to the training centre in Bule.¹⁰⁵⁰ W-0299 said his son was kidnapped in order to be trained as a child soldier, something that pained him as W-0298 was only 11 years old at the time.¹⁰⁵¹
377. W-0299 went to see W-0298 at the camp in Bule, but was informed that his son had gone to the Largo camp.¹⁰⁵² Some time between February and May 2003,¹⁰⁵³ the witness went to Largo to find his son, and saw him in the centre walking with older soldiers.¹⁰⁵⁴ The witness took his son back to Bunia where he resumed his studies.¹⁰⁵⁵
378. After returning to Bunia, W-0298 enrolled in his sixth year of primary school.¹⁰⁵⁶ At the end of this year, his son was again abducted by UPC/FPLC soldiers.¹⁰⁵⁷ W-0299 learned that the soldiers took his son to Mabanga and paid someone to bring his son back.¹⁰⁵⁸ W-0298 was later demobilised by an NGO in Bunia called [REDACTED].¹⁰⁵⁹

¹⁰⁴⁶ T.123, p.20, line 18 to p.21, line 9.

¹⁰⁴⁷ T.123, p.21, lines 10-12, p.41, line 23 to p.42, line 7, p.43, lines 7-8.

¹⁰⁴⁸ T.123, p.21, lines 13-14, 23-24, pp.57-59.

¹⁰⁴⁹ T.117, p.5, line 25 to p.6, line 8.

¹⁰⁵⁰ T.117, p.6, line 18 to p.8, line 13.

¹⁰⁵¹ T.117, p.10, lines 11-17, p.11, lines 16-23, p.12, lines 8-17.

¹⁰⁵² T.117, p.32, line 23 to p.33, line 3.

¹⁰⁵³ T.117, p.33, lines 23-25.

¹⁰⁵⁴ T.117, p.32, lines 14-16.

¹⁰⁵⁵ T.117, p.32, lines 21-22, p.33, lines 16-17.

¹⁰⁵⁶ T.117, p.35, lines 4-7.

¹⁰⁵⁷ T.117, p.35, lines 7-10, p.36, lines 3-9.

¹⁰⁵⁸ T.117, p.35, lines 10-12. W-0299 indicated that he was afraid to go find his son himself since he had deserted the UPC/FPLC and would be arrested if caught: T.117, p.36, lines 13-21.

¹⁰⁵⁹ T.122, p.18, line 14 to p.19, line 2.

W-0298's age

379. Expert witnesses W-0358 and W-0359 confirmed that as at 11 January 2008,¹⁰⁶⁰ W-0298 was between 15½ and 16 years of age.¹⁰⁶¹ This places W-0298 at approximately 11 years of age at the time of his abduction into the UPC/FPLC in 2002. Critically, expert witness W-0359 testified that the x-ray for W-0298 demonstrated that the child's growth cartilage was still widely open, enabling W-0359 to state with certainty that the child had not completed his growth at the time the x-ray was taken.¹⁰⁶² While W-0299 testified that his son was born in 1991,¹⁰⁶³ he expressed confusion in his re-interview, stating "on the date that ... uh ... confusing me, but I think 1989."¹⁰⁶⁴ In its Abuse Application, the Defence relied upon this to argue that the testimonies of W-0298 and W-0299 were untruthful.¹⁰⁶⁵ The scientific evidence and dental age support the testimony of W-0298 and W-0299 in confirming W-0298 was between 10 ½ to 11 years of age at the time of his forced recruitment in late 2002. This also casts doubt upon the reliability and authenticity of the documentary evidence relied on by the Defence in its Abuse Application to suggest that W-0298's and W-0299's evidence was untruthful.¹⁰⁶⁶

¹⁰⁶⁰ EVD-OTP-00638.

¹⁰⁶¹ EVD-OTP-00443; T.172, p.74, lines 15-16, p.75, lines 18-25

¹⁰⁶² T.172, p.74, line 10 to p.75, line 7

¹⁰⁶³ T.117, p.6, lines 4-5.

¹⁰⁶⁴ EVD-D01-00768, p.0269, line 840 to p.0270, line 849.

¹⁰⁶⁵ Abuse Application, paras 118-119.

¹⁰⁶⁶ Abuse Application, paras. 118-120. EVD-D01-00038 (school register listing '[REDACTED]' at no. [REDACTED] with a date of birth of [REDACTED] 1989), EVD-D01-00042 (primary school leaving certificate for '[REDACTED]' with a date of birth of [REDACTED] 1989), EVD-D01-00043 (school register listing '[REDACTED]' at no. [REDACTED] with a date of birth of [REDACTED] 1989), EVD-D01-00155, [REDACTED] (school register listing '[REDACTED]' at no. [REDACTED] with a date of birth of [REDACTED] 1989), EVD-D01-00156, [REDACTED] (school register listing '[REDACTED]' at no. [REDACTED] with a date of birth of [REDACTED] 1989).

W-0298's credibility

380. While W-0298 indicated that he initially had difficulty in testifying¹⁰⁶⁷ and sometimes had trouble remembering exact dates,¹⁰⁶⁸ he provided a credible and very detailed account of his time within the UPC/FPLC while providing his testimony in a free form narrative.¹⁰⁶⁹ On this point, the Prosecution relies also on the submissions already made in its response to the Defence Abuse Application,¹⁰⁷⁰ W-0298 provided ample detail in response to questions from the Defence – including names of the school children who were abducted alongside him,¹⁰⁷¹ names of the children who went with him to [REDACTED],¹⁰⁷² the name of a friend who also handed in a weapon to [REDACTED],¹⁰⁷³ and the type of weapon that the witness turned over to [REDACTED] for his demobilisation.¹⁰⁷⁴
381. Finally, the account of W-0298 is further corroborated by W-0031, who testified that he remembers W-0298,¹⁰⁷⁵ and that the child belonged to the [REDACTED]¹⁰⁷⁶ or [REDACTED].¹⁰⁷⁷ W-0031 confirmed that since W-0298 was involved with these organisations, verification of the child's identity and age would have been conducted by MONUC,¹⁰⁷⁸ and that [REDACTED] also would have verified the child's information to determine whether he could be admitted into the programme.¹⁰⁷⁹

¹⁰⁶⁷ T.123, p.30, lines 24-25.

¹⁰⁶⁸ T.123, p.42, lines 10-22; T.124, p.19, lines 15-19.

¹⁰⁶⁹ T.123, p.3, lines 16-25.

¹⁰⁷⁰ Prosecution Abuse Response, in particular paras. 91-92.

¹⁰⁷¹ T.123, p.49, lines 11-19, p.51, lines 11-16.

¹⁰⁷² T.123, p.44, lines 3-13.

¹⁰⁷³ T.124, p.40, lines 12-19; EVD-D01-00045.

¹⁰⁷⁴ T.124, p.38, lines 6-16; EVD-D01-00044; T.124, p.39, lines 2-7.

¹⁰⁷⁵ T.202, p.76, lines 14-18.

¹⁰⁷⁶ T.202, p.76, lines 19-20, p.77, lines 23-25.

¹⁰⁷⁷ T.202, p.77, lines 23-25.

¹⁰⁷⁸ T.202, p.78, lines 6-10.

¹⁰⁷⁹ T.202, p.78, lines 10-12.

The evidence of defence witnesses is flawed

382. Neither of the witnesses brought by the Defence was able to provide incontrovertibly contradictory evidence challenging the fact that W-0298 was conscripted and used by the UPC/FPLC to actively take part in hostilities during the time period relevant to the charges. Defence witness DRC-D01-WWWW-0015 (DW-0015), [REDACTED], confirmed that W-0298 fled from school in the company of a number of other boys, went to Bule, and returned a week later in a very unkempt state, armed with a weapon.¹⁰⁸⁰ Less than 2 weeks later, he abandoned school and left again.¹⁰⁸¹ She also confirmed that she knew that he had gone off to join the UPC/FPLC; she doubted only that he could possibly function effectively as a soldier on account of his young age.¹⁰⁸² This series of events was confirmed by W-0299 in an interview conducted with him following his testimony. W-0299 stated that W-0298 was [REDACTED], and that both DW-0015 and the *chef de localité* told him that W-0298 left [REDACTED] in 2002, aged 12, and returned with a weapon to collect his clothes before leaving again.¹⁰⁸³
383. Defence witness DRC-D01-WWWW-0014 (DW-0014), [REDACTED] of W-0298, testified that [REDACTED].¹⁰⁸⁴ She saw W-0298 once “during the war” when “there was peace”.¹⁰⁸⁵ While the witness did not state that [REDACTED] was in the UPC/FPLC, her extremely limited contact with W-0298 lends little credibility to her testimony on this point. In the Prosecution’s position, neither defence witness is in a position to contradict the clear and convincing evidence of W-0298 and W-0299.

¹⁰⁸⁰ T.279, p.6, line 19 to p.7, line 15.

¹⁰⁸¹ T.279, p.8, lines 19-22.

¹⁰⁸² T.279, p.19, line 8 to p.20, line 17.

¹⁰⁸³ EVD-D01-00768, pp.36-42 and EVD-D01-00769, pp.2, 5-6. W-0299’s evidence in this interview about W-0298’s enlistment and participation in the UPC/FPLC was consistent with his in-court testimony.

¹⁰⁸⁴ T.273, p.13, lines 9-10.

¹⁰⁸⁵ T.273, p.15, line 25 to p.16, line 2, p.17, lines 11-14.

10.2.3 Witness W-0011

The detailed account of W-0011's conscription, training and use by the UPC/FPLC

384. W-0011 was forcibly recruited by the UPC/FPLC and taken to Bule military camp for training in July 2002, when he had “not yet finished fourth year.”¹⁰⁸⁶ The witness initially testified to having voluntarily signed up for military service, but subsequently clarified that he was conscripted.¹⁰⁸⁷ Asked by the Defence if he voluntarily got on the truck, W-0011 replied: “you think that I was enlisted voluntarily in the UPC. Well, if I had been a volunteer, I would have had to go myself to the UPC camp for training, whereas we were standing there chatting by the roadside, and we didn't know anything about the fact that they were coming to get us. Suddenly we saw soldiers come toward us. Some of -- some people ran away, and we stayed, and they told us to get on the truck, and when we asked them where we were going, they said, ‘We're going to Bule, and you're going to have military training’.”¹⁰⁸⁸
385. After W-0011 arrived at Bule camp, he was instructed to build straw huts where he was supposed to sleep.¹⁰⁸⁹ He underwent training which involved various physical activities, and learning how to shoot, crawl, run, identify the enemy, and take positions.¹⁰⁹⁰ Female recruits would prepare the food

¹⁰⁸⁶ T.139, p.81, lines 22-23.

¹⁰⁸⁷ W-0294 testified that he and his friends met a group of soldiers in [REDACTED] village (T.138, p.61, line 4) and that he agreed when they asked him and his friends to go with them (T.138, pp.58-59) but when the soldiers told them that they were “going to do military service”, this was a phrase he did not understand. He knew that to take part in fighting, a person had to be a soldier (T.138, p.62, lines 1-10) but he was not a soldier (T.142, p.18, lines 18-21). Subsequently in response to questioning from the OPCV (T.139, p.34, lines 4-8) and the Defence, W-0294 was adamant that he was in fact enlisted by force (T.140, p.8, lines 10-25, p.11, lines 5-8, p.20, lines 4-12).

¹⁰⁸⁸ T.140, p.21, lines 18-25.

¹⁰⁸⁹ T.138, p.66, line 23 to p.67, line 8. W-0007 (T.148, p.30, line 24 to p.31, line 3, p.42, lines 15-18); W-0008 (T.135, p.12, lines 23-25, p.13, lines 6-7); W-0157 (T.185, p.80, lines 14-17); and W-0016 (T.191, p.34, lines 6-8) corroborate that recruits were made to build their own huts and that the ‘housing’ in UPC/FPLC camps consisted *inter alia* of straw huts.

¹⁰⁹⁰ T.138, p.70, lines 2-5, 19-21.

and were used as wives of the commanders.¹⁰⁹¹ Discipline was harsh. When infractions occurred, the punishment involved being detained in a hole in the ground.¹⁰⁹²

386. The senior-ranking officer in Bule camp was Commander Tshitsha.¹⁰⁹³ He was also W-0011's trainer,¹⁰⁹⁴ [REDACTED].¹⁰⁹⁵ After his training, W-0011 participated in combat as a UPC/FPLC soldier, fighting against the Lendu¹⁰⁹⁶ in battles at Barriere¹⁰⁹⁷ and Lipri.¹⁰⁹⁸

387. The witness remained in the UPC/FPLC until March 2003.¹⁰⁹⁹ He abandoned his weapon, put on civilian clothes and ran away from UPC/FPLC in Lipri.¹¹⁰⁰ Some time after the witness left the army, he went to [REDACTED] in Bunia to be demobilised.¹¹⁰¹

W-0011's age and schooling

388. W-0011 was born on [REDACTED] 1992 and stated that he was 17 years old at the time of his testimony (March 2009).¹¹⁰² He indicated that he knows his date of birth from his grandmother.¹¹⁰³ This means that he was 10 at the time of his abduction in July 2002. Allowing for the inter and intra-variation of one year, this date of birth and age is consistent with W-0358 and W-0359's

¹⁰⁹¹ T.138, p.65, line 25 to p.66, line 2, pp.73-74.

¹⁰⁹² T.139, pp.28-29. Imprisonment in holes in the ground as a form of punishment is also corroborated by W-0017 (T.158, p.32, line 17 to p.33, line 3, p.45, lines 7-10, p.47, lines 1-3) and W-0213 (T.132, p.40, lines 4-20).

¹⁰⁹³ T.140, p.33, lines 12-17, line 25 to p.34, line 4.

¹⁰⁹⁴ T.140, p.33, lines 6-8, line 25 to p.34, line 4.

¹⁰⁹⁵ T.139, p.14, lines 3-5, 12-14, pp.23-26.

¹⁰⁹⁶ T.140, p.55, lines 2-3.

¹⁰⁹⁷ T.138, p.75, line 25; T.139, pp.6-11; T.140, pp.40-47.

¹⁰⁹⁸ T.139, pp.11-20; T.140, pp.48-51.

¹⁰⁹⁹ The witness initially said July 2003 (T.138, p.58, lines 14-16) but later clarified that he left in March (T.140, p.20, lines 2-5; T.142, p.6, lines 5-7).

¹¹⁰⁰ T.139, p.31.

¹¹⁰¹ T.142, p.6, line 8 to p.7, line 15.

¹¹⁰² T.138, p.53, line 25, p.54, lines 2-5.

¹¹⁰³ T.138, p.55, lines 1-3.

analysis, which concluded that W-0011 was between 16 and 17 years of age at the end of 2007.¹¹⁰⁴

389. W-0011 was adamant that he attended his 1st, 2nd and part of his 3rd year of primary education in [REDACTED] and that he completed his 3rd and 4th year in [REDACTED].¹¹⁰⁵ The Prosecution submits that little or no weight ought to be given to the two school registers the Defence referred to in the Defence Abuse Application,¹¹⁰⁶ particularly given that W-0011 was not given an opportunity to comment on them, but also taking into account the irregularities contained in one of the registers,¹¹⁰⁷ and DW-0029's repeated recognition of the fact that school records in Ituri were compiled irregularly and contained egregious errors.¹¹⁰⁸

W-0011's credibility

390. W-0011 was a compelling and honest witness who readily corrected his own mistakes.¹¹⁰⁹ The witness' use of different names for different purposes and at different times in his life is in line with the explanations given by the name expert,¹¹¹⁰ and the witness himself provided plausible explanations for this. In cross-examination W-0011 explained that although "[REDACTED]" is his name, he does not like mentioning it,¹¹¹¹ and did not use that name

¹¹⁰⁴ EVD-OTP-00432.

¹¹⁰⁵ T.138, p.54, lines 10-16; T.139, p.75, lines 3-8.

¹¹⁰⁶ EVD-D01-00176 ([REDACTED]) and EVD-D01-00177 ([REDACTED]), see footnote 411 of the Defence Abuse Application.

¹¹⁰⁷ EVD-D01-00176; see T.296, p.27, line 5 to p.29, line 25.

¹¹⁰⁸ See for example T.296, p.6, lines 14-19, p.7 line 25 to p.8, line 10, p.9, lines 14-17, p.11, line 1 to p.13, line 13, p.16, line 20 to p.17, line 6, p.17, line 24 to p.18, line 22, p.25, lines 16-19, p.29, lines 22-25, p.31, lines 11-18, p.34, lines 1-24, p.35, lines 18-19.

¹¹⁰⁹ For example, the witness admitted the date of [REDACTED] 1992 on his witness statement was "a mistake" (T.139, p.58, lines 10-12, 15); that aspects of his initial 2005 statement regarding his recruitment were incorrect because of language issues (T.140, p.13, lines 1-8, p.21, lines 18-21) and that the place of departure for [REDACTED] in his first statement is not correct (T.139, p.11, lines 24-25; T.140, p.49, lines 11-17).

