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TRIAL CHAMBER VI

Before: **Judge Robert Fremr, Presiding Judge**
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. BOSCO NTAGANDA

Public redacted version of ICC-01/04-02/06-2276-Conf-Corr
With public Annexes A and B

Closing brief on behalf of the Former Child Soldiers

Source: **Office of Public Counsel for Victims (CLR1)**

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence
Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of the Victims
Ms Sarah Pellet
Mr Franck Mulenda
Mr Alejandro Kiss

Mr Dmytro Suprun
Ms Chérine Luzaisu
Ms Anne Grabowski

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. The legal representative of the 280 former child soldiers admitted to participate in the present proceedings[1] (the "Legal Representative") respectfully submits her closing brief to the Chamber.[2]

1. CONFIDENTIALITY

2. Pursuant to regulations 23*bis*(1) of the Regulations of the Court, the present closing brief is classified as "confidential" since it contains potentially identifying information in relation to witnesses. A public redacted version thereof will be provided as soon as practicable. Annexes A (Procedural Background) and B (List of Acronyms) are filed public since they do not contain confidential information.

2. THE ROLE OF VICTIMS IN TRIAL PROCEEDINGS

3. Article 68(3) of the Rome Statute (the "Statute")[3] provides victims in a clear and non-ambiguous manner with the right to participate, through their legal representative(s), in proceedings before the Court when their personal interests are affected.[4] While victims' interests are, to some extent, common with those of the

[1] Three resumption of action requests are currently pending before the Chamber and the present brief also reflects the views of the three applicants concerned. See the "Transmission of Resumption of Action Forms", No. ICC-01/04-02/06-2274, 19 April 2018.

[2] The Legal Representative informs the Chamber that references to transcripts include hyperlinks to the latest available version. Due to the very late notification of 63 corrected transcripts between 15 and 18 April, a considerable amount of time of the last days available for the drafting of the present brief was regrettably devoted to checking specific references against the last available corrected version. Given the ongoing notification process and the fact that the Defence is still identifying discrepancies requiring transcript corrections, she will file a corrigendum, once CMS certifies the end of said process, if need be.

[3] Where the term 'Article' is used in the present closing brief, it refers to the Rome Statute unless otherwise indicated.

[4] The analysis of the preparatory works of said provision leaves no doubt as to the possibility for victims to participate at all stages of the proceedings before the Court. See *e.g.* the Proposal submitted by France, UN Doc. PCNICC/1999/DP.2, 1 February 1999, p. 7; the Proposal submitted by Costa Rica, UN Doc. PCNICC/1999/WGRPE/DP.3, 24 February 1999; and the Proposal submitted by Colombia, UN Doc. PCNICC/1999/WGRPE/DP.37, 10 August 1999. See also BITTI (G.) & FRIMAN (H.), "Participation of Victims in the Proceedings", in LEE (R.S.) (ed.), *The International Criminal Court: Element of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc. New York, 2001, pp. 456-474. See also the "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06" (Pre-Trial Chamber II), No. ICC-02/04-101, 10 August 2007, para. 10.

Prosecutor, victims undoubtedly have an independent role and voice in the Court's proceedings, including *vis-à-vis* the Prosecutor.[5] Accordingly, their role is unique.[6]

4. Indeed, the very interest of the Prosecutor in the trial proceedings before the Court is to bring evidence with the aim to prove that the accused is criminally responsible under the Statute for the crimes charged, beyond reasonable doubt.[7] In contrast, besides the interest to receive reparations,[8] which is far from being the sole motivation of victims,[9] the core interest of victims in the proceedings is to effectively exercise their rights to truth and justice. These rights have been generally recognised by international human rights law,[10] the doctrine[11] and the constant jurisprudence of

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[5] See *e.g.* the "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6" (Pre-Trial Chamber I), No. ICC-01/04-101-tEN-Corr, 17 January 2006, para. 501; and the "Decision on 'Prosecutor's Application to attend 12 February hearing'" (Pre-Trial Chamber II), No. ICC-02/04-01/05-155, 9 February 2007, p. 4.

[6] See the "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled '*Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*'", No. ICC-01/04-01/06-824 OA7, 13 February 2007, para. 55.

[7] See the "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", No. ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para. 93.

[8] In this sense, see AMBOS (K.), "El Marco Jurídico de la Justicia de Transición", Tenus, Bogotá, 2008, notes 107-112. See also the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly of the United Nations in its resolution 60/147 in the 64th plenary meeting, UN Doc. A/RES/60/147, 16 December 2005, para. 21.

[9] See the Note prepared by the former Special Rapporteur of the Sub-Commission, Mr. Theo van Boven, in accordance with paragraph 2 of Sub-Commission resolution 1996/28, UN Doc. E/CN.4/1997/104, 16 January 1997, pp. 2-5. See also the Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Question of the impunity of perpetrators of human rights violations (civil and political), UN Doc. E/CN.4/Sub.2/1997/20, 26 June 1997, pp. 3-31. See also the "Decision on victims' participation" (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, para. 98.

[10] See IACHR, *La Cantuta v. Peru*, Judgment of 29 November 2006, Series C, 162, para. 222; *Vargas-Areco v. Paraguay*, Judgment of 26 September 2006, Series C, 155, paras. 153; *Almonacid-Arellano et al v. Chile*, Judgment of 26 September 2006, Series C, 154, para. 148; *Moiwana Community v. Suriname*, Judgment of 15 June 2005, Series C, 124, para. 204; and *Velasquez-Rodriguez v. Honduras*, Judgment of 29 July 1988, Series C, 7, paras. 162-166 and 174. See also ECHR, *Hugh Jordan v. UK*, Application 24746/94, Judgment of 4 May 2001, paras. 16, 23, 157 and 160; *Selmouni v. France*, Application 25803/94, Judgment of 28 July 1999, para. 79; *Kurt v. Turkey*, Application 24276/94, Judgment of 25 May 1998, para. 140; *Selcuk and Asker v. Turkey*, Application 23184/94, Judgment of 24 April 1998, para. 96; *Aydin v. Turkey*, Application 23178/94, Judgment of 25 September 1997, para. 103; and *Aksoy v. Turkey*, Application 21987/93, Judgment of 18 December 1996, para. 98.

[11] See DONAT-CATTIN (D.), "Article 68", in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, C.H. Beck, Hart, Nomos, München, Oxford, Baden-Baden, 3rd Edition, 2016, pp. 1690-1691; NAQVI (Y.), "The Right to the Truth in

the Court as essential for the persons directly affected by the crimes under the jurisdiction of the Court.[12]

5. The participation of victims in the proceedings before the Court in an effective and efficient manner is a necessary mechanism to implement their right to justice and is an essential element of the full realisation of the other elements of that right, namely to know the truth and to obtain reparations.[13] Such participation can only be deemed meaningful, as opposed to purely symbolic, if victims are entitled to positively contribute to the search for the truth – which may, in turn, eventually lead to the punishment of given individuals and the reparation of the harm caused. In this respect, any form of positive contribution from victims appears indispensable for the accomplishment of the Court's function.[14]

6. Pursuant to regulation 24(2) of the Regulations of the Court, victims enjoy the right to present their views and concerns with regard to any submission filed by the parties in order to defend their interests in the proceedings, regardless of whether the victims' views and concerns are supportive or contrary to the submissions made by either party to the proceedings. The possibility for victims to present their views and

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International Law: Fact or Fiction?", in (2006) *ICRC International Review*, 88, pp. 267-268; MENDEZ (J.), "The Right to Truth", in JOYNER (Ch.) (ed.), *Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights' Proceedings of the Siracusa Conference*, 17-21 September 1998, Eres, Toulouse, 1998, pp. 257; and AMBOS (K.), *op. cit. supra* note 8, pp. 42-44.

[12] See *e.g.* "Decision on victims' participation in trial proceedings" (Trial Chamber VI), No. ICC-01/04-02/06-449, 6 February 2015, paras. 52-56; the "Decision on the conduct of proceedings" (Trial Chamber VI), No. ICC-01/04-02/06-619, 2 June 2015, paras. 63-70; and the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I), No. ICC-01/04-01/07-474, 15 May 2008, paras. 31-44.

[13] See DONAT-CATTIN (D.), *op. cit.*, *supra* note 11, pp. 1686 and 1698-1700. See also *e.g.* the "Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", *supra* note 7, para. 97; the "Decision on victims' representation and participation" (Trial Chamber V), No. ICC-01/09-01/11-460, 3 October 2012, para. 10; the "Decision on victims' representation and participation" (Trial Chamber V), No. ICC-01/09-02/11-498, 3 October 2012, para. 9; the "Decision on common legal representation of victims for the purpose of trial" (Trial Chamber III), No. ICC-01/05-01/08-1005, 10 November 2010, para. 9(a); and the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", *idem*, para. 53.

[14] See DONAT-CATTIN (D.), *idem*, p. 1687.

concerns with regard to any submission filed by the parties is not *per se* prejudicial to or inconsistent with the rights of the accused.

7. Against this background, the recurrent allegation from the Defence that throughout the trial it has faced not only one prosecutor but two, and even three prosecutors[15] reflects at the very least a misconception of the role of victims in the proceedings. As noted *supra*, said role cannot be compared or confused with the role of the Prosecution.[16] Victims possess an autonomous role stemming from the internationally recognised rights to truth, justice and reparations which translates into a set of procedural prerogatives in criminal proceedings. The exercise of these rights and prerogatives does not turn victims into a "Prosecutor *bis*". To the extent these comments may amount to a legal submission, putting into question the fairness of the proceedings or otherwise, the Legal Representative is of the view that it shall be rejected.

8. Throughout the proceedings, victims have made it clear to the Legal Representative that their personal interests included in getting to know what happened in the DRC during the ethnic conflict which took place in 2002-2003; seeing those responsible for their conscription, enlistment and active participation in the hostilities, as well as rapes and sexual violence committed against them, punished; and eventually receiving reparations for said harm.

9. Gathering the views and concerns of 280 former child soldiers[17] while assuming their daily legal representation in court is an intense task. In order to discharge this mandate meaningfully, the Legal Representative, with the assistance of her field counsel, travelled to Ituri and elsewhere as often as possible whenever

[15] For the last occurrence to date, see No. ICC-01/04-02/06-T-258-ENG, p. 24: "[…] *since the beginning of this trial, we have one Prosecution, and I dare to say respectfully that we have two Prosecutors* bis, *and their submissions today clearly highlight that we have three Prosecutors in this room and not just one*".
[16] See *supra* paras. 3-4 and corresponding footnotes.
[17] See *supra* note 1.

the proceedings allow for it.[18] To this end, 16 missions were undertaken by the Legal Representative and/or her field counsel in Ituri and elsewhere in Africa since the start of the trial on 2 September 2015.[19] The Legal Representative met with nearly all of her clients,[20] having met the overwhelming majority of them on several occasions – up to five times or more. In addition, a constant (virtually 24/7) active link with her clients was maintained via her field counsel through phone calls.[21]

10. The attempt by the Legal Representative to convey said views and concerns in an articulate closing trial brief – without misrepresenting them – is not an easy task. Indeed, the trial proceedings often gave rise to a lot of frustrations on the part of the victims she represents, sometimes to hopes; and said frustrations and hopes are difficult to convey in a legal brief. Nonetheless, the Legal Representative posits that the developments *infra* are a result of the trust relationship that has been built with the victims she represents, over the years.

3. THE EVIDENTIARY STANDARD "BEYOND REASONABLE DOUBT"

11. According to the Defence, "*one party in* [the court]*room has a burden of proof; one party is responding to the burden of proof*".[22] Counsel further explained that "[t]*he idea* […] *is knowing the case the Accused has to meet*"[23] and "*respond to that*".[24] The Legal

[18] See the nine periodic reports on victims in the case and their general situation submitted by the Registry (respectively No. ICC-01/04-02/06-632, 8 June 2015; No. ICC-01/04-02/06-889, 6 October 2015; No. ICC-01/04-02/06-1157, 8 February 2016; No. ICC-01/04-02/06-1369, 6 June 2016; No. ICC-01/04-02/06-1567, 6 October 2016; No. ICC-01/04-02/06-1774, 6 February 2017; No. ICC-01/04-02/06-1938, 6 June 2017; No. ICC-01/04-02/06-2056, 6 October 2017; and No. ICC-01/04-02/06-2212, 6 February 2018) submitted pursuant to Trial Chamber VI's orders in the first and fourth decisions on victims' participation in trial proceedings. See the "Decision on victims' participation in trial proceedings", *supra* note 12, para. 24 (ix); and the "Fourth decision on victims' participation in trial proceedings" (Trial Chamber VI), No. ICC-01/04-02/06-805, 1 September 2015, para. 13(ii)(a).

[19] An additional 13 missions were undertaken during the pre-trial stage of the proceedings.

[20] Except for 9 of them who were not present in their usual place of residence on the numerous missions undertaken by her and/or her field counsel.

[21] See *supra* note 18.

[22] See No. ICC-01/04-02/06-T-258-ENG, p. 12.

[23] *Idem*.

[24] *Ibidem*, p. 13.

Representative posits that such simplistic approach does not accord with the legal texts of the Court.

12. Indeed, pursuant to Article 66, the accused is entitled to the benefit of the doubt. If guilt has not been proved beyond reasonable doubt at the end of the trial pursuant to Article 66(3), a conviction cannot be entered. Pursuant to Article 74(2), the Chamber "*shall base its evaluation on the evidence and the entire proceedings*". An item of evidence submitted at trial can influence the decision of the Chamber in two different ways: (a) the item may help reaching a conclusion about the existence or non-existence of a material fact; or (b) the item may help assessing the reliability of other evidence. The Legal Representative submits that in its consideration of the evidence and the factual findings in the case, the Chamber should take into account the jurisprudence according to which:

- reasonable doubt must be based on logic and common sense, and have a rational link to the evidence, lack of evidence or inconsistencies in the evidence;[25]
- the "*beyond reasonable doubt*" standard cannot be contested invoking frivolous doubt based on empathy or prejudice;[26]
- not each and every fact in the judgment must be proven beyond reasonable doubt but only those on which a conviction depends which include facts constituting the elements of the crime and the modes of liability as charged;[27] or "*material facts*" as opposed to subsidiary or "*collateral facts*"[28] or other sets of facts introduced by different types of evidence;[29]

[25] See the "Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute'", No. ICC-01/04-02/12-271-Corr A, 7 April 2015 (the "*Ngudjolo* Appeal Judgment"), paras. 109 *et seq.*; and *Prosecutor v. Rutaganda*, ICTR-96-3-A, Appeal Judgement, 26 May 2003, para. 488.
[26] See the *Ngudjolo* Appeal Judgment, *idem*, para. 109.
[27] See the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", No. ICC-01/04-01/06-3121-Red A5, 1 December 2014 (the "*Lubanga* Appeal Judgment"), para. 22.
[28] See the "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'", No. ICC-01/04-01/06-2205 OA15 OA16, 8 December 2009, footnote 163. See

- the Trial Chamber shall not take a piecemeal approach to the assessment of the evidence; but is rather required to carry out a holistic evaluation and weighing of all the evidence taken together in relation to the fact at issue;[30]
- inferences adverse to the accused can be entered so long as, based on the case record, they represent the only reasonable conclusion that could be drawn from the evidence;[31]
- the determination of whether an individual item of evidence is credible and reliable depends on the extent to which it is corroborated by other pieces of evidence taken cumulatively;[32]
- trauma[33] and passage of time[34] are factors that must be taken into account before rejecting the evidence of any witness on the basis of his/her inability fully or adequately to recount all details of the relevant events;

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also the "Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons'", No. ICC-01/04-01/07-3363 OA13, 27 March 2013, para. 50.

[29] See the *Ngudjolo* Appeal Judgment, *supra* note 25, para. 125; and the "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'", No. ICC-01/05-01/13-2275-Red A A2 A3 A4 A5, 8 March 2018 (the "*Bemba* et al. Appeal Judgment"), para. 868.

[30] See the *Bemba* et al. Appeal Judgment, *idem*, paras. 598, 1195 and 1540. See also the *Lubanga* Appeal Judgment, *supra* note 27, para. 22.

[31] See the *Bemba* et al. Appeal Judgment, *supra* note 29, para. 868. See also the "Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'", No. ICC-02/05-01/09-73 OA, 3 February 2010, para. 33.

[32] See *Prosecutor v. Limaj* et al., IT-03-66-A, Appeal Judgement, 27 September 2007, para. 153, citing *Prosecutor v. Limaj* et al., IT-03-66-T, Judgement, 30 November 2005, para. 20.

[33] For witnesses who experienced great *trauma*, revisiting such painful experiences is likely to be a source of pain and may affect her or his ability fully or adequately to recount the relevant events in a judicial context. Accordingly, the evidence of such witnesses should not be rejected despite reticence or circuitousness in "*being specific as to dates, times, distances and locations, and appeared unfamiliar with the use of maps, films, photographs and other graphic representations*". See *Prosecutor v. Musema*, ICTR-96-13, Judgement and Sentence, 27 January 2000, paras. 100 and 104.

[34] The passage of time may affect the witnesses' memories. In considering this evidence, the witness's "*relationship to the Accused, the age, vulnerability, any involvement in the events under consideration, the risk of self-incrimination, sincerity, possible bias toward or against the Accused and motives for telling the truth or giving false testimony*" must be taken into account. See the "Judgment pursuant to article 74 of the Statute" (Trial Chamber II), No. ICC-01/04-01/07-3436-tENG, 7 March 2014 (the "*Katanga* Judgment"), paras. 83 and 85.

- the Chamber may rely on part of a witness's testimony and reject other parts;[35] and
- that evidence is contested by the Defence does not mean that reasonable doubt is casted. Rather, the Chamber has the responsibility to resolve any inconsistencies that may arise within and/or among witnesses' testimonies.[36]

13. Furthermore, Defence witnesses may "corroborate" each other in respect of the evidence they provide. In the *Bemba* case, for instance, *nine* Defence witnesses testified consistently that MLC troops in the Central African Republic fell under the operational control of the Central African authorities;[37] a factual finding that in the submission of the Bemba defence would have been exonerating. The Chamber rejected said finding addressing – on a factor-by-factor basis – the considerations that weighed against the credibility of the witnesses concerned.[38] The Legal Representative respectfully requests the Chamber to follow said approach and be open to reject Defence evidence, even where various Defence witnesses corroborate each other, on the basis of considerations such as:

- the evidence is generally evasive, lacking spontaneity, qualified,[39] defensive,[40] exaggerated[41] or implausible;[42] with responses being illogical, improbable, or contradictory;[43]

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[35] See the "Judgment pursuant to Article 74 of the Statute" (Trial Chamber I), No. ICC-01/04-01/06-2842, 14 March 2012 (the "*Lubanga* Judgment"), para. 339; the *Katanga* Judgment, *idem*, para. 84; and the "Judgment pursuant to Article 74 of the Statute" (Trial Chamber VII), No. ICC-01/05-01/13-1989-Red, 19 October 2016, paras. 202 and 204. See also *Prosecutor v. Haradinaj* et al., IT-04-84, Appeal Judgement, 19 July 2010, para. 201.
[36] See the *Lubanga* Appeal Judgment, *supra* note 27, para. 23, citing *Prosecutor v. Kupreškić* et al., IT-95-16-A, Appeal Judgement, 23 October 2001, para. 31.
[37] See the "Judgment pursuant to Article 74 of the Statute" (Trial Chamber III), No. ICC-01/05-01/08-3343, 21 March 2016 (the "*Bemba* Judgment"), para. 430.
[38] *Idem*, para. 447.
[39] *Ibidem*, para. 435.
[40] *Ibid.*, para. 352.
[41] *Ibid.*, para. 357.
[42] *Ibid.*, para. 359.
[43] *Ibid.*, para. 348.

