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TRIAL CHAMBER I

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

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

Public redacted version

**Closing submissions of the Legal Representative of Victims a/0047/06, a/0048/06,
a/0050/06 and a/0052/06**

Source: Office of Public Counsel for Victims

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I. BACKGROUND

1. On 12 April 2011, the Chamber issued the *Order on the timetable for closing statements*¹ ("the Order of 12 April 2011") in which it ordered each of the three teams of legal representatives of victims, including the Office of Public Counsel for Victims, to file their closing submissions in the instant case in a document not exceeding 50 pages no later than 16.00 on 1 June 2011.²

2. Accordingly, the Office of Public Counsel for Victims, in its capacity as Legal Representative of Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 ("the Legal Representative"), hereby files its closing submissions.

3. These closing submissions are filed as confidential as they contain certain information relating to Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 that cannot be disclosed to the public.

4. In its Order of 12 April 2011, the Chamber provided a non-exhaustive list of the relevant legal and factual issues which, in its view, should be addressed in the closing submissions. However, in view of the limited number of pages allowed for the legal representatives of victims to file their closing submissions, as compared to the number of pages granted to the parties,³ the Legal Representative is not in a position to address all the relevant issues in its closing submissions and will therefore limit itself to the principal issues directly affecting the personal interests of the victims whom it is representing.

¹ See the *Order on the timetable for closing submissions* (Trial Chamber I), ICC-01/04-01/06-2722, 12 April 2011 ("the Order of 12 April 2011").

² *Idem.*, para. 3(b).

³ The Prosecution has been granted 250 pages in which to present its closing submissions, while the Defence has been granted 300 pages. See the Order of 12 April 2011, *supra*, footnote 1, paras. 3(a) and 3(c).

II. RELEVANT LEGAL PRINCIPLES

- 1) *Interpretation of the notions referred to in article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute*

5. The Legal Representative will examine below the following notions referred to in article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute and in the corresponding articles in the Elements of Crimes: “conscripting or enlisting children under the age of fifteen years into the national armed forces”, “using children under the age of fifteen years to participate actively in hostilities”, “international armed conflict” and “armed conflict not of an international character”.

A. “Conscripting or enlisting children under the age of fifteen years into the national armed forces”

6. In contrast to the other international instruments which use only the term “recruitment”, the drafters of the Rome Statute chose to insert in article 8(2)(b)(xxvi) and 8(2)(e)(vii) two separate terms, “conscripting” and “enlisting”, in order to broaden the scope of those articles to include any campaign that seeks to recruit children and/or any group akin to scouting.⁴ “Conscripting” and “enlisting” are two forms of “recruitment”, “enlisting” being a “voluntary” act, whilst “conscripting” is forcible recruitment.⁵ However, in both cases, the child’s consent is not a valid defence,⁶ particularly in light of the “principle that children should not be recruited into the armed forces” which includes the absolute prohibition of accepting the

⁴ See Cottier, M., “War Crimes”, in Triffterer, O. (ed.), *Commentary of the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Munich, Oxford, Baden-Baden, C.H. Beck, Hart, Nomos Verlagsgesellschaft, 2nd edition, 2008, para. 231, pp. 472-473. See also Von Hebel, H. and Robinson, D., “Crimes within the Jurisdiction of the Court”, in Lee, R.S. (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, The Hague, London, Boston, Kluwer Law International, 1999, p. 118.

⁵ See *Decision on the confirmation of charges* (Pre-Trial Chamber I), ICC-01/04-01/06-803-tEN, 29 January 2007 (“the Decision on the confirmation of charges”), paras. 246-247. See also SCSL, *The Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), *Dissenting Opinion of Judge Robertson to Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)*, 31 May 2004, para. 5.

⁶ See the *Decision on the confirmation of charges*, *supra*, footnote 5, para. 247.

voluntary enlistment of minors.⁷ Moreover, as children under the age of fifteen years cannot reasonably give their consent to be mistreated, it is especially perverse to use children from this age category to participate in hostilities since they have a suppressed sense of fear in battle.⁸ Finally, recruitment into armed groups is diametrically opposed to the best interests of the child.⁹ Indeed, the need to safeguard the interests of children was behind the consensus reached during the Rome Statute negotiations to criminalise the acts of conscripting and enlisting children under the age of fifteen years and of using them in hostilities.¹⁰

7. “Conscripting” and “enlisting” children under the age of fifteen years is a continuing offence. In particular, the crime of conscripting or enlisting children under the age of fifteen years continues to be committed so long as the children remain in the armed groups or forces.¹¹

8. Regarding the notion “national armed forces”, the Legal Representative refers to and supports the Pre-Trial Chamber’s interpretation in the Decision on the

⁷ *Idem*, para. 245. See also International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Sandoz, Swinarski and Zimmermann (eds.), 1986, pp. 1391-1393, para. 4557. See also the “Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict pursuant to Rule 103 of the Rules of Procedure and Evidence”, ICC-01/04-01/06-1229-AnxA, 18 March 2008, para. 10.

⁸ See the testimony of the Special Representative of the Secretary-General of the United Nations for Children and Armed Conflict (Ms Radhika Coomaraswamy), transcript of the hearing of 7 January 2010, ICC-01/04-01/06-T-223-ENG ET WT, p. 11, line 14 to p. 12, line 1.

⁹ *Idem.*, p. 33, lines 15-25.

¹⁰ See Von Hebel, H. and Robinson, D., *Crimes within the Jurisdiction of the Court*, *supra*, footnote 4, pp. 103-122. See also Dörmann, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge, Cambridge University Press, 2003, pp. 375-381 and pp. 470-471. See also Udombana, N.J., *War is not Child’s Play! International Law and the Prohibition of Children’s Involvement in Armed Conflicts*, Temple International and Comparative Law Journal, vol. 20, 2006, p. 58, in which the author states that: “[m]ilitary service can jeopardize the health and safety of children; some aspects of recruits’ training, particularly live-ammunition exercises and physical endurance programs, may lead to death, injury and trauma. Power relationships in the military often leave young recruits vulnerable to bullying, harassment, abuse, and sometimes rape”.

¹¹ See the Decision on the confirmation of charges, *supra*, footnote 5, para. 248.

confirmation of charges issued in the instant case,¹² which the Chamber repeats in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.¹³

B. “Using children under the age of fifteen years to participate actively in hostilities”

9. No distinction can be drawn between the participation of child combatants and that of child non-combatants in hostilities.¹⁴ “Participating actively” in hostilities means not only direct participation in hostilities, that is to say in combat, but also covers active participation in combat-related activities such as reconnaissance, spying, sabotage and the use of children as decoys or couriers or at military check-points.¹⁵ This terminology also covers the use of children as porters for carrying supplies to the front or for any other activities at the front itself.¹⁶ Article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute also applies if children are used to guard military objectives, such as the military quarters of the various units of the parties to the conflict, or to safeguard the physical safety of military commanders (in particular where children are used as bodyguards).¹⁷ These activities are indeed related to hostilities insofar as (i) the military commanders are in a position to take all necessary decisions regarding the conduct of hostilities; (ii) they have a direct impact

¹² *Idem.*, paras. 271-285.

¹³ See *Decision on the confirmation of charges* (Pre-Trial Chamber I), ICC-01/04-01/07-717, 30 September 2008, para. 249.

¹⁴ See the *United Nations New Operational Guide to the Integrated Disarmament, Demobilisation, and Reintegration Standards*, 2010, para. 5.30, p. 218. The document is available at the following address: http://unddr.org/docs/Operational_Guide_REV_2010_WEB.pdf.

¹⁵ See the *Decision on the confirmation of charges*, *supra*, footnote 5, para. 261. See also the *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, pp. 21 and 23. The document is available at the following address: <http://www.un.org/law/n9810105.pdf>. See also UN Doc. A/AC.249/1997/L.9/Rev.1, 18 December 1997, p. 9(t) and UN Doc. A/AC.249/1998/L.13, 4 February 1998, p. 27(t). Finally, see SCSL, *The Prosecutor v. Brima et al.*, Case SCSL-2004-16-T, Judgment, 20 June 2007, para. 737.

¹⁶ See UN Doc. A/CONF.183/2/Add.1, *supra*, footnote 15, p. 21.

¹⁷ See the *Decision on the confirmation of charges*, *supra*, footnote 5, para. 263. See also International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, *supra*, footnote 7, p. 925, para. 3187 and p. 1404, para. 4557. Finally, see UN Doc. A/CONF.183/2/Add.1, *supra*, footnote 15, p. 21.

on the level of logistic resources and on the organisation of operations required by the other party to the conflict whose aim is to attack such military objectives.¹⁸

10. The Legal Representative further submits that the notion “participate actively” must be interpreted as also including the use of girls recruited into the armed forces for sexual purposes in times of war, on the ground that girls are recruited into the armed forces primarily for use as sex slaves. This interpretation is fully supported by the Special Representative of the Secretary-General of the United Nations for Children and Armed Conflict (“the Special Representative”).¹⁹ In her criticism of Pre-Trial Chamber I’s approach, which limited the “participate actively” standard to hostilities and excluded any activity manifestly without connection to the hostilities,²⁰ the Special Representative specifically stated that “[t]he Court should deliberately include any sexual acts perpetrated, in particular against girls, within its understanding of the “using” [children in hostilities] crime [and] that during war, the use of girl children in particular includes sexual violence”.²¹ She explained further in this regard that “[girls] are recruited [into armed groups] as child soldiers and sex slaves”.²²

11. This interpretation is also consistent with the definition of the expression “child soldier” established by the Cape Town Principles, which includes girls recruited for sexual purposes and intended for forced marriage.²³ The Paris Principles, which were adopted in 2007, reiterate the fact that all children used for

¹⁸ See the Decision on the confirmation of charges, *supra*, footnote 5, para. 263. See also ICC-01/04-01/07-717, *supra* footnote 13, para. 250.

¹⁹ See “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”, *supra*, footnote 7, paras. 19, 21 and 26.

²⁰ *Idem*, para. 19.