¹¹¹⁰ See for example T.223, p.57, lines 2-14, p.67, line 8, p.69, line 23, p.70, lines 10-12, p.71.

¹¹¹¹ T.139, p.48, lines 22-24.

when he enrolled in school.¹¹¹² The witness also testified that “[REDACTED]” is the name of his deceased grandfather¹¹¹³ and that it was his grandmother who wrote it on the ‘attestation de sortie d’un enfant d’un groupe armé’ certificate attached to his application for victim participation.¹¹¹⁴

391. Moreover, W-0031 confirmed that W-0011 passed through [REDACTED] and that his details were checked by MONUC and [REDACTED].¹¹¹⁵ A contemporaneous document from the demobilisation program records ‘[REDACTED]’ as being aged 12 at the time he arrived at [REDACTED] centre.¹¹¹⁶ This further corroborates the witness’ evidence on his age at the time of his recruitment.

The evidence of defence witness DW-0024 does not assist in determining the truth

392. Defence witness DRC-D01-WWWW-0024 (DW-0024) did not [REDACTED] or have contact with W-0011 or [REDACTED] during the time he was serving in the UPC/FPLC. Her assertion that W-0011 was never in an armed group is vague and unsubstantiated, [REDACTED], and little if any reliance can thus be placed on her testimony.

393. DW-0024 testified that [REDACTED].¹¹¹⁷ [REDACTED].¹¹¹⁸ [REDACTED].¹¹¹⁹ [REDACTED].¹¹²⁰ [REDACTED],¹¹²¹ [REDACTED].¹¹²² [REDACTED].¹¹²³

¹¹¹² T.139, p.51, lines 2-4.

¹¹¹³ T.139, p.49, line 25, p.50, lines 9, 16.

¹¹¹⁴ T.139, p.49, lines 16-24. W-0011’s ‘Demande de participation à la procédure’ was shown to him in cross-examination but not tendered into evidence by the Defence. The witness later clarified that the name is ‘[REDACTED]’ and that ‘[REDACTED]’ (as written on the form) was a misspelling (T.139, p.61, line 17 to p.62, line 5).

¹¹¹⁵ T.202, p.74, lines 1-18.

¹¹¹⁶ The document, EVD-OTP-00474, is dated 21 July 2004. W-0031 testified that the ages listed therein are the ages “of the children when they arrived in the centre” (T.200, p.90, lines 9-12). W-0011 testified that his father’s name is ‘[REDACTED]’ (T.138, p.52, lines 22-25).

¹¹¹⁷ T.246, p.14, lines 1-4; T.247, p.8, lines 8-14.

¹¹¹⁸ T.246, p.13, lines 11-25; T.247, p.9, lines 9-11.

¹¹¹⁹ T.246, p.18, lines 5-7, 12-21; T.247, p.8, lines 2-5. [REDACTED] (T.246, p.15, lines 11-19, p.18, lines 12-19; T.247, p.7, lines 6-14).

[REDACTED]¹¹²⁴ [REDACTED]¹¹²⁵ [REDACTED].¹¹²⁶ In the Prosecution's submission the witness' evidence is too confused and unclear on this point to be reliable.

394. DW-0024 claimed that she knew that W-0011 was never a soldier¹¹²⁷ because [REDACTED] ([REDACTED]¹¹²⁸), [REDACTED]¹¹²⁹ [REDACTED].¹¹³⁰ [REDACTED].¹¹³¹ It is evident from her evidence that DW-0024 is not in a position to know whether or not W-0011 was in the army.

10.2.4 Witness W-0010

395. It is not disputed that W-0010 was a soldier in the UPC/FPLC. [REDACTED] evidence presented during the trial depicts [REDACTED], while the Accused delivered an address to the recruits on [REDACTED] at the Rwampara training camp.¹¹³² Among the recruits and soldiers on the video, W-0010 identified [REDACTED] aged less than 12 and a boy of about 10.¹¹³³ W-0010 was a bodyguard of Commander [REDACTED] and she was sexually abused by him and other commanders.¹¹³⁴

¹¹²⁰ [REDACTED] (T.247, p.9, lines 16-18). This took place in August 2002.

¹¹²¹ [REDACTED] (T.247, p.10, line 19 to p.11, line 2, p.18, lines 1-2).

¹¹²² T.247, p.11, lines 10-15, p.18, lines 5-9.

¹¹²³ T.247, p.12, lines 2-4.

¹¹²⁴ T.247, p.18, lines 10-14. [REDACTED]

¹¹²⁵ T.247, p.18, lines 18-24.

¹¹²⁶ T.247, p.18, line 21

¹¹²⁷ T.246, p.28, line 12.

¹¹²⁸ T.246, p.15, lines 11-19, p.18, lines 12-19; T.247, p.7, lines 6-14.

¹¹²⁹ T.246, p.28, lines 19-21.

¹¹³⁰ T.247, p.4, line 16 to p.5, line 9.

¹¹³¹ EVD-D01-00744, pp.32-33; EVD-D01-00745, p.29.

¹¹³² EVD-OTP-00570, [REDACTED]; T.145, p.10, lines 14-16, p.11, lines 17-18, p.13, lines 5-10.

¹¹³³ T.145, p.13, lines 12-17, 22-25, p.18, lines 5-14, p.23, line 12 to p.24, line 2.

¹¹³⁴ T.144, p.15, lines 19-23, p.45, lines 6-13; T.145, p.63, line 8 to p.64, line 16, p.79, lines 1-8, p.7, lines 1-15, p.8, lines 4-15.

The detailed account of W-0010's conscription, training and use in the UPC/FPLC

396. W-0010 was forcibly recruited by UPC/FPLC soldiers before she had finished the fourth grade of primary school, at age 13.¹¹³⁵ The witness situated the time of her forced recruitment as having occurred after the UPC/FPLC arrived to fight Lompondo's troops, the APC,¹¹³⁶ that is, in August 2002. The witness was part of the UPC/FPLC until its battle against the French, after which she fled.¹¹³⁷ This would have been in July 2003.¹¹³⁸
397. The witness provided specific details of her forced recruitment,¹¹³⁹ training¹¹⁴⁰ and use at the hands of the UPC/FPLC¹¹⁴¹ and she consistently maintained her evidence on these points during both Prosecution and Defence examinations. Notably, W-0010 testified that at the time the UPC/FPLC soldiers recruited her, "they put the elderly people to the side and they took the younger people. I was 13 years old at the time."¹¹⁴² Within her platoon there were children, "some who were younger than me. There were kadogos, and others were older than me."¹¹⁴³ W-0010 testified that she and her younger friend "[REDACTED]" ([REDACTED]¹¹⁴⁴) were bodyguards to [REDACTED],¹¹⁴⁵ that the Accused had bodyguards some of

¹¹³⁵ T.144, p.14, lines 6 -12, 23 to p.15, line 8, p.18, line, 22 to p.19, line 3; T.145, p.50, lines 9-14.

¹¹³⁶ T.145, p.2, lines 7-13, p.3, lines 9-23, pp.50-56. Other evidence in this trial situates this as occurring in August 2002.

¹¹³⁷ T.144, p.63, lines 17-20, p.64, lines 1-5, 10-16, 19-20; T.145, p.4, lines 1-7, 11. W-0017 corroborates that "[w]hen Artemis arrived, first there was that battle, and then afterwards it was calm, and they asked us to leave the town, at least the soldiers" (T.160, p.56, lines 12-14).

¹¹³⁸ DW-0019 confirmed that Artemis arrived in June 2003 (T.345 p.51, line 25 to p.52, line 3).

¹¹³⁹ T.144, pp.14-15, 17-21; T.145, p.3, lines 19-23, pp.50-55.

¹¹⁴⁰ T.144, pp.21-23, 35, 39.

¹¹⁴¹ T.144, pp.45-65; T.145, pp.63-66.

¹¹⁴² T.144, p.15, lines 2-8. The witness then indicated that of the children that were taken, "[s]ome of them were younger than I was and others were older" (T.144, p.20, lines 20-21).

¹¹⁴³ T.144, p.27, lines 9-17.

¹¹⁴⁴ T.145, p.18.

¹¹⁴⁵ T.144, p.45, line 9 to pg. 46, line 13.

whom were younger than she was,¹¹⁴⁶ and that there were kadogos, some younger than she was, and PMF, amongst those who fought in Libi.¹¹⁴⁷

W-0010's age

398. W-0010 was born in [REDACTED] 1989.¹¹⁴⁸ In cross-examination, she confirmed she was born in 1989, but did not know the month.¹¹⁴⁹ This is consistent with her evidence that she was 13 at the time of her recruitment. The witness explained that she started school late and that is why she was 13 years old in the fourth year of primary school when the average age of children in that grade is 9 or 10 years.¹¹⁵⁰ Asked by the Defence whether she was really an adult instead of 13 years of age when she enlisted in the UPC/FPLC, she replied: "I told you that when I was enlisted in the UPC, I was 13 years old."¹¹⁵¹
399. The witness' electoral card lists her date of birth as [REDACTED] 1986.¹¹⁵² W-0010 explained in a post-testimony interview with the OPCV that she deliberately gave an incorrect date of birth, one which indicated that she was older than she actually was, when she obtained the card.¹¹⁵³ In an extract from the 'Individual Case Story' seemingly related to W-0010, the year of birth is noted as 1987.¹¹⁵⁴ The document is not signed and it does not indicate that it was read back to the witness; in fact, W-0010 stated that she did not

¹¹⁴⁶ T.144, p.47, line 25 to p.48, line 6.

¹¹⁴⁷ T.144, p.49, line 25 to p.50, line 5.

¹¹⁴⁸ T.144, p.11, line 23, p.12, line 19 to p.13, line 3.

¹¹⁴⁹ T.145, p.47, lines 21-22.

¹¹⁵⁰ T.145, p.60, lines 4-7.

¹¹⁵¹ T.145, p.73, lines 14-16.

¹¹⁵² EVD-D01-00762.

¹¹⁵³ EVD-OTP-00660. The witness explained that when she fled the UPC/FPLC, there was a lot of insecurity in Bunia, and it was necessary to have an elector's card in order to safely circulate in town. In order to obtain the card, she gave a date of birth which placed her over the age of 18, and also lied about her real name in order to protect herself and her family.

¹¹⁵⁴ EVD-D01-00082.

speak to any MONUC officials and did not recognise the name of the person who is listed as having conducted the interview.¹¹⁵⁵

400. In the Prosecution's submission, neither of these documents is sufficiently reliable to disprove the witness' own evidence on her age. Taking into account the evidence of the experts regarding an inter and intra-variation of one year, it is scientifically possible for W-0010 to have been under the age of 15 at the time of her recruitment in late 2002.¹¹⁵⁶

The evidence of defence witnesses is flawed

401. The Defence called two witnesses to discredit W-0010's evidence of her age. First, [REDACTED],¹¹⁵⁷ [REDACTED],¹¹⁵⁸ [REDACTED],¹¹⁵⁹ [REDACTED],¹¹⁶⁰ [REDACTED],¹¹⁶¹ [REDACTED].¹¹⁶² [REDACTED]:

a. [REDACTED],¹¹⁶³

b. [REDACTED],¹¹⁶⁴

c. [REDACTED],¹¹⁶⁵ and

d. [REDACTED]¹¹⁶⁶

402. [REDACTED]¹¹⁶⁷ ([REDACTED]¹¹⁶⁸), [REDACTED].¹¹⁶⁹

¹¹⁵⁵ T.145, p.69, lines 16-21, p.70, lines 2-16.

¹¹⁵⁶ The analysis from W-0358 and W-0359 simply places W-0010 over the age of 18 years in December 2007: EVD-OTP-00430.

¹¹⁵⁷ [REDACTED]

¹¹⁵⁸ [REDACTED]

¹¹⁵⁹ [REDACTED]

¹¹⁶⁰ [REDACTED]

¹¹⁶¹ [REDACTED]

¹¹⁶² [REDACTED]

¹¹⁶³ [REDACTED]

¹¹⁶⁴ [REDACTED]

¹¹⁶⁵ [REDACTED]

¹¹⁶⁶ [REDACTED]

¹¹⁶⁷ [REDACTED]

¹¹⁶⁸ [REDACTED]

¹¹⁶⁹ [REDACTED]

403. Secondly, defence witness DRC-D01-WWWW-0005 (DW-0005) testified that she was W-0010's [REDACTED] and that [REDACTED].¹¹⁷⁰ DW-0005 testified that W-0010 was born in 1985.¹¹⁷¹ If true, this would mean that W-0010 was between 16 and 18 years of age during the relevant time period. This claim is not consistent with or corroborated by any other evidence in this trial. In the Prosecution's submission, DW-0005 was not a credible witness, and her unfounded assertion that W-0010 was born in 1985 should not be relied upon for the following reasons:

- a. [REDACTED];¹¹⁷²
- b. [REDACTED],¹¹⁷³ [REDACTED];¹¹⁷⁴
- c. [REDACTED].¹¹⁷⁵ [REDACTED]; and
- d. [REDACTED]¹¹⁷⁶ [REDACTED].¹¹⁷⁷

404. It is noted that the Defence did not put any of the assertions made by DW-0005 to W-0010 directly during their questioning of her in Court.

W-0010's credibility

405. W-0010 was consistent and credible in recounting her experience as a child soldier in the UPC/FPLC. She suffered tremendous difficulty and sexual abuse during this time and expressed this in her tears and in her poignant view of her life since her conscription: "My life is destroyed. My life is completely destroyed. I don't know after this phase where I'll go. My life is completely destroyed."¹¹⁷⁸

¹¹⁷⁰ T.261, p.20, lines 1-23, p.24, line 15 to p.25, line 9.

¹¹⁷¹ T.261, p.17, line 25 to p.18, line 3.

¹¹⁷² T.261, p.17, lines 7-11.

¹¹⁷³ T.263, p.21, lines 12-14.

¹¹⁷⁴ T.261, p.22, lines 8-18, p.25, line 25 to p.26, line 2; T.263, p.25, line 21 to p.26, line 6. [REDACTED]

¹¹⁷⁵ T.261, p.20, line 24 to p.21, line 18.

¹¹⁷⁶ T.263, p.23, line 19 to p.24, line 4: [REDACTED]

¹¹⁷⁷ EVD-D01-00742, lines 397-405.

¹¹⁷⁸ T.145, p.29, lines 12-14.

406. The Defence also sought to undermine W-0010's evidence by suggesting that she had been a member of another armed group prior to her enlistment in the UPC/FPLC. She flatly denied the suggestion: "I have said that it was UPC that enlisted me. At what age do you think I was that I would have been able to be in another armed group before that?"¹¹⁷⁹

10.2.5 Witnesses W-0007 & W-0008

407. W-0007 testified that his mother's name is [REDACTED]¹¹⁸⁰ and that his father's name is [REDACTED].¹¹⁸¹ W-0007 indicated that [REDACTED] (W-0008) was his father's son from another woman.¹¹⁸² In a post-testimony interview conducted by the OTP with W-0007 on [REDACTED] 2010, he acknowledged that he and W-0008 are in fact siblings,¹¹⁸³ his mother's name is [REDACTED],¹¹⁸⁴ and his biological father is [REDACTED].¹¹⁸⁵ W-0007 stated that at the time they met Prosecution investigators other children had had problems so they did not want to give their full identities.¹¹⁸⁶

408. W-0008 testified that his father's name is [REDACTED] and his mother's name is [REDACTED].¹¹⁸⁷ He stated that [REDACTED] (W-0007) is one of his cousins.¹¹⁸⁸ In the post-testimony interview conducted by the Prosecution

¹¹⁷⁹ T.145, p.66, line 25 to p.67, line 2. Asked if the UPC/FPLC was the first and only armed group that she was enlisted in, she repeated that it was the UPC/FPLC who enlisted her (T.145, p.67, lines 6-7). When pressed again by the Defence on whether she was enlisted by the APC and not the UPC/FPLC from 1999 until 2003, she replied: "I know nothing about what you're saying. I was enlisted by the UPC. What you're talking about, I know nothing about that" (T.145, p.73, lines 2-3).

¹¹⁸⁰ T.148, p.18, line 1.

¹¹⁸¹ T.148, p.18, line 3; T.149, p.52, lines 24-25.

¹¹⁸² T.149, p.51, lines 14-25.

¹¹⁸³ EVD-D01-00752, lines 372, 466-476.

¹¹⁸⁴ EVD-D01-00752, lines 479-483. The witness also recognised that his mother used the name '[REDACTED]' (EVD-D01-00752, lines 493-498).

¹¹⁸⁵ EVD-D01-00753, lines 151-173. The witness indicated that [REDACTED] is the man he grew up with (EVD-D01-00753, lines 188-192).