- the witness's responses were contrary to the evidence presented to him, but without any satisfactory explanation for such discrepancy;[44]
- the evidence is internally contradictory [45] or contradicted by other evidence in the case record;[46]
- despite abundant public information about the crimes, the witness claims to have had no information;[47]
- the witness claims not to have had information about issues which, actually, fell squarely within his alleged area of competence and knowledge;[48]
- the witness' source of knowledge was unclear and questionable.[49]

14. Finally, the Legal Representative notes that Mr Bosco NTAGANDA (the "Accused", "Mr NTAGANDA" or "NTAGANDA") chose to appear as a witness in his case and testified as the second witness during the presentation of the Defence case. Inevitably, all Defence witnesses who testified after the Accused had the opportunity to hear his evidence, which was broadcasted in public for an overwhelming part.

15. Admittedly, pursuant to rule 140(3) of the Rules of Procedure and Evidence (the "Rules"), a witness cannot be disqualified from testifying solely because he has heard the testimony of another witness. However, said provision provides that when a witness testifies after hearing the testimony of others, this fact shall be noted in the record and considered by the Trial Chamber when evaluating the relevant evidence. The rationale behind witnesses testifying separately is to prevent their mutually influencing each other.[50] A request for an order to the effect that Defence witnesses

[44] *Ibid.*, para. 438.
[45] *Ibid.*, para. 432.
[46] *Ibid.*, para. 366.
[47] *Ibid.*, para. 350.
[48] *Ibid.*, para. 349.
[49] *Ibid.*, paras. 430 and 441.
[50] See AMBOS (K.), *Treatise on International Criminal Law, Volume III: International Criminal Procedure*, Oxford University Press, 2016, pp. 469 and 483.

appearing after the Accused were forbidden to listen to, watch, attend or in any other manner follow Mr NTAGANDA'S testimony until they have completed their testimony was rejected, not as a matter of principle, but "*in light of* […] *enforcement issues*".[51] The Chamber referred to cross-examination and the requirements of rule 140(3) as sufficient safeguards on the matter.[52]

16. Crucially, the subsequent witnesses all belonged to the same ethnicity and/or recognised in the Accused a person of authority within the Hema community. The fact that the Rules prescribe that a sequence of events as the one under consideration is an exception and shall be taken note of and considered when evaluating the evidence; hence, such consideration should carry a meaningful weight. Coupled with the internal inconsistencies and suspicious *verbatim* coincidences between his evidence and that of the subsequent witnesses, the Legal Representative argues that their evidence is not reliable.

4. CONCLUSIONS ON RELEVANT ASPECTS OF THE PRESENT CASE

17. In accordance with the charges confirmed by Pre-Trial Chamber II, the Legal Representative will demonstrate *infra* that the Prosecution has presented evidence allowing the Chamber to conclude that the Accused is criminally responsible, beyond reasonable doubt, of the crimes of conscripting and enlisting children under 15 and their use to participate actively in hostilities as well as the rape and sexual slavery of UPC/FPLC child soldiers within the meaning of Article 8(2)(e)(vi), between on or about 6 August 2002 and on or about 31 December 2003.[53]

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[51] See the "Decision on further matters related to the testimony of Mr Ntaganda", No. ICC-01/04-02/06-1945, 8 June 2017, para. 28.
[52] *Idem*.
[53] See the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda" (Pre-Trial Chamber II), No. ICC-01/04-02/06-309, 9 June 2014 (the "*Ntaganda* Decision on the confirmation of charges").

4.1. On the characterisation of the conflict

18. Given the very stringent page and word limits imposed on the Legal Representative, she will not dwell on this issue. She therefore merely refers to and supports the position of Pre-Trial Chamber II in its decision confirming the charges in the present case according to which "[…] *between or about 6 August 2002 and on or about 31 December 2003,* [the UPC/FPLC] *engaged in an armed conflict not of an international character in Ituri Province, in the DRC, against other organised armed groups*".[54] The Legal Representative respectfully requests the Chamber not to deviate from said characterisation of the conflict.

19. Notwithstanding, and although this has no bearing on the contextual element of the war crimes concerned, the victims represented by the Legal Representative contest the adamant position of the Accused with regard to the nature of the conflict at stake. Said position is not supported by the evidence admitted in the present case. Indeed, according to the Accused, the conflict was not of an ethnic nature but merely resulting from the determination of the founding authorities of the UPC/FPLC to protect the entire Iturian population, without ethnic grounds, against the exactions committed by the APC.[55] The witnesses for the Defence themselves all argued – save for D-0017[56] – that the conflict which took place on the Ituri territory was indeed an ethnic one, or at least had an ethnic component.[57]

4.2. Age related issues

20. One of the most important aspects affecting the interests of the victims represented by the Legal Representative is the determination, based on the evidence

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[54] *Idem*, para. 31 and more generally the demonstration by Pre-Trial Chamber II, paras. 31-34.
[55] See *e.g.* No. ICC-01/04-02/06-T-230-ENG_CT_WT, pp. 71-72 and No. ICC-01/04-02/06-T-233-Red-ENG_WT, pp. 36-40.
[56] See No. ICC-01/04-02/06-T-252-Red-ENG_WT, p. 59.
[57] See *e.g.* No. ICC-01/04-02/06-T-261-Red-ENG_WT, pp. 14-17; No. ICC-01/04-02/06-T-207-Red-ENG_WT, p. 15; No. ICC-01/04-02/06-T-249-Red-ENG_CT_WT, pp. 46-47; and No. ICC-01/04-02/06-T-260-Red-ENG_CT_WT, p. 79. See also *e.g.* DRC-OTP-2054-0172, p. 0249.

submitted and discussed before the Chamber, on whether the children conscripted and enlisted in the UPC/FPLC or used to actively participate in hostilities during the period contemplated in the confirmed charges were under the age of 15.

21. Age determination with regard to crimes against children has been an issue in previous cases entertained before the Court. In the *Lubanga* case, whilst Trial Chamber I acknowledged the difficulty in distinguishing the age of young people, it found that it is feasible for non-expert witnesses to assess such age. It concluded that "*the sheer volume of credible evidence* […] *relating to the presence of children below the age of 15 within the ranks of the UPC/FPLC has demonstrated conclusively that a significant number were part of the UPC/FPLC army. An appreciable proportion of the prosecution witnesses, as well as D-0004, testified reliably that children under 15 were within the ranks of the UPC/FPLC*".[58]

22. In response to certain challenges, a body of jurisprudence emerged both from Trial Chambers and from the Appeals Chamber setting out the factors which are relevant to a proper age assessment. The jurisprudence of the SCSL is also relevant in this regard. The description *infra* is not intended to be exhaustive, but is indicative of factors that are relevant in the present case.

23. Both in the *Katanga*[59] and the *Lubanga* cases,[60] as well as in the RUF case before the SCSL,[61] Chambers accepted evidence of witnesses who, based on the physical appearance of the children, concluded that they were under the age of 15.

24. Frequently, in order to explain their age assessment, the witnesses underlined: the child's general appearance;[62] the child's physical development;[63] the child's face;[64]

[58] See the *Lubanga* Judgment, *supra* note 35, para. 643.
[59] See the *Katanga* Judgment, *supra* note 34, paras. 1062-1065.
[60] See *e.g.* P-0046 and P-0024 in the *Lubanga* Judgment, *supra* note 35, paras. 655 and 661-663 respectively. See generally paras. 641 to 731.
[61] See *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Judgement, 2 March 2009, paras. 1623 to 1628 (The "RUF Judgement").

comparison with other children;[65] the difficulties for some soldiers to carry weapons;[66] the way the child behaved;[67] the child's height;[68] the child's voice[69] and whether a girl had developed breasts.[70]

25. Witnesses also substantiated their age assessments by reference to, *e.g.* professional experience and background in this regard;[71] frequent contacts with young persons in the region[72] and whether the person worked closely with children for a considerable period of time.[73]

26. The Appeals Chamber accepted the estimation of non-expert witnesses of the age of a child based on their recollection of his/her physical appearance even where the testimony was provided several years after the events.[74] It also rejected that, under such circumstances, the age assessment need to be "*corroborated*" by other objective evidence.[75] Moreover, it found that where the Chamber applies a sufficient margin of error, it may reach a reasonable conclusion, despite the fact that nutritional problems and ethnic origin may make the physical appearance misleading and consequently the age assessment more difficult.[76]

27. In the *Lubanga* case, the Prosecution submitted video evidence depicting individuals recruited in the UPC/FPLC. The Chamber relied on its own assessment of

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[62] See the *Lubanga* Appeal Judgment, *supra* note 27, para. 229.
[63] See the *Lubanga* Judgment, *supra* note 35, *e.g.* P-0038, para. 688.
[64] See the *Katanga* Judgment, *supra* note 34, para. 1062.
[65] See the *Lubanga* Judgment, *supra* note 35, paras. 641. See also the *Lubanga* Appeal Judgment, *supra* note 27, para. 241.
[66] See the *Lubanga* Judgment, *supra* note 35, *e.g.* P-0012 and P-0038, paras. 668 and 688 respectively.
[67] *Idem*, *e.g.* P-0038, para. 688.
[68] See the RUF Judgement, *supra* note 61, paras. 1623 to 1628.
[69] See the *Lubanga* Judgment, *supra* note 35, *e.g.* P-0038, para. 688.
[70] *Idem*.
[71] *Ibidem*, paras. 655 and 661-663 respectively.
[72] See the *Lubanga* Appeal Judgment, *supra* note 27, para. 241.
[73] See the *Lubanga* Judgment, *supra* note 35, *e.g.* P-0038, para. 662.
[74] See the *Lubanga* Appeal Judgment, *supra* note 27, paras. 233-235.
[75] *Idem*, para. 234.
[76] *Ibidem*, para. 236.

the age of the children shown in the video excerpts;[77] finding specific individuals to be "*evidently*",[78] "*clearly*",[79] or "*significantly*"[80] under the age of 15 years. The Appeals Chamber noted that there is no strict legal requirement that the video excerpts had to be corroborated by other evidence in order for the Trial Chamber to be able to rely on them.[81] In said case, the Chamber also relied on evidence of P-0046, who worked in MONUC's child protection programme during the time period covered by the charges and interviewed former child soldiers and investigated about their age.[82] Reliance on P-0046 for age determination purpose was confirmed by the Appeals Chamber.[83] Trial Chamber I also relied on documentary evidence that soldiers aged 10 to 15 or 16 within the UPC/FPLC, willing to return to civilian life, were invited to join a demobilisation training.[84] Such reliance for age determination purpose was also confirmed by the Appeals Chamber.[85]

28. In the *Katanga* case, the Chamber relied on: a MONUC report on events in Ituri covering 2002 and 2003 stating that at least 40% of each militia consisted of children under the age of 18 years, with a significant minority below the age of 15;[86] the fact that as part of a resistance movement against attacks, the community

[77] See the *Lubanga* Judgment, *supra* note 35, paras. 644, 713, 774, 779, 792, 854, 858, 860, 861, 862, 912, 915, 1122, 1216, 1249, 1251, 1252, 1254, 1260 and 1339, referring DRC-OTP-0080-0002,at 00:52:14; DRC-OTP-0120-0293 at 00:06:54; DRC-OTP-0127-0058 at 00:00:50; and DRC-OTP-0120-0294 at 02:47:15-02:47:19 and 02:22:52-02:22:54. See also the *Lubanga* Appeal Judgment, *supra* note 27, para. 223.
[78] See the *Lubanga* Judgment, *supra* note 35, paras. 861 and 1254.
[79] *Idem*, paras. 713, 792, 854, 858, 862, 869, 912, 915 and 1348.
[80] *Ibidem*, paras. 1249, 1251-1252.
[81] See the *Lubanga* Appeal Judgment, *supra* note 27, para. 218.
[82] See the *Lubanga* Judgment, *supra* note 35, paras. 645-655.
[83] See the *Lubanga* Appeal Judgment, *supra* note 27, paras. 243 *et seq*. The Appeals Chamber reminded the jurisprudence and practice of the SCSL which relied on various forms of evidence to determine the age of the children concerned. In one such instance, the SCSL Trial Chamber in the *Taylor* case established the age of a witness based on its assessment of his appearance. Noting that there was no official document to corroborate the witness' date of birth, the Trial Chamber stated that "*he looked young at the time he gave evidence in 2008 ten years after the incidents he testified about*". See *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, Judgement, 18 May 2012 (the "*Taylor* Judgement"), paras. 1425 and 1431.
[84] See the *Lubanga* Judgment, *supra* note 35, paras. 741 to 748.
[85] See the *Lubanga* Appeal Judgment, *supra* note 27, paras. 263 *et seq*.
[86] See the *Katanga* Judgment, *supra* note 34, para. 1052.

mobilised and everyone was called upon to resist, including children;[87] and evidence that children under the age of 15 were demobilised;[88] including the logbooks lists of the demobilisation centres.[89]

29. Furthermore, as stressed by the Appeals Chamber, there is no requirement for the Chamber to set out the identity or the precise age of the victims it relies upon as evidence that the crimes charged were committed;[90] it suffices that it is established that the victim is within a certain *age range*, namely *under* the age of 15.[91]

30. The age determination based on a visual assessment of the physical image of a person is also applied by Congolese jurisdictions. For example, the Bukavu District Court seized the Independent Electoral Commission of the DRC of a request to verify that an alleged minor victim was not registered on the voters' list and was accordingly under 18 years of age. Absent of a response from the Commission, the Tribunal, referring to the physical appearance of the person, concluded that she was manifestly an adult.[92]

31. Moreover, in the DRC, *état civil* officers issuing electoral voting cards must reflect the approximate age of the person, when the date of birth is not known. Article 92 of the Family Code established that:

> "[l]*orsque la date de naissance doit être mentionnée et que cette date n'est pas connue*, l'acte énoncera l'âge approximatif de ladite personne".[93]

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[87] *Idem*, para. 1053.
[88] *Ibidem*, para. 1056.
[89] *Ibid.*, para. 1076.
[90] See the *Lubanga* Appeal Judgment, *supra* note 27, para. 197.
[91] *Idem*, para. 198.
[92] See TGI Bukavu, RP.12.068, 25 November 2008. In this sense, see AVOCATS SANS FRONTIÈRES, *La Justice face à la banalisation du viol en République démocratique du Congo : Étude de jurisprudence en matière des violences sexuelles de droit commun*, May 2012, p. 39.
[93] See the Congolese Family Code (emphasis added). See also generally the "*Observations finales au nom des anciens enfants-soldats*", No. ICC-01/04-02/06-273, 7 March 2014, paras. 22-34.

32. In the same vein, article 14 of the *Décision de la Commission électorale indépendante relative aux mesures d'application de la Loi n°04/028 du 24 décembre 2004 portant identification et enrôlement des électeurs en République Démocratique du Congo* specifies that "[s]*i la personne ne connaît pas l'année exacte de sa naissance,* l'agent inscrit celle qu'elle croit l'être".[94] Article 12 of the same decision states that "[l]*es renseignements fournis par la personne aux fins de son identification et de son enrôlement* sont présumés exacts sous réserve de leur contestation".[95] Accordingly, the law and the practice in the DRC provide additional support for the proposition that age assessments are valid even in the absence of documentary evidence.

4.2.1. Age assessment

33. According to the Accused, there were simply no children below the age of 18 in the UPC/FPLC ranks[96] since very stringent physical criteria were applied to any person willingly joining the militia.[97] Namely, they had to be able to carry rifles and boxes of ammunition and, if a soldier was injured on the battlefield, they had to be able to carry him/her.[98] The same criteria applied to the female recruits which, according to the Accused, was sufficient for him to be certain that his female bodyguards were all aged over 18.[99] It is, however, crystal clear that the purpose of this screening was not to assess the age of recruits, but rather whether they could serve the UPC/FPLC.[100] In fact, the Accused himself confirmed that these criteria were used "*to ensure that we had* young people *who were strong and fit*".[101]

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[94] See the "Décision de la Commission électorale indépendante n°008/CEI/BUR/05 du 09 juin 2005 relative aux mesures d'application de la Loi n°04/028 du 24 décembre 2004 portant identification et enrôlement des électeurs en République Démocratique du Congo" (emphasis added).
[95] *Idem* (emphasis added).
[96] See *e.g.* No. ICC-01/04-02/06-T-239-Red-ENG CT WT, p. 83.
[97] See No. ICC-01/04-02/06-T-213-Red-ENG WT, pp. 72-75.
[98] See No. ICC-01/04-02/06-T-214-Red-ENG WT, p. 32 and No. ICC-01/04-02/06-T-240-ENG CT WT, pp. 21-23.
[99] See No. ICC-01/04-02/06-T-214-Red-ENG WT, p. 32.
[100] See No. ICC-01/04-02/06-T-240-ENG CT WT, pp. 24-25.
[101] See No. ICC-01/04-02/06-T-239-Red-ENG CT WT, p. 13 (emphasis added); No. ICC-01/04-02/06-T-213-Red-ENG WT, p. 74; and No. ICC-01/04-02/06-T-240-ENG CT WT, p. 24-25.

34. With regard to questioning said individuals on their age, the responses of the Accused were unclear, to say the least. Indeed, although presented as a mandatory preliminary question[102], he acknowledged that "*asking their age wasn't enough*"[103] because "*there were no identity documents*"[104] and "*these people could lie* […] *about their age*", "*they could tell an age that wasn't correct*".[105] Conversely, D-0017 explained that the age of recruits was not asked upon registration by PETER, but only names, parents' names and villages of origin.[106] In addition, according to him, the only physical assessment undertaken was to ask recruits to wrap their hand around their head and touch their ear in order to prove they were old enough.[107]

35. Interestingly, although the Accused was adamant there were no children under the age of 18 in the UPC/FPLC owing to the criteria applied, witnesses for the Defence, who testified after him,[108] were not so categorical in this regard, to say the least. Indeed, a vast majority of them testified that there were children below 18 in the UPC/FPLC.[109]

36. The Legal Representative submits that these testimonies are not sufficient, in the least, to cast doubt on the wealth of evidence proving beyond reasonable doubt that there were child soldiers below the age of 15 in the ranks of the UPC/FPLC in

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[102] See No. ICC-01/04-02/06-T-240-ENG CT WT, p. 21 and No. ICC-01/04-02/06-T-239-Red-ENG CT WT, p. 13.
[103] See No. ICC-01/04-02/06-T-240-ENG CT WT, p. 22.
[104] See No. ICC-01/04-02/06-T-213-Red-ENG WT, p. 74.
[105] *Idem* and No. ICC-01/04-02/06-T-240-ENG CT WT, p. 22.
[106] See No. ICC-01/04-02/06-T-252-Red-ENG WT, pp. 51-53.
[107] *Idem*, pp. 53-55. However, it was proven during his testimony that asking children to wrap their hands around their heads was in fact a practice that originated from the colonial era to assess whether a child was old enough to go to school *i.e.* 6 years old. See No. ICC-01/04-02/06-T-253-Red-ENG CT WT, pp. 63-64. It therefore clearly shows the negligence of the commanders in assessing the age of the recruits.
[108] See *supra* para. 15.
[109] See No. ICC-01/04-02/06-T-245-Red-ENG WT, p. 103; No. ICC-01/04-02/06-T-246-Red-ENG CT WT, pp. 34-36; No. ICC-01/04-02/06-T-261-Red-ENG WT, p. 66; No. ICC-01/04-02/06-T-260-Red-ENG CT WT, pp. 16-17, 23, 43-58 and 63-66; and No. ICC-01/04-02/06-T-248-Red-ENG WT, p. 11. D-0017 was the only witness to clearly testify that there were no children below 18 in the UPC/FPLC. See No. ICC-01/04-02/06-T-252-Red-ENG WT, p. 55. *A contrario*, see also *idem*, pp. 53-54 and No. ICC-01/04-02/06-T-253-Red-ENG CT WT, pp. 66-68 and 73-74.