²¹ *Ibid.*, para. 21.

²² *Ibid.*, para. 26.

²³ See the Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa, adopted on 30 April 1997 at a symposium organised by the NGO Working Group on the Convention on the Rights of the Child and UNICEF, p. 11. The document is available at:

http://www.unicef.org/emerg/files/Cape_Town_Principles.pdf.

sexual purposes should be considered as child soldiers.²⁴ Moreover, the African Union has officially acknowledged the widespread practice of recruitment of child soldiers and abuse of girl children as wives and sex slaves and strongly condemned this practice in its Solemn Declaration on Gender Equality in Africa.²⁵ Finally, the United Nations has expressly recognised that girls are recruited into armed groups primarily for sexual purposes.²⁶

12. Accordingly, irrespective of whether the girl victims of sexual slavery within the armed forces were caused to participate actively in hostilities, their recruitment when they were under the age of fifteen years is sufficient proof. This opinion is shared by Trial Chamber I, which stated that “[i]t is not necessary [...] for the Chamber to engage in the critical question that otherwise arises in this application as to whether the ‘use’ of children for sexual purposes alone, and including forced marriage, can be regarded as conscription or enlistment into an armed force, or the use of that person to participate actively in the hostilities, in accordance with Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the Rome Statute. As just set out, the applicant has presented enough evidence to conclude, *prima facie*, that she was abducted in the broad context of the systematic conscription of children under the age of 15 into the military forces of the UPC”.²⁷

13. Since the Court’s texts do not address the definition of the notion “hostilities”, this notion may be defined as “acts of war that by their nature or purpose struck at

²⁴ See Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007, p. 7, point 2.1 The document is available at:

http://www.diplomatie.gouv.fr/en/IMG/pdf/Paris_Conference_Principles_English_31_January.pdf.

²⁵ Solemn Declaration on Gender Equality in Africa, adopted by African Union Member States, Addis Ababa, 6-8 July, 2004, available at: <http://www.chr.up.ac.za/about/2007/AfricaSolemnDec04.pdf>.

²⁶ See Report of the United Nations High Commission for Refugees: Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons, Guidelines for Prevention and Response, May 2003, pp. 72-3. This document is available at: <http://www.unhcr.org/3f696bcc4.pdf>. See also Report of the Secretary-General on children and armed conflict, 19 July 2000, A/52/163-S/2000/712, para. 34.

²⁷ See *Annex to the Corrigendum to the Decision on the applications by victims to participate in the proceedings* (Trial Chamber I), ICC-01/04-01/06-1556-Corr-Anx1, 13 January 2009, para. 103.

the personnel and materiel of enemy armed forces”.²⁸ “Hostilities” can also include preparations for combat and return from combat.²⁹ Regarding the notion “persons involved in hostilities”, although it is referred to only implicitly by article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute,³⁰ it does not only cover the period during which a civilian uses a weapon, but also, for example, the period during which the civilian carries the weapon, as well as situations in which the civilian commits hostile acts without the use of a weapon.³¹ Accordingly, the notion of hostilities must be interpreted as including any act of war committed in the context of a conflict.

C. “International armed conflict” and “armed conflict not of an international character”

14. Regarding the notions “international armed conflict” and “armed conflict not of an international character”, the Legal Representative refers to and supports Pre-Trial Chamber I’s interpretation in the Decision on the confirmation of charges issued in the present case.³²

15. The Legal Representative further submits that the Prosecution is better placed than the participating victims to address the issue of defining the notions “international armed conflict” and “armed conflict not of an international character” and to provide factual evidence to demonstrate the existence and the nature of the

²⁸ See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-1977), vol. XIV, CDDH/III/SR.2, p. 14. The document is available at: http://www.loc.gov/rr/frd/Military_Law/RC-dipl-conference-records.html.

²⁹ See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-1977), vol. XV, CDDH/III/224, p. 330. The document is available at: http://www.loc.gov/rr/frd/Military_Law/RC-dipl-conference-records.html.

³⁰ See article 45 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977. The text of the document is available at: <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>.

³¹ See Sandoz, Y., Swinarski, C. and Zimmermann, B. (ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, paras. 1943-1944.

³² See the Decision on the confirmation of charges, *supra*, footnote 5, paras. 205-217 and 228-234. The definition of the notion of “international armed conflict”, albeit in a condensed version, was used by Pre-Trial Chamber I in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*: see ICC-01/04-01/07-717, *supra*, footnote 13, para. 238.

armed conflict pertaining to the instant case,³³ and the accused's knowledge of the factual circumstances establishing the existence of an armed conflict.³⁴ In this regard, the Legal Representative confines itself to noting that the scope of the Statute's prohibition on enlisting, conscripting and using children under the age of fifteen years to participate actively in hostilities is identical, irrespective of the characterisation of the armed conflict. Thus, article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute criminalises the same conduct, irrespective of whether it is committed within the context of a conflict of an international character.

2) *Criminal responsibility applicable to the crime under article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute*

A. The subjective elements of the crime under article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute

16. With respect to the subjective elements of a war crime under article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute, the perpetrator must satisfy the intent and knowledge requirements of article 30 of the Statute as well as the negligence standard expressed by the phrase "should have known" concerning the requirement that the victim be under the age of fifteen years.³⁵ The intentional element encompasses, first and foremost, those situations in which the individual concerned (i) knows that his or her actions or omissions will bring about the objective elements of the crime, and (ii) undertakes such actions or omissions with the concrete intent to bring about the objective elements of the crime (also known as "*dolus directus* of the first degree").³⁶

³³ See paragraph 4 of article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Elements of Crimes.

³⁴ See paragraph 5 of article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Elements of Crimes.

³⁵ See paragraph 3 of article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Elements of Crimes.

³⁶ See Eser, A., "Mental Elements - Mistakes of Fact and Law", in Cassese, A., Gaeta, P. and Jones, J.R.W., *The Rome Statute of the International Criminal Court: a commentary*, Oxford, Oxford University Press, 2002, Vol. I, pp. 899-900.

17. The aforementioned intentional element also encompasses other manifestations of *dolus*³⁷ such as (i) those situations in which the individual in question, without having the concrete intent to bring about the objective elements of the crime, is aware that such elements will be the necessary result of his or her actions or omissions (also known as “*dolus directus* of the second degree”),³⁸ and (ii) those situations in which the individual concerned (a) is aware of the risk that the objective elements of the crime may result from his or her actions or omissions, and (b) accepts this result by reconciling himself or herself with it or consenting to it (also known as “*dolus eventualis*”).³⁹

18. Regarding *dolus eventualis*, two kinds of scenarios are distinguishable. Firstly, if the risk of bringing about the objective elements of the crime is high (that is to say, there is a likelihood that this consequence will occur in the ordinary course of events), the fact that the individual in question accepts the idea of bringing about the objective elements of the crime can be inferred from: (i) the awareness by the individual of the substantial likelihood that his or her actions or omissions would result in the realisation of the objective elements of the crime; and (ii) the decision by the individual to carry out his or her acts or omissions despite such awareness.⁴⁰ Secondly, if the risk of bringing about the objective elements of the crime is low, the individual concerned must have clearly or expressly accepted the idea that such objective elements may result from his or her acts or omissions.⁴¹

³⁷ See Piragoff, D.K. and Robinson, D., “Article 30: Mental Element”, in Triffterer, O. (ed.), *Commentary of the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Munich, Oxford, Baden-Baden, C.H. Beck, Hart, Nomos Verlagsgesellschaft, 2nd edition, 2008, p. 860.

³⁸ See Eser, A., *op. cit. supra*, footnote 36, pp. 898-899.

³⁹ In particular, the Trial Chamber of the ICTY ruled as follows: “[t]he technical definition of *dolus eventualis* is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he ‘reconciles himself’ or ‘makes peace’ with the likelihood of death”: see ICTY, *Prosecutor v. Milomir Stakic*, Case No. IT-97-24-T, Judgement, 31 July 2003, para. 587.

⁴⁰ See the Decision on the confirmation of charges, *supra*, footnote 5, para. 353.

⁴¹ *Idem*, para. 354.

19. The negligence standard expressed in the phrase “should have known” concerning the requirement that the victim be under the age of fifteen years⁴² is met when the individual concerned (i) did not know that the victims were under the age of fifteen years at the time they were enlisted, conscripted or used to participate actively in hostilities; and (ii) lacked such knowledge as a result of having failed to act with due diligence in the circumstances in question (it can only be said that the individual should have known if the individual’s lack of knowledge is due to a failure to comply with his or her duty to act with due diligence).⁴³ Accordingly, since this standard is an exception to the “intent and knowledge” condition set out in article 30 of the Statute,⁴⁴ it must be applied to the determination of the age of the persons concerned, whereas the afore-mentioned general condition must be applied to the other objective elements of the war crimes provided for in article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute, including the existence of an armed conflict and the nexus between the acts charged and the armed conflict.⁴⁵

B. The relevant forms of criminal responsibility

20. Article 25(3) of the Statute manifestly does not take account of the objective approach, which distinguishes between principals and accessories to the crime,⁴⁶ on the grounds that the concept of commission of an offence through another person – particularly when the other person is not criminally responsible – is inconsistent with the restriction of the group of principals to the crime to those who physically carry

⁴² See paragraph 3 of article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Elements of Crimes.

⁴³ See the Decision on the confirmation of charges, *supra*, footnote 5, para. 358. See also ICC-01/04-01/07-717, *supra*, footnote 13, para. 252. In addition, see ICTY, *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 62; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003, para. 151; and *Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 241. See also ICTR, *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A, Judgement, 3 July 2002, para. 42.

⁴⁴ Under article 30(1) of the Statute, the “intent and knowledge” condition must apply to any crime within the jurisdiction of the Court “[u]nless otherwise provided”. See Piragoff, D.K. and Robinson, D., *op. cit. supra*, footnote 37, p. 857.

⁴⁵ See the Decision on the confirmation of charges, *supra*, footnote 5, para. 359.