¹¹⁸⁶ EVD-D01-00752, lines 572-575, 639-645, 685-689.

¹¹⁸⁷ T.135, p.4, lines 4-8, p.65, lines 1-3. The mother's name was later transcribed as '[REDACTED]' (T.135, p.65, line 8). The witness stated that his parents also had other names but that those were the ones that he knew (T.135, p.4, lines 9-12).

¹¹⁸⁸ T.135, p.4, line 22 to p.5, line 6.

with the witness on [REDACTED] 2010, he acknowledged that W-0007 is in fact his sibling,¹¹⁸⁹ his mother's name is [REDACTED],¹¹⁹⁰ and his father is [REDACTED].¹¹⁹¹ The witness explained that he hid the truth because he was scared.¹¹⁹²

409. The OTP conducted interviews with [REDACTED] (W-0496), and [REDACTED] (W-0497), the transcripts of which were admitted from the bar table.¹¹⁹³ W-0496 and W-0497 identified themselves as the parents of W-0007 and W-0008,¹¹⁹⁴ confirmed that W-0007 and W-0008 are brothers, and corroborated critical aspects of W-0007 and W-0008's evidence, including that they were forcibly recruited and used as child soldiers in the UPC/FPLC/FPLC, as set out below.

The detailed account of W-0007's conscription, training and use in the UPC/FPLC

410. W-0007 was forcibly recruited by UPC/FPLC soldiers next to his school building at the beginning of 2003.¹¹⁹⁵ Although he could not recall the precise date, the witness remembers it was early in 2003 because they had just finished their examination for the first term of school, and it was just after

¹¹⁸⁹ EVD-D01-00750, line 746-748.

¹¹⁹⁰ EVD-D01-00750, lines 302-317.

¹¹⁹¹ EVD-D01-00750, lines 321-335. The witness also gave the name '[REDACTED]' for his father (EVD-D01-00750, line 339-345) and said that he lived with [REDACTED] (EVD-D01-00751, lines 293-317).

¹¹⁹² EVD-D01-00750, lines 798-800.

¹¹⁹³ W-0496 was interviewed on [REDACTED] 2009 and [REDACTED] 2010; see EVD-D01-00732 through to EVD-D01-00741 and EVD-D01-00746 through to EVD-D01-00749. W-0497 was interviewed on [REDACTED] 2009; see EVD-D01-00729 through to EVD-D01-00731.

¹¹⁹⁴ In fact, W-0496 is not the children's biological father. As W-0496 explained "[t]hey do not have any other father. I am the only responsible father to them." Apart from [REDACTED], the others only know W-0496 as their father (EVD-D01-00733, lines 693-697, 967-1011, 1050-1063). Their biological father was W-0496's brother, [REDACTED], who died when the children were still young (EVD-D01-00729, pp.17-31, 36-37); EVD-D01-00733, lines 378-388, 427-442.

¹¹⁹⁵ T.148, p.20, lines 1-5, p.21, lines 8-21, pp.23-24; T.149, p.65, lines 20-22, 24. Asked to reconcile this with his witness statement in which he had said that he was abducted from home, W-0007 replied: "Well, I don't really know what to say about the difference, but to be quite truthful, perhaps at that time, the time of my demobilisation, I was worried about my safety [...] We were scared of giving names, of telling what exactly had happened [...] So that is probably what explains the confusion, but I can confirm today that we were arrested when we were at the school." (T.149, p.76, lines 2-11, 14, 17-18, 22-25).

Christmas.¹¹⁹⁶ At the time he was arrested by UPC/FPLC soldiers, a number of other children were also recruited and “some of them were younger and others were older”.¹¹⁹⁷ The witness stated: “If you were above the age of 12, you had to join the army.”¹¹⁹⁸

411. W-0007 was taken for training at the UPC/FPLC camp in Irumu.¹¹⁹⁹ On arrival at the Irumu camp, no one asked them their ages.¹²⁰⁰ The recruits had to build their own straw huts for shelter.¹²⁰¹ Training included learning how to crawl, march, aim, shoot, assemble and disassemble a weapon.¹²⁰² The recruits were told: “If an enemy is in front of you, you have to aim right at the enemy and not shoot next to it. You have to aim so that you hit the body of your enemy.”¹²⁰³ The witness was taken from Irumu to complete his training at Mandro camp, at the end of which – about two to three months later – he was given a weapon.¹²⁰⁴ At the conclusion of his training, W-0007 and the other recruits “became real soldiers” and were expected to start their military work.¹²⁰⁵ W-0007 was sent to battle.¹²⁰⁶

412. The witness was a bodyguard to Commander [REDACTED],¹²⁰⁷ and participated in battles at Bogoro,¹²⁰⁸ Lipri,¹²⁰⁹ and Dele/Bunia.¹²¹⁰ During the fighting in Lipri, W-0007 “used up two magazines because the fighting was

¹¹⁹⁶ T.148, p.21, lines 8-12, 15-16.

¹¹⁹⁷ T.148, p.24, lines 3-4.

¹¹⁹⁸ T.148, p.27, lines 4-5.

¹¹⁹⁹ T.148, pp.21-30, 36-43.

¹²⁰⁰ T.148, p.30, lines 8-9.

¹²⁰¹ T.148, p.30, line 24 to p.31, line 3, p.42, lines 15-18. W-0008 (T.135, p.12, lines 23-25, p.13, lines 6-7), W-0011 (T.138, p.67, lines 1-2), W-0157 (T.185, p.80, lines 14-17) and W-0016 (T.191, p.34, lines 4-8) corroborate that recruits were made to build their own huts and that the ‘housing’ in UPC/FPLC camps consisted, in part, of straw huts.

¹²⁰² T.148, p.40, lines 8-11, 18-25.

¹²⁰³ T.148, p.41, lines 8-10.

¹²⁰⁴ T.148, p.40, lines 13-16, p.50, lines 22-25, p.53, line 25 to p.54, line 6, p.56, lines 10-13.

¹²⁰⁵ T.148, p.56, lines 18-21.

¹²⁰⁶ T.148, p.58, lines 14-23.

¹²⁰⁷ T.148, p.58, line 25 to p.59, line 2, lines 20-23; T.149, p.3, line 2 to p.4, line 16.

¹²⁰⁸ T.149, pp.9-18, p.45, lines 1-6.

¹²⁰⁹ T.149, pp.18-22.

¹²¹⁰ T.149, pp.23-25; T.150, pp.10-16

intense. There were many Lendus. There were others who had machetes, arrows. So we fired a lot of munitions on that day.”¹²¹¹ As with W-0294, W-0007’s detailed evidence on UPC/FPLC/FPLC commanders using Motorola radios for communication in the field and the use of call signs ¹²¹² is corroborated by FPLC military insiders.

413. W-0007 ran away from the UPC/FPLC in Fataki after having heard on the radio that the MONUC were telling the militia to surrender their weapons and that soldiers who did so would receive food and money.¹²¹³ Having seen that the [REDACTED] had set up a camp just before Fataki, the witness went there and was demobilised.¹²¹⁴ He recalled that this was when Bunia was occupied by Ugandan forces.¹²¹⁵

W-0007’s age

414. W-0007 testified that he was 21 years old at the time of his testimony (March 2009) and that he was born on [REDACTED] 1987.¹²¹⁶ Based on this trial evidence, W-0007 was 15 at the time of his abduction in early 2003,¹²¹⁷ which is also consistent with the bone and dental assessment of his age.¹²¹⁸
415. In his testimony, W-0007 attributed his knowledge of his date of birth to his school records. The birthdate, [REDACTED] 1987, appears on copies of the witness’ student cards.¹²¹⁹ Yet, as has been demonstrated through the

¹²¹¹ T.149, pp.20, lines 16-19.

¹²¹² T.149, p.4, line 13 to p.5, line 10.

¹²¹³ T.149, pp.36-37; T.150, p.25, lines 3-6, p.26.

¹²¹⁴ T.149, p.38, lines 1-5; T.150, p.26, lines 6-8, 20-23, p.27, lines 10-11.

¹²¹⁵ T.149, p.36, lines 11-13, 22-23.

¹²¹⁶ T.148, p.18, lines 15, 17. The witness testified that he knows his date of birth because he saw it on his primary school reports when a brother collected his school file for him some time after his interview with the OTP (T.148, p.18, lines 19-21, p.19, lines 8-10, p.34, line 8 to p.35, line 12). He later stated that it was his parents who told the school his date of birth (T.149, p.36, line 1).

¹²¹⁷ T.148, p.24, line 3.

¹²¹⁸ EVD-OTP-00426.

¹²¹⁹ EVD-OTP-00656 and EVD-OTP-00657. The student cards were disclosed to the Prosecution as annexes to a statement that W-0007 made to the OPCV in November 2010. The cards are for the 2007/2008 and 2008/2009 school years.

testimony of DW-0029, many of the school records were compiled irregularly and contained egregious errors in relation to dates of birth and other identifying features.¹²²⁰ Furthermore, the witness indicated that his parents provided his date of birth to the school,¹²²¹ but W-0496 and W-0497 were both unable to give precise evidence on either child's date of birth or age in their interviews with the OTP; W-0496 was certain however that they were no more than 13 and 14 when they enrolled in the UPC/FPLC.¹²²²

416. When he met with the Office of the Prosecutor in 2005, the W-0007 gave a different date of birth.¹²²³ However, taking into account the witness's in-court testimony, the conflict between the school records and the parents' recollections, and the scientific evidence (without regard for the one year margin for inter and intra-variation), it is possible that the witness was 15 at the time of his abduction, even though it is also scientifically possible for W-0007 to have been under the age of 15 at the time.¹²²⁴
417. If W-0007 was 15 in early 2003, he would not qualify as a child soldier. That, however, is not grounds to exclude his evidence regarding the recruitment and use of children in the UPC/FPLC. The Accused is charged with the enlistment, conscription, and use in hostilities of multiple child soldiers over a period of time, not with the recruitment or use in hostilities of any specific children. His conviction therefore does not depend even indirectly on a finding that W-0007 was under the age of 15 when conscripted.

¹²²⁰ See for example T.295, p.35, lines 10-12; T.296, p.7, line 25 to p.8, line 5, p.11, line 1 to p.13, line 13, p.16, line 20 to p.17, line 6, p.17, line 24 to p.18, line 22, p.25, lines 16-19, p.29, lines 22-25, p.31, lines 11-18, p.34, lines 1-24.

¹²²¹ T.149, p.36, line 1.

¹²²² W-0496 indicated many times in his interview that he was not sure of their birthdates or present ages, but repeated that W-0007 and W-0008 were 12, 13, or 14 when they enrolled in the UPC/FPLC: EVD-D01-00747, lines 814-821.

¹²²³ T.148, p.34, lines 8-12.

¹²²⁴ T.172, p.45, lines 1 to 23.

W-0007's credibility

418. W-0007 readily acknowledged and explained differences and discrepancies between his earlier statements and testimony. For example, when asked to explain why he did not mention training at Mandro in his 2005 interview with the Prosecution, he replied:

I told the investigators that I had just left the army, but later on at the IRC we were interviewed by a white man. He asked us a lot of questions, but we did not get any feedback. Later on, I discussed with these people who prepared the transcript you just read ... We were afraid that what we said could be broadcast over the radio. That is why certain information will not feature in this statement.¹²²⁵

419. The Prosecution submits that the fact that W-0007 withheld information at the time of his interview with the OTP is understandable, and should not discredit the detailed and corroborated evidence he otherwise provided to the Court. The witness was straight-forward in explaining his reasoning for withholding certain information: "I told them certain things, but I also withheld a certain amount of information, because I was afraid that such information would reveal my identity and I will be at danger."¹²²⁶

420. And later W-0007 explained: "I just gave you the reasons why I withheld certain information. I knew this was going to be a danger to me. If I had died, I wouldn't be sitting here to give testimony today."¹²²⁷

The detailed account of W-0008's conscription, training and use in the UPC/FPLC

421. W-0008 was in the second year of secondary school in [REDACTED] when the war broke out and interrupted his studies.¹²²⁸ He returned to where his

¹²²⁵ T.149, p.92, lines 17-23.

¹²²⁶ T.149, p.93, lines 5-7.

¹²²⁷ T.149, p.94, lines 15-17.

¹²²⁸ T.135, p.6, lines 2, 6-9, p.56, lines 8-12.

parents were living in [REDACTED] and was forcibly abducted by UPC/FPLC soldiers while at home.¹²²⁹ This was at the beginning of 2003.¹²³⁰

422. W-0008 was taken to the UPC/FPLC camp in Irumu where he was trained by Commander Pitchen.¹²³¹ He was taught “how to crawl, how to run, how to identify the enemy, and to flee” and trained to shoot using planks of wood as make-shift weapons.¹²³² The recruits were told “you’re free to take any of the women and to sleep with her.”¹²³³ Discipline was harsh; people would be punished by being beaten with sticks for making mistakes in training,¹²³⁴ and you could be executed for losing your weapon.¹²³⁵
423. The witness later served as a bodyguard to Commander [REDACTED],¹²³⁶ and fought in battles at Lipri¹²³⁷ and Barriere.¹²³⁸
424. One day, W-0008 escaped and hid in the house of a woman he knew in Bunia.¹²³⁹ The witness said: “It was not easy to leave the UPC/FPLC, but I did everything to leave because I did not like military service. So I did everything possible to leave, and I left.”¹²⁴⁰ He later went to an NGO that provided demobilisation assistance to child soldiers and was placed with a

¹²²⁹ T.135, p.6, lines 9-12, p.7, lines 4-11, line 23 to p.8, line 18 (threatening death, the soldiers took him from his parents: p.9, line 20 to p.10, line 3); T.137, p.28, lines 4, 11-16. The witness explained that he was at school when the soldiers came, but they fled home, which was not far away (T.137, p.21, lines 22-24, p.22, lines 4-5, 13, 25, p.25, lines 3-18)

¹²³⁰ T.135, p.12, lines 15-16.

¹²³¹ T.135, p.11, lines 15-20, p.13.

¹²³² T.135, p.11, p.15, lines 18-25; T.137, p.58; T.138, p.33, lines 4-5, 10-13.

¹²³³ T.135, p.13, lines 20-21.

¹²³⁴ T.135, pp.17-20.

¹²³⁵ T.137, pp.56-61.

¹²³⁶ T.135, pp.22-23; T.137, p.64, lines 6-8.

¹²³⁷ T.135, pp.24-35; T.137, pp.67-72.

¹²³⁸ T.135, pp.35-38; T.137, pp.74-76, T.138, p.7, lines 9-10.

¹²³⁹ T.135, p.53, lines 10-13, 18, 20-23; T.137, p.14, line 4-9; T.138, p.7 to p.8, line 12.

¹²⁴⁰ T.135, p.53, lines 6-8.

foster family.¹²⁴¹ The witness did not know how long he spent with the UPC/FPLC.¹²⁴²

W-0008's age

425. W-0008 testified that he was born on [REDACTED] 1989.¹²⁴³ The same date appears on a copy of the witness' electoral card issued in Bunia on [REDACTED] 2009.¹²⁴⁴ This is consistent with the evidence from his father, his brother and the bone age determination.¹²⁴⁵ In the Prosecution's submission, the evidence shows that W-0008 was aged 13 at the time of his forced recruitment in early 2003.

W-0008's credibility

426. In court, W-0008 explained that he did not have time to talk about everything at the time of his 2005 interview and therefore provided further information when he was later interviewed in 2008.¹²⁴⁶ During testimony he readily admitted that he had difficulty recalling specific dates, in response to questions from both the Prosecution and Defence.¹²⁴⁷ In the words of the witness: "It was not possible for us to keep a tally of the time" and "There

¹²⁴¹ T.135, p.53, lines 10-13, 18, 20-23; T.137, p.14, line 4; T.138, p.7, p.8, lines 5-12.

¹²⁴² T.135, p.54, lines 10-13: "I really can't tell you exactly how much time I spent with the UPC/FPLC because we did not have the time. It was not possible for us to keep a tally of the time. So I cannot give you the exact amount of time I spent with the UPC/FPLC."

¹²⁴³ T.135, p.4, line 14.

¹²⁴⁴ See Electoral card No. [REDACTED] (EVD-OTP-00659). The witness explained in a post-testimony interview with the OPCV (EVD-OTP-00658) that he gave a false birth date of [REDACTED] 1987 to officials in order to obtain an electoral card (issued only to adults, not minors) so that he could have identification and move about freely: No. [REDACTED], EVD-D01-01028.

¹²⁴⁵ The evidence from W-0358 and W-0359 is consistent but inconclusive for W-0008, simply placing him as 18 years or older as at the date of his x-ray, [REDACTED] December 2007; see EVD-OTP-00428. For evidence from DW-0012 see T.248, p.36, line 20-23.

