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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 Brief of the V02 Group of Victims

Source: - Mr Paul Kabongo Tshibangu
- Mr Joseph Keta Orwinyo
- Ms Carine Bapita Buyangandu
Legal Representatives of Victims

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo
Ms Fatou Bensouda

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

Legal Representatives of the Victims

Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Paul Kabongo Tshibangu
Mr Luc Walleyen
Mr Hervé Diakiese
Mr Franck Mulenda
Mr Jean Chrysostome Mulamba
Nsokoloni

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Ms Sarah Pellet

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar and Deputy Registrar

Ms Silvana Arbia and Mr Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Centre

Other

CLOSING BRIEF
OF THE V02 TEAM OF LEGAL REPRESENTATIVES OF VICTIMS

Noting article 8(2)(b)(xxvi), 8(2)(e)(vii) and 8(f) of the Rome Statute;

Noting article 25(3)(a) of the Statute;

Noting article 30 of the Statute;

Noting article 68(3) of the Statute;

Noting rule 89(1) of the Rules of Procedure and Evidence;

Noting article 8(1) and (8)(2)(e)(vii) of the Elements of Crimes;

I. Procedural history

1. On 12 January 2006, the Prosecution filed an application for the issuance of a warrant of arrest for Thomas Lubanga Dyilo.¹
2. On 10 February 2006, the Chamber issued a warrant for the arrest of Thomas Lubanga Dyilo.²
3. On 24 February 2006, Pre-Trial Chamber 1 issued a request for the arrest of Thomas Lubanga to the Democratic Republic of the Congo.³
4. On 28 August 2006, the Prosecutor filed the document containing the charges.⁴
5. On 10 February and 3 October 2006, the Chamber found that the instant case fell within the jurisdiction of the Court and was admissible under article 17 of the Statute.⁵
6. On 28 July 2006, the Chamber granted Applicant a/0002/06 the status of victim authorised to participate in the case of *The Prosecutor v. Thomas Lubanga Dyilo* in the situation in the DRC.⁶
7. On 20 October 2006, the Chamber authorised Applicant a/0105/06 to participate in the pre-trial stage of the case of *The Prosecutor v. Thomas Lubanga Dyilo*.⁷
8. On 13 January 2009, the Chamber further authorised Applicants a/0002/06, a/0051/06, a/0078/06, a/0105/06 (for the second time), a/0221/06, a/0224/06, a/0225/06, a/0226/06, a/0227/06, a/0229/06, a/0230/06, a/0231/06, a/0232/06, a/0233/06, a/0236/06, a/0237/06, a/0238/06, a/0244/06, a/0245/06, a/0246/06, a/0248/06, a/0249/06, a/0250/06, a/0001/07, a/0003/07, a/0005/07, a/0054/07, a/0055/07,

¹ ICC-01/04-98-US-Exp.

² ICC-01/04-01/06-2-tEN.

³ ICC-01/04-01/06-9-US.

⁴ ICC-01/04-01/06-356.

⁵ *Supra*, 1. See also ICC-01/04-01/06-512.

⁶ ICC-01/04-01/06-228; ICC-01/04-01/06-1556.

⁷ ICC-01/04-01/06-601.

a/0056/07, a/0057/07, a/0058/07, a/0059/07, a/0060/07, a/0063/07, a/0168/07, a/0169/07, a/0170/07, a/0171/07, a/0172/07, a/0173/07, a/0179/07, a/0181/07, a/0183/07, a/0184/07, a/0187/07, a/0190/07, a/0191/07, a/0251/07, a/0253/07, a/0257/07, a/0270/07, a/0271/07, a/0272/07, a/0273/07, a/0274/07, a/0275/07, a/0277/07, a/0279/07, a/0280/07, a/0282/07, a/0283/07, a/0285/07, a/0122/08, a/0123/08, a/0124/08, a/0125/08, a/0126/08, a/0130/08, a/0612/08, a/0613/08 to be participating victims in the case of *The Prosecutor v. Thomas Lubanga Dyilo*.⁸

9. On 10 July 2009, the Chamber granted Applicant a/0060/09 the status of victim authorised to participate in the case of *The Prosecutor v. Thomas Lubanga Dyilo*.⁹
10. On 21 July 2009, the Chamber also granted the status of victims authorised to participate in the case of *The Prosecutor v. Thomas Lubanga Dyilo* to the parents of Victims a/0002/06, a/0105/06, a/0246/06 and a/0613/08, on account of the harm they personally suffered as a result of their children's recruitment, and also granted victim status to Applicants a/0255/07 and a/0256/07.¹⁰
11. On 20 January 2011, the Chamber further granted the status of victims authorised to participate in the case of *The Prosecutor v. Thomas Lubanga Dyilo* to Applicants a/0026/10, a/0027/10, a/0028/10, a/0029/10, a/0030/10, a/0031/10, a/0033/10, a/0035/10 and a/0037/10.¹¹
12. On 29 January 2007, Trial Chamber I confirmed the charges against Thomas Lubanga Dyilo.¹²
13. On 26 January 2009, the parties and participants made their opening statements.¹³

II – Background of the case

14. The Democratic Republic of the Congo (DRC) consists of eleven provinces, including Orientale Province. Ituri is a district of Orientale Province and is rich in natural resources such as gold, petroleum, timber, coltan and diamonds.
15. In the past, despite such wealth, most of the population of Ituri – consisting of several ethnic groups, including the majority Hemas, the Lendus and their southern sub-group, the Ngitis, the Alurs and the Biras – predominantly made a living from agriculture, animal husbandry and fishing. Agriculture is the principal economic activity of the Lendus, while the Hema tribe is active in livestock farming.
16. In the 1990s, however, as a result of the appetites of multinationals and technological developments, there was a growing interest on the part of the population in activities related to natural resources, such as trading in gold, diamond and coltan.
17. In July 1999, the population of Ituri was plunged into conflict over land distribution and the ownership of natural resources, resulting in inter-ethnic violence in the second half of 2002.

⁸ ICC-01/04-01/06-1556-Corr.

⁹ ICC-01/04-01/06-2035.

¹⁰ ICC-01/04-01/06-2063.

¹¹ ICC-01/04-01/06-2659-Conf-Corr, p. 14.

¹² ICC-01/04-01/06-803-tEN.

¹³ Transcript of hearing ICC-01/04-01/06-T-107-ENG.