2002-2003. The examples discussed *infra* should not be interpreted as an opposition, on behalf of the Legal Representative, to other evidence in the case record which is of value to the issue of age determination.

37. Indeed, the witnesses in the present case frequently referred to the appearance and height of the children, when asserting that they were under the age of 15. Terms such as '*shorter*', '*small*', '*smaller*' or '*smallest ones*' were used on several occasions by P-0010[110], P-0883[111], P-0768[112], P-0017[113], P-0315[114] to describe child soldiers. In particular, P-0768 admitted to have had child soldiers within his unit. In this instance, the proximity with the children enhances the reliability of his age assessment.[115]

38. Another factor that merits consideration is the observation that the military uniforms worn by the child soldiers did not fit. P-0010 stated that "[t]*here was one that was the youngest. And when he pulled his sleeves back, he had to do it twice, rolled up them twice. He was really very young, around 9 years old*".[116] Likewise, P-0290[117] and P-0017 noticed that "[children] *simply had to fold* [their uniforms] *up and do with it* […]".[118] This was confirmed by P-0907,[119] by P-0190,[120] by P-0014[121] – [REDACTED] – and by P-0030.[122]

[110] See No. ICC-01/04-02/06-T-46-Red-ENG, p. 40.
[111] See No. ICC-01/04-02/06-T-168-Red-ENG, pp. 25-26.
[112] See No. ICC-01/04-02/06-T-34-Red-ENG, pp. 47-55.
[113] See No. ICC-01/04-02/06-T-58-Red-ENG, pp. 20 and 51.
[114] See No. ICC-01/04-02/06-T-107-Red-ENG, p. 88.
[115] See No. ICC-01/04-02/06-T-34-Red-ENG, pp. 48-49 and 57-59. See also [REDACTED].
[116] See No. ICC-01/04-02/06-T-47-Red-ENG, p. 6.
[117] See No. ICC-01/04-02/06-T-65-Red-ENG, pp. 42-43.
[118] See No. ICC-01/04-02/06-T-58-Red-ENG, p. 53.
[119] See No. ICC-01/04-02/06-T-89-Red-ENG, p. 29.
[120] See No. ICC-01/04-02/06-T-96-Red-ENG, p. 91.
[121] See No. ICC-01/04-02/06-T-136-Red-ENG, p. 39.
[122] See No. ICC-01/04-02/06-T-144-Red-ENG, p. 35.

39. The fact that the children were not able to carry their weapons;[123] could not perform military exercise easily;[124] or as far as female escorts are concerned, the fact that some of them had not fully developed[125] were also common comments made by witnesses. As established by the Appeals Chamber, the general appearance of a person depicted in a video, including his/her size compared to other individuals shown in the video excerpt can be a determining factor for a finding that a person was under the age of 15.[126] The Legal Representative submits that said jurisprudence should be followed in the present case.[127]

40. The observations provided by [REDACTED] are of particular assistance dealing with the issue of age determination for he spent a long time with child soldiers, and is the father of a large family, including young children.[128] He testified that some of the soldiers [REDACTED] "[REDACTED]";[129] to the point that he had to send some of them away because they did not qualify to follow the training.[130] According to him, the behaviour of these soldiers was clear evidence of the fact that they were under 15 years of age.[131] His observations are particularly reliable since he spent a long time with the children, [REDACTED]. He was able to observe that some of them were not able to focus, that they were only thinking about playing. According to him, they clearly demonstrated a lack of maturity.[132]

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[123] See P-0790's testimony about one of SALUMU's bodyguards, No. ICC-01/04-02/06-T-53-Red-ENG, p. 56. See also P-0907's testimony, No. ICC-01/04-02/06-T-89-Red-ENG, p. 29; P-0190's testimony, No. ICC-01/04-02/06-T-96-Red-ENG, p. 90; and P-0014's testimony about NTAGANDA'S bodyguards, No. ICC-01/04-02/06-T-136-Red-ENG, p. 38.
[124] See No. ICC-01/04-02/06-T-48-Red-ENG_WT, pp. 20-21.
[125] See No. ICC-01/04-02/06-T-58-Red-ENG, pp. 51-52.
[126] See the *Lubanga* Appeal Judgment, *supra* note 27, para. 229. See also *supra* para. 24.
[127] See DRC-OTP-2058-0251, from 42:58 to 49:29:09 and DRC-OTP-2058-0667 showing a dozen of child soldiers to be demobilised by a NGO [REDACTED]. See also [REDACTED], [REDACTED]. Finally, see DRC-OTP-0103-0008, at 32:17, 32:21, 32:27 [REDACTED] and DRC-OTP-0128-0043 [REDACTED].
[128] [REDACTED].
[129] [REDACTED].
[130] [REDACTED].
[131] [REDACTED].
[132] [REDACTED] and [REDACTED].

41. Witnesses who had in-sight knowledge about the UPC/FPLC noticed that the children demonstrated a childish behaviour. For example, P-0017 observed that the bodyguards who accompanied NTAGANDA or SALUMU were playing and could not concentrate.[133] P-0907[134] and D-0211[135] made a similar observation regarding a young female escort of KISEMBO: [REDACTED]. P-0769 also stated that children were playing in Camp Ndromo.[136]

42. P-0046 undertook a mission to collect information on the issue of children associated with armed forces and armed groups and to document the enlistment, conscription and use of children to participate in hostilities in Ituri during the period covered by the charges. She testified that she was assessing the reliability of the information of the children regarding their age and the accounts of the events based on the information provided by the children themselves, social workers, and also on physical appearance.[137] She specified that she was also relying on their behaviour since she realised that, for instance, the younger children would usually be less talkative, especially regarding certain events.[138] P-0046 also testified in the *Lubanga* trial. The evidence was found credible and reliable, and it was relied upon by the Chamber to conclude that there were children below the age of 15 in the UPC/FPLC within the timeframe relevant to the charges. This conclusion was upheld by the Appeals Chamber.[139]

43. [REDACTED], an organisation that worked in the field of demobilisation and reintegration of child soldiers in Bunia during the period covered by the charges. He

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[133] See No. ICC-01/04-02/06-T-58-Red-ENG, pp. 20-21, 25 and 51. See also P-0030's testimony, No. ICC-01/04-02/06-T-144-Red-ENG, pp. 35-36.
[134] According to P-0907, KISEMBO himself referred to her as being no more than 12. See No. ICC-01/04-02/06-T-89-Red-ENG, p. 57.
[135] See No. ICC-01/04-02/06-T-248-Red-ENG_WT, pp. 37-38.
[136] See No. ICC-01/04-02/06-T-120-Red-ENG, p. 38.
[137] See No. ICC-01/04-02/06-T-100-Red-ENG, pp. 23-28 and No. ICC-01/04-02/06-T-101-Red-ENG, pp. 101-102.
[138] See No. ICC-01/04-02/06-T-100-Red-ENG, pp. 47-48.
[139] See the *Lubanga* Judgment, *supra* note 35, paras. 645-655 and the *Lubanga* Appeal Judgment, *supra* note 27, paras. 243 *et seq*.

gave evidence that the age range of the demobilised children, from November 2002 onwards, was between 8 and a half and 18 years old.[140] He testified that the age of the children was assessed on the bases of their physical appearance, the information given by their own families, and school records, when available.[141] [REDACTED]. [REDACTED].[142] [REDACTED].[143] [REDACTED]. Nonetheless, the Legal Representatives submits this is a factor to be properly taken into account.

4.2.2. Documentary evidence

44. The Legal Representative posits that the fact that former child soldiers possess documents, such as voter cards, school records or birth certificates attesting a different age than their real one does not constitute a sufficient reason to conclude that they were not under the age of 15 within the timeframe of the charges.

45. The Legal Representative refers to her submissions regarding the Congolese *état civil* made at the pre-trial stage of the present case[144] setting out the imperfections and even serious flaws in of the *état civil*. As a result, individuals could obtain identity documents containing more or less accurate information, at one's own convenience. These serious flaws were known to the Congolese legislator who introduced, in 2004, rules according to which the identity and age of a person could be established, in the absence of documents through "*la déclaration écrite faite par trois personnes majeures déjà inscrites sur la liste des électeurs du même centre d'inscription contresignée, à titre gratuit, par le Chef de Quartier ou le Chef de Village·dans lequel se situe ce centre*".[145]

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[140] [REDACTED]. [REDACTED].
[141] *Idem*.
[142] [REDACTED].
[143] [REDACTED].
[144] See the "*Observations finales au nom des anciens enfants-soldats*", *supra* note 93, paras. 22-34.
[145] See article 72 of the "*Loi n° 87-010 du 1er août 1987 portant Code de la famille*" read in conjunction with article 10 of the "*Loi n° 04/028 du 24 décembre 2004 portant identification et enrôlement des électeurs en République Démocratique du Congo telle que modifiée et complétée par la loi n° 16/007 du 29 juin 2016*".

46. Some former child soldiers took advantage of the flexibility of the Congolese legislation and practice in relation to the issuance of identity documents. The possibility to prove their age through witnesses enabled them to obtain electoral cards showing erroneous dates of birth. At trial, these inconsistencies have been used by the Defence to discredit the persons concerned.[146] However, it was consistently explained that obtaining a voter card was crucial when the Artemis Force took control of Bunia as it was a guarantee of security and freedom of movement in the aftermath of the ethnic war in Ituri. As a result, since electoral cards could only be issued to adults, most former child soldiers had to provide a false date of birth to obtain one.[147] This was even corroborated by D-0172.[148] To obtain such a card, during the 2002-2003 conflict, it was sufficient to appear before the register office alone and provide his/her own information (first and last name, date of birth, name of parents, *etc*.) without any verification being undertaken.[149]

47. As far as P-0883, who is also a victim represented by the Legal Representative, is concerned, she provided birth certificates issued by a hospital[150] and later by the *état civil*.[151] With respect to P-0883, a voter card was also admitted into evidence; the date of birth coincided both with date she provided during her testimony and in her birth certificates.[152] Admittedly, [REDACTED] stated that [REDACTED] not usually

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[146] See *e.g.* No. ICC-01/04-02/06-T-50-Red-ENG, pp. 27-32.

[147] See P-0010's testimony, *ibidem*, p. 32. See also P-0901's testimony, No. ICC-01/04-02/06-T-29-Red-ENG, pp. 60-62. The fact that one has to be 18 at least to obtain a voter card was confirmed by P-0898, No. ICC-01/04-02/06-T-153-Red-ENG, p. 32 and D-0172, *infra* note 148. See also 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*", No. ICC-01/04-01/04-2675-Conf, 31 January 2011, para. 78.

[148] See No. ICC-01/04-02/06-T-245-Red-ENG_WT, p. 64: "*What I said in relation to my date of birth is as follows, at that time I did not know my date of birth, but, you see, at that time I didn't have the required age which would have entitled me to an electoral card, that is why my father asked me to alter my date of birth so that I could be issued an electoral card because those who didn't have electoral cards were harassed, were being harassed by soldiers at that time*".

[149] See the Defence's own submissions about DRC-OTP-2078-2736, No. ICC-01/04-02/06-T-169-Red-ENG_WT, p. 29. See also *e.g.* P-0758's testimony, No. ICC-01/04-02/06-T-160-Red-ENG, p. 73. P-0761 also confirmed it regarding [REDACTED] birth certificate, [REDACTED].

[150] See No. ICC-01/04-02/06-T-168-Red-ENG, pp. 44-45. See also DRC-OTP-2094-0656.

[151] See No. ICC-01/04-02/06-T-168-Red-ENG, pp. 50-51. See also DRC-OTP-2094-0655.

[152] See No. ICC-01/04-02/06-T-168-Red-ENG, pp. 47-50. See also DRC-OTP-2078-2736.

deliver retroactive birth certificates.[153] However, [REDACTED] having provided pre-signed forms to [REDACTED] to make it easier [REDACTED] to hand over birth certificates.[154] The witness confirmed that it was [REDACTED] who filled-in the document.[155] Importantly, [REDACTED] specified that the document provided by P-0883 was an authentic form.[156] Thus, it cannot be concluded that the document is forged.[157] As already noted, birth certificates coming from the *état civil* do not necessarily reflect the right date of birth and the electoral cards are issued without verification[158] against the payment of an administrative fee.[159] P-0883 was under the age of 15 in the timeframe relevant to the charges.

48. P-0551, who was [REDACTED] explained that school records issued at the time, are generally not reliable since the schools were not functioning properly.[160] There were many illegal practices during this period, including forgery of school records.[161] However, as stated by P-0551, schools were operating [REDACTED] which is consistent with P-0883's account and her school records.[162] Admittedly, P-0883 spotted errors in the school records she was presented with during trial. These errors concerned her date of birth. Nonetheless, the dates of birth reflected in said certificates do not prove that she was 15 or above during the relevant timeframe. If anything, they tend to prove the contrary: that she was in fact younger. Furthermore, the certificates do not attest that she attended school in 2003, after the war. Indeed, there is no record of her attending school during 2002-2003. This is consistent with the fact that she was abducted in [REDACTED], at the beginning of the school year.

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[153] See DRC-D18-0001-6141, para. 18.
[154] *Idem*, para. 12.
[155] See No. ICC-01/04-02/06-T-168-Red-ENG, p. 45 and No. ICC-01/04-02/06-T-169-Red-ENG_WT, p. 66.
[156] See DRC-D18-0001-6141, paras. 14-15.
[157] See No. ICC-01/04-02/06-T-168-Red-ENG, p. 61.
[158] *Idem*, pp. 50-51. See also DRC-D18-0001-6146, para. 15 and DRC-D18-0001-6159, para. 15.
[159] See DRC-D18-0001-6159, para. 16.
[160] See DRC-OTP-1054-0031, para. 13. See also D-0201's testimony, No. ICC-01/04-02/06-T-246-Red-ENG_CT_WT, p. 51.
[161] *Idem*, paras. 27-29.
[162] P-0883's school records – which she was not familiar with – mentioned [REDACTED] as her date of birth instead of [REDACTED]. See No. ICC-01/04-02/06-T-168-Red-ENG, pp. 52-61 and No. ICC-01/04-02/06-T-169-Red-ENG_WT, p. 71. See also DRC-OTP-2082-0368.

4.2.3. The term '*kadogo*'

49. Save for the Accused, the term '*kadogo*' unanimously referred to child soldiers. Several witnesses referred to the presence of *kadogos* in the UPC/FPLC.[163] But Accused has a different, and peculiar, use of the term '*kadogo*' which, according to him, would refer to "*little thing or someone who is small*" and is not necessarily age related, as opposed to '*kibonge*' which describes a bulky person.[164] By the same token, the Accused acknowledged that the AFDL was called the "kadogo *army*".[165] However, he explained that it did not refer to the use of children but rather to their slim bodies.[166]

50. The Accused created even more confusion as to the meaning and use of term '*kadogo*' when he referred to himself as '*kadogo*'. For instance, when he was interviewed by P-0315 in 2010, he stated: "*Before the AFDL, I was with the RPF in 1990 when I was 17 years old. In fact, I was 16 years old when I joined and then two months later I turned 17* […] *I was a child soldier myself, at 16 years*".[167] The interview was conducted in French, but the Accused claimed he used the Swahili term '*kadogo*' instead of the terms 'child soldier' in order to describe the fact the he was slim, and not that he was younger than 18.[168]

51. When questioned by the Legal Representative, the Accused affirmed that he ignored the difference between the Swahili term '*kado**go***' (emphasis on the last syllable) which stands for "child soldier", and the term '*ka**do**go*' (emphasis on the

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[163] See *e.g.* No. ICC-01/04-02/06-T-29-Red-ENG, p. 52; No. ICC-01/04-02/06-T-34-Red-ENG, p. 49; No. ICC-01/04-02/06-T-46-Red-ENG, p. 40; No. ICC-01/04-02/06-T-59-Red-ENG, p. 43; No. ICC-01/04-02/06-T-71-Red-ENG WT, p. 68; No. ICC-01/04-02/06-T-80-Red-ENG, pp. 9 and 35; No. ICC-01/04-02/06-T-136-Red-ENG, p. 38; and No. ICC-01/04-02/06-T-146-Red-ENG, p. 62. See also the testimonies of the Defence witnesses, *e.g.* No. ICC-01/04-02/06-T-245-Red-ENG WT, p. 32, and No. ICC-01/04-02/06-T-260-Red-ENG CT WT, p. 16 where D-0251 attempted to support the Accused's definition to no avail.

[164] See No. ICC-01/04-02/06-T-209-Red-ENG, pp. 34-35.

[165] See No. ICC-01/04-02/06-T-211-Red-ENG, p. 24.

[166] *Idem*.

[167] See DRC-OTP-2062-0363, p. 0363.

[168] See No. ICC-01/04-02/06-T-224-Red-ENG WT, pp. 72-75.

second syllable) which indeed stands for "small/thin".[169] This is improbable, given his self-demonstrated perfect command of the Swahili language, as evidenced by the simple fact that he testified for 121 hours in said language.

52. Finally regarding the French expression '*enfant soldat*' *i.e.* literally 'child soldier', the Accused provided contradictory explanations. He first claimed that he only "*discovered*" said term during the proceedings held in the present case.[170] Subsequently, he admitted that the terms '*enfants soldats*' used in UPC/FPLC correspondence referred to children under the age of 18 and who ought to be demobilised.[171]

53. The interpretation of the term '*kadogo*' put forward by the Accused is incompatible with the record of the case. Indeed, a number of witnesses confirmed that the term refers to child soldiers.[172] Moreover, according to Special Rapporteur Roberto Garretón, the term '*kadogo*' is being used since 1996 to unequivocally refer to the use children by the AFDL.[173] The same holds for the *Lubanga* case, where it was clarified that the term '*kadogo*' not only referred to children under the age of 15 but applied, at instances, to children under the age of 16 or 18.[174] It also holds for the *Katanga* case.[175] Accordingly, when mentioning the presence of *kadogos* in the UPC/FPLC, the witnesses concerned were clearly not making seize but age-related statements.

[169] See No. ICC-01/04-02/06-T-240-ENG CT WT, pp. 7-8.
[170] *Idem*, p. 8.
[171] See No. ICC-01/04-02/06-T-239-Red-ENG CT WT, p. 9.
[172] See *supra* para. 49 and footnote 163.
[173] See DRC-OTP-2084-0408, paras. 59-61.
[174] See the *Lubanga* Judgment, *supra* note 35, paras. 635-636 and 638.
[175] See the *Katanga* Judgment, *supra* note 34, para. 1061.

4.3. On the crimes of conscripting or enlisting children under the age of fifteen years into the UPC/FPLC or using them to participate actively in hostilities (Article 8(2)(e)(vii))

54. For the purpose of the present closing brief, the Legal Representative deems it necessary to analyse the notions covered under Article 8(2)(e)(vii). She will therefore focus on the notion of enlistment and conscription of child soldiers in an armed group on the one hand, and on the use of child soldiers in the UPC/FPLC on the other hand, both on a legal and factual points of view.

4.3.1. Preliminary observations: the existence of three distinct crimes

55. The Legal Representative submits that, considering the forms of criminality set out in Article 8(2)(e)(vi), enlistment is a "base crime" of which conscription is a special form. The use of children under the age of 15 to actively participate in hostilities, although related, is a separate form of criminality. The Legal Representative represents victims falling under each category and it is of particular interest for each set of victims that the conviction and the sentence reflect the crimes separately.