¹²⁴⁶ T.137, p.73, lines 16-19; T.138, p.28, lines 23-24.

¹²⁴⁷ The witness stated that he did not know the exact date when he was abducted (T.135, p.12, lines 15-16) and that he did not remember the dates of the battles he was involved in (T.137, page 72, lines 21-22; T.138, page 7, line 20), or how long he spent in the UPC/FPLC (T.135, p.54, lines 10-13).

are certain things that I don't remember because it's been quite a while now.”¹²⁴⁸

427. The Prosecution submits that the fact that W-0008 admitted in open court that he had raped a girl during one of the battles in which he was fighting ought to be a factor in assessing his credibility. W-0008 testified that during the battle in Barriere his commanders would ask the soldiers/recruits to get girls from their families, take them by force to where they lived and rape them.¹²⁴⁹ W-0008 admitted to having done this himself once with a girl about his age.¹²⁵⁰
428. In an interview conducted with the OTP following his testimony, W-0008 repeatedly explained that both he and W-0007 were not reassured that their security would be guaranteed and that they would be protected, and stressed that they were afraid because they were speaking against the Accused, who has “his army and his soldiers”.¹²⁵¹ Moreover, they did not want their family to get into trouble.¹²⁵² This explanation is justifiable, particularly as these were adolescents at the time of their interviews, having lived most of their lives in terrible insecurity.
429. W-0031 confirmed that W-0007 and W-0008 were brought to [REDACTED], that they indicated having been enlisted by the UPC/FPLC, that this information was verified by MONUC and the [REDACTED] and that they were evidently traumatised from their experiences fighting in the ranks of the UPC/FPLC. ¹²⁵³ Additionally, their names are included in a contemporaneous list of ‘child[ren] associated with armed forces and

¹²⁴⁸ T.135, p.54, lines 11-12; T.138, p.12, lines 2-3.

¹²⁴⁹ T.135, p.35, line 17 to p.38, line 10.

¹²⁵⁰ T.135, p.38, lines 12-18.

¹²⁵¹ EVD-D01-00750, lines 824-825 and 845-847.

¹²⁵² EVD-D01-00750, lines 933-936, 959-960, 975-976, 982-984.

¹²⁵³ T.201, p.72, line 22 to p.74, line 25, p.78, lines 9-17; T.202, p.65, line 22 to p.73, line 25.

groups’¹²⁵⁴ to be placed with host families that a social worker at [REDACTED] centre prepared in July 2004.¹²⁵⁵ [REDACTED] confirmed that the ages shown therein, 11 for [REDACTED] and 14 for [REDACTED], were the ages of the children when they arrived at the centre.¹²⁵⁶

The evidence of defence witness DW-0012 does not assist in determining the truth

430. According to the summary of his anticipated evidence, defence witness DRC-D01-WWWW-0012 (DW-0012) was to testify that [REDACTED] had never been soldiers in the UPC/FPLC ([REDACTED])¹²⁵⁷. Yet DW-0012 said no such thing during his evidence, he merely said that he had never been informed they were soldiers.¹²⁵⁸ [REDACTED].¹²⁵⁹ Having joined the UPC/FPLC army before Mr Lompondo was chased out (*i.e. before August 2002*), and having remained there until the French military arrived (*i.e. July 2003*),¹²⁶⁰ DW-0012 is not in any position to know if [REDACTED] were soldiers during this period, a fact the witness himself admitted during his examination by the Defence.¹²⁶¹

431. The Defence assertions regarding W-0007 and W-0008 must also be viewed against the information provided by W-0496 and W-0497 that they had been pressured by Dieudonné Mbuna and other well known UPC/FPLC members ([REDACTED]) to say that their children had not been in the UPC/FPLC

¹²⁵⁴ T.200, p.68, lines 18-20. T.200-FR, p.70, lines 8-9: ‘enfant associé aux forces et groupes armés’ (EAGFA).

¹²⁵⁵ EVD-OTP-00474; [REDACTED].

¹²⁵⁶ EVD-OTP-00474; [REDACTED]. The document itself is dated 21 July 2004, so the date they arrived at the centre would be prior to that date.

¹²⁵⁷ W-0496 and W-0497 both confirmed that W-0007 and W-0008 were soldiers in the UPC/FPLC: see *inter alia* EVD-D01-00736, lines 119-127; EVD-D01-00737, lines 1183-1219 (W-0496); EVD-D01-00730, lines 384-409 (W-0497).

¹²⁵⁸ T.248, p.41, lines 19-21.

¹²⁵⁹ T.248, p.40, lines 17-23.

¹²⁶⁰ T.248, p.39, lines 1-7.

¹²⁶¹ T.248, p.41, lines 19-21: “Well, I don’t know whether they were soldiers. When I left for the army they were not in the army and when I came back no one told me they had been in the army, so I have no information about whether or not they had been in the army.”

army.¹²⁶² Even DW-0012's evidence reveals that [REDACTED] and Dieudonné Mbuna visited him prior to his testimony.¹²⁶³

432. In conclusion, given the level of detail provided by W-0007 and W-0008 on their abductions, training and participation in battles, and their legitimate explanations for the few minor discrepancies contained in their evidence, their stories as child soldiers are reliable and demonstrate the manner in which children under the age of 15 were recruited and used by the UPC/FPLC.

10.2.6 Witness W-0297

The detailed account of W-0297's conscription, training and use in the UPC/FPLC

433. In 2002,¹²⁶⁴ after W-0297 had completed nearly three months of his second year of primary school,¹²⁶⁵ W-0297 was forcibly recruited from school in [REDACTED] by Commander Kisémbu and other UPC soldiers.¹²⁶⁶ The witness described Kisémbu as the Army Chief of Staff.¹²⁶⁷ At the time, the UPC/FPLC was in control of Bunia.¹²⁶⁸ Based on these elements, his conscription took place in the fall of 2002.
434. The UPC/FPLC soldiers were armed and in uniform; they "started catching children"¹²⁶⁹ threatening the children if they did not go along.¹²⁷⁰ There were two vehicles to transport the children, one white and one red.¹²⁷¹ W-0297

¹²⁶² See for example EVD-D01-00733, lines 1239-1289, 1337-1352; EVD-D01-00734, lines 30-233, 288-382, 1163-1201, EVD-D01-00735, lines 1030-1061, EVD-D01-00736, lines 857-934, 1115-1205 (W-0496); EVD-D01-00730, lines 851-1152, 1203-1323; EVD-D01-00731, lines 44-98 (W-0497).

¹²⁶³ T.249, p.6, line 1 to p.7, line 14.

¹²⁶⁴ T.285, p.46, line 2.

¹²⁶⁵ T.285, p.47, lines 12-14.

¹²⁶⁶ T.285, p.43, lines 21-24, p.44, lines 19-22, p.45, lines 13-16.

¹²⁶⁷ T.285, p.22, line 7.

¹²⁶⁸ T.285, p.45, lines 13-25.

¹²⁶⁹ T.285, p.46, line 11.

¹²⁷⁰ T.285, p.46, line 7 to p.47, line 3.

¹²⁷¹ T.285, p.50, line 18. The white vehicle was open at the back and the red vehicle was closed (T.286, p.2, lines 11-13). Other witnesses provided descriptions of the vehicles used by the UPC/FPLC to transport persons, including the colour of the vehicles: T.128, p.45, line 21 to p.46, line 4; T.195, p.31,

entered one of the vehicles; children who refused were beaten and forced into one of the vehicles.¹²⁷² About half of the student body was taken on that day; some children were W-0297's age and some were older.¹²⁷³ The teachers were powerless to stop the abductions.¹²⁷⁴ The students were taken to a military camp in Katoto and divided into groups.¹²⁷⁵ Kisembo was at the head of W-0297's group.¹²⁷⁶ There were trained soldiers at the camp wearing military fatigues and with weapons.¹²⁷⁷ One of the trainers was called Abelanga.¹²⁷⁸ W-0297 spent two days at the camp and fled.¹²⁷⁹ W-0297 confirmed this account during Defence questioning.¹²⁸⁰

435. Approximately one week later, when fighting broke out, W-0297 fled towards Centrale.¹²⁸¹ The witness saw UPC/FPLC soldiers in Centrale, including Bosco Ntaganda, whom he described as the commander responsible for operations in the UPC/FPLC.¹²⁸² Bosco told everyone to return to Katoto because "the fighting was over and UPC/FPLC soldiers were controlling Katoto".¹²⁸³ W-0297 and many other people went back to Katoto.¹²⁸⁴ The next morning, Bosco and Kisembo called a meeting and the UPC/FPLC soldiers forced all persons, young and old, to attend the

line 21 to p.33, line 13; T.185, p.74, line 3 to p.75, line 13; T.145, p.21, line 23 to p.24, line 14; T.133, p.64, line 16 to p.65, line 7; T.138, p.62, line 11 to p.63, line 9; T.148, p.25, line 8 to p.26, line 18; T.148, p.28, line 18 to p.29, line 24; T.135, p.9, line 17 to p.10, line 15.

¹²⁷² T.285, p.45, line 24 to p.46, line 20.

¹²⁷³ T.285, p.47, lines 23 to p.48, line 12.

¹²⁷⁴ T.290, p.8, line 19 to p.9, line 16.

¹²⁷⁵ T.286, p.3, lines 17 to p.4, line 12.

¹²⁷⁶ T.286, p.4, lines 10-11.

¹²⁷⁷ T.286, p.4, lines 12-22.

¹²⁷⁸ T.286, p.4, lines 23-24. W-0038 refers to UPC/FPLC Commander Abelanga (T.114, p.23, line 20 to p.24, line 11) as does W-0017 (T.154, p.28, line 9 to p.29, line 23); W-0089 (T.196, p.40, line 18 to p.42, line 2); W-0010 (T.144, p.25, line 25 to p.26, line 21) and DW-0004 (T.243, p.38, line 13 to p.39, line 17).

¹²⁷⁹ T.286, p.5, lines 4-6, 15-21.

¹²⁸⁰ T.289, p.7, line 17 to p.8, line 6.

¹²⁸¹ T.286, p.6, line 15 to p.7, line 24.

¹²⁸² T.286, p.8, line 18 to p.9, line 4, p.10, lines 1-4.

¹²⁸³ T.286, p.9, lines 5-11.

¹²⁸⁴ T.286, p.9, lines 11-12

meeting.¹²⁸⁵ At the meeting, Bosco and Kisembo conscripted the youth who were present, including W-0297, by threatening them should they refuse to board the vehicles.¹²⁸⁶ [REDACTED], the village chief, was present.¹²⁸⁷

436. W-0297 received military training at UPC/FPLC camps in Nizi and in Barrière¹²⁸⁸ and he spent time at the UPC/FPLC military training camp in Mandro.¹²⁸⁹ After training in Nizi, Bosco and Kisembo gave the recruits military uniforms and weapons.¹²⁹⁰
437. W-0297 was a bodyguard to Kisembo and then later to Bosco.¹²⁹¹ Bosco and Kisembo nicknamed him “[REDACTED]” which means “[REDACTED]” in Swahili.¹²⁹² It is highly unlikely that if he were lying about having been in the UPC/FPLC, W-0297 would invent such a close working relationship with two of the UPC/FPLC’s top military commanders.
438. W-0297 saw the Accused in Lopa and in Bunia.¹²⁹³ In Lopa, W-0297 accompanied Kisembo to a meeting with the Accused; other commanders arrived as well including Bosco, Patrick and Asimwe.¹²⁹⁴ W-0297 stood guard outside the house during the meeting.¹²⁹⁵ Some of the soldiers guarding the house were his age but most were older than him.¹²⁹⁶ W-0297 later formed part of an escort for the Accused in Bunia; he rode in a vehicle ahead of the

¹²⁸⁵ T.286, p.10, lines 5-15.

¹²⁸⁶ T.286, p.12, lines 5-25.

¹²⁸⁷ T.290, p.26, line 8 to p.27, line 5. W-0297 rejected the Defence suggestion that he was confusing the chief of [REDACTED] with the chief of Katoto since W-0297 referred to them both as ‘[REDACTED]’ but W-0297 insisted that they were two different persons. [REDACTED].

¹²⁸⁸ T.286, p.14, lines 1-7, p.19, lines 15-24.

¹²⁸⁹ T.285, p.27, lines 7-10, p.16, lines 14-18.

¹²⁹⁰ T.286, p.14, lines 8-16.

¹²⁹¹ T.285, p.13, lines 1-4; T.286, p.15, line 1; T.290, p.32, lines 12-13.

¹²⁹² T.286, p.17, line 7 to p.18, line 2. W-0297 further explained it means “[REDACTED].” (T.286, p.17, line 25 to p.18, line 2).

¹²⁹³ T.286, p.20, lines 21-23.

¹²⁹⁴ T.286, p.20, line 25 to p.22, line 6. DW-0006 refers to a UPC/FPLC commander named Asimwe (T.254, p.71, line 6 to p.72, line 6).

¹²⁹⁵ T.286, p.21, lines 4-7.

¹²⁹⁶ T.286, p.22, lines 7-13.

Accused's vehicle.¹²⁹⁷ This escort took place around the end of 2002 and the beginning of 2003.¹²⁹⁸

439. W-0297 fought with the UPC/FPLC in Mandro¹²⁹⁹ and stated the ammunition was kept at Mandro to supply the camps.¹³⁰⁰ W-0297 witnessed airplanes delivering ammunition and firearms two or three times per week in Mandro.¹³⁰¹ It was at the Mandro training camp that W-0297 found [REDACTED] undergoing training for several weeks.¹³⁰² Witness DRC-OTP-WWWW-0321 (W-0321) confirmed that [REDACTED] had been recruited by the UPC/FPLC.¹³⁰³

440. W-0297 deserted from the UPC/FPLC in Dele¹³⁰⁴ after June 2003.¹³⁰⁵ He had asked permission to go wash his clothing to the second-in-command to Bosco, known as "the American",¹³⁰⁶ and he seized the opportunity to desert.

W-0297's age

441. Although he could not recall his date of birth, W-0297 testified that he turned 20 in the year 2010,¹³⁰⁷ that he was either 10 or 11 when he was recruited in 2002,¹³⁰⁸ and between 12 and 13 years old in 2003.¹³⁰⁹ He testified

¹²⁹⁷ T.286, p.23, lines 18-25.

¹²⁹⁸ T.286, p.24, lines 10-14.

¹²⁹⁹ T.286, p.15, lines 4-7.

¹³⁰⁰ T.286, p.26, lines 10-15.]

¹³⁰¹ T.286, p.26, lines 16-20. W-0016 confirms that there was a weapons depot in Mandro and that weapons were airdropped (T.189, p.43, lines 20-24); as does W-0299 (T.117, p.14, line 25 to p.16, line 12).

¹³⁰² T.285, p.16, line 12 to p.17, line 9.

¹³⁰³ T.310, p.13, line 25 to p.14, line 18.

¹³⁰⁴ T.290, p.32, lines 16-17.

¹³⁰⁵ T.287, p.2, lines 10-14; T.291, p.3, lines 3-7.

¹³⁰⁶ T.290, p.33, lines 8-11. W-0016 testified that "Américain BEIZA" reported to Bosco (T.189, p.42, line 18 to p.43, line 19); W-0017 refers to 'Américain' (T.158, p.70, line 9 to p.71, line 15) and DW-0006 also refers to a UPC/FPLC commander named "Américain BAGUMA" (T.254, p.71, line 6 to p.72, line 6).

¹³⁰⁷ T.285, p.7, lines 7-16.

¹³⁰⁸ T.289, p.9, lines 12-21.

¹³⁰⁹ T.285, p.7, lines 15-16.

that his parents had told him his age.¹³¹⁰ Defence witness [REDACTED] corroborated this evidence by confirming that W-0297 was “approximately 19 years of age; at the most, 20 years of age” [REDACTED].¹³¹¹

442. Significantly, the experts on age determination corroborate this evidence. The experts concluded that W-0297 was between 16 and 17 years old in January 2008.¹³¹² This means that W-0297 was between 18-19 years old in January 2010, between 10-11 years old in January 2002 and between 11-12 years old in January 2003. W-0297, [REDACTED] and the expert evidence confirm that W-0297 was under the age of 15 in 2002 and 2003.
443. Despite the expert determination of W-0297’s age, W-0297’s testimony as to his age, and the corroborating testimony of its own witness ([REDACTED]), the Defence attempted to undermine the evidence through purported school records recording that W-0297 was born in 1986.¹³¹³ If this were true, W-0297 would have been 24 at the time of his testimony in 2010, 20-21 years of age at the time of the expert opinion in January 2008 and 16-17 years old in 2002-2003. This cannot be accurate, and the reliability of these records has been seriously called into question.
444. First, this age does not accord with the expert examination of W-0297’s hand and wrist bones and dental records even taking into account the one year margin or variation.¹³¹⁴ Crucially, in their assessment of W-0297’s x-rays, the experts identified the presence of growth cartilage in W-0297’s wrist and hand bones,¹³¹⁵ which indicates that W-0297’s bones had not yet fully fused.
445. Secondly, the purported school records are completely unreliable given the errors and inconsistencies contained within them. W-0297 adamantly

¹³¹⁰ T.289, p.9, line 25 to p.10, line 5.