18. Taking advantage of the renewed violence, certain local politicians made it their overriding objective to control and market all these resources as they saw fit, with the goal of consolidating their power through the income derived from this illegal trade.
19. On 15 September 2000, Thomas Lubanga Dyilo, who was active in local politics at the time, banded together with fellow politicians to found a political party named “*Union des patriotes congolais*” [Union of Congolese Patriots] (UPC), with headquarters in Bunia.¹⁴
20. In early September 2002, the UPC was renamed *Union des Patriotes Congolais/Réconciliation et Paix* [Union of Congolese Patriots/Reconciliation and Peace] (UPC/RP) and Thomas Lubanga Dyilo was appointed its President. In that capacity, he issued a decree establishing the armed military wing of his party, the *Forces patriotiques pour la libération du Congo* [Patriotic Forces for the Liberation of Congo] (FPLC). Immediately after the establishment of the FPLC, Thomas Lubanga Dyilo became its Commander-in-Chief.¹⁵
21. During the same period, namely July 2002 to December 2003, Thomas Lubanga Dyilo, by virtue of his capacity as FPLC Commander-in-Chief, and other FPLC members undertook the large-scale enlistment of children under the age of fifteen years who were trained in the FPLC training camps, including those in Bule, Centrale, Mandro, Rwampara, Bogoro, Sota and Irumu, and who subsequently participated actively in hostilities, including the fighting in Libi and Mbau in October 2002, Laru in early 2003, Lipri and Bogoro in February and March 2003, Bunia in May 2003, and Djugu and Mongwalu in June 2003.¹⁶
22. It should be noted that, by virtue of his positions as President of the UPC and Commander-in-Chief of the FPLC between July 2002 and December 2003, Mr Thomas Lubanga Dyilo, with awareness of his unique role in the UPC/FPLC, of which he made active use, exercised *de facto* authority and had ultimate control over the adoption and implementation of the plans and policies of the UPC/FPLC – a hierarchically organised armed group. The plans and policies included the enlistment and conscription of children under the age of fifteen years into the FPLC, and using them to participate actively in hostilities.
23. Such is the context of Mr Thomas Lubanga Dyilo’s prosecution, as a co-perpetrator, for:
 - the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles **8(2)(b)(xxvi)** and **25(3)(a)** of the Statute, from early September 2002 to 2 June 2003;

¹⁴ DRC-OTP-0091-0047, DRC-OTP-0105-0109, para. 137 and DRC-OTP-0105-0148, para. 342.

¹⁵ DRC-OTP-0092-0378.

¹⁶ ICC-01/04-01/06-356.

- the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles **8(2)(e)(vii)** and **25(3)(a)** of the Statute, from 2 June to 13 August 2003.¹⁷

24. It was in that same context that the victims with authorisation to participate in the proceedings were enlisted or conscripted by the UPC/FPLC for the purposes of using them to participate in hostilities.¹⁸

III – **War crimes**

A – **Notions**

25. Article **8(2)** of the Rome Statute contemplates “**war crimes**” as including:

- **(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: **(article 8(2)(b)(xxvi))** conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities;
- **(e)** other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: **(article 8(2)(e)(vii))** conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

26. Article **8 (2)(f)** adds: Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

27. Article 8 uses several legal terms, such as *international armed conflict*, *armed conflicts not of an international character*, *national armed forces* and *organized armed groups*, which require some comment.

28. Given that the conduct set out in article 8 of the Statute is characterised as criminal irrespective of whether it is committed in the context of an international or non-international conflict, the Legal Representatives of Victims consider it unnecessary to define these terms.

29. Moreover, in that regard, article **8(1)** of the Elements of Crimes reads:

¹⁷ ICC-01/04-01/06-356, previously cited.

¹⁸ ICC-01/04-01/06-1339-Conf-Anx15, p. 9; ICC-01/04-01/06-1339-Conf-Anx9, p. 9.

- There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international.
- In that context, there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international.
- There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms “**took place in the context of and was associated with**”.

30. Nevertheless, should the terms require clarification, the Legal Representatives of Victims would concur with the position of Pre-Trial Chamber I which, in its 29 January 2007 *Decision on the confirmation of charges*, explained all such expressions in abundant detail.¹⁹

B – Analysis of the constituent elements of the war crimes

31. Article 8(2)(e)(vii) of the Elements of Crimes restrictively defines the constituent elements as follows:

- The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities;
- Such person or persons were under the age of 15 years;
- The perpetrator knew or should have known that such person or persons were under the age of 15 years;
- The conduct took place in the context of and was associated with an armed conflict not of an international character;
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

32. The Legal Representatives of Victims will first analyse the **material elements common to the crimes**, irrespective of whether they were committed in the context of an international or non-international conflict. They will then turn to the **psychological or mental or intentional element**.

a. Material elements

i. Conscripting or enlisting one or more persons

33. This entails the forcible or voluntary recruitment of one or more persons for the purposes of using them to participate in hostilities.

34. In the same vein, relying on various international instruments, the two Additional Protocols to the Geneva Conventions, and Judge Robertson’s individual opinion appended to the 31 May 2004 judgment of the Appeals Chamber of the Special Court for Sierra

¹⁹ ICC-01/04-01/06-803-tEN, paras. 207 to 234.

Leone in the case of *The Prosecutor v. Sam Hinga Norman*, Pre-Trial Chamber I held that “conscripting” and “enlisting” are two forms of recruitment, “conscripting” being forcible recruitment, whereas “enlisting” pertains more to voluntary recruitment. It follows, therefore, according to the Chamber, that enlisting is a “voluntary” act, whilst conscripting is forcible recruitment. In other words, the child’s consent is not a valid defence.²⁰

35. Pre-Trial Chamber I’s explanation was illuminated by the report of expert witness Radhika Coomaraswamy, pursuant to the decision of Trial Chamber I inviting the expert witness to submit in writing her observations on: (a) the definition of “conscripting” or “enlisting” of children; and (b) the interpretation of the expression “using them to participate actively in the hostilities”, particularly in relation to the role of girls in armed forces.²¹

36. With reference to the Rome Statute, the expert witness states:

The war crimes established by the Rome Statute are limited to the conscription and enlistment of children under the age of fifteen years. The conscription and enlistment acts are two forms of recruitment. According to written commentary following the Rome Conference, the terms may be defined by their “ordinary signification[s]”: “Conscription refers to the compulsory entry into the armed forces. Enlistment refers to the generally voluntary act of joining armed forces by enrolment, typically on the ‘list’ of a military body or by engagement indicating membership and incorporation in the forces (para. 4 of the report).

37. Relying on the *Decision on the confirmation of charges* of Pre-Trial Chamber I (ICC-01/04-01/06-803-tEN), and the jurisprudence of Trial Chamber II of the SCSL (Case No. SCSL-2004-16-T, paras. 734 and 735-20 June 2007), the expert witness demonstrates that conscription and enlistment are species of recruitment (para. 8 of the report).
38. In her report, expert witness Radhika Coomaraswamy rightly states that the Court should approach the distinction between conscription and enlistment on a case-by-case basis.²² The Legal Representatives of Victims will therefore set out the context of their clients’ conscription.
39. The expert witness elaborated further, explaining that the case-by-case determination of which kind of recruitment will be relevant in a particular case will require evidence that focuses on the acts children are required to perform, the circumstances of how the child was enrolled and the circumstances surrounding the child’s separation from family and community. The case described by the expert witness at paragraph 16 of her report resembles those of Victims a/0229/06²³ and a/0225/06.

²⁰ ICC-01/04-01/06-803-tEN, paras. 242-248; ICC-01/04-01/06-1229-AnxA (EVD-CHN-0007), para. 10.