⁴⁶ According to the objective approach, only those individuals who physically carry out one or more elements of a crime could be considered principals of the crime. See Roxin, C., *Täterschaft und Tatherrschaft*, 8th ed., Berlin, De Gruyter, 2006, pp. 34 *et seq.*

out one or more of the objective elements of the offence.⁴⁷ Furthermore, modern doctrine has generally rejected the objective criterion approach.⁴⁸

21. Article 25(3) of the Statute also does not take into account the subjective approach⁴⁹ to the distinction between principals and accessories to the crime. Article 25(3)(d) of the Statute defines the concept of contribution to the commission or attempted commission of a crime by a group of persons acting with a common purpose with the aim of furthering the criminal activity of the group or in full knowledge of the criminal purpose.⁵⁰ Additionally, modern legal doctrine rejects this approach for distinguishing between principals and accessories.⁵¹

22. In contrast, article 25(3) of the Statute is based on the notion of control over the crime, which is underpinned by the idea that the principals to a crime cannot be limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.⁵² The control over the crime approach has been applied in a number of

⁴⁷ See the Decision on the confirmation of charges, *supra*, footnote 5, para. 333.

⁴⁸ It is generally recognised in the legal literature that the formal-objective approach cannot explain the commission of a crime through another person as a form of commission. See Roxin, C., *op. cit. supra*, footnote 46, p. 36; Roxin, C., *Strafrecht, Allgemeiner Teil II*, Munich, C.H., Beck, 2003, para. 25/29; Joecks, W. and Miebach, K. (ed.), *Münchener Kommentar zum Strafgesetzbuch I*, Munich, C.H., Beck, 2003, see para. 25/10. The objective approach has also been seen as conflicting with the law on the concept of co-perpetration (or commission of a crime jointly with another person). See Stratenwerth, G. and Kuhlen, L., *Strafrecht, Allgemeiner Teil*, 5th ed., Cologne, Heymanns, 2004, para. 12/4; Kuhl, K., *Strafrecht, Allgemeiner Teil*, 4th ed., Munich, Vahlen, 2002, para. 20/24; Roxin, C., *op. cit. supra*, footnote 46, pp. 37 and 38. See also ICC-01/04-01/07-717, *supra*, footnote 13, para. 482.

⁴⁹ The subjective approach – which has been endorsed by the jurisprudence of the ICTY through the concept of joint criminal enterprise or the common purpose doctrine – moves the focus from the level of contribution to the commission of the offence as the distinguishing criterion between principals and accessories to the crime, and places it instead on the state of mind in which the contribution to the crime was made. As a result, only those who make their contribution with the shared intent to commit the offence can be considered principals to the crime, regardless of the level of their contribution to its commission. See Roxin, C., *op. cit. supra*, footnote 46, pp. 52-59.

⁵⁰ See the Decision on the confirmation of charges, *supra*, footnote 5, para. 334.

⁵¹ See Roxin, C., *op. cit. supra*, footnote 46, pp. 52-59. See also ICC-01/04-01/07-717, *supra*, footnote 13, para. 483.

⁵² According to this approach, only those who have control over the commission of the offence – and are aware of having such control – may be principals because (i) they physically carry out the objective

legal systems, and is widely recognised in legal doctrine.⁵³ Regarding the description of the elements of co-perpetration based on joint control over the crime, the Legal Representative refers to and supports the analysis of Pre-Trial Chamber I in its Decision on the confirmation of charges issued in the present case.⁵⁴

elements of the offence (commission of the crime in person, or direct perpetration); (ii) they control the will of those carrying out the objective elements of the offence (commission of the crime through another person, or indirect perpetration); or (iii) they have, along with others, control over the offence by reason of the essential tasks assigned to them (commission of the crime jointly with others, or co-perpetration). See the Decision on the confirmation of charges, *supra* footnote 5, paras. 330-332.

⁵³ See Sancinetti, M., *Teoría del delito y disvalor de acción : una investigación sobre las consecuencias prácticas de un concepto personal de ilícito circunscripto al disvalor de acción*, Buenos Aires, Hammurabi, 1991, pp. 644 and 645; Quintero Olivares, G., *Derecho Penal, Parte General*, 1st ed., Barcelona, Signo, 1986, pp. 533 and 534; Bacigalupo, E., *La noción del autor en el Código Penal*, Buenos Aires, Abeledo-Perrot, 1965, p. 45; Bacigalupo, E., *Principios de derecho: parte general*, 5th ed., Madrid, Akal Publisher, 1998, pp. 313 and 314; Fletcher, G.P., *Rethinking Criminal Law*, New York, Oxford University Press, 2000, p. 639; Werle, G., *Principles of International Criminal Law*, The Hague, TMC Asser Press, 2005, marginal note 354; Bloy, R., *Die Beteiligungsform als Zurechnungstypus im Strafrecht*, Berlin, Duncker und Humblot, 1985, pp. 192 *et seq.*; Bockelmann, P., *Strafrecht, Allgemeiner Teil*, 3rd ed., Munich, Beck, 1979, p. 177; Bottke, W., *Täterschaft und Gestaltungsherrschaft*, Heidelberg, Müller, 1992, pp. 35 *et seq.*; Cerezo, M.J., *Estudio sobre la moderna reforma penal española*, Madrid, Technos, 1993, p. 236; Gallas, W., *Die moderne Entwicklung der Begriffe Täterschaft und Teilnahme*, Sonderheft der ZStW, 1957, pp. 3 *et seq.*; Gomez Benitez, J.M., *Teoría jurídica del delito: derecho penal: parte general*, 1st ed., Madrid, Civitas, 1984, p. 124; Gropp, W., *Strafrecht, Allgemeiner Teil*, 3rd ed., Berlin/Heidelberg/New York, Springer, 2005, para. 10/34; Herlitz, C.E., *Parties to a Crime and the Notion of a Complicity Object*, Uppsala, Iustus Förlag, 1992, pp. 259 *et seq.*; Jakobs, G., *Strafrecht, Allgemeiner Teil*, 2nd ed., Berlin/New York, De Gruyter, 1991, paras. 21/35 *et seq.*; Jescheck, H., *SchZStr.*, 71, 1956, pp. 225-243; Krey, V., *Deutsches Strafrecht, Allgemeiner Teil, Bd.2*, 2nd ed., Stuttgart, Kohlhammer, 2005, para. 26/86; Kühl, K., *Strafrecht, Allgemeiner Teil*, 5th ed., Munich, Vahlen, 2005, paras. 20/29; Kohlrausch, E. and Lange, R., *Strafgesetzbuch [für das Deutsche Reich] mit Erläuterungen und Nebengesetzen*, 43rd ed., Berlin, De Gruyter, 1961, para. 47, p. 160; *Leipziger Kommentar zum Strafgesetzbuch*, 11th ed., Berlin, De Gruyter, 1993, para. 25; Maurach, R., *Deutsches Strafrecht, Lehrbuch Allgemeiner Teil*, 2nd ed., Karlsruhe, C.F. Müller, 1958, p. 517; Murmann, U., *Die Nebentäterschaft im Strafrecht*, Berlin, Duncker und Humblot, 1993, pp. 69 *et seq.*; Niese, W., *Die finale Handlungslehre und ihre praktische Bedeutung*, Deutsche Richterzeitung, 1952, p. 23; Roxin, C., *op. cit. supra*, footnote 46, chapter 2; Sax, W., *Dogmatische Streifzüge durch den Entwurf des Allgemeinen Teils eines Strafgesetzbuches nach den Beschlüssen der Großen Strafrechtskommission*, ZStW 69, 1957, p. 430; Schönke, A. and Schröder, H., *Kommentar zum Strafgesetzbuch*, 26th ed., Munich, Beck, 2001, para. 25, footnote 71; Stratenwerth, G. and Kuhlen, L., *Strafrecht, Allgemeiner Teil*, 5th ed., Cologne, Heymanns, 2004, para. 12/15; Rudolph, H.-J. and Wolter, J., (ed.), *Systematischer Kommentar zum Strafgesetzbuch*, Frankfurt-am-Main, Metzner, 2001, para. 25; Welzel, H., *Lehrbuch des deutschen Strafrechts*, 7th ed., Berlin, De Gruyter, 1960, pp. 89-99; Wessels, J. and Beulke, W., *Strafrecht, Allgemeiner Teil*, 28th ed., Heidelberg, Müller, 1998, footnote 517 and Wessels, J. and Beulke, W., *Strafrecht, Allgemeiner Teil*, 35th ed., Heidelberg, Müller, 2005, para. 13/518. See also ICC-01/04-01/07-717, *supra*, footnote 13, para. 485.

⁵⁴ See the Decision on the confirmation of charges, *supra*, footnote 5, paras. 342-367.

23. Thus the notion of “commission” as set forth in article 25(3)(a) of the Statute refers to forms of participation which result in criminal responsibility as principal,⁵⁵ this notion corresponding to “perpetration” or “co-perpetration”.⁵⁶ Article 25(3)(b), 25(3)(c) and 25(3)(d) of the Statute refers to forms of secondary criminal responsibility as accessory.⁵⁷ Finally, article 28 of the Statute refers to the criminal responsibility of military commanders and other superiors, which is subsidiary to that provided for in article 25(3) of the Statute.⁵⁸

24. In order for the Statute to be understood as a consistent body of predictable law, the criminal responsibility of a person – whether as an individual, jointly with another or through another person – must be determined under the control over the crime approach to distinguishing between principals and accessories.⁵⁹

25. A definition of a principal that is predicated on the requirement of exercising control over the crime means that, for the purposes of distinguishing the three forms of principal responsibility provided for in article 25(3)(a) of the Statute, a principal is one who (a) physically carries out all elements of the offence (commission of the crime as an individual); (b) has, together with others, control over the offence by reason of the essential tasks assigned to him or her (commission of the crime jointly

⁵⁵ See the Decision on the confirmation of charges, *supra*, footnote 5, para. 320. See also *Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo* (Pre-Trial Chamber I), ICC-01/04-01/06-8-Corr, 24 February 2006, para. 78.