¹³¹¹ [REDACTED]

¹³¹² EVD-OTP-00618, p.0435.

¹³¹³ EVD-D01-00144; EVD-D01-00145; EVD-D01-00146; EVD-D01-00147.

¹³¹⁴ EVD-OTP-00618.

¹³¹⁵ EVD-OTP-00618, p.0433.

refuted the information in the records and asserted that they were tampered with by the individual he knows as “Cordo”.¹³¹⁶

446. DW-0029 testified that he is not the author of any of the records, nor was he at the individual schools from which they purportedly emanated at the time of their alleged creation.¹³¹⁷ When shown the one document that allegedly contains a reference to W-0297 being born in “86”,¹³¹⁸ W-0029 admitted that the document contains “a serious mistake”, “a really major error”.¹³¹⁹ [REDACTED] is listed on page [REDACTED] under matriculation number “[REDACTED]” and later on page [REDACTED] under matriculation number “[REDACTED]”. He is given the date of birth “86” on page [REDACTED] and no date of birth on page [REDACTED]. [REDACTED] or [REDACTED] is listed on page [REDACTED] under matriculation number “[REDACTED]” and later on page [REDACTED] under matriculation number “[REDACTED]”. [REDACTED] was allegedly born on “[REDACTED].88” on page [REDACTED] and in “1985” on page [REDACTED]. W-0029 repeated that these are “really major error[s]” and that “it’s not a good thing. It’s not proper”.¹³²⁰

447. Moreover, W-0297 testified that [REDACTED], whom he stated was his *elder* brother by two years,¹³²¹ had been a UPC/FPLC a bodyguard to [REDACTED] working for the Accused, and died “[REDACTED]” in [REDACTED] in [REDACTED].¹³²² W-0321 testified that W-0297’s family told

¹³¹⁶ T.289, p.16, line 21 to p.30, line 11. For the purported record listing his date of birth as “86” (EVD-D01-00145), see in particular T.289, p.24, line 2 to p.25, line 25.

¹³¹⁷ T.296, p.36, line 22 to p.37, line 5; p.98, lines 2-14.

¹³¹⁸ EVD-D01-00145, [REDACTED].

¹³¹⁹ T.296, p.22, line 12 to p.24, line 25.

¹³²⁰ T.296, p.22, line 12 to p.26, line 3.

¹³²¹ T.285, p.8, lines 7-13: “Q. Do you know how many years older than you he was? A. I was 12 years of age at the time, and he was 14 years of age.”

¹³²² T.285, p.8, line 14 to p.9, line 20.

him that W-0297's *older* brother had been a UPC/FPLC soldier and had died in combat.¹³²³

W-0297's credibility

448. W-0297 described his abductions and use by the UPC/FPLC in consistent detail over four days of testimony. While W-0297 freely acknowledged memory failings and accepted and gave explanations for any differences in statements given before trial¹³²⁴, he positively maintained throughout his testimony that he had been abducted, trained and used by the UPC/FPLC when he was under the age of 15.¹³²⁵
449. W-0297 gave evidence solemnly, without embellishment or ulterior motive. Aspects of his account are corroborated by other witnesses. Most notably, W-0321 confirmed that W-0297 had been a child soldier in the UPC/FPLC.¹³²⁶ W-0321 spoke to W-0297's family on several occasions about W-0297's past as a child soldier¹³²⁷ and to obtain their consent for a meeting with officials in Beni on the very subject of his military past.¹³²⁸ At no time during any of these visits did W-0297's family or [REDACTED] deny that W-0297 had served with the UPC/FPLC.¹³²⁹
450. Most importantly, W-0297 exposed a critical dimension to his evidence and to the evidence of defence witnesses. He revealed that he, his family and his friends had been pressured by UPC supporters to lie to the Court by denying their membership or that of other child soldiers in the UPC/FPLC.¹³³⁰ W-0297 testified that he and others were told that they must

¹³²³ T.310, p.3, line 21 to p.4, line 5.

¹³²⁴ See for example T.288, p.24, line 11 to p.25, line 5, p.26, line 7 to p.27, line 4; T.289, p.3, line 17 to p.6, line 14, p.10, line 18-21; T.290, p.6, lines 22 to p.7, line 5.

¹³²⁵ T.285, p.13, lines 2-4; T.288, p.21, lines 20-23.

¹³²⁶ T.309, p.31, line 18 to p.32, line 18; T.310, p.2, lines 16-24.

¹³²⁷ T.310, p.2, line 25 to p.3, line 10, p.5, line 20 to p.7, line 8, p.8, lines 16-23.

¹³²⁸ T.310, p.7, lines 10-23.

¹³²⁹ T.309, p.10, line 19 to p.11, line 7; T.310, p.6, line 2 to p.9, line 1.

¹³³⁰ T.285, p.9, lines 22-25, p.15, line 12 to p.17, line 9; T.288, p.12, line 15 to p.13, line 16.

lie to the Court so that “Mr Lubanga would be freed”.¹³³¹ They were to say that they had been bribed by a Prosecution intermediary to tell the Prosecution that they served as child soldiers in the UPC/FPLC but that they had never served in the UPC/FPLC.¹³³²

451. W-0297 implicates foremost an individual known as ‘Cordo’ who pressured persons to tell this tale to the Court as a means of undoing the statements they had given to the Prosecution years before.¹³³³ Cordo and others warned W-0297 not to testify against the Accused: “Do not tell them that you served as a child soldier. Because if we are alive today, it is thanks to Thomas Lubanga and what he did”.¹³³⁴

452. [REDACTED].¹³³⁵ [REDACTED].¹³³⁶ [REDACTED],¹³³⁷ [REDACTED].¹³³⁸ [REDACTED].¹³³⁹ [REDACTED].¹³⁴⁰

453. Notwithstanding the enormous pressure on him and his family, when asked whether it was true that he had been bribed to lie about having been a child soldier, W-0297 clarified once and for all: “I would like to explain the following to you, and this is the truth: Nobody gave me any money in order to come and testify here. All that I was given was travel costs - or travel

¹³³¹ T.285, p.11, lines 7-14, p.12, lines 12-25.

¹³³² T.285, p.42, lines 20 to p.43, line 2; T.288, p.10, line 11 to p.13, line 16.

¹³³³ T.285, p.31, line 1 to p.33, line 15.

¹³³⁴ T.285, p.22, lines 8-14. See also T.285, p.11, line 13. This atmosphere of support for, and gratitude to, the Accused was also referred to by defence witnesses: DW-0003 confirmed that “even today there are supporters” of the Accused in Bunia (T.240, p.13, lines 11-22); DW-0006 confirmed that “there are supporters of the UPC party in all 12 neighborhoods” of Bunia (T.255, p.4, lines 18-23) and that in June 2008 when there was a possibility that the Accused could be released “throughout the entire town the population was jubilant” (T.255, p.5, lines 2-4); DW-0036 explained that in 2002 “the UPC forces came and liberated the town and chased away those who were causing the insecurity, and from that day onwards there has been security in the town” (T.351, p.15, lines 20-22) and that “everyone was happy” (T.351, p.16, lines 3-4).

¹³³⁵ [REDACTED]

¹³³⁶ [REDACTED]

¹³³⁷ [REDACTED]

¹³³⁸ [REDACTED]

¹³³⁹ [REDACTED]

¹³⁴⁰ [REDACTED]

expenses - and clothes were bought for me".¹³⁴¹ W-0297 was adamant that "the only thing [REDACTED] told me was, that I should speak the truth, the whole truth, and explain my experiences in the army and tell them about the things I had done in the army".¹³⁴²

454. Significantly, W-0297 is not the only witness to testify that a person named Cordo, other UPC officials, and village chiefs mounted pressure campaigns after it became known that former child soldiers had met with the Prosecution in November 2007. DW-0003 and DW-0004 each detailed that they and the families of other witnesses were visited by influential UPC or community figures such as Cordo, Dieudonné Mbuna, and deputy chief Sumbuso or that they met with Chief Mateso, Chief Komanda and Chief Nembe who brought them to UPC officials such as John Tinanzabo.¹³⁴³ [REDACTED],¹³⁴⁴ when DW-0004 returned to Bunia he was immediately met by Cordo and Dieudonné Mbuna who "asked us the same questions. They said 'We discussed with you but what made you go to Kinshasa again?' These were difficult questions for us". Cordo and Dieudonné Mbuna wanted proof that DW-0004 had been in [REDACTED].¹³⁴⁵ They then advised, "if you are willing to listen, you should not get involved in politics".¹³⁴⁶
455. W-0321 explained that he left [REDACTED] because "people from the UPC were looking for me with a view to killing me" on account of his work with the ICC.¹³⁴⁷
456. Both DW-0004 and defence witness DRC-D01-WWWW-0036 (DW-0036) corroborate W-0297's testimony about Cordo's identity and his position in

¹³⁴¹ T.288, p.13, line 21 to p.14, line 1; T.285, p.11, lines 2-14.

¹³⁴² T.288, p.22, lines 2-4.

¹³⁴³ T.241, p.13, line 9 to p.15, line 19; T.245, p.28, line 11 to p.40, line 5.

¹³⁴⁴ T.288, p.11, lines 9-19, p.11, line 21 to p.12, line 3.

¹³⁴⁵ T.245, p.35, line 18 to p.36, line 5.

¹³⁴⁶ T.245, p.36, lines 6-8.

¹³⁴⁷ T.310, p.20, line 9 to p.33, line 16.

the community. W-0297 claimed that Cordo is Gegere¹³⁴⁸ (North Hema),¹³⁴⁹ [REDACTED]¹³⁵⁰ and worked in an office of the Accused,¹³⁵¹ that he was a teacher [REDACTED],¹³⁵² that he worked with demobilised youth,¹³⁵³ and that he assigned road repair work to these youth.¹³⁵⁴ DW-0004 confirmed that Cordo is Hema,¹³⁵⁵ that he used to work in an office,¹³⁵⁶ [REDACTED],¹³⁵⁷ that he is a teacher,¹³⁵⁸ and that Cordo, Dieudonné Mbuna and Sumbuso frequently met with him, his family and the families of former child soldiers to ensure that they told the Accused's lawyers that they had "lied" to the ICC in Beni.

457. DW-0036 confirmed that a person named Guillaume Lodji is known under the nickname Cordo,¹³⁵⁹ that he worked in a UPC office [REDACTED] and was the Coordinator and President of seven of the 12 neighborhoods in Bunia, [REDACTED],¹³⁶⁰ that he was a teacher in [REDACTED] primary school in [REDACTED],¹³⁶¹ that he "gathered all the young people who had been demobilized", that he was organised reintegration programs with demobilised youth, avenue heads and the community,¹³⁶² and that he was involved in community work known as 'salongo'.¹³⁶³

458. W-0297 testified that Cordo held regular meetings with the population to warn people against cooperating with the Court, attended by village leaders

¹³⁴⁸ T.285, p.13, line 22.

¹³⁴⁹ T.245, p.32, lines 20-25.

¹³⁵⁰ T.285, p.13, lines 18-20.

¹³⁵¹ T.285, p.13, lines 9-10.

¹³⁵² T.289, p.12, lines 14-15.

¹³⁵³ T.285, p.13, line 23 to p.14, line 5.

¹³⁵⁴ T.285, p.15, lines 7-11.

¹³⁵⁵ T.245, p.32, lines 20-25.

¹³⁵⁶ T.245, p.33, lines 3, 6-7.

¹³⁵⁷ T.245, p.33, lines 9-10.

¹³⁵⁸ T.245, p.33, lines 5-8.

¹³⁵⁹ T.351, p.9, lines 5-9.

¹³⁶⁰ T.351, p.9, lines 7-25.

¹³⁶¹ T.351, p.8, line 17 to p.9, line 4.

¹³⁶² T.351, p.12, lines 1-6.

¹³⁶³ T.351, p.10, lines 4-9.

such as Chief Mate, Chief Komanda, Chief Nembe and deputy chief Sumbuso.¹³⁶⁴ W-0297 stated that he was “very afraid” of Cordo, of former soldiers and of the village population, and that he feared being killed.¹³⁶⁵ His family was also deeply worried; his parents did not want him to stay with them fearing reprisals over W-0297’s cooperation with the Prosecution.¹³⁶⁶ W-0297 described photographs he had of himself in the UPC/FPLC with other soldiers;¹³⁶⁷ Cordo intervened to ensure that this evidence of his membership in the UPC/FPLC would never reach the Court.¹³⁶⁸

459. DW-0003 stated: “I was uncomfortable. Some people even wanted to hurt me. I fled”.¹³⁶⁹ He confirmed that his neighbours felt that he was “selling” his “chief Thomas Lubanga”,¹³⁷⁰ that he was “destroying Thomas Lubanga”,¹³⁷¹ and that he “had betrayed Thomas to sell him”.¹³⁷² DW-0004 also felt pressure from villagers who said that he and others had gone “to say lies against Thomas” and that he had “sold Thomas and made money” and that “it began to affect me”.¹³⁷³ DW-0004 [REDACTED] that the situation he was in was not a good one since everyone said that they “were testifying against Thomas”.¹³⁷⁴ They describe a situation that was unbearable: “I sometimes had to go take refuge in the bush at night [...] my wife shunned me. She was afraid because the people wanted to hurt us [...] I had nobody I could confide in [...] nobody wanted anything to do with me, and the children. At least the children were not seen, they had moved. But I who stayed there – I

¹³⁶⁴ T.285, p.19, line 4 to p.21, line 13.

¹³⁶⁵ T.285, p.20, line 21 to p.21, line 1.

¹³⁶⁶ T.285, p.21, lines 2-13; T.288, p.9, lines 9-15, p.10, line 15 to p.11, line 8.

¹³⁶⁷ T.285, p.24, line 12 to p.28, line 19.

¹³⁶⁸ T.285, p.29, lines 8-13.

¹³⁶⁹ T.240, p.11, lines 9-10.

¹³⁷⁰ T.240, p.14, lines 3-9.

¹³⁷¹ T.240, p.14, lines 10-16.

¹³⁷² T.241, p.11, line 11 to p.12, line 11.

¹³⁷³ T.245, p.42, lines 18-22.

¹³⁷⁴ T.245, p.43, lines 15-17.

suffered. I was subject to pressure”.¹³⁷⁵ As for DW-0004, he was “driven out of his home” because “even his family didn’t want him”.¹³⁷⁶

460. These witnesses succumbed to the pressure. When DW-0003 went to see village ‘wise men’ to beg for forgiveness, one of these leaders introduced him to UPC officials, first addressing the UPC leaders: “Someone like him wants to help us, do not hurt him”.¹³⁷⁷ At this meeting, DW-0003 agreed to testify on behalf of the Defence.¹³⁷⁸ Similarly, DW-0004 was taken to a UPC office where he also apologised and was asked to set an example:¹³⁷⁹ would he accept to meet the Accused’s lawyers if they asked him to deny that he had been a child soldier?¹³⁸⁰ He accepted.¹³⁸¹

461. Having now testified on behalf of the Accused, there is no more pressure. DW-0003 said that he and Simbuso¹³⁸² had “become enemies”; Simbuso had been “bandying” his name about¹³⁸³ and had questioned him for “plotting against Thomas Lubanga” and for going to Beni “for political reasons”.¹³⁸⁴ Curiously, today DW-0003 has no problems with Simbuso.¹³⁸⁵ Similarly, after detailing the many pressures he had received from his “brothers” and people in his village,¹³⁸⁶ DW-0003 tellingly admitted: “I think that when I leave this place, there will no longer be any pressure on me. [...] I will no longer be subject to pressure and I will feel at ease. I will have no worries”.¹³⁸⁷

¹³⁷⁵ T.241, p.11, line 14 to p.12, line 11.

¹³⁷⁶ T.241, p.11, lines 5-10.

¹³⁷⁷ T.241, p.13, lines 9-12.

¹³⁷⁸ T.241, p.13, lines 12-15.

¹³⁷⁹ T.245, p.28, lines 11-19, p.47, lines 20-23.

¹³⁸⁰ T.245, p.28, lines 18-22.

¹³⁸¹ T.245, p.28, line 22.

¹³⁸² T.240, p.44, lines 12-17.

¹³⁸³ T.240, p.44, lines 7-8.

¹³⁸⁴ T.240, p.43, line 24 to p.45, line 4.

¹³⁸⁵ T.240, p.44, lines 18-19.