²¹ ICC-01/04-01/06-1175, Decision of 18 February 2008, para. 11. See also ICC-01/04-01/06-1229-AnxA (EVD-CHN-0007), para. 1.

²² ICC-01/04-01/06-1229-AnxA (EVD-CHN-0007), paras. 12 and 13.

²³ ICC-01/04-01/06-1229-AnxA (EVD-CHN-0007), para. 16.

40. a/0229/06 states that he was forcibly recruited on the way home from school, just before [REDACTED], after sitting examinations, and was then taken to a militia camp 10 km from [REDACTED].²⁴
41. a/0225/06, for his part, states that he was forcibly recruited off the street (where he was playing ball). He was taken to the [REDACTED] transit camp.²⁵ The victim subsequently mentioned a second camp.²⁶ In all, the victim named two camps.²⁷
42. At paragraph 10 of her report, expert witness Radhika Coomaswaramy shows that consent of the child is not a valid defence to any of the three child soldiering war crimes. The line between lawful recruitment and unlawful recruitment is drawn based solely on age, under the Rome Statute as elaborated upon by the Elements of the Crimes, not on any act of the child.²⁸
43. At paragraphs 5 and 6 of her report, the expert witness establishes the vulnerability of minors conscripted or enlisted into modern conflict: "... the Court should recognize 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".
44. In the instant case, it is beyond doubt that children under the age of fifteen years were enlisted and conscripted into the UPC/FPLC in the period from early September 2002 to 13 August 2003.²⁹
45. Certain pieces of evidence indicate that even prior to the founding of the FPLC, the UPC had enlisted and conscripted children under the age of fifteen years.³⁰
46. After its founding in early September 2002, the FPLC continued to carry out this type of recruitment; it was a systematic practice which was known to the Hema population and which targeted a large number of children.³¹

²⁴ ICC-01/04-01/06-T-230-CONF-FRA, p. 42/71, lines 15-17 and 23-25.

²⁵ ICC-01/04-01/06-T-227-CONF-FRA, p. 66/93, lines 6-8 and p. 69/93.

²⁶ ICC-01/04-01/06-T-227-CONF-FRA, p. 70/93, lines 11-16.

²⁷ ICC-01/04-01/06-T-227-CONF-FRA, p. 74/93, lines 17-22.

²⁸ ICC-01/04-01/06-1229-AnxA (EVD-CHN-0007), para. 10.

²⁹ ICC-01/04-01/06-803-tEN, p. 133.

³⁰ MONUC, *Final Report of the MONUC Special Investigation Team on the Abuses Committed in Ituri from January to March 2003*, DRC-OTP-0152-0310, para. 91; DRC-OTP-0132-0082, para. 20.

³¹ Human Rights Watch, *Ituri: 'Covered in Blood': Ethnically Targeted Violence In Northeastern DR Congo* (DRC-OTP-0163-0344); see in particular the final paragraph of the page ("Yet there are frequent reports of the forcible recruitment of children by the UPC. On November 8, 2002 at 8:00 a.m., the UPC reportedly entered the Ecole Primaire of Mudzi Pela and forcibly rounded up the entire fifth grade, some forty children, for military service. A similar operation was carried out in Salongo where the UPC surrounded a neighborhood and then abducted all the children they could find. At the end of November, a school director complained that half of his students had been lost and spoke openly against the forcible recruitment. The Mothers Forum of Ituri complained

47. As part of this recruitment policy, a large number of children under the age of fifteen years were forced to join the FPLC, which forcibly recruited groups of children in several locations in Ituri, such as the areas surrounding Bunia in August 2002,³² Sota in early 2003,³³ and Centrale.³⁴ Defence Witness D01-0033 confirmed that the forcible recruitment of children generally took place in the area around Ndrele during 2002-2003.³⁵
48. These forcible recruitments were carried out by FPLC commanders,³⁶ and, moreover, Thomas Lubanga Dyilo himself participated in the conscription of a group of children, some of whom were under the age of fifteen years.³⁷
49. In addition, other children under the age of fifteen years “voluntarily” joined the ranks of the FPLC or were made available to the FPLC by their parents, in particular after calls for mobilisation directed at the Hema population; others joined out of a desire for revenge after the loss of a close relative allegedly killed by the militias fighting against the FPLC.³⁸

to UPC President Lubanga in late 2002 about the recruitment of children. The UPC opened a small demobilization center, but, according to local people, this was a mere public relations gimmick; the recruitment of children continued.”)

MONUC, *Special report on the events in Ituri, January 2002-December 2003*: “there can be no doubt that all of the armed groups have systematically recruited [...] children – ranging from 7 to 17 years old – throughout the district of Ituri.” (DRC-OTP-0129-0373, para. 138) and “[r]ecruitment into all armed groups has been both “voluntary” and through abduction, often as the children were in the markets or in the streets where they were forced to get into trucks and taken away. UPC recruitment drives took place regularly throughout 2002 and early 2003.” (DRC-OTP-0129-0373, para. 143).

In this regard, see also Kristine Peduto’s testimony, ICC-01-04-01-06-T-37-FR [15nov2006Edited], p. 76, lines 21-25 and p. 77, lines 17-19.

See also DRC-OTP-0108-0127, para. 21, DRC-OTP-0126-0158, para. 22, DRC-OTP-0126-0126, para. 24.

³² DRC-OTP-0126-0126, para. 23; DRC-OTP-0127-0083, paras. 60 and 61.

³³ DRC-OTP-0108-0126, para. 19 and DRC-OTP-0108-0127, para. 21; DRC-OTP-0108-0067, paras. 20 and 22.

³⁴ DRC-OTP-0126-0158, paras. 21 and 22.

³⁵ ICC-01/04-01/06-T-276-CONF-FRA, p. 68/77, lines 3-10.

³⁶ MONUC, *Final Report of the MONUC Special Investigation Team on the Abuses Committed in Ituri from January to March 2003*, DRC-OTP-0152-0310, para. 90.

³⁷ MONUC, *Histoires individuelles-Bunia (Ituri) Enfants-Soldats* 26/03/2003 (DRC-OTP-0152-0277 and DRC-OTP-0152-0279; ICC-01/04-01/06-803-tEN 02-02-2007 73/134 EO PT).

³⁸ MONUC, *Final Report of the MONUC Special Investigation Team on the Abuses Committed in Ituri from January to March 2003*, “two minors reported public gatherings during which families were asked to provide human forces.

In Bogoro, the *Chef de Collectivité* M. Mugeny and the *Chef de groupement* M. Benjamin were reported as having called on the population to send volunteers to the UPC (DRC-OTP-0152-0310, para. 90), MONUC, *Histoires individuelles-Bunia (Ituri) Enfants-Soldats* 26/03/2003 (DRC-OTP-0152-0277, para. 19).