⁵⁶ See Cryer, R., Friman, H., Robinson, D. and Wilmshurst, E., *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridge University Press, 2007, p. 302.

⁵⁷ See the Decision on the confirmation of charges, *supra* footnote 5, para. 320. See also *Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo* (Pre-Trial Chamber I), ICC-01/04-01/06-8-Corr, 24 February 2006, para. 78. See in addition *Decision on the Prosecution Application under Article 58(7) of the Statute* (Pre-Trial Chamber I), ICC-02/05-01/07-1-Corr, 27 April 2007, para. 77, footnote 101.

⁵⁸ See *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo* (Pre-Trial Chamber II), ICC-01/05-01/08-424, 15 June 2009, paras. 342 and 402. See Triffterer, O., “Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?”, *Leiden Journal of International Law*, vol. 15, 2002, p. 186.

⁵⁹ See ICC-01/04-01/07-717, *supra*, footnote 13, para. 486.

with others); or (c) has control over the will of those who carry out the objective elements of the offence (commission of the crime through another person).⁶⁰

26. The concept of co-perpetration based on joint control of the crime is rooted in the principle of the division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner. Hence, although none of these persons has control over all the elements of the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.⁶¹ The first requirement of this form of participation is the existence of an agreement or common plan between two or more persons.⁶² The agreement need not be explicit, and can be inferred from the subsequent concerted action of the co-perpetrators.⁶³ The second objective requirement of co-perpetration based on joint control over the crime is the coordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime.⁶⁴ Only those to whom essential tasks have been assigned – and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks – can be said to have joint control over the crime.⁶⁵ At the same time, there are no legal grounds for limiting the joint commission of the crime solely to cases in which the perpetrators execute a portion of the crime by exercising direct control over it.⁶⁶ Thus, if an individual acts

⁶⁰ See the Decision on the confirmation of charges, *supra*, footnote 5, para. 332. See also ICC-01/04-01/07-717, *supra*, footnote 13, para. 488. See in addition *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* (Pre-Trial Chamber I), ICC-02/05-01/09-3, 4 March 2009, para. 210.

⁶¹ See the Decision on the confirmation of charges, *supra*, footnote 5, para. 342. See also *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, *supra*, footnote 60, para. 212.

⁶² See the Decision on the confirmation of charges, *supra*, footnote 5, paras. 343-345. See also ICC-01/04-01/07-717, *supra*, footnote 13, paras. 522-523.

⁶³ *Idem*.

⁶⁴ See the Decision on the confirmation of charges, *supra* footnote 5, paras. 346-348. See also ICC-01/04-01/07-717, *supra*, footnote 13, paras. 524-526.

⁶⁵ *Idem*.

⁶⁶ See ICC-01/04-01/07-717, *supra*, footnote 13, para. 492.

jointly with another individual – one who controls the person used as an instrument – these crimes can be attributed to him or her on the basis of mutual attribution.⁶⁷

27. The commission of a crime through another person is a model of criminal responsibility recognised by the world's major legal systems.⁶⁸ According to this form of participation, the principal (the “perpetrator-by-means”) uses the executor (the direct perpetrator) as a tool or an instrument for the commission of the crime; typically, the executor who is being used as a mere instrument will not be fully criminally responsible for his or her actions.⁶⁹ However, article 25(3)(a) of the Statute is clear and provides that a person acting through another may be held criminally responsible, regardless of whether the executor (or direct perpetrator) is also criminally responsible. This provision is based on the theory of the “perpetrator behind the perpetrator”⁷⁰ which implies that the perpetrator behind the perpetrator is responsible because he or she controls the will of the direct perpetrator.⁷¹

28. Co-perpetration based on control over the crime through another person can also be based on the notion of “control over the organisation” where the highest authorities within an organisation are responsible as principals rather than as accessories.⁷² This notion is rooted in the concept of “control over an organised apparatus of power” which is widely recognised in modern legal doctrine⁷³ and has

⁶⁷ *Idem.*, para. 493.

⁶⁸ See Fletcher, G.P., *Rethinking criminal law*, New York, Oxford University Press, 2000, p. 639 and Werle, G., “Individual criminal responsibility under Article 25 of the Rome Statute”, *Journal of International Criminal Justice*, no. 5, 2007, p. 963.

⁶⁹ See Ambos, K., “Article 25: Individual Criminal Responsibility”, Triffterer, O. (ed.), *Commentary of the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Munich, Oxford, Baden-Baden, C.H. Beck, Hart, Nomos Verlagsgesellschaft, 2nd edition, 2008, pp. 747-748 and Jimenez de Asua, L., *Lecciones de Derecho Penal*, Mexico, Collection Clásicos del Derecho, 1995, p. 337.

⁷⁰ See Roxin, C., “Straftaten im Rahmen organisatorischer Machtapparate”, *Goltdammer’s Archiv für Strafrecht* (1963), pp. 193-207.

⁷¹ See ICC-01/04-01/07-717, *supra*, footnote 13, para. 497.

⁷² *Idem.*, paras. 500-510.

⁷³ See Sancinetti, M., *Teoría del delito y disvalor de acción : una investigación sobre las consecuencias prácticas de un concepto personal de ilícito circunscripto al disvalor de acción*, Buenos Aires, Hammurabi, 1991, pp. 712 *et seq.*; Sancinetti, M., *Derechos humanos en la Argentina post dictatorial*, Buenos Aires, Lea, 1988, pp. 27 *et seq.*; Sancinetti, M. and Ferrante, M., *El derecho penal en la protección de los derechos humanos*, Buenos Aires, Hammurabi, 1999, p. 313; Bacigalupo, E., *Principios de Derecho Penal, Parte General*, Buenos Aires,

also been echoed by various chambers of the Court.⁷⁴ Regarding the constituent elements of the notion of “control over the organisation”, the Legal Representative refers to and supports the analysis of Pre-Trial Chamber I in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.⁷⁵

29. The Legal Representative submits that the forms of criminal responsibility set forth in articles 25(3)(b), 25(3)(c), 25(3)(d) and 28 of the Statute are subordinate to those in article 25(3)(a).⁷⁶ Hence, although they may be applicable under the crime defined in article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute, they can only be taken into account if the Chamber decides that the accused person cannot be considered as the principal to the crime imputed to him either individually or as co-perpetrator.⁷⁷

Hammurabi, 1987, p. 334; Ambos, K., *La parte general del derecho penal internacional*, Montevideo, Temis, 2005, pp. 216-240; Ambos, K., *Internationales Strafrecht*, Munich, Beck, 2006, paras. 7/29 *et seq.*; Stratenwerth, G. and Kuhlen, L., *Strafrecht, Allgemeiner Teil I*, 5th ed., Cologne, Heymanns, 2004, paras. 12/65 *et seq.*; Kühl, K., *Strafrecht, Allgemeiner Teil*, 4th ed., Munich, Vahlen, 2002, paras. 20/73 *et seq.*; Wessels, J. and Beulke, W., *Strafrecht, Allgemeiner Teil*, 36th ed., Heidelberg, Müller, 2006, no. 541; Roxin, C., “Straftaten im Rahmen organisatorischer Machtapparate”, *Goltdammer’s Archiv für Strafrecht* (1963), pp. 193-207; Roxin, C., *Täterschaft und Tatherrschaft*, 8th ed., Berlin, De Gruyter, 2006, pp. 248 *et seq.*; Roxin, C., “Organisationsherrschaft und Tatentschlossenheit”, *Zeitschrift für Internationale Strafrechtsdogmatik*, vol. 7, 2006, p. 294; Roxin, C., “Anmerkungen zum Vortrag von Prof. Herzberg”, in Amelung, K. (ed.), *Individuelle Verantwortung und Beteiligungsverhältnisse bei Straftaten in bürokratischen Organisationen des Staates, der Wirtschaft und der Gesellschaft*, Sinzheim, Pro Universitate, 2000, pp. 55 *et seq.*; Herzberg, R.D., *Täterschaft und Teilnahme*, Munich, Beck, 1977, pp. 42 *et seq.*; Hirsch, H., *Rechtsstaatliches Strafrecht und staatlich gesteuertes Unrecht*, Opladen, Westdeutscher Verlag, 1996, pp. 22 and 23; Bloy, R., “Grenzen der Täterschaft bei fremdhändiger Tatausführung”, *Goltdammer’s Archiv für Strafrecht* (1996), pp. 425-442; Schönke, A. and Schröder, H., *Kommentar zum Strafgesetzbuch*, 26th ed., Munich, Beck, 2001, para. 25/25a; Tröndle, H. and Fischer, T., *Strafgesetzbuch, Kommentar*, 53rd ed., Munich, Beck, 2006, para. 25/7; Küpper, G., “Zur Abgrenzung der Täterschaftsformen”, *Goltdammer’s Archiv für Strafrecht* (1998), p. 524; Schlösser, J., *Soziale Tatherrschaft*, Berlin, Duncker und Humblot, 2004, pp. 145 *et seq.*; Radtke, H., “Mittelbare Täterschaft kraft Organisationsherrschaft im nationalen und internationalen Strafrecht”, *Goltdammer’s Archiv für Strafrecht* (2006), pp. 350 *et seq.*

⁷⁴ See ICC-01/04-01/07-717, *supra*, footnote 13, paras. 500-518. See also *Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo* (Pre-Trial Chamber III), ICC-01/05-01/08-14-tENG, 10 June 2008, para. 78.

⁷⁵ See ICC-01/04-01/07-717, *supra*, footnote 13, paras. 511-518.

⁷⁶ See paragraph 23 *supra*.

⁷⁷ See *Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga* (Pre-Trial Chamber I), ICC-01/04-01/07-4, 6 July 2007, para. 60; ICC-01/04-01/07-717, *supra*, footnote 13, para. 467. See also *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo* (Pre-Trial Chamber II), ICC-01/05-01-08-424, 15 June 2009, paras. 342 and 402. In principle, the accused person cannot be punished simultaneously as both principal perpetrator and accessory: see the *Decision on the confirmation of charges*, *supra*, footnote 5, para. 321. See also ICC-01/04-01/07-717, *supra*, footnote 13, para. 471. See also *Decision on the Prosecution Application under Article 58(7) of the Statute*, *supra*, footnote 57.