56. During the initial steps of the drafting history of the Statute, only the use of children to participate in hostilities or for military related labour was criminalised.[176] The concept of 'recruitment' appeared at a later stage.[177] In the context of negotiations involving several options[178] delegates decided to forbid "*recruiting children under the age of fifteen years into armed forces or using them to participate actively in hostilities*".[179] It

[176] See the Informal paper on war crimes, points B(t) for an international armed conflict and D(e) for an armed conflict not of an international character, 14 July 1997.
[177] See *e.g.* UN Doc. A/AC.249/1997/WG.1/CRP.2, 20 February 1997, p. 7 point B.(s) and UN doc. A/AC.249/1997/L.5, 12 March 1997, p. 13 (2)(p).
[178] See 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.
[179] See e.*g.* the interventions of Belgium, Switzerland, Bahrain, Turkey in different plenary meetings of the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998, Official Records, Volume II, UN Doc. A/CONF.183/13 (Vol. II), respectively p. 162, para. 8; p. 165, para. 58; p. 161, para. 70 and p. 166,

was only at the very end of the negotiation process that the terms 'conscripting and enlisting' were preferred over 'recruitment'.[180] Similar provisions in other international instruments also refer to 'recruitment' and 'participation in hostilities' as separate concepts.[181] The sequential incorporation of 'use', 'recruitment' and later 'enlistment and conscription' in the negotiations leading to the adoption of the Statute provides moderate support for the proposition that, since inception, they were conceived as different concepts. The distinctions made in other international instruments also support this conclusion. However, from these precedents, it cannot be discerned whether 'conscription', 'enlistment' and 'use' in Article 8(2)(e)(vi) constitute "*different crimes*" as opposed to "*different proscribed conducts of one crime*".

57. In the *Lubanga* case, Trial Chamber I decided that conscription, enlistment and use are three separate alternative offences.[182] This interpretation was not challenged on appeal. Therefore, the Appeals Chamber was explicit that it was not going to consider whether they are separate crimes or different proscribed conducts of one crime; the matter was left open for future assessment.[183]

58. In a partially dissenting opinion issued at the appeals stage, Judge Sang-Hyun Song considered that the Statute contains three separate *conducts* of one offence and that accordingly the Trial Chamber should have entered one only conviction and one

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para. 70. See also *idem*, p. 165, para. 46; p. 163, para. 18; p. 166, para. 69; p. 163, para. 24; paras. 61 and 67, p. 160; para. 73, p. 161; and para. 85, p. 167.

[180] In this sense, see COTTIER (M.) & GRIGNON (J.), "War Crimes", in TRIFFTERER (O.) (ed.), *op. cit.*, *supra* note 11, pp. 520-523. See also von HEBEL (H.) & ROBINSON (D.), "Crimes within the Jurisdiction of the Court", in. LEE (R. S) (ed.), *op. cit.*, *supra* note 4, p. 118.

[181] See *e.g.* article 77 (2) of the Additional Protocol I to the Geneva Conventions; article 4(3)(c) of the Additional Protocol II. This notwithstanding, the ICRC commentary separates between "conscription", "enlistment", or "use" of child soldiers. See ICRC Commentary to Article 4(3)(c) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, para. 4557. Similar language is reflected in article 38 of the Convention on the Rights of the Child.

[182] See the *Lubanga* Judgment, *supra* note 35, para. 609. In substance however, the Chamber reasoned a separation between 'enlistment and conscription' and 'use' to reject the interpretation that enlistment required a specific purpose: *i.e.* that the child later participates actively in hostilities. See also the *Katanga* Judgment, *supra* note 34, paras. 1040-1041.

[183] See the *Lubanga* Appeal Judgment, *supra* note 27, paras. 37-38.

only sentence, instead of three.[184] He underlined that Article 8(2)(e)(vii) lists the prohibited conducts in one and the same paragraph separated by the conjunction 'or': conscripting or enlisting or using. The dissenting opinion stressed that, when instead of different conducts of one crime distinct crimes are set out in one paragraph, these crimes are separated by the conjunction 'and'[185] as for instance in "*articles 8(2)(b)(xxii) and 8(2)(e)(vi) of the Statute* [where the terminology used is] *'[c]omitting rape, sexual slavery, enforced prostitution, forced pregnancy* […], *enforced sterilization, and any other form of sexual violence'*".[186] The Legal Representative notes respectfully that whilst Article 8(2)(e)(vi) was correctly quoted in the sense that it does use the conjunction 'and'; Article 8(2)(b)(xxii) actually uses for the same crimes the conjunction 'or'.[187] The different linguistic versions of the Statute do not coincide; 'or'/'and' have been used erratically.[188] It follows that the use of the conjunction 'or' in Article 8(2)(e)(vii) cannot support the interpretation that it refers to one only crime. In fact, it cannot support any of the competing interpretations.

59. Said partly dissenting opinion also relied on the 'Explanatory Note' to the Elements of Crimes to support that Article 8(2)(e)(vii) would list one only crime.[189] The Legal Representative respectfully submits that the Note solely sets out that where one paragraph of the Statute lists multiple crimes, the elements appear in

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[184] See the "Partly dissenting opinion of Judge Sang-Hyun Song", No. ICC-01/04-01/06-3121-Anx1 A5, 1 December 2014, paras. 1-10. See also the "Partly dissenting opinion of Judge Sang-Hyun Song", No. ICC-01/04-01/06-3122-Anx1 A4 A6, 1 December 2014, para. 5

[185] *Idem*, para. 4.

[186] *Ibidem.*

[187] Indeed, the provision states: "*Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization,* or *any other form of sexual violence also constituting a grave breach of the Geneva Conventions*" (emphasis added). The same applies for the relatively similar provision in Article 7(g).

[188] The Legal Representative notes that the French and the Spanish versions of Article 8(2)(e)(vi) do not use the conjunction 'and' as in English but the conjunction 'or' ('*ou*' and '*o*', respectively). The Spanish version of Article 8(2)(b)(xxii) does not use the conjunction 'or' as in English and French but the conjunction 'and' ('*y*').

[189] See the "Partly dissenting opinion of Judge Sang-Hyun Song", *supra* note 184, para. 5. The Explanatory Note sets out: "*The structure of the elements of the crimes of genocide, crimes against humanity and war crimes follows the structure of the corresponding provisions of articles 6, 7 and 8 of the Rome Statute. Some paragraphs of those articles of the Rome Statute list multiple crimes. In those instances, the elements of crimes appear in separate paragraphs which correspond to each of those crimes to facilitate the identification of the respective elements*".

separate paragraphs "*to facilitate the identification of the respective elements*". Accordingly, if the Elements of Crimes separate the paragraphs, each paragraph reflects one crime. But the reverse is not true: if the respective elements can be straightforwardly identified there should be no need to separate them in different paragraphs. Hence, lack of separation does not indicate the criminalisation of one only crime.[190]

60. In the submission of the Legal Representative, and as confirmed by the Appeals Chamber, the '*Blockburger* test' is the appropriate standard to determine whether conscription, enlistment and use of children allow separate convictions and sentences. Accordingly, a person can be convicted for more than one crime if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.[191] Where this test is not met, the Chamber must decide on the basis of the principle that the conviction under the more specific provision should be upheld.[192]

61. Clearly, 'use' is distinct from 'enlistment or conscription' in that children under the age of 15 may be used to participate in hostilities whether or not they had been recruited. Conversely, all elements contained in 'enlistment' are required for 'conscription'. Conscription requires an additional element. It follows that, technically, in relation to victims who joined forcibly the more specific provision to be applied is the one criminalising conscription; in other words: the Accused should not be convicted for the enlistment and the conscription of one and the same victim. However, in the submission of the Legal Representative, if proven that some victims

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[190] In this sense, see the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", No. ICC-RoC46(3)-01/18-1, 9 April 2018, paras. 18 *et seq*.
[191] In this sense, see WASCHEFORT (G.), *International Law and Child Soldiers (Studies in International Law)*, Hart Publishing, Oxford, 2015, 1st edition, pp. 125-126.
[192] See the *Bemba* et al. Appeal Judgment, *supra* note 29, para. 750 referring to *Prosecutor v. Delalić* et al. (*Čelebići case*), IT-96-21-A, Appeal Judgement, 20 February 2001, paras. 409, 412 and 413.

have been conscripted and other victims enlisted separate convictions and sentences are still apposite.

4.3.2. Enlistment and conscription of child soldiers in the UPC/FPLC

4.3.2.1. Principles of law

62. Neither Article 8(2)(e)(vi) nor the Elements of Crimes contain a definition of 'enlistment' and 'conscription'. In the jurisprudence of the Court, 'enlistment' has been defined as "*to enrol on the list of a military body*" or "*military service*" and 'conscription' as "*to enlist compulsorily*". The distinguishing element between the two crimes is that conscription has an "*added element of compulsion*".[193]

63. The Court has developed voluminous jurisprudence dealing with the interpretation of 'enlistment' and 'conscription' of children under the age of 15 in an armed force or group, as a war crime. The Legal Representative submits that, interpreting said provision, the Chamber should contemplate that:

- enlistment and conscription are both forms of recruitment;[194]
- conscription is the compulsory enlistment of persons into military service;[195]
- compulsion must be determined on a case-by-case basis, taking into account whether the force, threat of force or psychological pressure applied were of such a degree and so pervasive, that individuals can be said to have been forced to join the armed force or group.[196] In this regard:
  - a demonstration that an individual joined the armed group due to, *inter alia*, a legal obligation, brute force, threat of force, or

[193] See the *Lubanga* Judgment, *supra* note 35, paras. 607-608, referring to *Oxford Dictionary*, p. 491. See also COTTIER (M.) & GRIGNON (J.), *op. cit*., *supra* note 12, p. 524 and DÖRMANN (K.), *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, ICRC and Cambridge University Press, 2003, p. 377. Finally, see the *Lubanga* Appeal Judgment, *supra* note 27, para. 277 defining conscription as "*compulsory enlistment of persons into military service*".
[194] See the *Lubanga* Judgment, *supra* note 35, para. 607.
[195] See the *Lubanga* Appeal Judgment, *supra* note 27, para. 277.
[196] *Idem*, para. 282.

psychological pressure amounting to coercion may show compulsion;[197]

- compulsion does not require that an individual entered into an armed group against his/her will – conscription can be made out through a *legal obligation* to serve, the fact that the child *wanted* to join the army is irrelevant;[198]
- appeals and encouragement to enlist in an armed force are regular features of recruitment campaigns in countries that have voluntary military forces, even more so during on-going armed conflicts, and recruitment campaigns of this nature do not necessarily amount to coercion. However, depending on the specific circumstances of the case, mobilisation campaigns may show compulsion;[199]
- evidence indicating that wise elderly men persuaded the population to make young people available to the UPC/FPLC in order to contribute to the protection of their ethnic group against the Lendu, or in order to bring peace and avoid future problems show compulsion to the extent it had the capacity to create an obligation for communities to provide children;[200]
- lack of food or loss of parents and the general living conditions of a population are *per se not sufficient* to establish the degree of compulsion required to for the crime of conscription;[201]

- there is no requirement to demonstrate lack of consent;[202]
- a child's consent is not a valid defence, children lack the capacity and ability to give informed or genuine consent;[203] and

[197] *Ibidem*, para. 278.
[198] *Ibid.*, para. 301.
[199] *Ibid.*, paras. 285-286.
[200] *Ibid.*, paras. 294-295.
[201] *Ibid*.
[202] *Ibid.*, paras. 301-303.
[203] *Ibid.*, para. 300. See also the *Lubanga* Judgment, *supra* note 35, para. 617.

- these crimes are continuous in nature.[204]

64. Moreover, as noted, the status of a child under 15 who has been enlisted or conscripted is not dependent on the fact that he/she may have been used to participate actively in hostilities. Although it may often be the case, their subsequent potential participation in hostilities is not a requirement to demonstrate the commission of the crime of enlistment or conscription.[205]

65. By the same token, the Defence introduced a distinction between "*new recruits that are joining the FPLC and having their first training*" against "*soldiers that joined the FPLC and that are having their ideology training* [within the UPC/FPLC]".[206] The Legal Representative posits that such a distinction is without legal meaning and consequences. The provision of 'military training' is clearly inessential for purposes of the legal characterisation of the facts as enlistment or conscription. Indeed, whether the military training was provided by the UPC/FPLC, another militia, or was never provided, has no bearing on the criminalisation of the recruitment of children in armed groups. Even if accepted *arguendo* that recruitment is connected to the later use of the children to actively participate in hostilities, such an interpretation would not render the military training determinative of the question of recruitment. As set out in further details *infra*, active participation in hostilities include a series of non-combat activities[207] for which military training is unnecessary.

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[204] See the *Lubanga* Judgment, *supra* note 35, paras. 618 and 759, citing the "Decision on the Confirmation of Charges" (Pre-Trial Chamber I), No. ICC-01/04-01/06-803-tEN, 29 January 2007, para. 248 and *Prosecutor v. Nahimana* et al., ICTR-99-52-A, Appeal Judgement, 28 November 2007, para. 721.

[205] See the *Lubanga* Judgment, *supra* note 35, para. 609: "[I]*f Article 8(2)(e)(vii) is taken on its own, the position is potentially ambiguous, given it reads '****[c]onscripting or enlisting*** *children under the age of fifteen years into armed forces or groups* ***or using*** *them to participate actively in hostilities'" (emphasis added). However, the Elements of Crimes clarify the issue by requiring '1. 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'*** *(emphasis added)*" (emphasis original). See also the *Katanga* Judgment, *supra* note 34, paras. 1040-1041.

[206] See No. ICC-01/04-02/06-T-240-ENG_CT_WT, pp. 11-12. Regarding the so-called "*ideology training*", see *e.g.* No. ICC-01/04-02/06-T-214-Red-ENG_WT, pp. 4-7 and No. ICC-01/04-02/06-T-216-ENG_CT2_WT, p. 16.

[207] See *infra* paras. 115-118.

66. Concerning the issue of 'compulsion', the Legal Representative admits that "*recruitment does not necessarily involve the conscription of children by force, given the many alternative, non-forceful ways of persuading children to join the military 'voluntarily' that were available. Similar pressure could be applied to their families*".[208]

67. The Legal Representative also accepts, as set out *supra*, that lack of food or loss of parents and the general living conditions of a population are *per se not sufficient* to establish the degree of compulsion required for the crime of conscription.[209] However, when these circumstances are not viewed in isolation but rather combined with other factors, a voluntary incorporation into the armed group of a child below 15 can no longer be conceived. As articulated by the UN Special Representative on Children and Armed Conflict in its *amicus curiae* brief in the *Lubanga* case, joining an army in the DRC may be a step taken in "*a desperate attempt to survive*". Children are confronted with limited options in the context of poverty, or driven by ethnic rivalry and ideological motivations, if not encouraged by their own family members.[210]

68. The Legal Representative posits that the circumstances of the present case had a serious impact on any decision by child soldiers to join the UPC/FPLC or on a parent's decision to surrender their children to the militia. She respectfully requests the Chamber to take these observations into account when analysing the facts *infra*.

69. The Legal Representative submits that the Chamber may decide to deal with the facts relevant to the crimes of conscription and enlistment together.[211] Article 74(5) imposes no limitation in this respect. Whereas the judgment must contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions, it is entirely left to its discretion how to present the

[208] See the *Lubanga* Judgment, *supra* note 35, para. 784.
[209] See *supra* para. 63 and note 201.
[210] See the "Annex A of 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", No. ICC-01/04-01/06-1229-AnxA, 18 March 2008, paras. 13-14.
[211] See the *Lubanga* Judgment, *supra* note 35, para. 618.

relevant findings. Admittedly, witnesses and documents have mostly addressed these crimes jointly. Hence, although separating the crimes may enhance the Appeals Chamber's ability to review the judgment,[212] if need be, this might also lead to unnecessary repetitions or artificial expunctions. In any event, analysing the evidence of conscription and enlistment together would reveal no error.[213]

4.3.2.2. Relevant facts

a. Preliminary observations: The widespread recruitment and use of child soldiers in Ituri in 2002-2003

70. According to Special Rapporteur Roberto Garretón, the use of children by armed groups was a widespread issue throughout the DRC, and more specifically in Ituri, just before the period covered by the confirmed charges.[214] According to him, this pattern of using children could be observed in several armed conflicts which took place in the DRC and within different armed groups, such as the RCD-Goma, or the Maï-Maï militia for instance.[215] He further explained that children are seen as more loyal and obedient soldiers who are not afraid to fight.[216] This assertion was confirmed by P-0963, who explained that children were more compliant of orders, wicked, and had less material needs.[217] As a conservative estimate, it is believed that at least 40% of each militia force in 2002-2003 was composed of children below the age of 18, "*with a significant minority below the age of 15*".[218]

71. P-0315 drafted a report in July 2003 about the situation in Ituri, and more specifically the ethnically targeted violence in said province. Based on detailed information, the report concluded that "[a]*ll armed groups fighting in Ituri have large numbers of children in their ranks. As the war intensified, the forced recruitment of children*

[212] See the *Lubanga* Appeal Judgment, *supra* note 27, para. 313.
[213] *Idem*, paras. 311-312.
[214] See DRC-OTP-2084-0408.
[215] *Idem*, paras. 67-83. See also DRC-OTP-2088-0132, pp. 0188-0204.
[216] See DRC-OTP-2084-0408, para. 58. In this sense, see also No. ICC-01/04-02/06-T-144-Red-ENG, p. 36.
[217] See No. ICC-01/04-02/06-T-80-Red-ENG, p. 32.
[218] See DRC-OTP-0074-0422, p. 0461, para. 141.

also increased dramatically. Children as young as seven, including girls, have been recruited for military service".[219]

72. P-0046, spent 33 months with MONUC in Congo as a Child Protection Adviser as of January 2002.[220] She was posted in Bunia and covered Ituri from May 2003 until she left Congo.[221] She reported to the Chief Child Protection based in Kinshasa and to the Head of sector six (*i.e.* Bunia) through the provision of weekly written reports.[222] In said reports, she relied on direct observation while in Bunia or during her field missions, and on the information provided by MILOBs and other colleagues from the MONUC.[223] P-0046 explained that the MILOBs would identify the number of children below 18 present in the armed groups during their visits of military camps, even reporting of the types of weapons the children were using.[224]

73. P-0046 interviewed many child soldiers and collected information about the family or schools for the purpose of family tracing and reunification. She would also cross-check information with people working in transit centres who spent significant time with them and thus were in a better position to assess the age of the children.[225] She paid particular attention to the PMFs which was a great concern.[226] She also documented children below the age of 15 in every CTOs. According to her, 220 children out of 600 that were recorded in CTOs were under the age of 15.[227] 167 out of 220 children were demobilised from the UPC/FPLC, however she could not recall how many were there in 2002-2003.[228] 71 children among them were under 15, and out of these 71, 33 stated that they participated in combats before they

[219] See DRC-OTP-0074-0797, p. 0850 (footnote omitted).
[220] See No. ICC-01/04-02/06-T-100-Red-ENG, pp. 9-10.
[221] *Idem*, p. 11.
[222] *Ibidem*, p. 12.
[223] *Ibid.*, pp. 13-14.
[224] *Ibid.*, pp. 16-17.
[225] *Ibid.*, pp. 23-26 and No. ICC-01/04-02/06-T-101-Red-ENG, pp. 101-102.
[226] See No. ICC-01/04-02/06-T-100-Red-ENG, p. 28.
[227] *Idem*, pp. 42-43.
[228] *Ibidem*, pp. 43-46.

reached the age of 15.[229] She explained that the children always had some type of information about their age, and none of the children she talked to had any reason to lie about it.[230] In fact, it happened once that a child pretended to be a former child soldier just to be admitted in a CTO, but the other children reported him. He was referred to other services and NGOs specialised on unaccompanied children for instance.[231]

74. Demobilisation centres would also verify the child's information by cross-checking his/her account of his/her role during the war, and those of other children,[232] by talking to their parents or by checking civil and school records.[233] They would record all the information.[234] According to P-0031, most of the girls present in demobilisation centres were used as 'wives' and some of them would come with children they delivered during their time in the militia.[235]

b. The UPC/FPLC enlisted children under the age of 15, conducted recruitment campaigns and abductions

75. The Accused was adamant that all recruits within the UPC/FPLC came to the training camps "*on their own accord*".[236] He further stated that he was never involved in any campaign encouraging people from Ituri to join the ranks of the militia.[237] However, the record of the case proves the contrary. Indeed, recruitment was being undertaken by high ranking officers of the UPC/FPLC, including the Accused himself, through recruitment campaigns, and even abductions.