See also *DRC: MONUC denounces recruitment of child soldiers by Lubanga's UPC/RP*, in which it is stated that “Radio Okapi, run by the UN Mission in the DRC (MONUC), reported that Lubanga had decreed that each

50. The FPLC allegedly accepted them, thus implementing a policy to enlist children under the age of fifteen years.³⁹
51. By a decree dated 1 June 2003, Thomas Lubanga Dyilo, in his capacity as President of the UPC/RP, ordered the demobilisation from the FPLC of any individual under the age of eighteen years. He tasked the National Secretary for Follow-up and Monitoring and the FPLC Chief of General Staff with executing the decree.⁴⁰ At the hearing of 12/04/2011, the Prosecution revealed that the decree of 1 June 2003 was never executed, the demobilisation of child soldiers had never taken place and, on the contrary, the children were rearmed.
52. Several pieces of documentary and oral evidence admitted show that Thomas Lubanga Dyilo's much-discussed decree of 1 June 2003 pertained to the demobilisation of children under the age of eighteen years, rather than under the age of fifteen years.⁴¹

ii. Active participation in hostilities

53. "Active participation" in hostilities means not only direct participation in hostilities, combat in other words, but also covers active participation in combat-related activities such as scouting, spying, sabotage and the use of children as decoys, couriers or at military check-points⁴² or to transport ammunition.⁴³

family in the area under its control must contribute to the war effort by providing a cow, money, or a child for the UPC/RP's rebel militia." (DRC-OTP-0074-0003).

See also in this regard, Human Rights Watch, *Ituri: "Covered in Blood": Ethnically Targeted Violence In Northeastern DR Congo*, (DRC-OTP-0163-0345), and Kristine Peduto's testimony, which also mentions instructions issued by Thomas Lubanga Dyilo to his officials so that "[TRANSLATION] there should be recruitment" (ICC-01-04-01-06-T-37-FR [15nov2006Edited], p. 78, lines 12-25 and p. 79, lines 1-5., See also ICC-01-04-01-06-T-39-FR [21nov2006Edited], p. 66, lines 19-25 and p. 67, lines 1-7).

Moreover, some children also joined the UPC militia following the loss of family members or out of a desire for revenge, see DRC-OTP-0114-0019, paras. 21 and 22, and the MONUC report, *Histoires Individuelles-Bunia (Ituri) Enfants-Soldats* 26/03/2003, DRC-OTP-0152-0274, para. 3; DRC-OTP-0152-0275 to DRC-OTP-0152-0276, para. 7, DRC-OTP-0152-0280, para. 26, and Kristine Peduto's testimony mentioning the different reasons motivating the children to join the armed groups, ICC-01-04-01-06-T-37-FR [15nov2006Edited], p. 92, lines 18-25 and p. 93, lines 1-13).

³⁹ MONUC, *Histoires Individuelles-Bunia (Ituri) Enfants-Soldats* 26/03/2003, DRC-OTP-0152-0274, para. 3; DRC-OTP-0152-0275 to DRC-OTP-0152-0276, para. 7, and DRC-OTP-0152-0280, para. 26; See *Ituri: "Covered in Blood": Ethnically Targeted Violence in Northeastern DR Congo*, DRC-OTP-0163-0345.

⁴⁰ *Décret N°01bis/UPC/RP/CAB/PRES/2003 du 1er juin 2003 portant démobilisation des enfants-soldats des forces patriotiques pour la libération du Congo*, DRC-OTP-0151-0299.

⁴¹ ICC-01-04-01-06-T-37-FR[15Nov2006Edited], p. 87, lines 20 to 25 and p. 88, lines 1-16. See also Human Rights Watch report, *Ituri: "Covered in Blood" Ethnically Targeted Violence in Northeastern DR Congo*, DRC-OTP-0163-0344; DRC-OTP-0130-0409, para. 142.

⁴² *Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the establishment of an International Criminal Court*, addendum 1, UN Doc. A/CONF.183/2/Add.1, p. 21.

⁴³ ICC-01/04-01/06-1339-Conf-Anx30, p. 10/27; ICC-01/04-01/06-1652-Conf-Exp-Anx6, p. 9; ICC-01/04-01/06-1339-Conf-Anx68, p. 10; ICC-01/04-01/06-1652-Conf-Exp-Anx5, p. 9; ICC-01/04-01/06-1339-Conf-No. **ICC-01/04-01/06**

54. This is also the case, as Pre-Trial Chamber I has affirmed,⁴⁴ 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.⁴⁵
55. Expert witness R. Coomaraswamy also defined the parameters of interpretation of the expression “using them to participate actively in hostilities”. That crime proscribes the acceptance of a child’s participation to support conflict; the “participate actively” standard covers combatant and non-combatant children (para. 17 of the report).
56. At paragraph 19, with reference to Pre-Trial Chamber I’s *Decision on the confirmation of charges*, the expert witness stated: the Pre-Trial Chamber placed an outer limit on the “participate actively” standard, stating that it does not apply when the contribution in question is “manifestly without connection to the hostilities”. The Chamber provided the examples of food delivery and domestic help in an officer’s married accommodation as activities without connection, in contrast to related activities such as guarding military objects or acting as a bodyguard.⁴⁶
57. The same applies to the use of children as porters to take supplies to the front line, or activities at the front itself. The jurisprudence of the SCSL Trial Chamber encapsulates this in its judgement of 27 June 2007 in the AFRC case: “‘Using’ children to ‘participate actively in the hostilities’ encompasses putting their lives directly at risk in combat [...] [A]ny labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation.”⁴⁷
58. In light of these considerations, there are substantial grounds to believe that the FPLC used children under the age of fifteen years to participate actively in hostilities.
59. Indeed, after their recruitment, the children were taken to FPLC training camps in Centrale, 12 km north of Bunia,⁴⁸ Mandro, 15 km east of Bunia,⁴⁹ Rwampara, 13 km

Anx68, p. 10; ICC-01/04-01/06-1339-Conf-Anx80, p. 10; ICC-01/04-01/06-1339-Conf-Anx83, p. 12; ICC-01/04-01/06-1339-Conf-Anx9, p. 9.

⁴⁴ ICC-01/04-01/06-803-tEN, paras. 262-263.

⁴⁵ 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, p. 925, para. 3187 and p. 1404, para. 4557. See also the *Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the establishment of an International Criminal Court*, addendum 1, UN Doc. A/CONF.183/2/Add.1, p. 21.

⁴⁶ ICC-01/04-01/06-1229-AnxA (EVD-CHN-0007), para 19.

⁴⁷ *Prosecutor v. Brima, Kamara, Kanu* (AFRC accused), Case No. SCSL-2004-16-T, paras. 736 and 737, 20 June 2007.

⁴⁸ DRC-OTP-0126-0158, para. 23 and DRC-OTP-0126-0159, para. 24; DRC-OTP-0108-0131, para. 42.