However, the Legal Representative will present evidence hereinafter showing that in the instant case, the accused is indeed the principal to the crime under article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute.

III. SUBMISSIONS ON RELEVANT ASPECTS OF THE CASE

30. In accordance with the charges confirmed by Pre-Trial Chamber I,⁷⁸ the Legal Representative will demonstrate below that Mr Thomas Lubanga Dyilo is responsible as a principal perpetrator for having committed against Victims a/0047/06 (OTP-0007), a/0048/06 (OTP-0008), a/0050/06 (OTP-0010) and a/0052/06 (OTP-0011) the crime of enlisting and conscripting children under the age of fifteen years into the UPC/FPLC and of using them to participate actively in hostilities, within the meaning of article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute, from early September 2002 to 13 August 2003.

- 1) *Commission of the crime set forth in article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute with regard to Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06*

A. Identity and date of birth of the victims

31. The name of Victim a/0047/06 is [REDACTED] and the other names used are [REDACTED],⁷⁹ [REDACTED],⁸⁰ the last name being the family name or the honorific name which is used as a nickname for children.⁸¹ The victim's date of birth is [REDACTED].⁸² The name of Victim a/0048/06 is [REDACTED] and another name used is [REDACTED].⁸³ The victim's date of birth is [REDACTED].⁸⁴ The name of Victim a/0050/06

⁷⁸ See the Decision on the confirmation of charges, *supra*, footnote 5, p. 133.

⁷⁹ [REDACTED]

⁸⁰ [REDACTED]

⁸¹ [REDACTED]

⁸² [REDACTED]

⁸³ [REDACTED]

⁸⁴ [REDACTED]

is [REDACTED].⁸⁵ The victim's date of birth is [REDACTED].⁸⁶ The name of Victim a/0052/06 is [REDACTED].⁸⁷ The victim's date of birth is [REDACTED].⁸⁸

32. The Legal Representative recalls, and resubmits in their entirety, the observations it filed with the Chamber in its response to the Defence application for abuse of process dated 10 December 2010⁸⁹ ("the Response to the abuse of process application"), wherein it explained that certain documents concerning Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 contain names and dates of birth which do not correspond to the victims' real identities and dates of birth.⁹⁰ It further resubmits that the current practice in the Democratic Republic of the Congo ("the DRC") regarding registration at the civil registry and the attribution and use of names at the civil registry has perforce had an impact on individual cases with regard to the attribution of names, to procedures for registering at the civil registry, and to enrolling children in school in the DRC.⁹¹ Finally, it also resubmits that the Defence allegations based on the statements of third persons, seeking to call into question the ages of Victims a/0047/06, a/0048/06 and a/0050/06, are purely and simply speculative.⁹²

33. Regarding certain identity documents admitted into evidence at the Defence's request, the Legal Representative recalls, and repeats, its observations demonstrating the very low probative value⁹³ of the attestations of birth of Victims a/0047/06,⁹⁴

⁸⁵ [REDACTED]

⁸⁶ [REDACTED]

⁸⁷ [REDACTED]

⁸⁸ [REDACTED]

⁸⁹ See the *"Réponse du Représentant légal des victimes a/0047/06, a/0048/06, a/0050/06 et a/0052/06 à la 'Requête de la Défense aux fins d'arrêt définitif des procédures' datée du 10 décembre 2010"*, ICC-01/04-01/06-2675-Conf, 31 January 2011 ("the Response to the abuse of process application").

⁹⁰ *Idem.*, paras. 61-63, and 64-71.

⁹¹ *Ibid.*, paras. 59-60.

⁹² *Ibid.*, paras. 66 and 69.

⁹³ See the Response to the abuse of process application, *supra* footnote 89, paras. 72-76.

⁹⁴ [REDACTED]

a/0048/06,⁹⁵ a/0050/06⁹⁶ and a/0052/06⁹⁷ and the lack of any probative value whatsoever⁹⁸ of the voting cards issued for Victims a/0047/06,⁹⁹ a/0048/06¹⁰⁰ and a/0050/06,¹⁰¹ as well as the irrelevance with regard to Victim a/0052/06¹⁰² of the personal information contained in the database of the DRC Independent Electoral Commission for the individual named [REDACTED].¹⁰³ In general terms, the Legal Representative again submits that the civil registry in the DRC, particularly in Ituri, including the procedure for issuing identity documents, suffered during the period relating to the instant case from numerous imperfections, indeed serious flaws, which allowed any individual who so wished to obtain an identity document containing information which may or may not have been accurate, at his or her convenience.¹⁰⁴ This argument is corroborated by numerous witnesses and confirmed by various international organisations, including the United Nations.¹⁰⁵ Finally, the Legal Representative recalls that the statements of Witnesses OTP-0007, OTP-0008 and OTP-0010 dated 15 November 2010 relating to the circumstances in which the voting cards concerning them were issued have also been admitted into evidence.¹⁰⁶

B. Enlistment of victims under the age of fifteen years into the armed forces of the UPC/FPLC during the period from early September 2002 to 13 August 2003

34. Victim a/0047/06 was abducted by UPC soldiers [REDACTED] in early 2003 as the victim was leaving school and was subsequently sent for military training.¹⁰⁷ The

⁹⁵ [REDACTED]

⁹⁶ [REDACTED]

⁹⁷ [REDACTED]

⁹⁸ See the Response to the abuse of process application, *supra*, footnote 89, paras. 77-79.

⁹⁹ [REDACTED]

¹⁰⁰ [REDACTED]

¹⁰¹ [REDACTED]

¹⁰² See the Response to the abuse of process application, *supra*, footnote 89, paras. 80-81.

¹⁰³ [REDACTED]

¹⁰⁴ See the Response to the abuse of process application, *supra*, footnote 89, paras. 72-75 and 77-78.

¹⁰⁵ *Idem*.

¹⁰⁶ [REDACTED]

¹⁰⁷ [REDACTED]

victim was taken first to [REDACTED] military training camp and then to [REDACTED] military training camp.¹⁰⁸ Witness W-0496 confirmed that the victim was enlisted into the army.¹⁰⁹

35. Victim a/0048/06 was abducted by UPC soldiers [REDACTED] in early 2003 after he had returned home from school¹¹⁰ and was trying to hide from UPC soldiers [REDACTED].¹¹¹ The victim was taken first to the UPC military training camp [REDACTED].¹¹² Witness W-0496 confirmed that the victim was enlisted into the army.¹¹³

36. Victim a/0050/06 was abducted by UPC soldiers when, after the start of the war [REDACTED] in 2002, she was [REDACTED].¹¹⁴ The victim was taken first to [REDACTED] military training camp for two weeks, then to [REDACTED] camp for two weeks, and was finally taken back to [REDACTED] camp where she completed military training.¹¹⁵ The victim's enlistment in the armed forces of the UPC/FPLC is admitted by Witness D01-0005¹¹⁶ and by the Defence itself.¹¹⁷

37. Victim a/0052/06 was abducted by UPC soldiers in July 2002¹¹⁸ when he was in [REDACTED]¹¹⁹ and enlisted in the armed forces of the UPC/FPLC,¹²⁰ where he

¹⁰⁸ [REDACTED]

¹⁰⁹ [REDACTED]

¹¹⁰ [REDACTED]

¹¹¹ [REDACTED]

¹¹² [REDACTED]

¹¹³ [REDACTED]

¹¹⁴ [REDACTED]

¹¹⁵ [REDACTED]

¹¹⁶ [REDACTED]

¹¹⁷ The Defence challenges only the age of Victim a/0050/06 at the time of enlistment in the UPC and not the enlistment itself. [REDACTED]

¹¹⁸ [REDACTED]

¹¹⁹ [REDACTED]

¹²⁰ [REDACTED]

remained until July 2003.¹²¹ After being abducted, the victim was taken to [REDACTED] military training camp¹²² for four months.¹²³

C. Military training of victims under the age of fifteen years in UPC/FPLC military training camps during the period from early September 2002 to 13 August 2003

38. As part of his generally very difficult training at [REDACTED] camp¹²⁴ which lasted around four weeks,¹²⁵ Victim a/0047/06 learned how to fight Lendus from the FNI.¹²⁶ In particular, the victim learned how to run, crawl, perform specific exercises to train as a soldier,¹²⁷ use a firearm,¹²⁸ and sing morale-boosting songs.¹²⁹ Recruits who failed to perform the exercises were beaten with pieces of wood and the girls in particular suffered from this treatment.¹³⁰ Recruits caught trying to escape from the camp were beaten and even risked being killed; the victim personally witnessed the execution of a recruit who had attempted to escape.¹³¹ At [REDACTED] camp the victim was issued with a weapon,¹³² specifically a submachine gun (SMG), and a military uniform.¹³³ At [REDACTED] camp, the recruits were punished daily.¹³⁴ As a form of punishment, a recruit could be imprisoned in a covered pit in the ground, which had only a small opening for ventilation and for prisoners to enter; the pit could hold between 15 and 20 people for periods of up to one week depending on the offence.¹³⁵

¹²¹ [REDACTED]

¹²² [REDACTED]

¹²³ [REDACTED]

¹²⁴ [REDACTED]

¹²⁵ [REDACTED]

¹²⁶ [REDACTED]

¹²⁷ [REDACTED]

¹²⁸ [REDACTED]

¹²⁹ [REDACTED]

¹³⁰ [REDACTED]

¹³¹ [REDACTED]

¹³² [REDACTED]

¹³³ [REDACTED]

¹³⁴ [REDACTED]

¹³⁵ [REDACTED]