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[229] See No. ICC-01/04-02/06-T-101-Red-ENG, p 100.
[230] See No. ICC-01/04-02/06-T-100-Red-ENG, p. 47 and No. ICC-01/04-02/06-T-101-Red-ENG, pp. 103-104.
[231] See No. ICC-01/04-02/06-T-102-Red-ENG, p. 103.
[232] See DRC-OTP-2054-3939, p. 3950.
[233] *Idem*, pp. 3952-3954.
[234] See DRC-OTP-2054-3939, p. 3950.
[235] See DRC-OTP-2054-3760, p. 3782.
[236] See No. ICC-01/04-02/06-T-213-Red-ENG_WT, p. 75.
[237] See No. ICC-01/04-02/06-T-240-ENG_CT_WT, p. 28.

76. P-0046 produced a report comprising all the information gathered by the Special Investigation team and the human rights investigations made by the child protection section of the MONUC. It confirmed that UPC/FPLC recruitment drives took place regularly throughout 2002 and early 2003.[238] The existence of these recruitment campaigns was also confirmed by P-0116 who justified the recruitment by the need for the UPC/FPLC to "*consolidate its position as a strong political movement in the Ituri region*".[239] Re-recruitment even took place using threats against demobilised children, or their families.[240]

77. P-0901 confirmed that outreach campaigns took place in Bunia and in the rural areas, as ordered by NTAGANDA and KISEMBO. According to him, the purpose was to raise awareness within the population and to ask parents to provide their children to ensure the safety of their villages. The recruits would then be sent to different training camps.[241] P-0768 further explained that the UPC/FPLC commanders would then carry on the recruitment themselves as well by speaking to the surrounding communities, in the nearby Hema villages.[242] P-0017 confirmed that KISEMBO, for instance, went to Kilo État where he encouraged the elders to enlist the children. As a result, many children joined the UPC/FPLC. P-0017 even clearly recalled an incident where a mother tried to get her child back before he was sent for training because he was only 12.[243] Likewise, [REDACTED] remembered that UPC/FPLC members, and more specifically KISEMBO, came to Kilo in order to launch a recruitment campaign amongst the Nyali people. They argued that children needed to join the UPC/FPLC in order to protect their own territory.[244] When

[238] See No. ICC-01/04-02/06-T-100-Red-ENG, pp. 94-95. See also DRC-OTP-0074-0422, para. 143.
[239] See DRC-OTP-2054-4494, p. 4589. See also DRC-OTP-2054-6975, pp. 7035-7036.
[240] See DRC-OTP-2054-4494, pp. 4590-4591.
[241] See No. ICC-01/04-02/06-T-27-Red-ENGp. 61 and No. ICC-01/04-02/06-T-32-Red-ENG, pp. 55-57. See also P-0012's testimony, DRC-OTP-2054-0172, p. 0249 and *infra* paras. 87-91.
[242] See No. ICC-01/04-02/06-T-34-Red-ENG, pp. 56-57.
[243] See No. ICC-01/04-02/06-T-59-Red-ENG, p. 44.
[244] [REDACTED].

[REDACTED] joined the UPC/FPLC, he was only 13. He was trained in Mandro and came back later to the witness' house.[245]

78. In August 2002, NTAGANDA was also forcibly recruiting in primary schools in Mudzipela (in fifth and sixth years of primary school) where he found young children, necessarily under-aged, to be trained in Mandro in order to participate in the Songolo attack. P-0190 testified that he and his parents were living in a house nearby and he was approached by many parents, [REDACTED], who reported that their children were taken.[246] He further explained that Mudzipela was strategic because it was situated not far away from Mandro where a large majority of Hema people lived. Thus, the Accused was more certain to find recruits to join the ranks of the UPC/FPLC to meet its need for additional troops,[247] which was described as his unique purpose at the time.[248] Said purpose, in and off itself, was confirmed by the Accused who testified that his "*role was to provide* [the UPC/FPLC] *with troops to provide security from Mandro to Tchomia*".[249] Other children would be picked up along the way and had to travel on foot to the Mandro training camp.[250] Among them was [REDACTED], aged 14 at the time, together with other young children.[251] According to P-0190, families and school officials reacted very strongly to the conscription of these children but were powerless.[252]

79. P-0898 [REDACTED], [REDACTED] was 13[253] and joined the UPC/FPLC following the killings committed by the APC and the Lendu combatants.[254] He was

[245] [REDACTED].
[246] See No. ICC-01/04-02/06-T-97-Red-ENG, pp. 37-38.
[247] *Idem*, pp. 31-35. See also [REDACTED]'s testimony where the witness mentioned that most of the children to be found [REDACTED] were coming from Mudzipela, [REDACTED].
[248] See No. ICC-01/04-02/06-T-97-Red-ENG, p. 37.
[249] See No. ICC-01/04-02/06-T-215-ENG_CT_WT, p. 50.
[250] See No. ICC-01/04-02/06-T-97-Red-ENG, pp. 33-34, 36 and 38-39.
[251] [REDACTED]. See also [REDACTED] .
[252] See No. ICC-01/04-02/06-T-97-Red-ENG, pp. 36-37.
[253] See No. ICC-01/04-02/06-T-153-Red-ENG, p. 30.
[254] *Idem*, p. 51.

trained first at the [REDACTED],[255] together with 40 to 50 recruits.[256] [REDACTED] the Mandro training camp.[257] [REDACTED] P-0918 recalled that NTAGANDA held a rally [REDACTED] by addressing civilians and calling upon them to follow military training and to send their children, rather than fleeing.[258] Children were being regrouped [REDACTED]. Most of these children were joining because they were orphans and were hoping to find shelter and food.[259]

80. [REDACTED], P-0888, explained that he was attending [REDACTED] at the time.[260] He provided further details about the circumstances of the kidnapping which happened while he was fetching water.[261] He was put in a pick-up truck by soldiers armed with SMGs and rocket launchers with about forty other recruits,[262] including [REDACTED], also aged 14, [REDACTED] and [REDACTED].[263] He was told that "*Afande BOSCO*" was in the other vehicle, but given his state of panic, did not verify the information or try to know who he was.[264]

81. P-0769 explained that he participated in a propaganda meeting [REDACTED] where the Accused was addressing the participants at the primary school and preparatory meeting for the UPC/FPLC celebrations with the young people of Ituri.[265] The witness explained that students were very interested in the UPC/FPLC because the representatives of the militia were saying there were going to recruit people to become 'cadres', *i.e.* executives, of the UPC/FPLC and pay for their studies.[266]

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[255] *Ibidem*, p. 52.
[256] *Ibid.*, p. 53.
[257] *Ibid.*, p. 54.
[258] See No. ICC-01/04-02/06-T-155-Red-ENG, pp. 79-81.
[259] *Idem*, pp. 81-82.
[260] See No. ICC-01/04-02/06-T-105-Red-ENG, pp. 12-13. See also DRC-OTP-0118-0043, p. 46; DRC-OTP-2094-0034; DRC-OTP-0118-0020; and No. ICC-01/04-02/06-T-109-Red-ENG, pp. 8-36.
[261] See No. ICC-01/04-02/06-T-105-Red-ENG, pp. 13-17.
[262] *Idem*, pp. 16 and 20.
[263] *Ibidem*, pp. 18 and 21.
[264] *Ibid.*, p. 19. No. ICC-01/04-02/06-T-106-Red-ENG, pp. 49-50.
[265] See No. ICC-01/04-02/06-T-120-Red-ENG, pp. 11 and 16-17.
[266] *Idem*, pp. 11 and 13-17.

82. P-0315 reported that:

> "*On November 8, 2002 at 8:00 a.m., the UPC/FPLC 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/FPLC 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 to UPC/FPLC President Lubanga in late 2002 about the recruitment of children* […] *Witnesses report that at the start of the conflict each Hema family had to give one child to the Hema militias or had to pay to be exempt from this obligation. If parents refused, their children were taken by force. Parents with the necessary financial means sent their children away to Kisangani, Kampala, or elsewhere to avoid their being pressed into military service*".[267]

83. In September 2002, P-0046 heard about a wave of recruitment of child soldiers by the UPC/FPLC, and the calls from ISP officials to the Hema families to give a child to the UPC.[268] Pressure on young people by the community to join the UPC/FPLC was also corroborated by D-0172.[269] In the same vein, P-0031 was told by Hema children [REDACTED] that the UPC/FPLC would conduct mobilisation and recruitment campaigns targeting families in order to provide children and money.[270] The age range of the children [REDACTED] was from 9 to 16.[271]

84. P-0010 recalled that on one occasion she saw the Accused stopped on the Mongbwalu road in Mabanga – a Hema village – to talk to the authorities and to sensitise the population into joining the ranks of the UPC/FPLC "*whether it be kadogo, kibonge or mothers*".[272] The very same event was corroborated by [REDACTED] who witnessed the Accused, together with Chief KAHWA, holding rallies in front of

[267] See DRC-OTP-0074-0797, p. 0851 (footnote omitted).
[268] See No. ICC-01/04-02/06-T-100-Red-ENG, pp. 49-52.
[269] See No. ICC-01/04-02/06-T-245-Red-ENG_WT, pp. 80-81 and 83.
[270] See DRC-OTP-2054-3760, pp. 3766-3767 and 3789-3790.
[271] *Idem* and 3791.
[272] See No. ICC-01/04-02/06-T-47-Red-ENG, pp. 51-52.

young people in Mabanga. He further witnessed the latter requesting that every family give at least one child.[273]

85. P-0014 realised that the practice of recruiting children in Ituri was ongoing before the creation of the UPC/FPLC but that it did in fact reach a higher scale when said militia took control over the region.[274] Children would join on their own or would be abducted at schools, for instance.[275] P-0014 also confirmed that Hema families who could not contribute financially or materially would have to give a child to the militia.[276] He also specified that these campaigns would start from Bunia and other villages throughout the territories of Djugu and Irumu, and were later extended to Aru and Mahagi.[277] He testified [REDACTED] he saw children being trained at the UPC/FPLC's headquarters starting in July 2002 by the person who was "*at the core of the Lubanga's army*", "*a certain Bosco Ntaganda*".[278] He was told by a child that 'Commander Bosco' taught him that his weapon was his father, mother, brother and sister.[279]

86. To P-0055's knowledge, some people came voluntarily and others were recruited forcibly.[280] He testified about the abduction of young people in Mudzipela[281] and Fataki[282]. P-0055 also reported a conversation in which [REDACTED] told him that "*if people didn't want to give a child and have a child go for training,* [the UPC/FPLC] *would take the children by force. Some women didn't want to provide a child or children, so they would give money instead so that their children would be spared*".[283]

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[273] [REDACTED].
[274] [REDACTED].
[275] See No. ICC-01/04-02/06-T-137-Red-ENG, pp. 4-5.
[276] See No. ICC-01/04-02/06-T-136-Red-ENG, p. 38.
[277] See No. ICC-01/04-02/06-T-137-Red-ENG, p. 5.
[278] [REDACTED]. See also No. ICC-01/04-02/06-T-136-Red-ENG, p. 40.
[279] [REDACTED]. See also No. ICC-01/04-02/06-T-136-Red-ENG, pp. 40-41.
[280] See No. ICC-01/04-02/06-T-71-Red-ENG_WT, p. 66.
[281] *Idem*.
[282] *Ibidem*, p. 67.
[283] *Ibid.*, pp. 67-68.

c. Existence of UPC/FPLC training camps

87. Once recruited, children were trained in training camps in order to increase the UPC/FPLC military capacity. The existence of numerous UPC/FPLC trainings camps was not disputed by the Accused who confirmed that such camps were established throughout Ituri, including in Mandro, Saikpa, Rwampara, Boga, Bule, Lingo, Fataki, Largu, Katoto, Mont Awa, Kudja and Tchomia.[284] He also mentioned the existence of camps, albeit not used as training camps, such as Joo.[285]

88. P-0010 explained that she was taught to fire and handle weapons in Mandro.[286] According to her, Chief KAHWA was the commander in charge of the Mandro camp.[287] P-0012 corroborated this piece of information, and specified that NTAGANDA was in charge of training the young Hema children.[288] The Accused confirmed the same.[289] P-0888 provided further details regarding the training which involved instructions on using weapons such as SMGs and rocket launchers.[290]

89. After the Mandro training camp was attacked by the APC, the recruits were moved to Saikpa in order to continue their training.[291] The Accused similarly refers to this event.[292] P-0055 confirmed there was a training camp in every sector such as in Fataki[293], Aru, Mahagi, Sota and Centrale.[294] The Bule training camp was the last one to be put in place in February 2003.[295]

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[284] See *e.g.* No. ICC-01/04-02/06-T-239-Red-ENG CT WT, p. 51; No. ICC-01/04-02/06-T-213-Red-ENG WT, pp. 60-62; No. ICC-01/04-02/06-T-214-Red-ENG WT, pp. 13 and 19-20; No. ICC-01/04-02/06-T-215-ENG CT WT, pp. 49-51, 63-64 and 77-78; No. ICC-01/04-02/06-T-217-Red-ENG WT, p. 90; and No. ICC-01/04-02/06-T-220-Red-ENG WT, pp. 24-31.
[285] See No. ICC-01/04-02/06-T-239-Red-ENG CT WT, p. 52.
[286] See No. ICC-01/04-02/06-T-46-Red-ENG, p. 41.
[287] *Idem*. See also No. ICC-01/04-02/06-T-47-Red-ENG, pp. 4-5.
[288] See DRC-OTP-0105-0085, para. 116. See also No. ICC-01/04-02/06-T-164-Red-ENG, p. 26.
[289] He explained that he decided the topics to be taught in Mandro, namely: "*how to dismantle a weapon and to assemble it, as well as how to use a weapon,* […] *military drills,* […] *combat tactics, field craft* […] *and* […] *military ideology*": No. ICC-01/04-02/06-T-213-Red-ENG WT, p. 64.
[290] See No. ICC-01/04-02/06-T-105-Red-ENG, pp. 25-26.
[291] See No. ICC-01/04-02/06-T-31-Red-ENG, p. 37.
[292] See No. ICC-01/04-02/06-T-214-Red-ENG WT, p. 12.
[293] See No. ICC-01/04-02/06-T-71-Red-ENG WT, p. 64.

90. P-0031 confirmed that [REDACTED] children who were taken in Mongbwalu and sent to Aru and Mahagi.[296]

91. As discussed *infra*, military insiders and former child soldiers provided detailed evidence as to the presence of child soldiers in the UPC/FPLC training camps[297] and the harsh living conditions and the brutal discipline they were subjected to.[298]

d. Presence of child soldiers in the UPC/FPLC training camps

92. In her report "*Ituri: 'covered in blood'*", P-0315 wrote:

> "*Many observers described the UPC force as 'an army of children'. The children, some as young as seven and including girls, were trained by the UPC at training centers in Mandro and Rwampara for one to two months before being sent into action. A person arrested by the UPC in Bunia said he was guarded by child soldiers. 'There were four children guarding the cell, all under 13,' he recounted. 'I asked them what they were doing there. They said their parents were dead and they could earn something in the army. One of them said he'd done only three years of school. They were all armed but you could tell they didn't want to be there.' MONUC observers reported back to headquarters in Kinshasa that an estimated twenty percent of the recruits in Mandro camp were children. Other sources estimated the Mandro camp to have about 5,000 fighters, implying there may have been nearly 1,000 child soldiers there. On September 10 and 27 MONUC officers reported to Kinshasa that the UPC was continuing forcible recruitment of children. When MONUC staff took up the problem with UPC Commander Bosco he said that 'the underage children were all orphans and that the UPC were looking after them.' He insisted that all recruitment was voluntary*".[299]

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[294] *Idem*, pp. 65-66.
[295] See No. ICC-01/04-02/06-T-32-Red-ENG, pp. 56-57.
[296] See DRC-OTP-2054-4127, p. 4140.
[297] See *infra*, paras. 92-96.
[298] See *infra*, paras. 99-104.
[299] See DRC-OTP-0074-0797, p. 0851 (footnotes omitted).