⁴⁹ DRC-OTP-0105-0105; in this regard, see also Human Rights Watch report, *Ituri: “Covered in Blood” Ethnically Targeted Violence in Northeastern DR Congo* (DRC-OTP-0163-0344).

south-west of Bunia,⁵⁰ Irumu, 55 km south-west of Bunia,⁵¹ Bule, 110 km north-east of Bunia⁵², Bogoro⁵³ and Sota,⁵⁴ amongst other places, where they received military training. Defence Witnesses D01-0033 and D01-0032 confirm that they received military training; D01-0032 confirms that he met Victim a/0270/07 during his military training;⁵⁵ D01-0033 speaks of his military training, specifying that boys, girls and even pupils from [REDACTED] were there during his training.⁵⁶

60. Upon completion of this military training, which consisted, *inter alia*, of lengthy and exhausting physical exercises which lasted all day, such as saluting, marching, taking position and running, singing aggressive military songs, the use of firearms, etc, the children were deemed fit for combat and each received a military uniform, a firearm and ammunition from their FPLC commanders, who then sent them to the front line to fight.⁵⁷ Defence Witness D01-0033 confirms that the clashes between the FNI and the UPC took place around Ndrele from 2002 to 2003.⁵⁸ He confirms the existence of the UPC camp in Ndrele,⁵⁹ which he names.⁶⁰

61. In the instant case, the children under the age of fifteen years participated actively in hostilities, specifically in Libi and Mbau in October 2002,⁶¹ in Largu in early 2003,⁶² in Lipri⁶³ and Bogoro⁶⁴ in February/March 2003, and in Bunia in May 2003.⁶⁵

⁵⁰ DRC-OTP-0126-0126, para. 24; See also ICC-01-04-01-06-T-37-FR [15nov2006Edited], p. 48, line 12 to p. 49, line 25 and see also video DRC-OTP-0120-0293 featuring Thomas Lubanga Dyilo visiting the Rwampara camp.

⁵¹ DRC-OTP-0108-0127, para. 22, DRC-OTP-0108-0068, paras. 22 and 23.

⁵² MONUC, *Special report on the events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0376, para. 153; DRC-OTP-0114-0019, para. 23.

⁵³ MONUC, *Special report on the events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0353, para.

64. MONUC, *Histoires Individuelles-Bunia (Ituri) Enfants-Soldats* 26/03/2003; DRC-OTP-0152-0281, para. 28; DRC-OTP-0108-0131, para. 42.

⁵⁴ MONUC, *Report on Child Soldiers in Ituri*, DRC-OTP 0152-0255; DRC-OTP-0105-0149, para. 348.

⁵⁵ ICC-01/04-01/06-T-275-CONF-FRA, p. 11/65 lines 14-2; p. 12/65, lines 7-17; and p.13/65, lines 9-10.

⁵⁶ ICC-01/04-01/06-T-276-CONF-FRA, p. 60/77 lines 20-24 and p. 33/77 lines 6-14; ICC-01/04-01/06-T-227-CONF-FRA, p. 16/45 lines 22-25, and p. 17/45 lines 7-25.

⁵⁷ DRC-OTP-0108-0128, para. 28; DRC-OTP-0108-0069, para. 26; DRC-OTP-0126-0160, para. 27. See also the testimony of Kristine Peduto, ICC-01-04-01-06-T-37-FR [15nov2006Edited], p. 54, lines 6-10. See video recording DRC-OTP-0120-0293; DRC-OTP-0108-0128, para. 25; DRC-OTP-0108-0128, para. 24; DRC-OTP-0126-0160 to DRCOTP-0126-0161, para. 29; DRC-OTP-0108-0129, para. 32; DRC-OTP-0108-0070, para. 31; DRC-OTP-0126-0131, para. 41; DRC-OTP-0126-0162 to DRC-OTP-0126-0163, para. 37; DRC-OTP-0132-0084, para. 28. See also the testimony of Kristine Peduto, ICC-01-04-01-06-T-37-FR [15nov2006Edited], p. 24, lines 16-25; p. 26, lines 6-14 and p. 38, lines 3-100.

⁵⁸ ICC-01/04-01/06-T-276-CONF-FRA, p. 62/77, lines 7-25.

⁵⁹ ICC-01/04-01/06-T-276-CONF-FRA, p. 63/77, lines 15-20.

⁶⁰ ICC-01/04-01/06-T-276-CONF-FRA, p. 68/77, lines 8-10.

⁶¹ DRC-OTP-0126-0131, particularly paras. 41, 45 and 46.

⁶² DRC-OTP-0132-0089; see in particular paras. 49-54.

62. In addition, the children under the age of fifteen years were also used as bodyguards by the FPLC commanders, even during military deployments;⁶⁶ Thomas Lubanga Dyilo personally used them.⁶⁷
63. Lastly, these children under the age of fifteen years were also responsible for protecting the general staff headquarters located in Bunia.⁶⁸
64. In light of all the evidence set out above, there are substantial grounds to believe that the particular victims represented by the V02 team were conscripted by the FPLC mainly in Mahagi and Aru and predominantly trained in several camps, including Bule, and that they took part in hostilities at various locations, including those mentioned above. Some of the victims acted as bodyguards for commanders, including Mobozo, Kisembo, Ndayisaba, Linganga, Bachu, Bosco, Kasereka, Wgando, Patrick, Mugisa, Soudanais, Adriko, Katanasi, Samy and Samuel.
65. From the foregoing, it can be seen that there is sufficient evidence to establish substantial grounds to believe that, during the period from September to August 2003, in the context of an armed conflict, whether international or non-international, the FPLC enlisted and conscripted children under the age of fifteen years into its armed group for the purposes of using them to participate actively in hostilities.

iii. The person or persons were under the age of fifteen years

66. Article **8(2)(e)(vii)(2)** of the Elements of Crimes stipulates that the person or persons who were enlisted and conscripted and who participated actively in hostilities must be under the age of fifteen years.
67. As previously stated, several pieces of evidence admitted into the record show that even prior to the creation of the FPLC, the UPC had already enlisted and conscripted children under the age of fifteen years during the period from September 2002 to August 2003.⁶⁹

⁶³ DRC-OTP-0108-0131 to DRC-OTP-0108-0132, paras. 43, 44 and 45; DRC-OTP-0108-0072 to DRC-OTP-0108-0073, paras. 39 to 43); DRC-OTP-0126-0166, para. 51; DRC-OTP-0114-0023, para. 41.

⁶⁴ DRC-OTP-0108-0133, para. 51; MONUC, *Special report on the events in Ituri, January 2002-December 2003*; DRC-OTP-0129-0375, para. 149; see also ICC-01/04-01/06-T-37-FR [15nov2006Edited] p. 54.

⁶⁵ DRC-OTP-0132-0090, para. 55 to DRC-OTP-0132-0091, paras. 56 and 57.

⁶⁶ DRC-OTP-0126-0159, para. 26; DRC-OTP-0132-0087, para. 39; DRC-OTP-0108-0072, para. 40; and DRC-OTP-0108-0129, para. 33.

⁶⁷ Testimony of Kristine Peduto, ICC-01/04-01/06-T-37-FR [15 nov2006Edited], p. 82, line 10 to p. 83, line 1. See also the cross-examination of Kristine Peduto, ICC-01/04-01/06-T-39-FR, [21nov2006Edited], p. 80, line 5 to p. 83, line 3.

⁶⁸ Testimony of Kristine Peduto, ICC-01-04-01-06-T-37-FR [15nov2006Edited], p. 23, line 19 to p. 24, line 25; see also the cross-examination of Kristine Peduto, ICC-01-04-01-06-T-38-FR [20nov2006Edited], p. 69, line 10 to p. 70, line 24.