¹³⁸⁶ T.241, p.11, line 23 to p.12, line 24.

¹³⁸⁷ T.241, p.17, lines 15-17.

The accounts of defence witnesses are flawed

462. The accounts of DW-0003 and DW-0004 that they were bribed to lie to the Prosecution, and that W-0297 and others were also bribed, do not hold up to scrutiny.
463. First, both W-0297 and W-0321 powerfully and credibly denied these accusations during their testimony.¹³⁸⁸ Secondly, DW-0003 and DW-0004 were at pains to describe this alleged scam in any concrete or logical terms. DW-0003 had never met W-0321 before,¹³⁸⁹ yet according to DW-0003's testimony he blindly accepted an offer to lie to officials of the ICC¹³⁹⁰ in exchange for a future promise of money (no defined amount)¹³⁹¹ or "a plot of land"¹³⁹² or "a house"¹³⁹³ or that they would leave their village.¹³⁹⁴ W-0321 did not get any money from DW-0003; no share of these promised benefits: DW-0003 did not pay him anything.¹³⁹⁵ Nothing is signed, nothing documents this alleged agreement.¹³⁹⁶ The plan, according to DW-0003, was explained, digested and agreed upon in less than an hour between

¹³⁸⁸ T.285, p.11, lines 2-14; T.288, p.13, line 17 to p.14, line 1, p.22, lines 2-4; T.308, p.51, lines 6-21, p.82, line 20 to p.87, line 13; T.309, p.18, line 3 to p.19, line 19, p.29, line 17 to p.30, line 14; T.310, p.9, line 15 to p.13, line 5.

¹³⁸⁹ T.240, p.20, lines 9-12.

¹³⁹⁰ DW-0003 insisted that W-0321 told him from their first meeting that he would be meeting ICC officials. (T.240, p.23, lines 7-9, p.24, lines 11-22). Both W-0321 and witness DRC-OTP-WWWW-0581 (W-0581) explained that told the families that they were meeting with NGO officials, and did not explain that they were meeting the ICC (T.301, p.7, line 17 to p.9, line 9; T.308, p.49, lines 4-19; T.309, p.6, line 13 to p.10, line 10).

¹³⁹¹ At first, the witness stated that W-0321 did not tell him the amount of money he would receive (T.240, p.22, lines 21-22), then he said that W-0321 mentioned "a large amount of money" (T.240, p.25, line 16), then retracted and said that he did not say how much money they would receive but that they would get money to start a business (T.240, p.25, lines 20-25).

¹³⁹² T.240, p.22, line 23.

¹³⁹³ T.240, p.25, lines 24-25.

¹³⁹⁴ T.240, p.26, lines 1-2.

¹³⁹⁵ T.240, p.24, line 23 to p.25, line 1.

¹³⁹⁶ T.239, p.33, lines 12-13; T.240, p.20, lines 20-23, p.21, lines 10-11.

[REDACTED], DW-0003 and W-0321.¹³⁹⁷ It seems that it was only because W-0321 had to shelter from the rain that the meeting lasted as long as it did.¹³⁹⁸

464. DW-0003 claimed that W-0321 operated openly, that “it wasn’t a secret” that he was offering such bribes to children: “[REDACTED] didn’t have any secrets”.¹³⁹⁹ This alleged element is improbable; it is far more likely that a scam of this magnitude would require a high degree of confidence, secrecy and meticulous planning.
465. Yet DW-0003 gives few details as to what he was coached to say or actually said to ICC officials, other than: “all I had to do was say ‘yes’”.¹⁴⁰⁰ W-0321 did not accompany the witnesses to Beni¹⁴⁰¹ and was not privy to the questions that the investigators were going to ask the children or their guardians.¹⁴⁰² This lack of detail adds to the implausibility of DW-0003’s testimony, [REDACTED].¹⁴⁰³ When asked what precisely W-0321 had done to prepare the plan, DW-0003’s answer was incomprehensible.¹⁴⁰⁴
466. In stark opposition to his story of a ‘web of lies’, DW-0003 stated clearly that he “didn’t even discuss” the various lies with [REDACTED].¹⁴⁰⁵ DW-0003 maintained that W-0321 had told them to lie about threats that DW-0004 had received from UPC officials; yet DW-0004 does not corroborate this story.¹⁴⁰⁶
467. DW-0003 last met W-0321 in [REDACTED] 2008¹⁴⁰⁷ [REDACTED].¹⁴⁰⁸ Neither DW-0003 nor DW-0004 spoke to W-0321 again.¹⁴⁰⁹ W-0321 apparently trusts

¹³⁹⁷ T.240, p.30, line 12 to p.31, line 7.

¹³⁹⁸ T.240, p.30, lines 21-24.

¹³⁹⁹ T.239, p.34, lines 5-12; T.240, p.27, lines 20-23.

¹⁴⁰⁰ T.239, p.35, line 17 to p.36, line 2. See also T.239, p.26, lines 6-13.

¹⁴⁰¹ T.239, p.35, line 16; T.240, p.27, lines 9-12.

¹⁴⁰² T.300, p.31, lines 1-23, p.37, line 11 to p.38, line 1; T.301, p.24, line 24 to p.26, line 16 (W-0581); T.308, p.77, lines 17-21; p.79, lines 1-4; T.309, p.17, line 18 to p.18, line 2; T.310, p.14, line 22 to p.15, line 4 (W-0321).

¹⁴⁰³ T.239, p.36, lines 4-12; T.240, p.32, line 13 to p.33, line 15.

¹⁴⁰⁴ T.241, p.3, line 16 to p.4, line 2.

¹⁴⁰⁵ T.241, p.5, lines 14-18.

¹⁴⁰⁶ T.241, p.2, line 11 to p.3, line 15; T.245, p.44, lines 11-14.

¹⁴⁰⁷ T.240, p.44, lines 20 to p.45, line 1.

the children and their guardians so unquestionably that he did not once contact them to ensure that they were not undermining the “plan”.¹⁴¹⁰ DW-0003 similarly did not contact W-0321 to ask for the money or land or house he was allegedly promised.¹⁴¹¹

468. Finally, the witnesses never saw any of the promised money, or land, and though they were relocated for several months they soon returned to Bunia.¹⁴¹² They nonetheless said and did nothing to expose the “fraud”, maintaining the story that they *now* say someone else had spun for them.¹⁴¹³

469. The Prosecution submits that this story makes no logical sense. Rather, the evidence reveals that these children were indeed child soldiers in the UPC/FPLC, they went to Beni and spoke the truth accompanied by guardians who confirmed this truth, and they thereafter honestly reported to the Prosecution that they had received pressure and threats from UPC officials and supporters, such as Cordo, once it became known that they had met the Prosecution of the International Criminal Court. Under directed and persistent pressure campaigns, the witnesses, who were now living once again in Bunia, had to change their stories abruptly more than two years later and assert that they had been lying to the Prosecution all along.

W-0297's schooling

470. The Defence also put school records to W-0297 to challenge his account of his schooling. W-0297 maintained his evidence and rejected the information contained in the purported school documents as having been fabricated.¹⁴¹⁴

¹⁴⁰⁸ T.239, p.24, lines 17-19. DW-0003 admitted that W-0321 had been threatened.

¹⁴⁰⁹ T.239, p.38, line 25 to p.39, line 3; T.240, p.31, line 18 to p.32, line 12.

¹⁴¹⁰ T.239, p.38, line 25 to p.39, line 3; T.240, p.32, lines 7-12.

¹⁴¹¹ T.240, p.32, lines 7-12.

¹⁴¹² T.240, p.21, lines 21-24, p.22, line 8, p.46, line 21.

¹⁴¹³ T.241, p.16, line 16 to p.17, line 4.

¹⁴¹⁴ T.289, p.17, line 1-21, p.24, lines 15-24, p.28, line 9-13, p.29, line 20 to p.21, line 2.

The witness insisted that he resumed his studies in 2004 in [REDACTED], contrary to what was contained in the records.¹⁴¹⁵

471. As for document EVD-D01-00144, the Prosecution notes that the document is nothing more than several pages stapled together.¹⁴¹⁶ The school year is strangely absent from the top of the page the Defence contends is relevant for W-0297, in stark contrast to all other pages.¹⁴¹⁷ There is nothing on this page to indicate the year in which W-0297 allegedly attended the school. The document proves nothing.

W-0297's family and residence

472. W-0297's biological mother is a woman named [REDACTED] who died in [REDACTED] during the war.¹⁴¹⁸ The witness explained during testimony that his father had married two sisters and had children with them both.¹⁴¹⁹ [REDACTED] sister is [REDACTED] and she is alive. W-0297 explained that [REDACTED] is his maternal aunt, but that he also calls her his mother, because of her dual status as aunt and stepmother.¹⁴²⁰ He recognised a photo of [REDACTED] shown to him by the Defence.¹⁴²¹
473. [REDACTED] testified that [REDACTED] is W-0297's mother,¹⁴²² but does not clarify whether she is W-0297's biological mother or stepmother.
474. [REDACTED] agreed that W-0297's father is a polygamist.¹⁴²³ He identified in a photograph a person he recognised as "[REDACTED]" and whom he

¹⁴¹⁵ T.289, p.11, lines 7-10, pp.24-25, p.27, line 8 to p.28, line 13.

¹⁴¹⁶ T.296, p.65, lines 10-12.

¹⁴¹⁷ EVD-D01-00144 at p.3315.

¹⁴¹⁸ T.290, p.14, line 22 to p.18, line 3, p.18, lines 21-24.

¹⁴¹⁹ T.290, p.17, line 12 to p.18, line 3. W-0297 referred to his mother's death and that his father had married two sisters at early points in testimony as well: T.287, p.9, line 24 to p.10, line 12; T.288, p.17, lines 8-12.

¹⁴²⁰ T.290, p.17, line 12 to p.18, line 3.

¹⁴²¹ EVD-D01-00151; T.290, p.24, line 21 to p.25, line 14.

¹⁴²² [REDACTED]

¹⁴²³ [REDACTED]

claims is W-0297's biological mother.¹⁴²⁴ Yet, as his testimony unfolded, the full limits of his knowledge on W-0297's family became clear. [REDACTED] knows nothing of the family history. When speaking of W-0297 he said: "I don't know his full identity. I don't know his place of birth. I know his father and his mother, that's all. I know that residence".¹⁴²⁵ When asked whether W-0297's father was married to [REDACTED] sister, [REDACTED], [REDACTED] said "that's not something I can know"; he could only repeat that [REDACTED] is W-0297's father's wife and that she is W-0297's mother.¹⁴²⁶ Finally, he could not name any other children he alleges are the biological offspring of W-0297's father and [REDACTED], saying: "I haven't drafted a list of their children, because I didn't know that such a question would be put to me within the framework of my testimony".¹⁴²⁷

475. What these responses reveal is that [REDACTED] came prepared to address certain issues but could not answer questions when taken outside his script. His credibility on core points has been seriously called into question as a result. His bald assertion that he is certain that W-0297 is the biological son of a person named "[REDACTED]" is equally undermined by the fact that he could not provide the same type of information about other witnesses in this case: he does not know whether defence witness [REDACTED] is the father or the guardian of [REDACTED],¹⁴²⁸ he does not know how many children [REDACTED] has with his wife¹⁴²⁹ and he does not recall the names of the wives of [REDACTED] or the gender of his children.¹⁴³⁰ He may know of the families to a limited extent, but his evidence cannot supplant the

¹⁴²⁴ [REDACTED]

¹⁴²⁵ [REDACTED]

¹⁴²⁶ [REDACTED]

¹⁴²⁷ [REDACTED]

¹⁴²⁸ [REDACTED]

¹⁴²⁹ [REDACTED]

¹⁴³⁰ [REDACTED]

evidence from the witnesses themselves as to their family relationships or membership in the UPC/FPLC.

476. [REDACTED].¹⁴³¹ [REDACTED].¹⁴³² [REDACTED],¹⁴³³ [REDACTED].¹⁴³⁴
[REDACTED].¹⁴³⁵

10.2.7 Witness W-0213

The detailed account of W-0213's conscription, training and use in the UPC/FPLC

477. W-0213 stated that he was forcibly recruited in the UPC/FPLC three times.¹⁴³⁶
The first time was at the end of his third year of primary school.¹⁴³⁷
UPC/FPLC soldiers put the witness and his friends in a white Toyota vehicle and took them to Lopa military camp located on a field not far from school.¹⁴³⁸ He escaped after a few weeks, returned home and resumed school, but was captured by UPC/FPLC soldiers a second time.¹⁴³⁹

478. The witness recalled that the second conscription was when he was in fourth grade of primary school,¹⁴⁴⁰ and confirmed that sometime prior to this, Lompondo had been chased out and the Accused and the UPC/FPLC controlled Bunia.¹⁴⁴¹ He escaped and went back home again.¹⁴⁴² The witness started fifth grade, but was forcibly recruited by the UPC/FPLC for a third

¹⁴³¹ [REDACTED]

¹⁴³² [REDACTED]

¹⁴³³ [REDACTED]

¹⁴³⁴ [REDACTED]

¹⁴³⁵ [REDACTED]

¹⁴³⁶ T.132, p.9, lines 18-19; T.133, p.71, lines 13-15.

¹⁴³⁷ T.132, p.7, lines 3-9, p.9, line 24 to p.11, line 25, especially p.11, lines 14-15; T.133, p.62, lines 2-7.

¹⁴³⁸ T.132, p.8, lines 11-16, p.9, line 20 to p.10, line 9, p.11, lines 4-5, 16-25; T.133, p.64, line 23 to p.65, line 16.

¹⁴³⁹ T.132, p.8, lines 11-20, p.13, lines 3-11, p.15, line 2; T.133, p.66, lines 18-20, p.69, lines 14-17, p.73, lines 9-14.

¹⁴⁴⁰ T.132, p.23, lines 7-9; T.133, p.77, lines 15-17. The witness did not remember if it was at the beginning, middle or end of the school year, but he was in fourth form (T.134, p.20, lines 1-12).

¹⁴⁴¹ T.133, p.75, line 18 to p.76, line 6. Other evidence admitted at trial and referred to in this brief establishes that this occurred in August 2002.

¹⁴⁴² T.132, p.16, lines 3-4, p.39, lines 8-25.

time, on the way to school while preparing for the end-of-year exams.¹⁴⁴³ UPC/FPLC soldiers recognised him and he was taken to a camp and imprisoned as punishment for being a traitor to the party.¹⁴⁴⁴

479. Based on the fact that W-0213's second conscription took place sometime after the UPC/FPLC chased Governor Molondo Lomondo out of Bunia in August 2002, when the witness was in his fourth year of school, in the Prosecution's submission the witness' first conscription – which took place at the end of his third year of primary school – would have occurred towards the 2001-2002 school year, but prior to August 2002.
480. The witness was trained at UPC/FPLC military camps in Lopa and Bule,¹⁴⁴⁵ served as bodyguard to Commander [REDACTED] ([REDACTED]),¹⁴⁴⁶ and participated in a battle against the Ugandans in Bunia.¹⁴⁴⁷ The witness also gave evidence about visits by high-ranking members of the UPC/FPLC to Bule camp,¹⁴⁴⁸ and about commanders using Motorola radios,¹⁴⁴⁹ the details of which are corroborated by other evidence in this trial.
481. W-0213 testified that he was injured in the UPC/FPLC's battle against the Ugandans in Bunia during which the Ugandans forced the UPC/FPLC to retreat,¹⁴⁵⁰ treated for his wounds, and then abandoned military service for good.¹⁴⁵¹ He went back to school and resumed fifth grade.¹⁴⁵² The witness

¹⁴⁴³ T.132, p.40, lines 3-7; T.134, p.43, line 21 to p.44, line 2.

¹⁴⁴⁴ T.132, p.40, lines 3-16; T.134, p.43, lines 3-10.

¹⁴⁴⁵ T.132, pp.11-14; T.134, pp.29-32.

¹⁴⁴⁶ T.132, pp.29-31, p.37, line 23 to p.38, line 10; T.134, p.25, line 22.

¹⁴⁴⁷ T.132, p.9, lines 1-14, p.48, line 18-22; T.134, p.51.

¹⁴⁴⁸ W-0213 spoke about visits by Bosco and Kisembo (T.132, p.28, line 24 to p.29, line 7, p.29, line 16 to p.30, line 8; T.134, p.34). W-0213 also mentioned that Commanders Bosco and Kisembo visited Bule Camp on a regular basis (T.132, p.29). W-0011 also talked about Bosco and Kisembo visiting Bule camp (T.1139, p.13, lines 2-10, p.22, lines 15-18_

¹⁴⁴⁹ T.132, p.51, line 3; T.133, p.6, lines 13-18. This is corroborated by FPLC military insiders.

¹⁴⁵⁰ T.132, p.48, lines 15-22, p.49, lines 13-19; T.134, pp.51-58.