At [REDACTED] camp, the victim was beaten twice, the first time for walking too slowly and the second for not dismantling his weapon quickly enough.¹³⁶ The victim's training at this camp lasted between two and three months; training normally lasted three months.¹³⁷ At [REDACTED] camp the commanders selected girl recruits to sleep with them, knowing that the girls could not refuse.¹³⁸ Furthermore, the commanders would decide whether pregnant girls should have an abortion; if a pregnant girl went against the commander's decision and did not have an abortion, she was driven away.¹³⁹ Pregnant girls performed their own abortions by taking traditional products; the victim witnessed the death of one 14-year old girl following an abortion.¹⁴⁰

39. As part of his two weeks of training in [REDACTED] camp,¹⁴¹ Victim a/0048/06 learnt to use a firearm, specifically an SMG,¹⁴² crawl, run and evade the enemy.¹⁴³ The victim was also forced to seek out girls for the purpose of sleeping with them.¹⁴⁴ When recruits were unable to perform the exercises correctly, they were beaten with sticks; the victim was beaten on several occasions by [REDACTED].¹⁴⁵ In case of loss of a weapon or escape from the camp, recruits were severely beaten and could even be killed.¹⁴⁶ A young recruit [REDACTED] was killed in [REDACTED] camp for having lost his weapon.¹⁴⁷

¹³⁶ [REDACTED]

¹³⁷ [REDACTED]

¹³⁸ [REDACTED]

¹³⁹ [REDACTED]

¹⁴⁰ [REDACTED]

¹⁴¹ [REDACTED]

¹⁴² [REDACTED]

¹⁴³ [REDACTED]

¹⁴⁴ [REDACTED]

¹⁴⁵ [REDACTED]

¹⁴⁶ [REDACTED]

¹⁴⁷ [REDACTED]

40. When Victim a/0050/06 arrived in the [REDACTED] training camp, her hair was shaved off with a bottle shard.¹⁴⁸ Training was held every day from 4.00 a.m. and proceeded as follows: the recruits first had to run a race of about 8 kilometres, and then do press-ups, crawl, climb walls and jump into holes,¹⁴⁹ and learn how to use a weapon and to shoot.¹⁵⁰ The training ended at about 11.00 p.m., after the recruits had sung morale-boosting songs.¹⁵¹ During the training, the victim learnt to fight the Walendu.¹⁵² If a recruit disobeyed orders or escaped from the camp,¹⁵³ he or she could be killed or at the very least punished very severely;¹⁵⁴ for example, by being beaten with sticks or even whipped for minor transgressions.¹⁵⁵ The victim was punished for not attending the singing.¹⁵⁶ She was raped by and lost her virginity to [REDACTED], and other girls, [REDACTED], were similarly treated by the UPC/FPLC commanders.¹⁵⁷ Subsequently, the victim was raped several times [REDACTED]¹⁵⁸ and [REDACTED].¹⁵⁹ The victim was given a weapon, specifically an SMG, with ammunition, and a military uniform when she was brought back from [REDACTED] camp to [REDACTED] camp.¹⁶⁰ At [REDACTED] camp, the commanders encouraged recruits to smoke cannabis to give themselves courage before they went to fight.¹⁶¹

41. As part of his military training three times a week in [REDACTED] camp,¹⁶² Victim a/0052/06 learnt to crawl, to take position during battle and to shoot¹⁶³ with

¹⁴⁸ [REDACTED]

¹⁴⁹ [REDACTED]

¹⁵⁰ [REDACTED]

¹⁵¹ [REDACTED]

¹⁵² [REDACTED]

¹⁵³ [REDACTED]

¹⁵⁴ [REDACTED]

¹⁵⁵ [REDACTED]

¹⁵⁶ [REDACTED]. In particular, the victim was first made to roll in a puddle of water and was next ordered to do press-ups on rocks. Finally, she was ordered to crawl and roll over and over.

¹⁵⁷ [REDACTED]

¹⁵⁸ [REDACTED]

¹⁵⁹ [REDACTED]

¹⁶⁰ [REDACTED]

¹⁶¹ [REDACTED]

¹⁶² [REDACTED]

guns which were provided to the recruits [REDACTED].¹⁶⁴ At night, the victim also went on patrol to provide security for the camp.¹⁶⁵ When the victim was in [REDACTED] camp, he was punished for a minor transgression and was thrown into prison, which was a hole in the ground that could hold about 5 detainees.¹⁶⁶ He stayed in prison for about a week.¹⁶⁷ At the end of his training, the victim was given a weapon and a military uniform.¹⁶⁸

D. Active participation of victims under the age of fifteen years in hostilities within the armed forces of the UPC/FPLC during the period from early September 2002 to 13 August 2003

42. When his training was completed, Victim a/0047/06 was first sent on patrol [REDACTED].¹⁶⁹ Afterwards, he became a bodyguard [REDACTED];¹⁷⁰ his role was to provide security for the commander during the commander's movements and to carry his weapon, his Motorola radio, and his documents.¹⁷¹ Within the ranks of the UPC/FPLC, the victim took part in the fighting [REDACTED] against FNI troops.¹⁷² Afterwards, he took part in the fighting [REDACTED] and [REDACTED].¹⁷³ During the fighting in [REDACTED] and [REDACTED], the victim had to use his weapon and kill enemy soldiers.¹⁷⁴ During the fighting in [REDACTED], he sustained a bullet wound to the heel.¹⁷⁵

¹⁶³ [REDACTED]

¹⁶⁴ [REDACTED]

¹⁶⁵ [REDACTED]

¹⁶⁶ [REDACTED]

¹⁶⁷ [REDACTED]

¹⁶⁸ [REDACTED]

¹⁶⁹ [REDACTED]

¹⁷⁰ [REDACTED]

¹⁷¹ [REDACTED]

¹⁷² [REDACTED]

¹⁷³ [REDACTED]

¹⁷⁴ [REDACTED]

¹⁷⁵ [REDACTED]

43. Following his military training, Victim a/0048/06 became a bodyguard [REDACTED];¹⁷⁶ his role was to provide security for the commander, carry his weapons, and carry his Motorola radio.¹⁷⁷ Within the ranks of the UPC/FPLC, the victim took part in the fighting in [REDACTED] and in [REDACTED]¹⁷⁸ against the Lendus.¹⁷⁹ During those battles, he had to use his weapon and to kill enemy soldiers¹⁸⁰ and, during the fighting in [REDACTED], he sustained a bullet wound to his left heel.¹⁸¹ After the fighting in [REDACTED], the victim returned [REDACTED] where, as part of the UPC/FPLC troops, he provided security [REDACTED] during [REDACTED].¹⁸² The victim also accompanied Commander [REDACTED] to recover weapons dropped by aircraft¹⁸³ and had to provide military training to other recruits, although only for a brief period.¹⁸⁴

44. Once her training was completed, Victim a/0050/06 became a bodyguard for commander [REDACTED] and was subsequently absorbed into the UPC/FPLC troops to go into combat.¹⁸⁵ The role of the victim as a bodyguard was to accompany [REDACTED] during his movements, including to battlegrounds, and to provide security for him.¹⁸⁶ Within the ranks of the UPC/FPLC, the victim took part in the fighting against the Lendus¹⁸⁷ in [REDACTED],¹⁸⁸ in [REDACTED]¹⁸⁹ and in [REDACTED],¹⁹⁰

¹⁷⁶ [REDACTED]

¹⁷⁷ [REDACTED]

¹⁷⁸ [REDACTED]

¹⁷⁹ [REDACTED]

¹⁸⁰ [REDACTED]

¹⁸¹ [REDACTED]

¹⁸² [REDACTED]

¹⁸³ [REDACTED]

¹⁸⁴ [REDACTED]

¹⁸⁵ [REDACTED]

¹⁸⁶ [REDACTED]

¹⁸⁷ [REDACTED]

¹⁸⁸ [REDACTED]

¹⁸⁹ [REDACTED]

¹⁹⁰ [REDACTED]

during which she had to use her weapon and kill enemy soldiers.¹⁹¹ During the fighting in [REDACTED], the victim sustained a wound to her left foot (lower part of the leg).¹⁹² In addition, the victim took part in the fighting in [REDACTED], [REDACTED] and [REDACTED],¹⁹³ as well as in the fighting in [REDACTED] against [REDACTED].¹⁹⁴ The victim accompanied [REDACTED] to [REDACTED] to recover weapons and then to transport them to Thomas Lubanga's residence.¹⁹⁵ [REDACTED].¹⁹⁶

45. Once his training was completed, Victim a/0052/06 became bodyguard to Commander [REDACTED]; and his role was to accompany the commander during all his movements and to provide security for him.¹⁹⁷ Soon after, the victim was sent to fight in [REDACTED]¹⁹⁸ against the Lendus of the APC.¹⁹⁹ During that battle, the victim had to use his weapon and to kill enemy soldiers.²⁰⁰ Afterwards, the victim was sent to fight in [REDACTED],²⁰¹ where he fought in two battles, using his weapon.²⁰² In one of these battles, the victim was wounded in the foot by an exploding shell.²⁰³

E. The veracity, reliability and probative value of the victims' statements

46. In regard to the veracity, reliability and probative value of the statements provided by Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06, the Legal Representative repeats its submissions filed with the Chamber in response to the

¹⁹¹ [REDACTED]

¹⁹² [REDACTED]

¹⁹³ [REDACTED]

¹⁹⁴ [REDACTED]

¹⁹⁵ [REDACTED]

¹⁹⁶ [REDACTED]

¹⁹⁷ [REDACTED]

¹⁹⁸ [REDACTED]

¹⁹⁹ [REDACTED]

²⁰⁰ [REDACTED]

²⁰¹ [REDACTED]

²⁰² [REDACTED]

²⁰³ [REDACTED]

abuse of process application.²⁰⁴ In particular, the Legal Representative again submits that the statements of Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 made during their testimony before the Chamber should be granted more weight and probative value than the subsequent statements by these victims, which were provided outside the courtroom.²⁰⁵ Moreover, the statements of Witnesses W-0496 and W-0497 cannot, in any event, be granted more weight and probative value than the statements of Victims a/0047/06 and a/0048/06 who testified before the Chamber under oath.²⁰⁶ Similarly, there is no valid ground for attaching more weight and probative value to the statements of Witnesses D01-0012, D01-0005, D01-0006 and D01-0024 than to the statements provided by Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06, owing also to the existence of circumstances that cast serious doubt on the veracity and probative value of their statements.²⁰⁷ Finally, allowing that there are contradictions and inconsistencies in the various statements provided by Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06, these can be explained firstly by the victims' interest in preserving their security and that of their family members, and secondly by the victims' difficulties in recalling events that are linked to their traumatic experiences in the army and/or by the stress they suffered during their testimony.²⁰⁸

47. The Legal Representative submits that, in any event, any inconsistencies and contradictions in some of the statements provided by Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 are not likely to reduce the weight and probative value attached to their statements when taken as a whole, especially as those parts of their statements that speak to the fundamental aspects of the case are corroborated by other evidence presented at trial.