⁶⁹ MONUC, *Final Report of the MONUC Special Investigation Team on the Abuses Committed in Ituri from January to March 2003*, DRC-OTP-0152-0310, para. 91; DRC-OTP-0132-0082, para. 20.

68. Moreover, awareness of the massive presence of children under the age of fifteen years prompted its President, Thomas Lubanga Dyilo, to order the demobilisation from the FPLC of any individual under the age of eighteen years by decree of 1 June 2003.⁷⁰
69. In the case at bar, all of the direct victims represented by the V02 team were under the age of fifteen years at the time of their recruitment into the FPLC.⁷¹
70. Accordingly, there is sufficient evidence to establish substantial grounds to believe that during the aforesaid period, the persons who were enlisted and conscripted into the FLPC and who participated actively in the hostilities were under the age of fifteen years.

iv. The existence or context of an armed conflict

71. Under article **8(2)(b)(xxvi)** and **(8)(2)(e)(vii)** of the Statute and the Elements of Crimes, criminal responsibility accrues for the enlistment and conscription of children under the age of fifteen years and for using them to participate actively in hostilities if, and only if, the conduct took place in the context of and was associated with an international armed conflict or armed conflict not of an international character.
72. For the sake of clarity, it is necessary to explain the terms “*armed conflict of an international character or not of an international character*”, despite the fact that article 8 of the Statute defines the same conduct as criminal regardless of whether it was committed in the context of an international or non-international conflict.
73. Article 1 of Protocol II Additional to the Geneva Conventions of 1949 defines international armed conflict as all armed conflicts which take place in the territory of a State between its armed forces and dominant armed forces or other organised armed groups.
74. However, a conflict in the territory of a State between two ethnic groups may be classed as an international armed conflict, provided that it has the necessary characteristics of intensity, duration and characterisation.⁷²
75. Taking such definitions into account and in light of the evidence admitted in the instant case, there is sufficient evidence to establish substantial grounds to believe that from September 2002 to August 2003, an armed conflict of a certain degree of intensity existed on the territory of Ituri and involved, *inter alia*, the UPC, PUSIC and the FNI.⁷³ In

⁷⁰ Décret N°01bis/UPC/RP/CAB/PRES/2003 du 1er juin 2003 portant démobilisation des enfants-soldats des forces patriotiques pour la libération du Congo, DRC-OTP-0151-0299.

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⁷² *Dictionary of the international law of armed conflict*, International Committee of the Red Cross.

⁷³ See the various attacks carried out by the FNI cited in the MONUC *Special report on the events in Ituri, January 2002-December 2003*.

particular, the UPC and the FNI fought over control of the gold-mining town of Mongbwalu.⁷⁴ In early November 2003, the UPC/FPLC carried out a military operation against the town of Tchomia, which was then under PUSIC control,⁷⁵ the village of Iga Barrière, and the town of Nizi in December 2003;⁷⁶ numerous other armed attacks were carried out in Ituri during that period,⁷⁷ causing many victims.⁷⁸

76. For this reason, a political statement was signed in mid-August 2003 in Kinshasa by the main armed groups operating in Ituri calling on the transitional government to organise “[TRANSLATION] a meeting with us, current political and military actors on the ground, so as to nominate by consensus, new administrative officials for appointment”.⁷⁹

77. In fact, at the time, the Security Council even adopted a resolution pursuant to Chapter VII of the Charter of the United Nations and remained actively seized of the matter for the entire duration of the material period.⁸⁰

⁷⁴ See the Human Rights Watch report, *The Curse of Gold*, DRC-OTP-0163-0410: “After the Ugandan forces had left in May 2003, the UPC retook Mongbwalu on June 10, 2003. [...] The UPC was able to hold the town for only forty-eight hours before being pushed back by the FNI combatants under the command of Mateso Ninga”. See also DRC-OTP-0126-0122; and DRC-OTP-0126-0139, para. 68.

⁷⁵ DRC-OTP-0105-0085, paras. 178-180; DRC-OTP-0014-0272; and DRC-OTP-0018-0172.

⁷⁶ MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*: “In December 2003, the Child Protection Section visited the Kilo-État and Iga Barrière/Nizi areas, where there are gold fields, the latter controlled by UPC militia and the former by FNI. In the UPC-controlled Iga Barrière area, the former headquarters of the Kilo Moto Mining Company, the Section staff saw that three quarters of a mine pit team were under 18 years of age, most being between 11 and 15. Sources at the site alleged that the children present in the mine were all active or former child soldiers.” (DRC-OTP-0129-0377, para. 155). See also *Fifteenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*: “there have been some 20 separate attacks on the Mission, including on its aircraft and patrols in Kasenyi (16 January) and near Iga Barrière (19 and 20 January).” This report also states that a MONUC staff member was killed by a member of the UPC-L (DRC-OTP-0130-0462, para. 25).

⁷⁷ MONUC’s *Special Report on the Events in Ituri, January 2002-December 2003* (DRC-OTP-0129-0394) mentions the following attacks: 10 June 2003: Lendus attack Nioka; 11 June 2003: Lendu and Ngiti militias attack Kasenyi; 6 and 7 July 2003: Lendus and Ngitis attack Ambe and the surrounding areas; 15 July 2003: the same militias attack Tchomia, killing ten (more than 80 according to the *Interim report of the Special Rapporteur on the situation of human rights in the Democratic Republic of the Congo*, 24 October 2003, DRC-OTP-0130-0283, para. 41); 19 July 2003: FNI and FAPC attack Fataki; 23 July 2003, Ngiti militia attack Kaseyni; 5 August 2003: FNI and FAPC attack Fataki; 22 August 2003: reports of massacre in Gobu; late August–early September 2003: reports of new attacks against the population of Fataki; 6 October 2003: Lendu forces attack Kachele. See also UPC attack on Mongbwalu on 10 June 2003, not mentioned in the various United Nations reports, but described in some detail in the Human Rights Watch report, *The Curse of Gold* : DRC-OTP-0163-0399 to DRC-OTP-0163-0400; DRC-OTP-0126-0139, paras. 68 *et seq.*

⁷⁸ According to MONUC’s *Special Report on the Events in Ituri, January 2002-December 2003*, the above-mentioned attacks caused approximately 400 deaths. Furthermore, for the whole of the material period, the hostilities in Ituri caused the displacement of tens of thousands of people. See, for example, paragraph 82 of the Special Report: “[t]he total of the new internally displaced persons as a result of the May events in Bunia was reportedly 180,000 persons.”: DRC-OTP-0129-0358.

⁷⁹ *Déclaration politique des responsables politiques et militaires de l’Ituri, réunis en concertation du 16 au 17 août 2003 à Kinshasa* (DRC-OTP-0093-0814). See also the Human Rights Watch report that the statement was signed in August; see also the two IRIN press reports, including an interview with Thomas Lubanga Dyilo (DRC-OTP-0159-0276 and DRC-OTP-0074-0028).