93. P-10 visited the Rwampara camp [REDACTED].[300] She was able to describe the training that was taking place as the recruits were dressed in civilian clothing and would train with sticks.[301] She further explained that the recruits who were already wearing uniforms were close to finishing the training.[302] She noticed some recruits being under 15.[303] The Accused's presence in Rwampara was confirmed by [REDACTED],[304] and recalled seeing children under 15, some were 12, 13 or 14, in the Accused's escort.[305] As far as P-0898 is concerned, he estimated that at the time he was trained in Mandro, about 50 recruits were as young as he was, *i.e.* 13 years of age.[306] P-0768 also witnessed recruits of all age in the Mandro camp, starting from "*12 or 11 years old*".[307] P-0017 similarly stated that he saw four recruits aged around 10 or 11 in Mandro.[308] The presence of a large number of *kadogos* in Mandro was also confirmed by P-0190[309] and P-0888[310] who specified that NTAGANDA gave clear orders that they had to be trained.[311]

94. P-0963 was present [REDACTED] during the last phase of training that occurred in [REDACTED]. This phase was known as the '*ujanja la pori*' and meant that uniforms and weapons would be handed to the newly trained recruits in order to deploy them and fight within town. On this occasion, he noticed that some of the

[300] See DRC-OTP-0120-0293.
[301] See No. ICC-01/04-02/06-T-48-Red-ENG_WT, pp. 5-6 and 10-14. This information was also detailed by P-0963 who explained that the stick was also named '*muti*' which meant wood in Swahili. The stick could also be named '*papa te*' or '*mama te*' meaning that the father and the mother were absent so there the recruits were not supposed to cry. It is an interesting detail as regards the age (and behaviour) of some of the recruits for whom these terms were used. See No. ICC-01/04-02/06-T-80-Red-ENG, pp. 24-25.
[302] See No. ICC-01/04-02/06-T-47-Red-ENG, pp. 52-55 and No. ICC-01/04-02/06-T-48-Red-ENG_WT, pp. 3-16. See also DRC-OTP-0120-0293.
[303] See No. ICC-01/04-02/06-T-47-Red-ENG, p. 55.
[304] [REDACTED] and [REDACTED].
[305] [REDACTED].
[306] See No. ICC-01/04-02/06-T-153-Red-ENG, p. 58.
[307] See No. ICC-01/04-02/06-T-34-Red-ENG, p. 51.
[308] See No. ICC-01/04-02/06-T-58-Red-ENG, pp. 24-25.
[309] See No. ICC-01/04-02/06-T-97-Red-ENG, pp. 33-46.
[310] See No. ICC-01/04-02/06-T-105-Red-ENG, p. 27.
[311] *Idem*, pp. 31-32.

recruits were child soldiers. These recruits would spontaneously give their age when asked, or simply talked about it.[312]

95. Similarly, [REDACTED] noticed children aged 13 or 14 years old who joined the training in the Saikpa centre. He indicated that he was aware of their age since he was told directly by them.[313] P-0769, who was sent to Camp Ndromo after enrolling, also explained that there were children at the Ndromo camp as young as 9. A lot of them were speaking *kilendu* as if they were coming from Djugu and have been displaced by the war.[314] He indicated that the child recruits were present and participating in the parade when Commander KISEMBO was coming to the camp.[315] Similarly, P-0768 mentioned the Mont Awa training camp where no age criteria were applied when recruiting.[316] P-0907 explained that children joined the Kudja training camp seeking refuge. They were aged 10, 12 and over.[317]

96. P-0758, aged 13 at the time, was abducted together with other civilians [REDACTED] by UPC/FPLC soldiers.[318] Before being sent to the Lingo camp, she was held in a place called [REDACTED] under, among others, Commander [REDACTED] watch.[319] In Lingo, she met KISEMBO who explained that they will have to undergo training.[320] They received NTAGANDA'S visit.[321] She later joined the camp in [REDACTED][322] and finally joined the [REDACTED] where there used to be a market.[323]

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[312] See No. ICC-01/04-02/06-T-80-Red-ENG, pp. 11-14.
[313] [REDACTED].
[314] See No. ICC-01/04-02/06-T-120-Red-ENG, p. 38.
[315] *Idem*, p. 41.
[316] See No. ICC-01/04-02/06-T-34-Red-ENG, pp. 53-54.
[317] See No. ICC-01/04-02/06-T-89-Red-ENG, pp. 24-25.
[318] See No. ICC-01/04-02/06-T-160-Red-ENG, pp. 78-81.
[319] *Idem*, pp. 81-83.
[320] *Ibidem*, pp. 92-93.
[321] See No. ICC-01/04-02/06-T-161-Red-ENG, pp. 15-17.
[322] *Idem*, pp. 52-53.
[323] *Ibidem*, p. 56.

e. Harsh living conditions and brutal discipline in the UPC/FPLC training camps

97. The Accused testified to the effect that "*the army was considered as a family*".[324] He further added that "[a]*ll those who joined the FPLC did so on a voluntary basis*" and "[i]*f somebody wanted to leave the army, that was authorised* […] *without imposing any conditions thereto*".[325] According to the Accused, the UPC/FPLC "*army had sufficient food*"[326] and at no point food supplies were lacking.[327] In the same vein, D-0017 testified "*the sanitary conditions* [in Mandro] *were very good*".[328] And according to D-0251, "[i]*n the UPC* [soldiers] *lived in love and agreement*".[329] The record of the case proves a different reality.

98. The Accused specified that severe punishment, "*even up to point of being executed*" could be applied to soldiers who deserted with a weapon.[330] Regarding the punishment of recruits, the Accused delivered two different versions. Although he first admitted that they were indeed beaten,[331] he further stated that they were not beaten because they were from the same ethnic groups of the instructors[332] and accordingly the only punishments imposed were push-ups and rollovers.[333] However, a report sent to KISEMBO, by the G5, suggested stopping the excessive whipping and executions for small errors.[334] The report further referred to desertion as an event that would discourage 'children' from joining the army.[335]

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[324] See No. ICC-01/04-02/06-T-239-Red-ENG CT WT, p. 47 and No. ICC-01/04-02/06-T-213-Red-ENG WT, pp. 65-66.
[325] See No. ICC-01/04-02/06-T-240-ENG CT WT, p. 14 and No. ICC-01/04-02/06-T-213-Red-ENG WT, p. 75.
[326] See No. ICC-01/04-02/06-T-240-ENG CT WT, pp. 15-16.
[327] *Idem*, p. 17. See also No. ICC-01/04-02/06-T-213-Red-ENG WT, pp. 67-68.
[328] See No. ICC-01/04-02/06-T-252-Red-ENG WT, p. 64. See also D-0080's statement, DRC-D18-0001-6163, p. 6168.
[329] See No. ICC-01/04-02/06-T-260-Red-ENG CT WT, p. 34.
[330] See No. ICC-01/04-02/06-T-227-Red-ENG WT, p. 47-48.
[331] See No. ICC-01/04-02/06-T-213-Red-ENG WT, p. 84.
[332] See No. ICC-01/04-02/06-T-227-Red-ENG WT, pp. 45-46.
[333] *Idem*, p. 46.
[334] See DRC-OTP-0109-0136 and No. ICC-01/04-02/06-T-227-Red-ENG WT, pp. 56-63.
[335] *Idem*, p. 59-60.

99. According to P-0768, the children undertook the same training as the adults.[336] This testimony was corroborated by many witnesses, including P-0769[337] and P-0010.[338] The same holds true with regard to the fact that the girls were undertaking the same training as the boys.[339]

100. P-0010 explained that it was impossible to leave the Rwampara training camp, or to refuse to do military exercise, as the recruits would face punishment in such instances.[340] It was physically difficult for *kadogos* to perform certain military exercises, but if they did not perform well, corporal punishment would also be used.[341]

101. P-0888 explained that escaping from Mandro was not an option, as recruits knew they would face harsh punishment.[342] P-0963 confirmed that it was impossible for recruits to leave the camp as they faced severe punishments. If one was caught deserting, he/she would automatically be sought after and sent back to Mandro.[343] D-0017 corroborated the existence of harsh punishment specifying that he "*was amongst the staff who were supposed to monitor people who would flee from the camp* […]".[344] P-0769 also explained that it was not possible to escape the Ndromo camp, [REDACTED].[345] Similarly, regarding the Kudja Camp, P-0907 explained that if children tried to escape, they could be killed.[346]

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[336] See No. ICC-01/04-02/06-T-34-Red-ENG, p. 51.
[337] See No. ICC-01/04-02/06-T-120-Red-ENG, pp. 39-41.
[338] See No. ICC-01/04-02/06-T-48-Red-ENG_WT, p. 20.
[339] See *e.g.* No. ICC-01/04-02/06-T-71-Red-ENG_WT, p. 76; No. ICC-01/04-02/06-T-34-Red-ENG, p. 51; and No. ICC-01/04-02/06-T-252-Red-ENG_WT, p. 68.
[340] See No. ICC-01/04-02/06-T-46-Red-ENG, p. 39.
[341] See No. ICC-01/04-02/06-T-48-Red-ENG_WT, pp. 20-21.
[342] See No. ICC-01/04-02/06-T-105-Red-ENG, p. 40.
[343] See No. ICC-01/04-02/06-T-80-Red-ENG, p. 26.
[344] See No. ICC-01/04-02/06-T-254-Red-ENG_WT, p. 7.
[345] See No. ICC-01/04-02/06-T-120-Red-ENG, pp. 54-55.
[346] See No. ICC-01/04-02/06-T-89-Red-ENG, pp. 28-29.

102. P-0883 described the training in the Bule camp, where they had to use sticks instead of real rifles.[347] They were also threatened to be killed if they ever tried to flee; in addition, they would be constantly surrounded by armed soldiers.[348]

103. P-0888 further reported the pitiful living conditions in Mandro. According to his account, recruits were given one meal per day in the evening, but the food was not properly cooked and it was poured into their shirts.[349] There was no medical care.[350] According to P-0883, the recruits would receive once a day a mix of beans and maize called '*mbilibo*' as their only meal at Bule Camp.[351] They would sleep under a tarpaulin while commanders would sleep in their own houses.[352]

104. They were often beaten, and as far as P-0888 is concerned, [REDACTED], it was mostly on his upper body part and his calves.[353] The other recruits were also severely punished, for instance, if they had lost their weapons. P-0888 reported that a child soldier was even killed for that reason, probably following the Accused's orders, [REDACTED].[354] P-0014 testified that he saw children undergoing training being flogged "*on their buttocks, on their back, on their stomach*".[355] The same types of punishment were described by P-0758.[356]

[347] See No. ICC-01/04-02/06-T-168-Red-ENG, pp. 15-16.
[348] *Idem*, pp. 25-26.
[349] See No. ICC-01/04-02/06-T-105-Red-ENG, pp. 22 and 33. This fact was also described by P-0898, No. ICC-01/04-02/06-T-153-Red-ENG, p. 71.
[350] See No. ICC-01/04-02/06-T-105-Red-ENG, pp. 22-23.
[351] See No. ICC-01/04-02/06-T-168-Red-ENG, p. 28.
[352] See No. ICC-01/04-02/06-T-105-Red-ENG, pp. 32-33.
[353] *Idem*, p. 34. [REDACTED].
[354] See No. ICC-01/04-02/06-T-105-Red-ENG, pp. 40-42.
[355] See No. ICC-01/04-02/06-T-137-Red-ENG, pp. 7-8.
[356] See No. ICC-01/04-02/06-T-161-Red-ENG, pp. 18-19.

f. Visit of the Accused in the UPC/FPLC training camps

105. The Accused acknowledged having been in charge of the training in the Mandro camp, to train "*young people*"[357] and having visited the Rwampara camp several times.[358]

106. Indeed, P-0010 visited the Rwampara camp [REDACTED]. LUBANGA was also present to give a speech.[359] The Accused's presence in Rwampara training camp was confirmed by [REDACTED][360] and recalled seeing children in the Accused's escort.[361]

107. P-0055 described the graduation ceremonies as events chaired by either NTAGANDA or KISEMBO where the recruits would demonstrate their shooting skills and were then given a uniform.[362] Thereafter, they would be deployed upon NTAGANDA's orders.[363] In the same vein, P-0010 testified that after completion of her training in Mandro, she was subsequently given a weapon and a uniform in Rwampara by NTAGANDA.[364] As far as P-0898 is concerned, he remembered seeing the Accused at least on three occasions in Mandro, the last time being during the graduation ceremony, when recruits received their uniforms.[365]

108. Consequently, the Accused could not to ignore the child soldiers' presence in the camps he visited. His defence consisting in arguing that children clearly visible

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[357] See No. ICC-01/04-02/06-T-213-Red-ENG WT, pp. 51-52 and 59; and No. ICC-01/04-02/06-T-215-ENG CT WT, p. 50.
[358] See No. ICC-01/04-02/06-T-239-Red-ENG CT WT, p. 55 and No. ICC-01/04-02/06-T-220-Red-ENG WT, pp. 24-25 and 31-41. See also DRC-D18-0001-0463; DRC-OTP-0120-0293; and DRC-D18-0001-6163, p. 6170.
[359] See DRC-OTP-0120-0293. See also *supra* para. 93.
[360] [REDACTED].
[361] [REDACTED] [REDACTED]
[362] See *e.g.* NNo. ICC-01/04-02/06-T-71-Red-ENG WT, p. 80.
[363] See No. ICC-01/04-02/06-T-29-Red-ENG, pp. 53-54; No. ICC-01/04-02/06-T-34-Red-ENG, p. 49; and No. ICC-01/04-02/06-T-71-Red-ENG WT, p. 82.
[364] See No. ICC-01/04-02/06-T-46-Red-ENG, p. 42.
[365] See No. ICC-01/04-02/06-T-153-Red-ENG, p. 57.

on the Rwampara video[366] were not recruits but merely "*set aside with the intention of sending them back to their home*"[367] has no standing. Indeed, he specifically explained that nobody except for recruits could enter the UPC/FPLP training camps and that one of the "*absolute criterion for selection*" of a location for a training centre is that "*members of the population* [must not] *be mixed up with the recruits*"[368] and that "*the training camps should only be accessible to* those who are authorised to follow the training".[369]

g. Orders issued to create the appearance of efforts made to demobilise children from the UPC/FPLC

109. For his Defence, the Accused testified to the effect that there was simply no demobilisation of child soldiers because there were no child soldiers in the UPC/FPLC below the age of 18.[370] The record of the case proves the contrary; it shows instances of children, even from 8 years and a half, were being demobilised from the militia.

110. According to the Accused, the UPC/FPLC document dated 21 October 2002[371] in which LUBANGA denounced the recruitment of children within the militia and the document dated 27 January 2003 about the follow-up on demobilisation of child soldiers,[372] were just a general reminder that the recruitment of children aged below 18 was prohibited.[373] He also simultaneously acknowledged not been aware of any demobilisation of child soldiers within the UPC/FPLC[374] or simply not been aware of

[366] See DRC-OTP-0120-0293.
[367] See No. ICC-01/04-02/06-T-240-ENG_CT_WT, pp. 38-39.
[368] See No. ICC-01/04-02/06-T-238-Red-ENG_CT2_WT, pp. 74-75.
[369] *Idem*, p. 75. See also No. ICC-01/04-02/06-T-213-Red-ENG_WT, p. 61.
[370] See *supra* para. 33.
[371] See DRC-OTP-0029-0274.
[372] See DRC-OTP-0029-0275.
[373] See No. ICC-01/04-02/06-T-239-Red-ENG_CT_WT, pp. 15-16, 19-20, 22-23 and 29-30.
[374] *Idem*, pp. 19-20.

the existence of documents signed by Thomas LUBANGA, despite his ranks in the UPC/FPLC.[375]

111. *A contrario*, he also remembered that the UPC/FPLC were demobilising soldiers over 18 who wanted to go back to school, such as some of his bodyguards.[376] He even signed a letter, '*par ordre*', dated 16 February 2003[377] about the disarmament of child soldiers. In fact, the witness himself explained that P.O. *i.e.* '*par ordre*' meant that he was absent but the content of the letter would be explained upon his return. He was thus aware of its content.[378]

112. According to some witnesses, an order of demobilisation was issued by the UPC/FPLC,[379] but it was not followed by action.[380] It was even broadcasted on the radio,[381] but even if some camps did demobilise, it was only made on an informal basis, and not as a part of an official demobilisation process.[382] P-0017 even recalled that children were to be rearmed following the attack in Bunia in 2003.[383]

113. On the other hand, some witnesses stated that they were not informed of the existence of such a demobilisation order.[384] And according to P-0046, she and the MILOBs were aware of the UPC/FPLC decree regarding demobilisation,[385] but had no information regarding a document signed by KISEMBO related to disarmament of

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[375] *Ibidem*, pp. 27-28
[376] *Ibid.*, pp. 14-15.
[377] See DRC-D01-0003-5896.
[378] See No. ICC-01/04-02/06-T-239-Red-ENG_CT_WT, pp. 24-26.
[379] See *e.g.* P-0901's testimony, No. ICC-01/04-02/06-T-29-Red-ENG, p. 59. See also DRC-OTP-0151-0299.
[380] See *e.g.* P-0901's testimony, No. ICC-01/04-02/06-T-29-Red-ENG, p. 60.
[381] The broadcasting was also mentioned by P-0976 who analysed it as part of an act to improve the UPC/FPLC's reputation. See No. ICC-01/04-02/06-T-152-Red-ENG, pp. 20 and 92.
[382] See No. ICC-01/04-02/06-T-101-Red-ENG, pp. 15-20.
[383] See No. ICC-01/04-02/06-T-60-Red-ENG, p. 32.
[384] See P-0055's testimony, No. ICC-01/04-02/06-T-71-Red-ENG_WT, p. 95. See also P-0005's testimony who never heard about demobilisation [REDACTED], [REDACTED], No. ICC-01/04-02/06-T-185-Red-ENG, pp. 13-19 and DRC-OTP-0113-0070; and [REDACTED] who had not seen the document referred to, nor did he witness demobilisation being programmed by the UPC/FPLC, [REDACTED].
[385] See No. ICC-01/04-02/06-T-101-Red-ENG, p. 20. See also P-0005's testimony, No. ICC-01/04-02/06-T-189-Red-ENG, p. 23.

children dated 30 October 2002.[386] P-0046 even asked the UPC/FPLC to appoint a focal person for child soldiers, to no avail.[387]

114. As already explained *supra*, P-0976 gave evidence that the age range of the demobilised children, from November 2002 onwards, was between 8 and a half and 18 years old.[388] P-0046 explained that no demobilisation certificates were issued prior to the official start of the demobilisation process in 2004.[389] This piece of information was confirmed by [REDACTED] who specified that prior to the official start of the CONADER activities in 2004, no demobilisation certificates were issued "*because* [the child soldiers] *when they came to* [NGO CTOs] […] [were] *auto-demobilised or self-demobilised*".[390]

4.3.3. Use of child soldiers to participate actively in hostilities

4.3.3.1. Principles of law

115. Neither Article 8(2)(e)(vi) nor the Elements of Crimes provide for a definition of the use of children under the age of 15 to actively participate in hostilities. The Legal Representative submits that, interpreting said provision, the Chamber should follow the analysis of the Appeals Chamber to the effect that:

- Article 8(2)(e)(vii) seeks to protect individuals under the age of 15 years from being used to 'participate actively in armed hostilities' and the concomitant risks to their lives and well-being;[391]
- the purpose of Article 8(2)(e)(vii) is different from that of Common Article 3 of the Geneva Conventions, which establishes, *inter alia*, under

[386] See No. ICC-01/04-02/06-T-102-Red-ENG, pp. 33-34. See also DRC-D01-0003-5894. However, P-0315 recalled that at that period a small demobilisation centre was created by the UPC/FPLC but for the sole purpose of improving their reputation, DRC-OTP-0074-0797, p. 0851.
[387] See No. ICC-01/04-02/06-T-101-Red-ENG, p. 15.
[388] See *supra* para. 43.
[389] See No. ICC-01/04-02/06-T-101-Red-ENG, p. 86.
[390] [REDACTED].
[391] See the *Lubanga* Appeal Judgment, *supra* note 27, para. 324.

which conditions an individual loses protection as a civilian because he/she takes direct part in hostilities;[392]

- it follows that the interchangeable use in Common Article 3 of the Geneva Conventions of the terms 'active' and 'direct' participation does not limit or inform the interpretation of the terms 'participate actively in hostilities' in Article 8(2)(e)(vii);[393] and

- accordingly, the provisions of international humanitarian law do not establish that the phrase "*participate actively in armed hostilities*" should be interpreted so as to only refer to forms of direct participation in armed hostilities, as understood in the context of the principle of distinction and Common Article 3 of the Geneva Conventions.[394]

116. Therefore, Article 8(2)(e)(vii) not only refers to combatant children but also non-combatant children as possible victims of the crime.[395] In establishing the roles to be considered as "active participation" which do not engage direct participation in hostilities, the Legal Representative respectfully requests the Chamber to contemplate the preparatory works of the Rome Statute and in particular a footnote to the 'Zutphen Draft'; according to which:

- A child is not actively participating in hostilities if the activity in question was "clearly unrelated to hostilities". Examples of activity clearly unrelated to hostilities include:

  - food deliveries to an airbase; and
  - the use of domestic staff in an officer's married accommodation.

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[392] *Idem*.
[393] *Ibidem*, paras. 323-324 and 326-327.
[394] *Ibid.*, para. 328.
[395] According to the UN DDR policy, the roles of combatants and non-combatants are blurred as children, in particular girls, perform numerous combat support and non-combat roles that are essential to the functioning of the armed force or group. See the Operational Guide to the Integrated Disarmament, Demobilization and Reintegration Standards, 1 August 2006, p. 230.