²⁰⁴ See *Réponse à la requête en abus de procédure*, *supra*, footnote 89, paras. 59-116.

²⁰⁵ *Idem*.

²⁰⁶ *Ibid*.

²⁰⁷ *Ibid*.

²⁰⁸ *Ibid*.

F. Corroboration of the victims' statements

48. According to the evidence presented at trial, from early September 2002 until 13 August 2003, UPC/FPLC soldiers forcibly recruited children, and even groups of children, under the age of fifteen years from various locations in Ituri,²⁰⁹ very often by going to schools or by seizing children in the street. The abducted children were immediately taken to the training camps of the UPC/FPLC,²¹⁰ some of which were located in Mandro, Rwampara, Irumu and Bule,²¹¹ where they all underwent military training. As a general rule, the military training of the children began on the day following their arrival in the camp and could last for up to two or three months. The recruits were subjected to rigorous and harsh discipline, to physical exercise which lasted all day and included running, crawling, marching, saluting and taking positions, in addition to training on how to handle firearms. Moreover, recruits were forced to sing aggressive military songs.²¹²

49. At the end of the military training, the children were deployed into the armed forces of the UPC/FPLC; a large number of them were sent to fight on the front line and some became bodyguards for commanders of the UPC/FPLC.²¹³ The evidence presented at trial shows that children under the age of fifteen years actively

²⁰⁹ According to Witness OTP-0055, who is a former commander of the UPC/FPLC, the recruitment of children into the UPC/FPLC was carried out in several different locations throughout the area controlled by the UPC. [REDACTED]

²¹⁰ [REDACTED]

²¹¹ Witness OTP-0038 testified to the existence of UPC/FPLC military training camps in Mandro, Bule and Mongbwalu: [REDACTED]. Witness OTP-0299 testified to the existence of the military training camp in Mandro: [REDACTED]. Witness OTP-0030 testified to the existence of the UPC/FPLC military training camp in Rwampara: [REDACTED]. The witness testified to the existence of training camps in Bule, Mandro, Mongbwalu and Rwampara: [REDACTED]. Witness OTP-0055 testified to the existence of training camps in Bunia, Rwampara, Bule, Fataki and Aru: [REDACTED]. Witness OTP-0089 testified to the existence of training camps in Mandro, Rwampara, Mongbwalu, Fataki and Irumu: [REDACTED].

²¹² [REDACTED]

²¹³ [REDACTED]

participated in the hostilities which took place in Ituri and, during these hostilities, used their weapons to defend themselves and to kill enemy soldiers.²¹⁴

50. The evidence presented at trial corroborates the existence of the widespread and/or systematic practice whereby recruits were whipped, often cruelly beaten, and sometimes killed during their military training for disobeying orders, lack of diligence, and above all, for attempts to escape from the camp or for loss of a weapon. The practice was confirmed by a former UPC/FPLC soldier, Witness OTP 0299,²¹⁵ and by former child soldiers forcibly recruited by the UPC/FPLC, viz. Witnesses OTP 0038,²¹⁶ OTP 0298,²¹⁷ OTP 0213²¹⁸ and OTP 0294.²¹⁹ The inhumane and degrading training and living conditions of the recruits, including children under the age of fifteen years, in the various military training camps of the UPC/FPLC are corroborated by Witness OTP 0298.²²⁰ The practice whereby UPC/FPLC recruits, including children under the age of fifteen years, were forced to drink alcohol and smoke cannabis is corroborated by Witnesses OTP 0298,²²¹ OTP 0293,²²² OTP 0017²²³ and OTP 0294.²²⁴ The inhumane detention conditions, including for children under the age of fifteen years, in the prisons of the various military camps are corroborated by Witnesses OTP 0298²²⁵ and OTP 0213.²²⁶

51. The existence within the UPC/FPLC of a systematic and/or widespread practice following which girls, including those under the age of fifteen years, served

²¹⁴ [REDACTED]

²¹⁵ [REDACTED]

²¹⁶ [REDACTED]

²¹⁷ [REDACTED]

²¹⁸ [REDACTED]

²¹⁹ [REDACTED]

²²⁰ [REDACTED]

²²¹ [REDACTED]

²²² [REDACTED]

²²³ [REDACTED]

²²⁴ [REDACTED]

²²⁵ [REDACTED]

²²⁶ [REDACTED]

against their will as wives or sex slaves for UPC/FPLC commanders is corroborated by former soldiers of that group – Witnesses OTP 0299²²⁷ and OTP 0017²²⁸ – and by former child soldiers forcibly recruited by the UPC/FPLC – Witnesses OTP 0038,²²⁹ OTP 0298²³⁰ and OTP 0294.²³¹ The existence of a systematic and/or widespread practice whereby UPC/FPLC soldiers, including child soldiers under the age of fifteen years, were tasked with finding girls, including girls under the age of fifteen years, for the sexual needs of their commanders as well as for their own sexual needs, is corroborated by former child soldiers forcibly recruited by the UPC/FPLC – Witnesses OTP 0213²³² and OTP 0294.²³³

2) *Mr Thomas Lubanga Dyilo's criminal responsibility for the commission of the crime set forth in article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute*

52. From early September 2002 until late 2003, Mr Thomas Lubanga Dyilo *de jure* and *de facto* held the position of President of the *Union des Patriotes Congolais pour la Reconciliation et la Paix* (UPC/RP),²³⁴ the UPC being a political-military movement²³⁵ with an armed wing called the *Forces Patriotiques pour la Libération du Congo* (FPLC).²³⁶ Furthermore, Mr Thomas Lubanga was Commander-in-Chief of the armed forces of the UPC/FLPC,²³⁷ was informed of all the military operations planned and implemented by the general staff of the UPC/FPLC,²³⁸ and was also responsible for

²²⁷ [REDACTED]

²²⁸ [REDACTED]

²²⁹ [REDACTED]

²³⁰ [REDACTED]

²³¹ [REDACTED]

²³² [REDACTED]

²³³ [REDACTED]

²³⁴ [REDACTED]

²³⁵ See the testimony of Witness D01-0019, transcript of the hearing of 31 March 2011, ICC-01/04-01/06-T-341-FRA ET WT, p. 4, lines 7-8. See also the testimony of Witness D01-0007, transcript of the hearing of 12 April 2011, ICC-01/04-01/06-T-348-FRA ET WT, p. 37, lines 26-27.

²³⁶ [REDACTED]. In addition, see the testimony of Witness D01-0019, transcript of the hearing of 30 March 2011, ICC-01/04-01/06-T-340-FRA CT WT, p. 62, lines 1-5.

²³⁷ [REDACTED]

²³⁸ [REDACTED]

the logistical organisation and provision of supplies for the said operations.²³⁹ In this regard, he maintained direct and regular contact with the ranking military leaders of the UPC/FPLC,²⁴⁰ such as the Chief of General Staff, Mr Floribert Kisembo, the Head of Operations, Mr Bosco Ntaganda, and the Minister of Defence, Chief Kahwa,²⁴¹ either through meetings held in Mr Thomas Lubanga's residence in Bunia,²⁴² or through methods of communication, such as the Motorola radios with which all of the commanders of the UPC/FPLC were provided.²⁴³

53. During the period in question, Mr Thomas Lubanga Dyilo's bodyguards included children under the age of fifteen years,²⁴⁴ as did the guards at his residence in Bunia.²⁴⁵ Moreover, considering that he maintained direct and regular contact with the ranking military leaders comprising the general staff of the UPC/FPLC,²⁴⁶ he could not have been unaware that the bodyguards of those leaders included children under the age of fifteen years.²⁴⁷ Nor could he have been unaware that there were children under the age of fifteen years among the recruits trained in the various UPC/FPLC training camps, since he visited them regularly.²⁴⁸

54. Moreover, Mr Thomas Lubanga Dyilo issued public calls, both in person and by other means, to the civilian Hema population to be mobilised into the ranks of the UPC/FPLC.²⁴⁹ He implemented, or at least contributed essentially to, the practice within the UPC/FPLC of encouraging the Hema population to participate in the war

²³⁹ [REDACTED]

²⁴⁰ [REDACTED]

²⁴¹ [REDACTED]

²⁴² [REDACTED]

²⁴³ [REDACTED]

²⁴⁴ [REDACTED]

²⁴⁵ [REDACTED]

²⁴⁶ According to Witness OTP-0017, within the general staff of the UPC/FPLC, there was a unit of *kadogos* comprising approximately 45 children, including children who were under the age of fifteen years, who performed the duties of bodyguards for the Chief of General Staff: [REDACTED].

²⁴⁷ [REDACTED]

²⁴⁸ [REDACTED]

²⁴⁹ [REDACTED]

effort, in particular by providing young recruits, including children under the age of fifteen years.²⁵⁰ In any event, he visited UPC/FPLC training camps in person to boost morale and spur on recruits, including children under the age of fifteen years, encouraging them to continue their military training in order then to go into combat.²⁵¹ In addition, Mr Thomas Lubanga Dyilo and the ranking military leaders of the UPC/FPLC acting on his orders²⁵² personally participated in parades during which young UPC/FPLC recruits, including those under the age of fifteen years, were issued with a uniform and a weapon.²⁵³

55. Even allowing that Mr Thomas Lubanga Dyilo did in fact take initiatives to demobilise the children under the age of fifteen years who were in the FPLC and a legacy of the self-defence committees²⁵⁴ created throughout Ituri,²⁵⁵ such initiatives were only taken for the first time in February 2003,²⁵⁶ whereas throughout 2002, the self-defence committees had regularly sent young recruits of all ages to undergo military training with the UPC/FPLC in Mandro, in order that they might then return to their respective self-defence committees. However, as a general rule, they never returned,²⁵⁷ because they joined the ranks of the UPC/FPLC.