⁸⁰ See Security Council resolution S/RES/1493 of 28 July 2003: “Deeply concerned by the continuation of hostilities in the eastern part of the Democratic Republic of the Congo, particularly in North and South Kivu and in Ituri, and by the grave violations of human rights and of international humanitarian law that accompany

78. Based on the foregoing analysis, there are substantial grounds to believe that there was indeed a conflict on the territory of Ituri involving the above-mentioned armed groups, organised within the meaning of article 8(2)(f) of the Statute, since it is clearly apparent that the UPC/FPLC was capable of carrying out large-scale military operations for a protracted period of time.⁸¹
79. Witness T0055 testified that the UPC was highly structured, in that each of its sectors had brigades. For example, in Mahagi Sector, there were three brigades and several commanders, including Sami Ndeze, Ndaisaba, and Kisembo,⁸² the commander of Mahagi Sector being Mugisha. Witness T0055 described the chain of command for every brigade, namely several battalion commanders and company commanders.⁸³
80. Similarly, intelligence agents were present at the brigade, battalion, company and section levels and were respectively given titles such as T2 brigade, T2 battalion, desk officer at company level, or AIS at section level.⁸⁴
81. In Mahagi Sector alone, it has been proven that the UPC/FLPC was an organised armed group within the meaning of article 8(2)(f) of the Statute, and that some of the victims were in the ranks under certain sector commanders, including Victim a/0246/06, who was part of Commander [REDACTED]'s escort, and Victim a/0250/06, who was in the ranks of [REDACTED]'s soldiers.
82. From this organisation, which proves the existence of a chain of command and the coordinated organisation of brigades, it is possible to infer the existence of a common plan between the perpetrators of the crimes for which Thomas Lubanga is on trial before the Chamber.⁸⁵ As regards the recruitment plan, Witness 0055 explained his understanding of the situation.⁸⁶

them”, the Security Council “[a]uthorizes MONUC to use all necessary means to fulfil its mandate in the Ituri district [...] [r]equests the Secretary-General to deploy in the Ituri district, as soon as possible, the tactical brigade-size force [...] by mid-August 2003” (DRC-OTP-0131-0161, preamble and paras. 26 and 27). See also the Fourteenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, 17 November 2003, S/2003/1098: “Despite the historic advances made in the formation of the Transitional Government in Kinshasa, [...] fighting and conflict continued in Ituri [...]” (DRC-OTP-0130-0409, paras. 2 and 3).

⁸¹ MONUC, *Special report on the events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0329.

⁸² EVD-V-02-001, entered into the record on 20/5/2010.

⁸³ ICC-01/04-01/06-T-177-CONF-FRA, p. 32, lines 6-18.

⁸⁴ ICC-01/04-01/06-T-177-CONF-FRA, p. 40, lines 15-25, pp. 41-43.

⁸⁵ ICC-01/04-01/06-T-176-CONF-FRA, page 22, lines 12-16: “[TRANSLATION] *And Bosco also gave me the same answer. He said to me: “Let these people be attacked because they’re refusing to do what they’re being told to do.” You see it was the same answer. So, there was nothing else I could do. I had to go along with it because it was in their programme, in their plans.*”

⁸⁶ ICC-01/04-01/06-T-177-CONF-FRA, p. 53, lines 23-25, pp. 54-55, line 3. ICC-01/04-01/06-T-178-CONF-FRA, p. 29, line 25 to p. 30, line 8; p. 59, lines 18-25 to p. 61, line 5.

v. *The conduct took place in the context of and was associated with an armed conflict*

83. Once the existence of an armed conflict is established, it should be noted that for a particular crime to qualify as a war crime within the meaning of articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute, it is necessary to establish a sufficient and clear nexus between that crime and the conflict. In other words, it must be proved that there are substantial grounds to believe that the alleged crimes were closely related to the hostilities.⁸⁷
84. As previously stated, the Elements of Crimes require the material conduct to have taken place in the context of, and to have been associated with, that conflict.
85. In that regard, Pre-Trial Chamber I held, following the approach of the jurisprudence of the ICTY,⁸⁸ that the conduct must have been related to the hostilities occurring in all or part of the territories controlled by the parties to the conflict. The armed conflict need not be considered the ultimate reason for the conduct and the conduct need not have taken place in the midst of battle. Nonetheless, the armed conflict must play a substantial role in the perpetrator's decision, in his or her ability to commit the crime or in the manner in which the conduct was ultimately committed.⁸⁹
86. On the evidence admitted in this case, there are substantial grounds to believe that children under the age of fifteen years were enlisted and conscripted in order to undergo a short military training lasting less than two months, during which they learnt how to use weapons, among other skills. The purpose of the training was to use them to participate in hostilities alongside UPC militia members, specifically in Libi, Mbau, Kpandroma, Lipri, Largu and in Bunia and to "fight the Lendu enemies".⁹⁰
87. In this respect, one witness pointed out in his statement that:

[TRANSLATION] In any event, after the Ugandan authorities granted the Hemas the opportunity for military training, an extensive recruitment campaign was organised in Bunia and the surrounding area. Kahwa said that he told the *chefs de collectivité* to send over the youngest possible Hemas. Still according to Kahwa, about 750 militiamen – all Hemas – were trained at Kyankwanzi camp in Uganda. [...] Chief Kahwa offered Mandro as the UPC's first military training centre. With the site agreed upon, the Hema traditional chiefs sent their young people to Mandro to undergo military training.⁹¹

88. This is corroborated by Kristine Peduto's testimony⁹² at the confirmation hearing, by a Human Rights Watch report dated July 2003,⁹³ and by the video of Thomas Lubanga

⁸⁷ *Prosecutor v. Dario Kordic and Mario Cerkez*, Judgement of 26 February 2001, Case No. IT-95-14/2-T, paras. 32 and 33.

⁸⁸ *Prosecutor v. Dusko Tadic*, Judgement of 2 October 1995, Case No. IT-94-1-A, para. 70 or *Prosecutor v. Radoslav Brdjanin*, Judgement of 1 September 2004, Case No. IT-99-36-T, para. 123.

⁸⁹ ICC-01/04-01/06-803-tEN, para. 287.

⁹⁰ *Supra*, 16 and 51-55.

⁹¹ DRC-OTP-0105-0099, para. 79 and DRC-OTP-0105-0105, para. 115.

Dyilo's visit to the Rwampara training camp on 12 February 2003 in which he is seen urging new recruits to finish their training and to prepare for combat.⁹⁴

89. In light of all this evidence, there are substantial grounds to believe that the conduct took place in the context of, and was associated with, an armed conflict in Ituri between July 2002 and late December 2003, in which the UPC/RP and the FPLC were key players.

a. Mental or psychological element

90. Article (30)(1) of the Statute stipulates that “[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge”.

- Article 8(1)(2)(e)(vii)(3)(5) of the Elements of Crimes further provides as follows:
- The perpetrator knew or should have known that such person or persons were under the age of 15 years;
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

91. From article 30 of the Statute, the mental element is clearly “*with intent and knowledge*” and applies to all crimes within the Court’s jurisdiction, unless otherwise provided by the definition of the crime concerned.