- The terms "participate actively in hostilities" is to be understood as prohibiting a broader range of participation than "direct" participation in hostilities. Examples of active participation in hostilities include:
  - scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints; and
  - use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself.[396]

117. In light of the facts addressed *infra*,[397] the Legal Representative respectfully requests the Chamber to take into account the following examples already subsumed, in the jurisprudence of the Court and of the SCSL, as constitutive of use of children under the age of 15 to actively participate in hostilities:

- participation in combat;[398]
- safeguarding the physical safety of military commanders[399] or acting as bodyguards and escorts[400] and guarding military objectives,[401] including where these activities are conducted in an active conflict-zone;[402]
- parading and guarding a camp and a jail;[403]
- transporting and receiving weapons and ammunitions;[404]
- carting loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields;[405]

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[396] See 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, p. 21, footnote 12.
[397] See *infra* paras. 120-156.
[398] See the *Lubanga* Appeal Judgment, *supra* note 27, paras. 336 and 340.
[399] See the "Decision on the Confirmation of Charges", *supra* note 204, para. 263.
[400] See the *Lubanga* Judgment, *supra* note 35, paras. 839-857 and 915. See also the *Taylor* Judgement, *supra* note 83, paras. 1483-1486, and 1526.
[401] See the *Lubanga* Decision on the confirmation of charges, *supra* note 204, para. 263.
[402] See the *Lubanga* Judgment, *supra* note 35, para. 915 and the *Lubanga* Appeal Judgment, *supra* note 27, para. 337.
[403] See the *Katanga* Judgment, *supra* note 34, para. 1073. See also the RUF Judgement, *supra* note 61, paras. 1717-1718.
[404] See the RUF Judgement, *supra* note 61, paras. 1081-1082. See also *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-T, Judgement, 20 June 2007 (the "AFRC Judgement"), paras. 1524, 1565 and 1592.

- spying;[406]
- removal and carrying away of looted goods;[407] and
- committing crimes.[408]
- Moreover, domestic chores were performed in addition to other military tasks.[409]

118. Before proceeding to analysing the facts, the Legal Representative deems it necessary to stress two distinct issues. First, the *Lubanga* Trial Chamber developed a criterion to ascertain whether an "indirect" role is to be treated as "active participation" in hostilities. Accordingly, the key factor, referred to as "potential target", is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target.[410] This jurisprudence was overturned on appeal.[411] The Legal Representative therefore respectfully requests the Chamber to rule in line with the Appeals Chamber's jurisprudence. Second, the Appeals Chamber decided that the "*formation*" within the armed group of a special '*Kadogo* unit' does not, in and of itself, constitute use of children under the age of 15 to

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[405] See the AFRC Judgement, *idem*, para. 737.
[406] See the RUF Judgement, *supra* note 61, para. 1729.
[407] See the *Taylor* Judgement, *supra* note 83, para. 1546.
[408] *Idem*, paras. 1488-1490, 1502-1505, 1512, 1516, 1526, 1528, 1565, 1575 and 1592.
[409] See the *Lubanga* Appeal Judgment, *supra* note 27, para. 340. The submission is not that domestic work taken in isolation qualifies as active participation in hostilities. But rather that this consideration should be taken into account together with other tasks carried out as UPC/FPLC soldiers.
[410] See the *Lubanga* Judgment, *supra* note 35, para. 628. This ruling has been criticised as the distinction between direct participation and "active participate in hostilities" is in fact inexistent according to the ICRC Interpretative Guidance. It leads the Trial Chamber to determine when indirect participation becomes active participation *i.e.* direct participation. It is further argued that it also makes children more targetable as a large number of their activities fall within the scope of participating in hostilities. See *e.g.* JENKS (C.) "Law as Shield, Law as Sword: The ICC's Lubanga Decision, Child Soldiers and the Perverse Mutualism of Participation in Hostilities", *University of Miami National Security and Armed Conflict Law Review*, Vol. III, 2013, pp. 120-124 and VITÉ (S.), "Between Consolidation and Innovation: The International Criminal Court's Trial Chamber Judgment in the *Lubanga* case", *Yearbook of International Humanitarian Law 2012*, pp. 76-82. Some authors are in disagreement with this as they consider that the principle of distinction that is found in common article 3 of the Geneva conventions should be used only to interpret International Humanitarian Law provisions, while Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) serve the purpose of protecting children. See *e.g.* YUVARAJ (J.), "When Does a Child 'Participate Actively in Hostilities' under the Rome Statute? Protecting Children from Use in Hostilities after *Lubanga*", *Utrecht Journal of International and European law,* Vol. 69, 2016, pp. 78-80.
[411] See the *Lubanga* Appeal Judgment, *supra* note 27, para. 340.

participate actively in hostilities.[412] However, the Legal Representative posits that when said unit was deployed for combat or non-combat functions qualifying as active participation, the crime of use of child soldiers is demonstrated.[413]

4.3.3.2. Relevant facts

119. Based on the rules and jurisprudence detailed *supra*,[414] several activities undertaken by UPC/FPLC child soldiers are covered by the crime of use of children to participate actively in hostilities. The developments *infra* analyse the activities conducted by child soldiers within the UPC/FPLC. They demonstrate that children had to fulfil many tasks covered by Article 8(2)(e)(vii).

a. Guards and escorts

120. P-0046 testified to the effect that NTAGANDA and KISEMBO – among other commanders – used children as bodyguards.[415] P-0014 also witnessed many children being on guard duty after completion of their training. They would guard buildings and carry out other specific missions that were assigned to them.[416] He specified that NTAGANDA had five bodyguards who were aged 13 to 18.[417] To his recollection Commanders KISEMBO, JÉRÔME, SALONGO and ALEX also had *kadogos* within their escorts.[418] P-0113 also mentioned seeing at least one *kadogo* aged 14 or 15 within SALUMU'S unit.[419]

121. As described by P-0055, the main task of the escorts was to ensure the security of the commander they were assigned to, regardless their gender.[420] They were all

[412] *Idem*, para. 338.
[413] See also *infra* para. 128.
[414] See *supra* paras. 115-118.
[415] See No. ICC-01/04-02/06-T-101-Red-ENG, pp. 70-71.
[416] See DRC-OTP-2054-0429, p. 0511. This is also consistent with P-0030's testimony. See No. ICC-01/04-02/06-T-146-Red-ENG, pp. 64-65.
[417] See No. ICC-01/04-02/06-T-136-Red-ENG, p. 38.
[418] *Idem*, p. 55.
[419] See No. ICC-01/04-02/06-T-118-Red-ENG, pp. 50-51 and 57.
[420] See No. ICC-01/04-02/06-T-71-Red-ENG WT, p. 86.

armed and wearing military uniform.[421] He estimated that about a dozen of the Accused's escort were below the age of 15.[422]

122. [REDACTED] [REDACTED] was chosen by Bosco NTAGANDA to become one of his escorts [REDACTED] in [REDATED].[423] To become escorts, children had to follow the same training as the other recruits.[424] [REDACTED] [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED] as the Accused's bodyguards.[425] [REDACTED] further explained that the girls were called PMFs and the younger boys were called *kadogos*.[426] [REDACTED]. They would carry weapons and they all fulfilled the same tasks which were guarding, carrying out patrols, and accompanying Bosco NTAGANDA whenever needed.[427]

123. The Accused confirmed he benefited from a large number of escorts under the command of CLAUDE (referred by his call sign 'Uniform Zulu' by P-0055 who confirmed CLAUDE's position as chief escort[428]) and later Martin GASANA (also referred by his call sign 'Six One Sierra') as of January 2003.[429] BROWN and MUSEVENI were also mentioned as chief escorts.[430]

124. P-0901 stated that NTAGANDA had bodyguards, [REDACTED], he was able to affirm that some of them were 15 and under.[431] As noticed by P-0768, the young escorts within NTAGANDA's unit were numerous, had to accomplish the same tasks as the others and would be sent to the battlefield as well.[432]

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[421] *Idem*.
[422] *Ibidem*, p. 84.
[423] [REDACTED].
[424] [REDACTED].
[425] [REDACTED].
[426] [REDACTED].
[427] [REDACTED] and [REDACTED].
[428] See No. ICC-01/04-02/06-T-72-Red-ENG_WT, p. 76.
[429] See No. ICC-01/04-02/06-T-214-Red-ENG_WT, pp. 49 and 51.
[430] See No. ICC-01/04-02/06-T-72-Red-ENG_WT, p. 76.
[431] See No. ICC-01/04-02/06-T-29-Red-ENG, p. 56.
[432] See No. ICC-01/04-02/06-T-34-Red-ENG, pp. 54-55.

125. P-0888 was [REDACTED]. He remembered there were many *kadogos* with him. He described similar tasks, such as providing security for NTAGANDA and accompanying him everywhere. According to him, both LUBANGA and KISEMBO had – together with other commanders – young escorts aged 14 or 15.[433] More importantly, his description about NTAGANDA's residence was consistent with the one made by other witnesses.[434] P-0907 was able to name [REDACTED] as a PMF aged around 12 at the time and escorting KISEMBO[435] and P-0758, aged 13 at the time, became [REDACTED] bodyguard after her training in Lingo.[436]

126. [REDACTED] spent a lot of time at NTAGANDA's compound and he witnessed child soldiers – among other elements – guarding the residence. He estimated that the youngest must have been 13, or at least not over 15.[437] Similarly, [REDACTED] who had access to the Accused's compound and the weapons stored inside the premises was able to observe that some of the bodyguards "*might have been 12 to 13 years old*".[438] [REDACTED] also mentioned seeing *kadogos* among his escorts, called [REDACTED] and [REDACTED] and, according to his impression, aged around 14, like himself.[439]

127. P-0886, a civilian living in Sayo during the attack, testified that he saw many child soldiers accompanying the UPC/FPLC troops that remained in Sayo.[440] The *kadogos* were bodyguards.[441]

128. P-0017 also mentioned that after the battle to take over Bunia in March 2003, once they were driven out of town, some members of KISEMBO's unit settled down

[433] See No. ICC-01/04-02/06-T-105-Red-ENG, pp. 62-69.
[434] *Idem*, p. 70. See also *e.g.* P-0017's testimony, No. ICC-01/04-02/06-T-58-Red-ENG, pp. 33-36.
[435] See No. ICC-01/04-02/06-T-89-Red-ENG, p. 52.
[436] See No. ICC-01/04-02/06-T-161-Red-ENG, pp. 32-33.
[437] [REDACTED].
[438] [REDACTED].
[439] [REDACTED].
[440] See No. ICC-01/04-02/06-T-37-Red-ENG, pp. 63-64.
[441] *Idem*, p. 65. See also No. ICC-01/04-02/06-T-38-Red-ENG, p. 6.

in Mamedi. Most of the *kadogos* left in Mamedi were reunited into the '*Kadogo* unit', composed of "*more than 30*" children, all aged under 15.[442] The witness reported that all of them were under 15. They were armed and accompanied KISEMBO everywhere. This unit was specifically created for that purpose and only included the youngest recruits.[443] P-0963 corroborated this statement and remembered there were at least 36 children within said unit. He recalled that they were later handed over to UNICEF.[444]

129. According to [REDACTED], Commander LIÉVEN – who was LUBANGA's brother – had the youngest escorts among his unit, aged 10, 11 and 12.[445] In a report written in September 2003, it seemed that Commander '*Lieve* (sic)' was indeed eager to discard two children aged 14, and one aged 11.[446]

130. Although it is not a legal requirement, the Legal Representative submits that for all the instances set out *supra* the children were performing as bodyguards and escorts in an active conflict-zone.[447]

b. Participation in battles and presence on the battlefield

131. P-0046 reported that the training of child soldiers would last from two weeks up to three months and afterwards they would be deployed as escorts, guards, and in the battlefield. They used weapons, including SMGs, AK-47, RPG, *etc*.[448] P-0010 also recalled that the children who were in NTAGANDA'S escort would also go

[442] See No. ICC-01/04-02/06-T-60-Red-ENG, p. 31.
[443] *Idem*, pp. 31-32.
[444] See No. ICC-01/04-02/06-T-80-Red-ENG, p. 31.
[445] [REDACTED].
[446] See No. ICC-01/04-02/06-T-101-Red-ENG, pp. 45-46. See also DRC-OTP-0001-0067.
[447] See the *Lubanga* Judgment, *supra* note 35, para. 915 and the *Lubanga* Appeal Judgment, *supra* note 27, para. 337.
[448] See No. ICC-01/04-02/06-T-101-Red-ENG, pp. 69-70.

fighting to the frontline.[449] Similarly, P-0901 explained he never heard of a specific age to be sent out into the battlefield and "*anybody* [could] *be deployed there*".[450]

132. The first battle described by P-0010 was the one in Mongbwalu in which she participated under the orders of Commanders Bosco NTAGANDA, SALUMU MULENDA, KASANGAKI, SALONGO (referred by his call sign 'Tiger One') and KISEMBO (referred by his call sign 'Zulu Mike').[451] [REDACTED].[452] She provided further significant details such as their itinerary through Kobu road but also the names of the support weapons (RPGs or B-10) and light weapons (SMGs).[453] The witness always carried a SMG[454] while the RPG for instance would remain on the vehicle.[455]

133. P-0010 was instructed by NTAGANDA to hit the enemy identified as the Lendu.[456] The expression '*kupiga na kuchaji*' was often used by UPC/FPLC commanders which meant that soldiers have to fight and loot when they enter into battle, it was also a way to boost the morale of the troops.[457] This was confirmed by P-0963 for instance who testified that the mission was to "*shot at anything that moved*".[458]

134. P-0010 also participated in the battles of Tchomia, Barrière, Katoto, Kasenyi,[459] and the battle to recover Bunia.[460] She referred to the second battle of Mongbwalu which occurred when Artemis was already in Bunia.[461] She was also able to recount

[449] See No. ICC-01/04-02/06-T-47-Red-ENG, p. 7.
[450] See No. ICC-01/04-02/06-T-29-Red-ENG, p. 53.
[451] See No. ICC-01/04-02/06-T-47-Red-ENG, p. 9.
[452] *Idem*, p. 10 and No. ICC-01/04-02/06-T-50-Red-ENG, p. 25.
[453] See No. ICC-01/04-02/06-T-47-Red-ENG, pp. 9-13.
[454] The fact that escorts carry personal SMGs was confirmed by P-0290. See No. ICC-01/04-02/06-T-67-Red-ENG WT, p. 11.
[455] See No. ICC-01/04-02/06-T-47-Red-ENG, p. 11.
[456] *Idem*, p. 10.
[457] *Ibidem*, pp. 14-15.
[458] See No. ICC-01/04-02/06-T-78-Red-ENG, p. 81.
[459] See No. ICC-01/04-02/06-T-47-Red-ENG, pp. 20-22.
[460] *Idem*, p. 29.
[461] *Ibidem*, p. 30.

the battles in Libi where the UPC/FPLC soldiers were ambushed, the battles of Mbau and Kpandroma.[462]

135. Regarding the first battle in Mongbwalu, P-0887 saw several bodyguards aged 12 or 13 [REDACTED].[463] She also saw a very young escort, [REDACTED], [REDACTED].[464] Likewise, P-0017 met two battalions in Lalu in order to carry out the second operation in Mongbwalu together with Commanders ABELANGA and AMÉRICAIN. Commander ABELANGA had female bodyguards aged 12 or 13, named [REDACTED] and [REDACTED].[465] He also mentioned that many members of the troops were under 15.[466] The participation of child soldiers in the second attack in Mongbwalu was confirmed by P-0190.[467]

136. [REDACTED] confirmed that children were part of the troops that "*had been given to us by UPC before the Mongbwalu occupations, before we entered Mongbwalu*".[468] He further explained that he brought some of these children with him [REDACTED].[469] [REDACTED].[470]

137. P-0888 – who was aged 14 at the time – participated in both attacks in Mongbwalu and gave a detailed account of said operations conducted by NTAGANDA,[471] with *inter alia* KISEMBO and the troops of commander SALUMU.[472] The first operation failed, so they attempted a second attack following a meeting at LUBANGA's residence in Bunia.[473] During the second attack, they succeeded in

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[462] See No. ICC-01/04-02/06-T-49-Red-ENG, pp. 60-65.
[463] See No. ICC-01/04-02/06-T-93-Red-ENG WT, pp. 37-38.
[464] *Idem*, p. 40.
[465] See No. ICC-01/04-02/06-T-58-Red-ENG, pp. 51-52.
[466] *Idem*, p. 53.
[467] See No. ICC-01/04-02/06-T-97-Red-ENG, p. 15.
[468] [REDACTED]. [REDACTED] [REDACTED].
[469] [REDACTED].
[470] [REDACTED]. [REDACTED].
[471] P-0315 gathered information from reliable witnesses that Bosco NTAGANDA was in charge of the entire operation in Mongbwalu. See No. ICC-01/04-02/06-T-108-Red-ENG, pp. 45, 51-52 and 56-58.
[472] See No. ICC-01/04-02/06-T-105-Red-ENG, pp. 74 and 76.
[473] *Idem*, pp. 74-75.

driving out the APC soldiers.[474] They massacred the Lendu and other tribes which were deemed to be the enemy of the UPC/FPLC. Many people were killed in Mongbwalu, including civilians, women and children.[475] He witnessed soldiers taking out people from houses, to beat them up and kill them.[476] He was not aware of anyone being punished for these killings.[477]

138. After Mongbwalu fell, commanders gave the order to fight and loot, he also referred to the expression '*kupiga na kuchaji*'.[478] P-0888 took part in the pillaging, targeting items from shops, such as food, and even clothing.[479]

139. P-0888 also took part in the operation in Bunia with KISEMBO and NTAGANDA [REDACTED], where they fought the UPDF allied with the Lendu combatants. They failed and lost many troops and they had no other choice but to withdraw [REDACTED].[480]

140. P-0898, aged 13,[481] was sent to the battles of the Bunia-Komanda road in Irumu led by TCHALIGONZA[482], an operation to re-establish supply lines in Ngongo, and later in the two Mongbwalu operations.[483] He was able to provide consistent details about the unsuccessful first attack, the attack from the airport and the fact that they were both led by NTAGANDA[484]; Commanders JÉRÔME, SALUMU and AMÉRICAIN[485] were also present.[486] [REDACTED].[487] He also fought in Sayo.[488]

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[474] *Ibidem*, p. 75.
[475] The witness also recounted the rapes of young girls and the killing of a priest. *Ibid.*, pp. 75-76 and 79-82.
[476] *Ibid.*, p. 81.
[477] *Ibid.*
[478] *Ibid.*, p. 77. See also *supra* para. 133.
[479] *Ibid.*, pp. 82-84.
[480] *Ibid.*, pp. 86-89.
[481] See No. ICC-01/04-02/06-T-153-Red-ENG, p. 30.
[482] See No. ICC-01/04-02/06-T-154-Red-ENG WT, p. 27.
[483] *Idem*, p. 8.
[484] *Ibidem*, pp. 8-15 and 22.
[485] *Ibid.*, pp. 14-15.
[486] *Ibid.*, p. 13.
[487] [REDACTED].