56. Accordingly, the Legal Representative submits that, in light of the evidence tendered at trial, as set out above, Mr Thomas Lubanga Dyilo must primarily be held responsible, firstly as a direct perpetrator, for the commission of the crime of

²⁵⁰ [REDACTED]

²⁵¹ [REDACTED]

²⁵² [REDACTED]

²⁵³ [REDACTED]

²⁵⁴ According to Witness D01-0019, self-defence committees comprised, *inter alia*, children who were under the age of fifteen years: see the transcript of the hearing of 30 March 2011, ICC-01/04-01/06-T-340-FRA CT WT, p. 63, lines 17 to 22.

²⁵⁵ According to Witness D01-0007, Mr Thomas Lubanga initiated a meeting with the co-ordinators of the self-defence forces for the purposes of demobilising the children in February 2003. No other initiative of this type had been taken previously: see the testimony of Witness D01-0007, transcript of the hearing of 12 April 2011, ICC-01/04-01/06-T-348-FRA ET WT, p. 24, line 22 to p. 25, line 8 and p. 52, lines 24 to 28.

²⁵⁶ *Idem*.

²⁵⁷ *Ibid.*, p. 32, line 20 to p. 35, line 19.

enlisting and conscripting children under the age of fifteen years into the UPC/FPLC and for using them to participate actively in hostilities within the meaning of article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute, from early September 2002 until 13 August 2003.

57. In particular, throughout the material period, Mr Thomas Lubanga Dyilo, both in person and by other means, called publicly on the civilian Hema population to be mobilised into the ranks of the UPC/FPLC, and encouraged the enlistment and military training of young people, including children under the age of fifteen years, by paying regular visits to the UPC/FPLC training camps and by participating in parades during which the young UPC/FPLC recruits, including those under the age of fifteen years, were issued with a uniform and a personal weapon. Furthermore, his own bodyguards and the guards of his residence in Bunia included children under the age of fifteen years dressed in military uniform and carrying weapons; he was thereby using these children actively in hostilities.²⁵⁸

58. Moreover, in light of the evidence tendered at trial, as set out above, Mr Thomas Lubanga Dyilo must also be held responsible, as co-perpetrator, for the commission of the crime of enlisting and conscripting children under the age of fifteen years into the UPC/FPLC and for using them actively in hostilities, within the meaning of article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute, from early September 2002 until 13 August 2003, in respect of Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06.

59. In particular, throughout the material period, in his capacity as President and Commander-in-Chief of the UPC/FPLC, Mr Thomas Lubanga Dyilo had control over the said political-military movement, including the movement's armed forces, through coordinating the planning and implementation of the military operations

²⁵⁸ The term "active participation of children under the age of fifteen years in hostilities", includes, *inter alia*, cases where children are used as bodyguards: see paragraph 9 *supra*.

carried out by the general staff of the UPC/FPLC, and through being regularly informed, at least, through regular meetings and/or through other methods of communication with the ranking military leaders of the UPC/FPLC, such as Floribert Kisembo and Bosco Ntaganda, and moreover, through his personal responsibility for the logistical organisation and provision of supplies for the military operations of the UPC/FPLC. By regularly visiting the UPC/FPLC's military training camps and by meeting regularly with Floribert Kisembo and Bosco Ntaganda, who were always accompanied by bodyguards, Mr Thomas Lubanga Dyilo could not have been unaware of the presence of children under the age of fifteen years among the bodyguards of these military leaders, nor could he have been unaware of the presence of children of this age category among the recruits being trained in the said camps. Thus, although he was fully aware²⁵⁹ that children under the age of fifteen years were being regularly recruited into the ranks of the UPC/FPLC and were being used actively in hostilities, including as bodyguards, he did not undertake any concrete steps to bring an end to the presence of children under the age of fifteen years in the ranks of the UPC/FPLC,²⁶⁰ even though he had the power to do so in light of his role within the UPC/FPLC.²⁶¹ Moreover, he implemented, or at the very least contributed essentially to,²⁶² the practice within the UPC/FPLC of encouraging the Hema population to participate in the war effort, in particular by providing young recruits, including children under the age of fifteen years. In any event, given that Mr Thomas Lubanga Dyilo should have known that the children recruited into the army should not have been under the age of fifteen years, he failed to comply with his duty to act with due diligence in the circumstances at issue.²⁶³

²⁵⁹ The Legal Representative submits that Mr Thomas Lubanga Dyilo fulfils the requirements of intent and knowledge set forth in article 30 of the Rome Statute: see paragraphs 16 to 18 *supra*.

²⁶⁰ According to Witness OTP-0046, the United Nations notified UPC representatives many times about the illegality of the recruitment of children into its armed forces on numerous occasions, but the UPC displayed no willingness to enter into dialogue: [REDACTED].

²⁶¹ The Legal Representative submits that Mr Thomas Lubanga Dyilo's role within the UPC/FPLC falls within the scope of "control over the organisation": see paragraph 28 *supra*.

²⁶² The Legal Representative submits that Mr Thomas Lubanga's mode of participation falls within the concept of co-perpetration based on joint control over the crime: see paragraph 26 *supra*.

²⁶³ The Legal Representative submits that Mr Thomas Lubanga Dyilo fulfils the requirements for negligence: see paragraph 19 *supra*.

60. In conclusion, as co-perpetrator, Mr Thomas Lubanga Dyilo exercised control over the crime as provided in article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute, jointly with the ranking military leaders of the UPC/FPLC, such as Floribert Kisembo and Bosco Ntaganda, in such a manner as to have contributed essentially to the common plan²⁶⁴ carried out directly by the commanders and soldiers of the UPC/FPLC, and to have exercised control over the will of these persons,²⁶⁵ who were responsible for the execution of the various tasks linked to the implementation of the plan, which consisted of: (i) voluntary and forcible recruitment of young persons, including children under the age of fifteen years, into the UPC/FPLC, and their transportation to the military training camps; (ii) providing military training of recruits and arming them at the said training camps; (iii) assigning recruits, after their training, to military units or as bodyguards to protect military objectives; and (iv) ordering the recruits to fight.

3) *The circumstances to be taken into account in considering Mr Thomas Lubanga Dyilo's criminal responsibility*

61. The Legal Representative submits that, in their Joint Application filed under regulation 55 of the Regulations of the Court,²⁶⁶ the Legal Representatives of the Victims demonstrated that certain factual elements relating to the crime of conscripting and enlisting children under the age of fifteen years into the UPC/FPLC and using them actively in hostilities, with which Mr Thomas Lubanga Dyilo is charged, relate to acts of inhuman and/or cruel treatment and sexual slavery.²⁶⁷ The Legal Representatives specified that the factual elements in question are such that they can be considered both as "circumstances of manner" of a crime within the meaning of rule 145(1)(c) of the Rules of Procedure and Evidence, and as

²⁶⁴ See paragraphs 22 and 25-26 *supra*.

²⁶⁵ See paragraphs 22, 25 and 27-28 *supra*.

²⁶⁶ See the "Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court", ICC-01/04-01/06-1891-tENG, 22 May 2009.

²⁶⁷ *Idem.*, paras. 17-40.

“aggravating circumstances” of a crime within the meaning of 145(2)(b) of the Rules of Procedure and Evidence.²⁶⁸ This last argument advanced by the Legal Representatives of the Victims was supported by the Prosecution,²⁶⁹ and the Chamber seems to be in agreement.²⁷⁰

62. Accordingly, the Legal Representative of the Victims refers to and supports the submissions of the Legal Representatives of the Victims on the factual elements of the crime with which the accused is charged, which relate to acts of inhuman and/or cruel treatment and sexual slavery,²⁷¹ and submits that the said elements must be taken into account for the purposes of considering Mr Thomas Lubanga Dyilo’s criminal responsibility.

²⁶⁸ See the “*Observations conjointes des Représentants Légaux des Victimes quant aux conséquences de l’arrêt de la Chambre d’appel du 8 décembre 2009*”, ICC-01/04-01/06-2211, 15 December 2009, paras. 21-25.

²⁶⁹ See the “*Prosecution’s Observations on the consequences of the Appeal Judgment of 8 December 2009*”, ICC-01/04-01/06-2215, 22 December 2009, paras. 18-19.

²⁷⁰ See *Decision on the Legal Representatives’ Joint Submissions concerning the Appeals Chamber’s Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court* (Trial Chamber I), ICC-01/04-01/06-2223, 30 March 2010, para. 36.

²⁷¹ See footnotes 266 to 268 *supra*.

For these reasons, **the Legal Representative of the Victims respectfully requests the Trial Chamber:**

- to find Mr Thomas Lubanga Dyilo guilty, as direct perpetrator, of the crime of enlisting and conscripting children under the age of fifteen years into the UPC/FPLC and of using them actively in hostilities, within the meaning of article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute, from early September 2002 until 13 August 2003;
- to find Mr Thomas Lubanga Dyilo guilty, as co-perpetrator, of the crime of enlisting and conscripting children under the age of fifteen years into the UPC/FPLC and of using them actively in hostilities, within the meaning of article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute, from early September 2002 until 13 August 2003 in respect of Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06; and
- to take into account the factual elements of the crime with which the accused is charged which relate to acts of inhuman and/or cruel treatment and sexual slavery, as set forth above,²⁷² in considering Mr Thomas Lubanga Dyilo's criminal responsibility.

[signed]
Paolina Massidda
Principal Counsel

Dated this 31 May 2011

At The Hague, The Netherlands

²⁷² See paragraphs 61 and 62 *supra*.