¹⁴⁵¹ T.132, p.9, lines 2-15, p.49, lines 15-19, 22-24, p.50, lines 5-7, 12-14.

¹⁴⁵² T.132, p.50, lines 10-14, p.51, lines 4-7; T.143, p.43, lines 8-17.

heard over the radio about demobilisation centres¹⁴⁵³ and went with others to [REDACTED] to hand in their rifles, but they were told that [REDACTED] was for older people so they then went to [REDACTED], who took them to [REDACTED], his last demobilisation centre.¹⁴⁵⁴

W-0213's age and schooling

482. W-0213 testified that was born on [REDACTED] 1991 and that he knows this based on information from his parents.¹⁴⁵⁵ Being born in [REDACTED] 1991 would mean that the witness was 11-12 years old in 2002-2003, and [REDACTED] 16 years old in December 2007 when his x-rays were taken for the purposes of forensic age determination.¹⁴⁵⁶ This is in line with the conclusion reached by W-0358 and W-0359.¹⁴⁵⁷ In the Prosecution's submission, the evidence thus shows that W-0213 was under the age of 15 at the time of his forced recruitment.

483. In the Defence Abuse Application, the Defence relied on an entry in the register of [REDACTED] school to argue that W-0213 lied about his age and schooling.¹⁴⁵⁸ In entry [REDACTED] of EVD-D01-00054, a '[REDACTED]' is listed as born in "89".¹⁴⁵⁹ When shown this record in cross-examination, W-0213 answered that he *might* be the one enrolled on that register but that it is difficult for him to confirm if the name '[REDACTED]' is himself or someone else since many people bear the name '[REDACTED]'.¹⁴⁶⁰ Notably, even allowing for the one year margin for inter and intra-variation, a birth year of

¹⁴⁵³ T.133, p.31, lines 23-25.

¹⁴⁵⁴ T.133, p.30, lines 6-11.

¹⁴⁵⁵ T.132, p.6, lines 12-15; T.133, p.16, line 22. The witness stated that he didn't know his date of birth at the time of his interview with the OTP. He later asked his mother and she told him. In response to the Defence suggestion that his mother told OTP investigators that he was born on [REDACTED] 1989, the witness indicated that his mother could have been mistaken (T.133, p.17, lines 1-13).

¹⁴⁵⁶ EVD-OTP-00634.

¹⁴⁵⁷ EVD-OTP-00437. As noted above, the experts analysed W-0213 as having a bone age of 15 at December 2007.

¹⁴⁵⁸ Defence Abuse Application, para. 129.

¹⁴⁵⁹ EVD-D01-00054, p.0140, no. 2297.

¹⁴⁶⁰ T.134, p.68, lines 2-15.

1989 is inconsistent with the results of the forensic evaluation of bone age for W-0213. Moreover, based on an expert forensic examination of the original version of EVD-D01-00054, the handwritten year of birth in entry no. 2297 overwrites a previous entry that is partially visible underneath.¹⁴⁶¹ For all these reasons, the register should be given little, if any, weight.

W-0213's credibility

484. W-0213 testified for three days under oath, giving a detailed account of his participation as a soldier in the UPC/FPLC. Not once did the Defence directly suggest that he had never been in the UPC/FPLC or that he was lying. W-0213 was credible and forthright in his testimony. He indicated on his first day of testimony that "it was a big decision for me to take [...] I took the decision to come here to testify because of the evil he [the Accused] has done."¹⁴⁶²
485. The witness freely admitted when he did not know the answer to particular questions,¹⁴⁶³ and expressed caution about trying to guess or estimate certain details. For example, when asked to estimate the time it took to walk from home to school, the witness replied: "We used to leave very early. We used to leave very early. I don't remember. I don't want to say something which is not correct here. We used to leave very early in the morning."¹⁴⁶⁴ When asked the amount of time between when he started his 4th year of school and was abducted, the witness replied "Well, I don't want to make any mistakes, so I can't remember".¹⁴⁶⁵
486. At the conclusion of his testimony, W-0213 honestly indicated that threats to his safety affected his willingness to give names in his testimony and that he

¹⁴⁶¹ EVD-OTP-00639, Troisième partie, pp.4-6, annexes 1 and 2 (page ERNs -0322 to -0335). The forensic experts were unable to determine the original, underlying reference (page ERN -0324).

¹⁴⁶² T.132, p.46, lines 17-21.

¹⁴⁶³ See for example T.132, p.12, lines 13-15, 22-23, p.27, lines 10-12, p.38, line 24, p.46, lines 7-9.

¹⁴⁶⁴ T.133, p.63, lines 9-11.

¹⁴⁶⁵ T.133, p.77, line 22.

had agreed with his relatives not to provide details that could identify him and his family.¹⁴⁶⁶ Notwithstanding that his decision to testify “caused a lot of problems” in his family,¹⁴⁶⁷ W-0213 affirmed he had told the truth in court.¹⁴⁶⁸

487. Notably, W-0321 corroborates W-0213’s evidence that he was a member of the UPC/FPLC. W-0321 recognised a photo of W-0213¹⁴⁶⁹ and confirmed that it was because he had done military service with the UPC/FPLC, that W-0213 was at the CTO [REDACTED]. W-0321 explained he was responsible for W-0213 at the CTO and reunited him with his family.¹⁴⁷⁰

The accounts of defence witnesses are flawed

488. The Defence called W-0213’s [REDACTED], in an attempt to challenge the evidence that W-0213 was a child soldier in the UPC/FPLC.
489. [REDACTED] testified that he never knew W-0213 to have been recruited as a child soldier. The witness was evasive, defensive and argumentative in his responses to many questions, even on marginal issues.¹⁴⁷¹ For example, in answer to the question whether the family lived in a Hema neighbourhood, the witness said:

[REDACTED] ¹⁴⁷²

490. Additionally, a detailed examination of [REDACTED]’s assertions reveal a number of weaknesses: he claimed that W-0213 was with him when [REDACTED], but gives contradictory information on the places they

¹⁴⁶⁶ W-0213 stated that he gave his real name, but not the real name of his mother (who did not know he testified before the Court) and that he and his relatives discussed this and did not want to give his identity, date of birth, names of parents, or the place where he studied (T.134, pp.75-77).

¹⁴⁶⁷ T.134, p.77, line 2.

¹⁴⁶⁸ T.134, p.75, line 1 to p.77, line 18. See also T.133, p.54, lines 11-20.

¹⁴⁶⁹ EVD-OTP-00589.

¹⁴⁷⁰ T.309, p.26, line 15 to p.29, line 23.

¹⁴⁷¹ [REDACTED]

¹⁴⁷² [REDACTED]

went,¹⁴⁷³ he admitted that people thought he had received money for W-0213 to testify,¹⁴⁷⁴ and he hid the fact of his meeting with defence resource person Dieudonné Mbuna from W-0213, despite having spoken to him recently.¹⁴⁷⁵ Finally, the Prosecution submits that the witness' evidence must be considered against the background of pressure campaigns that have been shown to have influenced many witnesses [REDACTED], as outlined in above.

491. [REDACTED] provided no basis for his assertion that W-0213 was not a child soldier in 2002 or 2003.¹⁴⁷⁶ He was asked directly if he knew where W-0213 lived in 2002 and 2003 and he did not give an answer;¹⁴⁷⁷ he merely stated that he knew W-0213 from 1997 or 1998 and that he "came to visit members of his family".¹⁴⁷⁸ This evidence does not contradict W-0213's own evidence that he lived in [REDACTED] at the time of his conscription.¹⁴⁷⁹ [REDACTED] also claimed that he knew that W-0213 was living with [REDACTED],¹⁴⁸⁰ yet he did not meet [REDACTED] until after November 2003,¹⁴⁸¹ [REDACTED].¹⁴⁸² These clarifications reveal that [REDACTED] is not in a position to give definitive evidence about W-0213's movements and membership in the UPC/FPLC. The Prosecution relies on the submissions advanced above in respect of [REDACTED], and submits that his testimony regarding W-0213 is equally as incredible and unconvincing as it is for W-0297.

¹⁴⁷³ [REDACTED]

¹⁴⁷⁴ [REDACTED]

¹⁴⁷⁵ [REDACTED]

¹⁴⁷⁶ [REDACTED]

¹⁴⁷⁷ [REDACTED]

¹⁴⁷⁸ [REDACTED]

¹⁴⁷⁹ [REDACTED].

¹⁴⁸⁰ [REDACTED]

¹⁴⁸¹ [REDACTED]

¹⁴⁸² [REDACTED]

10.2.8 Witness W-0157

492. W-0157 is [REDACTED], known also to his friends as [REDACTED].¹⁴⁸³ He was forcibly recruited into the UPC/FPLC army when he had just started secondary school.¹⁴⁸⁴ Although he could not recall the year in which he was enlisted, he did recall that at the time the UPC/FPLC was in control of the town of Bunia.¹⁴⁸⁵ He further explained that a person named Lompondo had been the head of the army known as the APC and when the APC was driven out, the territory was occupied by the UPC/FPLC.¹⁴⁸⁶ The Prosecution submits that other evidence tendered in the trial corroborates the fact that Governor Lompondo was in control of the APC, the armed forces of the RCD-K/ML, and that he fled Bunia during an attack by the UPC/FPLC on or about 9 August 2002 after which the Accused and the UPC/FPLC seized control of Bunia.¹⁴⁸⁷

493. As for when he left the UPC/FPLC, W-0157 stated that by the time of the attack on Bogoro on 24 February he had become a soldier in the group known as the FNI.¹⁴⁸⁸ Other evidence tendered indicates that the main attack on Bogoro by the FNI/FRPI combatants occurred on 24 February 2003.¹⁴⁸⁹

The detailed account of W-0157's conscription, training and use by the UPC/FPLC

494. W-0157 was on his way home from school with his friend, [REDACTED], when they were intercepted near a bridge called Tongle in Bunia¹⁴⁹⁰ by four soldiers from the UPC/FPLC/FPLC whom he could identify because of their

¹⁴⁸³ T.185, p.61, lines 21-25 and p.62, lines 1-4.

¹⁴⁸⁴ T.185, p.68, line 6 to p.69, line 1; T.187, p.34, line 10 to p.35, line 10.

¹⁴⁸⁵ T.185, p.69, lines 23-25.

¹⁴⁸⁶ T.185, p.73, line 13 to p.74, line 2.

¹⁴⁸⁷ See T.189, p.9, line 22 to p.10, line 16; EVD-OTP-00686; EVD-OTP-00014; and EVD-OTP-00208.

¹⁴⁸⁸ T.188, p.47, lines 8-18.

¹⁴⁸⁹ EVD-OTP-00623: para. 28: FNI attacked UPC/FPLC in Bogoro in February 2003, para. 65: Ngiti together with Lendu attacked Hema in Bogoro on 24 February 2003. W-0046 confirmed that there was a battle in Bogoro in February 2003 (T.39, p.25, lines 12-19).

¹⁴⁹⁰ T.185, p.66, line 15 to p.67, line 13.

‘tache-tache’ uniforms.¹⁴⁹¹ The soldiers were armed.¹⁴⁹² W-0157 and his friend asked the soldiers to let them go but they could not refuse to obey the armed soldiers.¹⁴⁹³

495. W-0157 and his friend were ordered into a white Hilux with a double cabin.¹⁴⁹⁴ The UPC/FPLC soldiers took them to the stadium in Bunia where they joined others, some older than W-0157 and some younger.¹⁴⁹⁵

496. At the stadium of Bunia, the UPC/FPLC Chief of Staff Kisémbó ordered¹⁴⁹⁶ the soldiers and assembled group to leave.¹⁴⁹⁷ The soldiers had not told the witness where they were being taken, and W-0157 described that he felt both sad and angry while he was in the vehicle.¹⁴⁹⁸

497. Upon arrival at the Mandro training camp, they were beaten by the soldiers who trained the recruits.¹⁴⁹⁹ There were other people already in the Mandro camp when the truck carrying the witness arrived. Some were being trained, some were singing.¹⁵⁰⁰ There were both boys and girls,¹⁵⁰¹ and some were the witness’s age or older than him.¹⁵⁰²

498. The witness recalled commanders Jaguar and Pepe in the UPC/FPLC camp in Mandro.¹⁵⁰³ Describing a typical day at the Mandro training centre, the witness testified that he and the other recruits would rise very early and then go for a parade or a drill, which was the first exercise for the recruits.¹⁵⁰⁴

¹⁴⁹¹ T.185, p.68-69.

¹⁴⁹² T.185, p.69, lines 10-11.

¹⁴⁹³ T.185, p.70, lines 1-6.

¹⁴⁹⁴ T.185, p.74, lines 14-15.

¹⁴⁹⁵ T.185, p.78, lines 9-10.

¹⁴⁹⁶ T.185, p.79, lines 6-16.

¹⁴⁹⁷ T.185, p.79, lines 17-20.

¹⁴⁹⁸ T.185, p.80, lines 6-11.

¹⁴⁹⁹ T.185, p.80, line 22 to p.81, line 16; T.186, p.8, lines 2-16.

¹⁵⁰⁰ T.186, p.8, lines 5-10.

¹⁵⁰¹ T.186, p.9, line 1.

¹⁵⁰² T.186, p.8, lines 20-23.

¹⁵⁰³ T.186, p.9, lines 14-23.

¹⁵⁰⁴ T.186, p.13, lines 8-15.

He described the parade as an assembly where a headcount was made of all the recruits.¹⁵⁰⁵ At the assembly, there would be a roll-call as officers had a list of members of their group.¹⁵⁰⁶ The officers did not ask the recruits how old they were.¹⁵⁰⁷

499. The recruits were positioned during the parades according to their size – smaller recruits would be positioned in front of taller recruits.¹⁵⁰⁸ Typically, senior authorities attended the general parades in order to know how the training was being conducted and to supervise.¹⁵⁰⁹
500. W-0157 saw the Accused, whom he knew as the President of the UPC/FPLC, at the Mandro training centre on two occasions.¹⁵¹⁰ On the first occasion, the Accused addressed them, asked about their situation in general and asked how they felt about their training and how the officers were carrying out the training.¹⁵¹¹ On the second occasion, a few days before the end of their training, the Accused again addressed them and tried to boost their morale and encourage them.¹⁵¹²
501. The witness confirmed that when the Accused addressed them the recruits were arranged according to height.¹⁵¹³ He recalled that the recruits were dressed in civilian clothing during the general parades attended by the Accused, because they could not wear military uniforms until they had

¹⁵⁰⁵ T.186, p.13, lines 16-20.

¹⁵⁰⁶ T.186, p.17, lines 20-25.

¹⁵⁰⁷ T.186, p.18, lines 1-3.

¹⁵⁰⁸ T.186, p.24, line 23 to p.26, line 13. The recruits in the Rwampara video are positioned according to their height (EVD-OTP-00570).

¹⁵⁰⁹ T.186, p.26, lines 14-20.

¹⁵¹⁰ T.186, p.27, lines 1-9. Other witnesses confirm that they saw the Accused visit the Mandro camp: W-0038 saw the Accused at the Mandro training camp giving speeches to boost morale to those at the camp, including child soldiers (T.113, p.42, line 5 to p.43, line 25); W-0299 saw the Accused at the Mandro camp pleased with the impressive number of soldiers at the camp and singing songs in front of the soldiers (T.117, p.28, line 14 to p.29, line 11 and T.122, p.40, lines 5-14); W-0007 saw the Accused at the Mandro camp with his escort giving a speech to the soldiers and recruits (T.148, pp.50-53).

¹⁵¹¹ T.186, p.27, lines 9-12.

¹⁵¹² T.186, p.27, lines 13-16.

¹⁵¹³ T.186, p.29, lines 17-25.

completed their training.¹⁵¹⁴ Bosco Ntaganda was present for the Accused's visit as he ensured the security of the entrance and exit and gave a report to the President.¹⁵¹⁵

502. The recruits were made to undergo training exercises,¹⁵¹⁶ and they were taught how to use a firearm and military ideology.¹⁵¹⁷ They learned how to handle, clean and repair light and heavy weapons:¹⁵¹⁸ W-0157 learned how to use pistols and SMGs – he recalled that the magazine for this weapon contained 32 bullets, and recalled another weapon called an LMG which is a heavy weapon but which uses SMG ammunition in the form of ammunition belts.¹⁵¹⁹ There were rocket launchers and light machine-guns called MAGs which use ammunition belts but the bullets are larger than those used for SMGs.¹⁵²⁰ There was a weapon known as a recoiler as along with 82-millimetre and 120-millimetre mortars used to fire shells, and there were grenades in the shape of a pineapple.¹⁵²¹ The witness clarified that although he had seen these weapons at the Mandro training camp, he did not learn to handle the recoiler since he did not have the strength to fire it.¹⁵²²
503. W-0157 explained that he was given a piece of wood during training rather than a weapon of his own. He was required to have the piece of wood with him wherever he went. If he left the piece of wood somewhere he risked being punished.¹⁵²³ This happened to W-0157 and he was whipped.¹⁵²⁴

¹⁵¹⁴ T.186, p.30, lines 10-12.