92. That mental element is also applicable to the crimes charged in the instant case: “*the perpetrator knew ... that such person or persons were under the age of 15 years; the perpetrator was aware of factual circumstances that established the existence of an armed conflict*”.

93. However, the third element stipulated in the Elements of Crimes for the crimes concerned requires that, in relation to the age of the victims: “*the perpetrator [...] should have known* that such person or persons were under the age of 15 years”.

94. In this regard, Trial Chamber I states that this constructive knowledge requirement falls within the concept of negligence because it is met when the suspect:

- 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

⁹² ICC-04-01-01-06-T-37 FR [15Nov2006Edited], p. 78, lines 12-27 and p. 79, lines 1-14; see also ICC-04-01-01-06-T-39 FR [21Nov2006Edited], p. 66, lines 19-25 and p. 67, lines 1-7.

⁹³ Human Rights Watch, *Ituri: “Covered in Blood” Ethnically Targeted Violence in Northeastern DR Congo*, DRC-OTP-0163-0345.

⁹⁴ DRC-OTP-0120-0343, lines 169-175, cited in ICC-01/04-01/06-803-tEN, page 129/134, footnote 558.

- lacked such knowledge because he or she did not act with due diligence in the relevant circumstances. One can only say that the suspect “should have known” if his or her lack of knowledge results from his or her failure to comply with his or her duty to act with due diligence.⁹⁵

95. Trial Chamber I held that the “should have known” requirement as provided for in the Elements of Crimes in relation to articles 8(2)(b)(xxvi) and 8(2)(e)(vii) is an exception to the “intent and knowledge” requirement set forth in article 30 of the Statute. Accordingly, as provided for in article 30(1) of the Statute, it will apply in determining the age of the victims, whereas the general “intent and knowledge” requirement will apply to the other objective elements of the war crimes set forth in articles 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.⁹⁶

96. With respect to the existence of the armed conflict, Trial Chamber I notes that the Elements of Crimes require only that “[t]he perpetrator was aware of factual circumstances that established the existence of an armed conflict”, without going as far as to require that he or she conclude, on the basis of a legal assessment of the said circumstances, that there was an armed conflict.⁹⁷

97. In light of the afore-mentioned legal provisions and Trial Chamber I’s position, there are substantial grounds to believe that, throughout the period of the events, Thomas Lubanga Dyilo:

- was aware of the implementation of the common plan or the strategy of forcible or voluntary recruitment of children under the age of fifteen years into the ranks of the FPLC or of the use of them to participate actively in military operations and as bodyguards to protect military objectives;
- accepted such a result by reconciling himself with it or by condoning it.

98. In fact, Thomas Lubanga Dyilo was present at the time and place of the forcible enlistment of children under the age of fifteen years into the FPLC, and, as President and Commander-in-Chief of the FPLC and the coordinator of the implementation of the common plan with other members of the hierarchy with a view to bolstering the UPC/RP and FPLC war effort, he even gave a speech before the young FPLC recruits, including those under the age of fifteen years, urging them to complete their military training and to prepare to participate in military operations.⁹⁸

⁹⁵ ICC-01/04-01/06, para. 358.

⁹⁶ ICC-01/04-01/06-803-tEN, para. 359.

⁹⁷ ICC-01/04-01/06-803-tEN, para. 360.

⁹⁸ MONUC, *Histoires individuelles – Bunia (Ituri). Enfants soldats* DRC-OTP-0152-0278; ICC-04-01-01-06-T-37-FR [15Nov2006Edited], p. 23, line 13 to p. 24, line 25; Transcript of a video (DRC-OTP-0120-0342, line 142, to DRC-OTP-0120-0349, line 329).

99. In light of the foregoing, there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo:

- was aware of the factual circumstances that established the existence of an armed conflict, be it international or non-international;
- was aware of the existence of a nexus between the enlistment and conscription of children under the age of fifteen years into the FPLC and their active participation in hostilities, on the one hand, and the armed conflict taking place in Ituri, on the other;
- was aware of the specific role that he played within the UPC/RP and the FPLC;
- was aware of his co-ordinating role in the implementation of the common plan in furtherance of the UPC/RP and FPLC war effort by voluntarily or forcibly recruiting young people into the FPLC, by subjecting them to military training and by using them to participate actively in military operations, as bodyguards and to protect military objectives;
- was aware of the essential nature of his co-ordinating role in the implementation of the common plan and of his ability to frustrate the implementation of the plan by refusing to play this co-ordinating role.

C - Personal interests of the victims (article 68 of the Statute and Rule 89 of the RPE)

100. On 2 April 2009, the Legal Representatives of Victims petitioned Trial Chamber I to allow Victims a/0225/06, a/0229/06 and a/0270/07 to appear in person.⁹⁹ One reason for the petition was that Mahagi Territory, like many other areas from which the victims represented by the VO2 team come, was not specifically mentioned by the Prosecutor, despite being the scene of heinous acts of violence by the FLPC, among other armed militias, in the period within the Court's jurisdiction.

101. On 22 April 2009, the Prosecutor¹⁰⁰ set out his objections to said petition, as did the Defence on 23 April 2009.¹⁰¹

102. By decision of 26 June 2009, Trial Chamber I authorised the aforementioned victims to appear in person and to present their views and concerns.¹⁰²

103. At the hearings of 12 and 25 January 2011, the victims set out their views and concerns, which were considered by Trial Chamber I.¹⁰³

⁹⁹ ICC-01/04-01/06-1812-Conf.

¹⁰⁰ ICC-01/04-01/06-1824-Conf.

¹⁰¹ ICC-01/04-01/06-1826-Conf.

¹⁰² *Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial*, 26 June 2009, ICC-01/04-01/06-2002-Conf.

¹⁰³ See transcripts of hearings ICC-01/04-01/06-T-225-CONF-FRA; ICC-01/04-01/06-T-226-CONF-FRA; ICC-01/04-01/06-T-227-CONF-FRA; ICC-01/04-01/06-T-228-CONF-FRA; ICC-01/04-01/06-T-229-CONF-FRA;

104. By articulating their views and concerns to Trial Chamber I, Victims a/0225/06, a/0229/06 and a/0270/07 demonstrated *prima facie* that they suffered harm as a result of the crimes committed by the FPLC in Ituri during the period of September 2002 to August 2003.

FOR THESE REASONS:

The Legal Representatives of Victims conclude that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo incurred criminal responsibility as a co-perpetrator within the meaning of article 25(3)(a) of the Statute for the crimes referred to in articles **8(2)(b)(xxvi) and 8(2)(e)(vii)** of the Statute, consisting of the conscription or enlistment of children under the age of fifteen years into the national armed forces or armed groups and using them to participate actively in hostilities.

Done at Kinshasa and Tours,

This 1 June 2011

[signed]
Mr Paul Kabongo Tshibangu

[signed]
Mr Joseph Keta Orwinyo

[signed]
Ms Carine Bapita Buyangandu