¹⁵¹⁵ T.186, p.30, lines 19-25.

¹⁵¹⁶ T.186, p.18, lines 5-6.

¹⁵¹⁷ T.186, p.18, lines 7-14.

¹⁵¹⁸ T.186, p.19, lines 1 to p.20, line 3.

¹⁵¹⁹ T.186, p.20, lines 15-19.

¹⁵²⁰ T.186, p.20, lines 19-22.

¹⁵²¹ T.186, p.20, lines 24-25.

¹⁵²² T.186, p.21, lines 5-9.

¹⁵²³ T.186, p.21, line 15 to p.23, line 20.

¹⁵²⁴ T.186, p.23, lines 8-19.

504. During the training, the recruits sang songs to improve morale.¹⁵²⁵ W-0157 explained that the songs sometimes had messages of sadness or other feelings that one had in his heart.¹⁵²⁶ Some songs praised the officers as good commanders.¹⁵²⁷ Other songs calmed the morale of the other recruits indicating that there would be moments of sadness and moments of joy and that tomorrow things may be better.¹⁵²⁸
505. Both girls and boys received the same training.¹⁵²⁹ During his time with the military W-0157 abused drugs and alcohol.¹⁵³⁰
506. The witness once tried to flee the Mandro training centre.¹⁵³¹ He was not willing to recount what happened to him when he tried to flee due to the memory of it.¹⁵³²
507. At the end of his training, the witness received a military uniform and a weapon.¹⁵³³
508. W-0157 estimated that he spent between four and five months at the Mandro training centre, before being sent to provide reinforcement to the UPC/FPLC troops in Nyamnkunde.¹⁵³⁴ Jaguar was appointed the commander of the witness's battalion and the group was deployed to Djugu.¹⁵³⁵ There were children and adults in his group – the same composition as in training.¹⁵³⁶ W-0157 states that he spent four months in Djugu¹⁵³⁷ but he did not have a diary

¹⁵²⁵ T.186, p.23, lines 20-25.

¹⁵²⁶ T.186, p.24, lines 3-4.

¹⁵²⁷ T.186, p.24, lines 4-5.

¹⁵²⁸ T.186, p.24, lines 5-7.

¹⁵²⁹ T.186, p.37, line 23 to p.38, line 2.

¹⁵³⁰ T.187, p.32, lines 21-25; T.188, p.26, lines 10-11.

¹⁵³¹ T.186, p.36, lines 20-21.

¹⁵³² T.186, p.36, line 22 to p.37, line 11.

¹⁵³³ T.186, p.34, lines 22-23.

¹⁵³⁴ T.186, p.36, lines 10-14.

¹⁵³⁵ T.186, p.38, lines 15-16.

¹⁵³⁶ T.187, p.4, lines 7-11.

¹⁵³⁷ T.186, p.39, lines 1-6.

to look at and “when you’re in a difficult situation [...] you don’t know how the days pass”.¹⁵³⁸

509. The witness’ commander, [REDACTED], then sent him to Rwampara to guard cattle.¹⁵³⁹ The farm and cattle belonged to a Gegere person named [REDACTED].¹⁵⁴⁰ W-0157 stayed approximately one or two months in Rwampara.¹⁵⁴¹ He stated that the Ugandans were based at the main airport of Bunia.¹⁵⁴²

510. From Rwampara, the witness decided to leave the UPC/FPLC; he testified that it was not easy to leave the UPC/FPLC so he fled at night.¹⁵⁴³ He ran away in civilian uniform rather than military uniform because he could have been easily identified in military uniform.¹⁵⁴⁴ He left his uniform and his weapon at the farm.¹⁵⁴⁵ He fled with the same friend with whom he had been abducted to join the UPC/FPLC.¹⁵⁴⁶ They fled to [REDACTED].¹⁵⁴⁷ [REDACTED].¹⁵⁴⁸

W-0157’s age and schooling

511. The witness testified that he was born on [REDACTED] 1991,¹⁵⁴⁹ which is information he received from his parents.¹⁵⁵⁰ When asked his age during

¹⁵³⁸ T.188, p.25, lines 16-25.

¹⁵³⁹ T.187, p.6, lines 8-17.

¹⁵⁴⁰ T.187, p.7, line 23 to p.8, line 3.

¹⁵⁴¹ T.188, p.30, lines 2-15.

¹⁵⁴² T.188, p.31, lines 2-4. W-0002 testified that by March 2003 the Ugandans occupied the Bunia airport (T.162, p.53, lines 12-15); W-0055 testified that when he arrived in Ituri in 2002, the town of Bunia was controlled by the UPC/FPLC but the Bunia airport was controlled by the Ugandan army (T.174, p.25, lines 3-19; T.178, p.26, lines 17-19); W-0038 testified that in November 2002 the Ugandans could attack them when UPC/FPLC trainees arrived at the airport in Bunia (T.114, p.8, line 14 to p.9, line 1); W-0299 stated that at some time after April 2002 the Ugandans controlled the Bunia airport (T.120, p.18, line 3 to p.19, line 3).

¹⁵⁴³ T.187, p.10, lines 19-25, p.11, line 4, p.12, lines 2-3, line 11.

¹⁵⁴⁴ T.187, p.11, lines 6-8.

¹⁵⁴⁵ T.187, p.11, lines 9-14.

¹⁵⁴⁶ T.187, p.11, lines 15-24.

¹⁵⁴⁷ T.187, p.12, lines 10-16.

¹⁵⁴⁸ T.187, p.12, line 25 to p.13, line 1.

¹⁵⁴⁹ T.185, p.63, lines 5-7.

Defence questioning he said that he was 18 years old at the time of his testimony (June 2009),¹⁵⁵¹ which is consistent with the birth date he gave in evidence, placing him under the age of 15 in 2002-2003.

512. The experts on age determination assessed W-0157's age as equal to or over the age of 19 at the date of his x-rays (December 2007).¹⁵⁵² With the standard one-year variability applicable to all cases, W-0157 could have been as young as 18 at the time of his x-rays, which puts him under the age of 15 in 2002-2003. It is also scientifically possible for W-0157 to have been over the age of 15 at the time.
513. The Defence showed the witness two school records that recorded his birth date as [REDACTED] 1986,¹⁵⁵³ making him five years older than he testified. W-0157 acknowledged that his parents are best-placed to know his age but did not otherwise comment upon the accuracy of the school records regarding his age.¹⁵⁵⁴ Defence witness [REDACTED] testified under oath that he does not know W-0157's age.¹⁵⁵⁵
514. The school records are unreliable and therefore insufficient to discredit the witness's testimony as to his age. An expert forensic examination of entry [REDACTED] in EVD-D01-00257 (which is an extract of the complete register at EVD-OTP-00170) revealed that W-0157's name and biographic details had been superimposed over another, different entry that is partially visible underneath.¹⁵⁵⁶ The paper on which the underlying entry is written shows signs of scraping, indicating that the original entry was rubbed away with an eraser or other scraping device before the new entry was inserted.

¹⁵⁵⁰ T.185, p.63, lines 8-15.

¹⁵⁵¹ T.187, p.28, line 8.

¹⁵⁵² EVD-OTP-00435.

¹⁵⁵³ EVD-D01-00257, EVD-D01-00258.

¹⁵⁵⁴ T.188, p.65, line 25 to p.67, line 11.

¹⁵⁵⁵ [REDACTED]: "Q: In approximate terms, do you know the age of [REDACTED]? A: I have no specific idea or information about that."

¹⁵⁵⁶ EVD-OTP-00639, p.0159 to p.0171 and Annexes 1-2.

The evidence of serious alteration undermines the reliability of this entry and this document. Additionally, different students are assigned the same matriculation numbers, which DW-0029 acknowledged is improper, and the numbering contains errors throughout.¹⁵⁵⁷ Finally, it is established in this record that school records generally may contain glaring inconsistencies and errors.¹⁵⁵⁸ DW-0029 explained that “some people don’t fill out all the records properly”,¹⁵⁵⁹ “the chief of the establishment may forget minor details,”¹⁵⁶⁰ and “also there is laziness”.¹⁵⁶¹ He admitted that there are mistakes in the dates of birth of school records,¹⁵⁶² both before and after the war, because “some of the principals were not very serious fellows and so they would do their work poorly”.¹⁵⁶³

515. In any event, for the reasons set forth previously in connection with W-0007 (para. 417, above), it is not necessary that the Chamber find beyond a reasonable doubt that W-0157 was under 15 at the time of conscription to consider his evidence or find the Accused guilty of the charged crimes.

W-0157's credibility

516. W-0157 was credible and honest in his testimony. He admitted he was afraid to be before so many people in the courtroom.¹⁵⁶⁴ Although certain subjects brought back painful memories, he answered questions sincerely and he articulated the emotional difficulties he was experiencing.¹⁵⁶⁵

¹⁵⁵⁷ T.295, p.27, lines 3-7; T.296, p.10, line 17 to p.13, line 15, p.16, line 18 to p.17, line 6. See also forensic report at EVD-OTP-00639, p.0161 to p.0243, Annexes 1-3.

¹⁵⁵⁸ See for example, T.296, p.7, line 25 to p.8, line 5, p.11, line 1 to p.13, line 13, p.16, line 20 to p.17, line 6, p.17, line 24 to p.18, line 22, p.25, lines 16-19, p.29, lines 22-25, p.31, lines 11-18, p.34, lines 1-24.

¹⁵⁵⁹ T.295, p.35, lines 10-12.

¹⁵⁶⁰ T.296, p.6, lines 14-15.

¹⁵⁶¹ T.296, p.6, line 19.

¹⁵⁶² T.296, p.8, lines 6-10.

¹⁵⁶³ T.296, p.9, lines 15-17.

¹⁵⁶⁴ T.185, p.60, lines 16-18.

¹⁵⁶⁵ T.186, p.7, line 24 to p.8, line 1, p.33, line 20 to p.34, line 4; T.187, p.32, line 21 to p.33, line 10.

517. W-0157 recalled testimony on previous days¹⁵⁶⁶ yet he freely admitted when he could not remember certain details going back 6 or 7 years.¹⁵⁶⁷ He did not waiver from his testimony that he was forcibly recruited by UPC/FPLC soldiers, trained by them and that he was used actively to participate in hostilities by the UPC/FPLC.
518. W-0321 confirmed that W-0157 had been a UPC/FPLC child soldier.¹⁵⁶⁸
519. The Defence sought to challenge the witness's credibility by referring to his first statement to the Prosecution wherein he made no mention of Commander Jaguar; in response, the witness stated that he could not include every detail of his experience during this first meeting.¹⁵⁶⁹ Furthermore, as the Defence itself pointed out, the witness *did* mention commander Jaguar during his second interview with OTP investigators.¹⁵⁷⁰
520. The Defence also sought to challenge W-0157 on the fact that he did not tell the Prosecution that he had been a UPC/FPLC child soldier during his first interview, and W-0157 explained that he was meeting the investigators for the first time and did not provide every detail of his experience.¹⁵⁷¹ Importantly, this was expressly acknowledged in W-0157's second signed statement at paragraph 162¹⁵⁷² where he described that he was afraid to mention the UPC/FPLC during his first meeting with the Prosecution.¹⁵⁷³

¹⁵⁶⁶ For example, during the Defence examination on the third day of his testimony, the witness accurately recalled his testimony given on the first day of his testimony: "A: You know, the first day I was very frightened. We didn't actually draw water from the well on site. They told us to go draw water. And you will recall that the second day they asked me that question and I corrected it, because the first day was the first day I came – I appeared before the Court and I was very frightened. We didn't draw water on site." (T.187, p.35, line 24 to p.36, line 11). Presiding Judge Fulford: "Mr. Desalliers, in fairness to the witness, my note entirely bears out what he just said [...] So I think it needs to be stated that the witness's recollection is accurate."

¹⁵⁶⁷ See for example, T.188, page 25, lines 16-25, p.76, lines 13-14.

¹⁵⁶⁸ T.308, p.47, line 3 to p.48, line 4.

¹⁵⁶⁹ T.188, p.4, line 10 to p.5, line 21.

¹⁵⁷⁰ T.188, p.6, lines 20-25.

¹⁵⁷¹ T.188, p.47, line 19 to p.48, line 20, line 25 to p.49, line 5.

¹⁵⁷² T.188, p.78, lines 7-14: "Q. [...] I will read paragraph 162, and the statement reads: 'The first time I saw the investigators from the ICC, I did not speak about my time in the UPC/FPLC. Back then, I

521. As for the testimony of DW-0025, it is significant that he does not contradict W-0157's testimony that he had been a soldier in the UPC/FPLC, nor that he had later been a soldier in a Lendu/Ngiti armed group known as the FNI/FRPI.¹⁵⁷⁴ In fact, DW-0025 simply stated that in the middle of 2003,¹⁵⁷⁵ he believed that W-0157 had joined the FRPI but he gave no evidence as to what W-0157 may have been doing during the period the Prosecution submits W-0157 was a child soldier in the UPC/FPLC.
522. Critically, the Defence did not ask W-0157 any questions about DW-0025, thereby denying W-0157 the opportunity of telling the Chamber whether he knows DW-0025 at all or the extent of their familiarity with each other.

10.3 Evidentiary Considerations: Trauma and Memory

523. The Chamber will evaluate each witness's evidence to determine the overall reliability. In undertaking this assessment, the Chamber must consider the nature and extent of any inconsistencies with other evidence or with a previous statement by the same witness. Chambers in other international tribunals have held that minor discrepancies will not lead to the conclusion that a witness is unreliable if the core aspects of the events have been recounted in sufficient detail.¹⁵⁷⁶ On this point, the ICTY Appeals Chamber in *Kupreskic* held that:

[t]he presence of inconsistencies in the evidence does not, *per se*, require a reasonable Trial Chamber to reject it as being unreliable. Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the

was afraid to tell you everything, and that is why I did not mention everything. I was afraid of the ICC.”

¹⁵⁷³ T.188, p.78, lines 17 to p.79, line 9.

¹⁵⁷⁴ T.259, p.21, line 5 to p.22, line 5.

¹⁵⁷⁵ T.259, p.19, line 24 to p.21, line 24.

¹⁵⁷⁶ AFRC Case, SCSL-04-16-T, Trial Chamber II, Judgement, 20 June 2007, paras. 110-113.

events took place do not automatically exclude the Trial Chamber from relying on the evidence.¹⁵⁷⁷

524. In evaluating the evidence provided by the former child soldier witnesses, the Prosecution urges the Chamber to consider the evidence of the Court expert DRC-CHM-WWWW0001 (CHM-0001) regarding the impact of trauma on the ability to recall and recount difficult events. CHM-0001 explained it as follows:

If you ask them a question, for example, about who gave you this command to kill [...] you bring up a lot of the memory related to combat, related to killing, to shooting, and related to the same sensory environment; right?

Now, the problem is not that they can't remember, the problem is that they remember too much in that moment, too much of the same elements, and they're not just – they're not just saved like on a computer as a thought. They are encoded in emotions, in physiological reactions, in feelings and in -- the whole body becomes active. [...]

So children who have developed post-traumatic stress disorder might want to avoid that whole memory system now to become active, because it's very painful to recall and to have -- of course with the recall comes the suffering of that moment. [...] So avoidance can play a role in not wanting to retrieve particular moments because they cannot retrieve just a single item without everything else coming up as well. [...] So you might get a bias in that – in that sometimes they're in better shape, they can do it, and other times they are not capable of going there.¹⁵⁷⁸

[...] there are, of course, memories related to severely traumatising moments of your life where it's difficult to pick a piece, because when you pick a piece the whole load comes. You can't just retrieve one item. That's called post-traumatic stress disorder, the intrusion of memory involuntarily. That's why it's a disorder, because you can't hold it back. It comes to you. And if you -- if it doesn't come to you but you take a piece out of that day, of that moment, the rest also comes. *But it doesn't mean that it's not true. It's just maybe hard to put it*

¹⁵⁷⁷ *Prosecutor v. Kupreskic*, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 31.

¹⁵⁷⁸ T.166, pp.52-54.

in words in a proper order and structure as it is needed here. [emphasis added]

11. Sentencing

525. The Prosecution reiterates that the crimes are grave and upon a conviction merit an appropriate sentence. The Prosecution will elaborate at the oral argument.

12. Conclusion

526. The evidence establishes beyond a reasonable doubt that the Accused is criminally responsible for the crimes of conscription, enlistment and use of children under the age of 15 years to participate actively in hostilities.



Luis Moreno-Ocampo
Prosecutor

Dated this 1st day of June 2011
At The Hague, The Netherlands