141. Regarding the battle in Bunia in 2002 where the UPC/FPLC faced Lompondo's forces, P-0017 estimated that some of the Accused's bodyguards were aged 11 and 12.[489] P-0012 described the battle to recover Bunia where child soldiers were put at the frontline.[490] P-0031 also recalled seeing children on guard duty at the time.[491]

142. [REDACTED] logbook messages, it appears that the Accused referred clearly to 'children' when talking about soldiers. He ordered 'children' to come with their vehicles through Mabanga and Barrière, to Bunia. [REDACTED] explained that 'children' unequivocally meant 'child soldiers'[492] despite the peculiar explanation provided by the Accused according to which 'children' would refer to soldiers because the UPC/FPLC "*was considered as a family*".[493]

143. [REDACTED] was in charge of training the recruits in Mongbwalu during the *'ujanja la pori'* stage. Upon this final stage, they were all armed and subsequently sent to Kobu.[494] He insisted on the fact that *kadogos* were used to participate actively in every battle he witnessed.[495]

144. P-0907 also stated that several *kadogos* joined the Komanda operation.[496] P-0888 confirmed that, after the training in Mandro, he and other recruits spent two days in Bunia where NTAGANDA was living, before being sent to Songolo to conduct an attack.[497] P-0012 also witnessed many injured child soldiers who were back from the

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[488] *Ibid.*, p. 26.
[489] See No. ICC-01/04-02/06-T-58-Red-ENG, p. 20.
[490] See DRC-OTP-2054-0172, pp. 0247 and 0249-0251.
[491] See DRC-OTP-2054-3760, p. 3778.
[492] [REDACTED].
[493] [REDACTED]. See also *supra* para. 97.
[494] [REDACTED].
[495] [REDACTED].
[496] See No. ICC-01/04-02/06-T-89-Red-ENG, p. 51.
[497] See No. ICC-01/04-02/06-T-105-Red-ENG, pp. 46-61.

Songolo attack, some of them were found at the military hospital Mbuya.[498] P-0190 witnessed the same.[499]

145. Likewise, [REDACTED], who joined the UPC/FPLC after its recruitment campaign in Kilo at the age of 13, participated in the attack in Bunia against the UPDF in March 2003.[500]

c. Spies

146. P-0010 explained that PMFs like her would sometimes be sent as an '*IS girl*' which meant that she had to glean intelligence about, for instance, the weapons of the enemy. She explained that was not typically a mission assigned to girls; however, young girls were often sent [REDACTED] as they could act as a prostitute and have sexual intercourse with the enemy which would allow them to ascertain the kind of weapons they possessed.[501] P-0758 confirmed the use of young girls dressed as civilians to spy on the enemy.[502]

147. P-0014 also recalled that he was told by UPC/FPLC officials that children were rendering good services such as intelligence ones when they would, for instance, circulate around in the streets.[503] P-0898 would similarly sometimes help gathering information that he would obtain from acquaintances and then disclose the same to his superiors.[504]

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[498] See DRC-OTP-2054-0172, pp. 0246-0247.
[499] See No. ICC-01/04-02/06-T-96-Red-ENG, pp. 36 and 88-90; and No. ICC-01/04-02/06-T-97-Red-ENG, pp. 41-43.
[500] [REDACTED].
[501] [REDACTED].
[502] See No. ICC-01/04-02/06-T-161-Red-ENG, pp. 36-37.
[503] See DRC-OTP-2054-0612, pp. 0632-0633.
[504] See No. ICC-01/04-02/06-T-154-Red-ENG WT, p. 27.

d. Commission of crimes

148. P-0010 was instructed by NTAGANDA to hit the enemy identified as the Lendu.[505] The expression '*kupiga na kuchaji*' was often used by the UPC/FPLC commanders which means that soldiers have to fight and loot when they enter into battle; it was also a way to boost the morale of the troops.[506] Soldiers carried out looting in Mongbwalu, mostly houses and shops.[507] P-0010 recalled taking a bed, clothes, shoes and drinks as ordered by UPC/FPLC commanders, including the Accused. Some of the goods would be directly brought to the Accused's residence; however, he was not seen looting goods himself.[508] P-0030, [REDACTED], also witnessed UPC/FPLC soldiers and *kadogos* looting houses.[509]

149. [REDACTED] also explained that male escorts were ordered by NTAGANDA to rape two civilians close to the airport during the second battle in Mongbwalu. Afterwards, the women were shot dead.[510]

150. During the Songolo operation, P-0888 explained that the orders given by NTAGANDA via the Motorola were to kill the enemy identified as the Lendu and the Ngiti. They were to go from house to house to kill the enemy inside – without any distinction made between civilians and combatants – and to either destroy the enemy' possessions, or to loot their valuables found in shops or houses. His friends [REDACTED] and [REDACTED] – aged 14,[511] died during the operation.[512] P-0758

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[505] See No. ICC-01/04-02/06-T-47-Red-ENG, p. 10.
[506] *Idem*, pp. 14-15. See *supra* paras. 133 and 138.
[507] The on-going looting in Mongbwalu by both combatants and commanders was also described by P-0017. See No. ICC-01/04-02/06-T-59-Red-ENG, pp. 17-20.
[508] See No. ICC-01/04-02/06-T-47-Red-ENG, pp. 9 and 14-15; and No. ICC-01/04-02/06-T-50-Red-ENG, pp. 19-23.
[509] See No. ICC-01/04-02/06-T-146-Red-ENG, pp. 6-32.
[510] [REDACTED]. It should be stressed that on other occasions, the witness refused to talk about rapes committed on civilians who were brought to the '*manyatas*', as she could not confirm that they were not there on their free will. It shows the cautiousness she applies when recalling these events. P-0315 came to the conclusion, after gathering information, that Bosco NTAGANDA led the attack at the airport. See No. ICC-01/04-02/06-T-108-Red-ENG, pp. 32-33.
[511] See No. ICC-01/04-02/06-T-105-Red-ENG, p. 21.
[512] *Idem*, p. 48.

also reported that they were ordered to attack all the Lendu, without any distinction to be drawn between civilians and combatants.[513]

151. P-0365 recalled seeing, in September 2003, UPC/FPLC soldiers aged under 15 threatening and bribing people at the roadblocks in an aggressive and fearless manner.[514]

e. Transporting and receiving weapons and ammunitions

152. As a child soldier, P-0883 was asked to carry ammunitions during the fighting in [REDACTED] in March 2003. She was injured on this occasion.[515]

153. According to P-0963, the task of *kadogos* attached to commanders, including the Accused, was to carry their weapons and their ammunitions.[516] P-0017 saw two child soldiers with NTAGANDA whose main tasks were to carry the communications equipment and the Accused's weapon.[517] Likewise, part of P-0758's tasks when she was accompanying [REDACTED] was to carry his rifle.[518]

f. Patrolling

154. P-0010 confirmed that patrolling was also part of the *kadogos*' tasks.[519] [REDACTED].[520] Patrolling involved walking the streets and arresting possible thieves and filing a report accordingly, or taking people to their homes.[521]

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[513] See No. ICC-01/04-02/06-T-161-Red-ENG, pp. 46-47.
[514] See No. ICC-01/04-02/06-T-147-Red-ENG, pp. 49-52 and No. ICC-01/04-02/06-T-148-Red-ENG, p. 7. See also P-0758's testimony explaining that she was working at a roadblock, No. ICC-01/04-02/06-T-161-Red-ENG, pp. 56-57.
[515] See No. ICC-01/04-02/06-T-168-Red-ENG, pp. 34 and 37.
[516] See No. ICC-01/04-02/06-T-80-Red-ENG, p. 32. See also *supra* paras. 120-129.
[517] See No. ICC-01/04-02/06-T-58-Red-ENG, p. 26.
[518] See No. ICC-01/04-02/06-T-161-Red-ENG, p. 50.
[519] See No. ICC-01/04-02/06-T-47-Red-ENG, p. 7. See also *supra* para. 151.
[520] [REDACTED].
[521] See No. ICC-01/04-02/06-T-168-Red-ENG, p. 29.

g. Domestic chores

155. The Accused admitted having used PMFs for household duties.[522]

156. According to P-0963, the young PMFs' tasks were to take care of the commanders' clothing and to cook food: "[t]*hey were like house girls, so to speak, under military orders*".[523] P-0758, after being a soldier, had to perform domestic chores [REDACTED].[524] P-0046 also reported that the girls also had to take care of household duties.[525] These activities were all carried out in addition to the other tasks performed as UPC/FPLC soldiers.

4.4. On the crimes of rape and sexual violence committed against child soldiers

4.4.1 Principles of law

4.4.1.1. Rape under Article 8(2)(e)(vi)-1

157. Pursuant to article 8(2)(e)(vi)-1 of the Elements of Crimes, the war crime of rape involves two material elements, namely the invasion of the body of a person[526] and the circumstances in which such an invasion occurs[527].

158. According to the Elements of Crimes, footnote 63, "*the concept of 'invasion' is intended to be broad enough to be gender-neutral*".[528] Furthermore, in the jurisprudence of

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[522] See No. ICC-01/04-02/06-T-214-Red-ENG WT, p. 31.
[523] See No. ICC-01/04-02/06-T-80-Red-ENG, pp. 32-33. See also P-0898's testimony, No. ICC-01/04-02/06-T-153-Red-ENG, p. 72.
[524] [REDACTED].
[525] See No. ICC-01/04-02/06-T-101-Red-ENG, pp. 68-69.
[526] See article 8(2)(e)(vi)-1, 1. of the Elements of Crimes which reads as follows: "*The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body*" (footnote omitted).
[527] See article 8(2)(e)(vi)-1, 2. of the Elements of Crimes which reads as follows:"*The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such a person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent*" (footnote ommitted).

the Court, "invasion", includes same-sex penetration, and encompasses both male and/or female perpetrators and victims.[529]

159. The second constitutive element addresses the circumstances and conditions of invasion of the body of the victim. Article 8(2)(e)(vi)-1, 2 of the Elements of Crimes, provides that for the invasion of the body of a person to constitute rape, it has to be committed under one or more of four possible circumstances: (i) by force; (ii) by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person; (iii) taking advantage of a coercive environment; or (iv) against a person incapable of giving genuine consent.

160. The legal interpretation of the circumstances under (i) and (ii) *supra* is clear and it needs no further elucidation in light of the facts relevant to the present brief. Notwithstanding and importantly, the preparatory works of the Rome Statute demonstrate that the drafters chose not to require the Prosecution to prove the non-consent of the victim beyond reasonable doubt, on the basis that such a requirement would, in most cases, undermine efforts to bring perpetrators to justice.[530] Accordingly, where "*force*", "*threat of force or coercion*", or "*taking advantage of coercive environment*" is proven there is no need to prove the victim's lack of consent.[531] Such lack of consent is not a legal element of the crime of rape under the Statute. Moreover, although rule 70 of the Rules addresses scenarios preventing a judicial

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[528] See articles 7(1)(g)-1, footnote 15, 8(2)(b)(xxii)-1, footnote 50, and 8(2)(e)(vi)-1 of the Elements of Crimes. The term 'invasion' in the French version of the Elements of Crimes reads: "*prendre possession*".

[529] See the *Bemba* Judgment, *supra* note 37, para. 100.

[530] See COTTIER (M.) & MZEE (S.), "Rape and other forms of sexual violence", in TRIFFTERER (O.) (ed.), *op. cit.*, *supra* note 11, para. 690. See also ROBINSON (D.), "Crime against Humanity of Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization, or Any Other Form of Sexual Violence of Comparable Gravity", in LEE (R.S.) (ed), *op. cit.*, *supra* note 4, p. 93.

[531] See the *Bemba* Judgment, *supra* note 37, para. 106.

inference of consent, it does not make lack of consent a legal element of the crime; hence needed to be proven.[532]

161. In relation to (iii) *supra*, namely "*taking advantage of a coercive environment*", it is important to recall the jurisprudence of the Court that "coercive environment", of which the perpetrator must take advantage, includes:

- the military presence of hostile forces among the civilian population;
- the number of people involved in the commission of the crime;
- whether rape is committed during or immediately following a combat situation; and
- whether rape is committed "together with other crimes".[533]

162. In the view of the Legal Representative, the coercive environment is present where the invasion of the body of a child resulting in penetration is committed "*together with*" (meaning for purposes of these submissions "during") the child's presence in a training camp as part of the enduring execution of the crimes of enlistment or conscription. The circumstances prevailing in the UPC/FPLC training camps, along with the young age of the victims, necessarily under 15, support the conclusion that the coercive environment was taken advantage of. Accordingly, all victims concerned represented by the Legal Representatives qualify as victims of rape because the relevant acts were committed by force; threat of force; coercion and/or taking advantage of a coercive environment.

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[532] The same *rationale* applies to several crimes under the Statute and in domestic legislations. Causing body harm constitutes a criminal act and it is not an element of the crime and therefore unnecessary to establish that the victim did not consent to it. This interpretation holds even though, if the victim consents to the act (for instance, because performed in the context and within the rules of a joint sportive activity) such a consent excludes the objective imputation of liability.

[533] See the *Bemba* Judgment, *supra* note 37, para. 100. See also the "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), No. ICC-01/05-01/08-424, 15 June 2009, para. 162; and *Prosecutor v. Akayesu*, IT-96-4-T, Judgement, 2 September 1998, para. 688.

163. In relation to the *mens rea* requirements, the Statute and the Elements of Crimes provide no particular mental element concerning the crime of rape. Hence, the requirements established pursuant to Article 30 apply. As to the required 'intent', it must be proven that the perpetrator "*meant to engage in the conduct in order for the penetration to take place*".[534] The fact that the body of a person is invaded by conduct resulting in penetration is a "consequence" in the sense of Article 30(2)(b). This provision requires that the person intends to cause the consequence, or is aware that it will occur in the ordinary course of events.

164. That the perpetrator used force, threat of force or coercion, took advantage of a coercive environment or acted against a person incapable of giving genuine consent are all 'circumstances' in the sense of Article 30(3). Said provision establishes that a person has knowledge of a circumstance where he or she is aware that it exists.[535]

4.4.1.2. Sexual slavery under Article 8(2)(e)(vi)

165. The Statute recognises rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and other forms of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions as distinct types of war crimes. It is the first international instrument expressly listing "sexual slavery" as a war crime and as a crime against humanity.[536]

166. The Elements of Crimes, which define sexual slavery under article 8(2)(e)(vi)(2), specify:

> "*1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.*

[534] See the *Bemba* Judgment, *supra* note 37, para. 111.
[535] See the *Katanga* Judgment, *supra* note 34, para. 970.
[536] In this sense, see OOSTERVELD (V.), "Sexual slavery and the International Criminal Court: Advancing International Law", *Michigan Journal of International Law*, Vol. 25, 2004, pp. 605-650.

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict".

167. The jurisprudence of the Court has established that:

- the examples of exercise of rights of ownership spelled out in article 8(2)(e)(vi)-2 (1) of the Elements of Crimes are not exhaustive;
- the right of ownership include the use, enjoyment and disposition over a person who is regarded as property;
- the person is placed in a situation of dependence which entails a deprivation of autonomy;
- factors showing the exercise of powers attached to the right of ownership include:
    - detention or captivity, their duration and measures taken to prevent or deter any attempt at escape;
    - use of threats, force or other forms of physical or mental coercion, forced labour, psychological pressure;
    - the victim's vulnerability and the socio-economic conditions in which the power is exerted; and
- the victim's reasonable fear and subjective perception of the situation must be taken into account in the analysis of the deprivation of liberty.[537]

168. According to the SCSL jurisprudence, the exercise of the right of ownership was considered established where there was "*control of the victim's movement, control of their physical environment, psychological control, measures taken to deter escape, use or threat of force or coercion against the victim, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour*".[538]

[537] See the *Katanga* Judgment, *supra* note 34, paras. 974-977.
[538] See the *Taylor* Judgement, *supra* note 83, para. 420.

169. Regarding the victim's ability to decide the conditions in which he/she engages in sexual activity, the jurisprudence of the Court establishes that it includes situations where women and girls are forced to leave together with another person with whom they have to engage in acts of a sexual nature.[539]

170. In relation to the *mens rea* requirements, the perpetrator must have been aware that he/she exercised, individually or collectively, one of the attributes of the rights of ownership over a person and forced the latter to engage in one or more acts of a sexual nature.[540] The perpetrator must have been aware that he/she was exerting such powers and meant to engage in the conduct in order to force the person concerned to engage in acts of a sexual nature or have been aware that such a consequence would occur in the ordinary course of events.[541]

171. The Legal Representative considers it relevant to spell out the factors the AFRC Judgement considered appropriate to fill-in the elements of sexual slavery:

- women were captured and placed under the "*full control*" of commanders, becoming their "*wives*";[542] or they were detained in a house with the rebel husband and other rebels feeling that that there was no escape for fear of how the rebel husband might react;[543]
- women captured were subject to repeated rape by members of the AFRC/RUF;[544] rape was conducted repeatedly by the rebel husband;[545] or the women were "*used sexually*"[546] and the environment of violence and coercion allowed for an inference that that women did not consent to these sexual acts;[547] and

[539] See the *Katanga* Judgment, *supra* note 34, para. 978.
[540] *Idem*, para. 981.
[541] *Ibidem*, para. 982.
[542] See the AFRC Judgement, *supra* note 404, para. 1105.
[543] *Idem*, para. 1183.
[544] *Ibidem*, para. 1126.
[545] *Ibid.*, para. 1183.
[546] *Ibid.*, para. 1105.
[547] *Ibid.*

- the use of the term 'wife', was considered a label of possession[548] indicative of an exclusive relationships of ownership;[549] these women cooked;[550] launder clothes and washed dishes;[551] they were punished with physical violence if the exclusive sexual relationship was violated.[552]

172. These facts were found indicative of the deprivation of liberty and the exercise of ownership over captured women which, together with acts of sexual violence, satisfied the *actus reus* and *mens rea* of the crime of sexual slavery.[553]

4.4.1.3. War crimes of rape and sexual slavery committed against child soldiers of the same armed group as the Accused

173. The Legal Representative notes that, during the pre-trial, trial and appeal litigation in the present case, the Defence argued that the war crimes of rape and sexual slavery committed against child soldiers by members of the recruiting group were not foreseen by the Statute, as international humanitarian law does not protect persons taking part in hostilities from crimes committed by other persons taking part in hostilities on the same side of the armed conflict.[554] This argument was addressed in the proceedings by the Legal Representative, repeatedly.[555] It was first rejected by

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[548] *Ibid.*, para. 1183.
[549] *Ibid.*, para. 1126.
[550] *Ibid.*, para. 1105.
[551] *Ibid.*, para. 1126.
[552] *Ibid*.
[553] *Ibid.*, paras. 1126 and 1183.
[554] See No. ICC-01/04-02/06-T-10-Red-ENG, p. 27. See also the "*Conclusions écrites de la Défense de Bosco Ntaganda suite à l'Audience de confirmation des charges*", No. ICC-01/04-02/06-292-Red2, 14 April 2014, paras. 250-263; the "Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document containing the charges", No. ICC-01/04-02/06-804, 1 September 2015; the "Appeal on behalf of Mr Ntaganda against Trial Chamber VI's 'Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9', ICC-01/04-02/06-892", No. ICC-01/04-02/06-909 OA2, 19 October 2015; and the "Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges", No. ICC-01/04-02/06-1256, 7 April 2016.
[555] See the "*Observations finales au nom des anciens enfants-soldats*", *supra* note 93, paras. 73 *et seq.*; the "Former child soldiers' Response to the 'Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges'", No. ICC-01/04-02/06-1279, 14 April 2016, paras. 9 *et seq.;* and the "Former Child Soldiers' observations on the 'Document in support of the appeal on behalf of Mr Ntaganda against Trial Chamber VI's 'Decision

the Pre-Trial Chamber in the Decision on the Confirmation of Charges,[556] then by the Trial Chamber[557] and later by the Appeals Chamber.[558]

174. Indeed, the Appeals Chamber ruled that members of an armed force or group are not categorically excluded from protection against the war crimes of rape and sexual slavery under Articles 8(2)(b)(xxii) and 8(2)(e)(vi) when committed by members of the same armed group or force.[559] It noted that "*the Statute does not expressly provide that the victims of rape or sexual slavery must be 'protected persons' in terms of the Geneva Conventions or 'persons taking no active part in the hostilities' in terms of Common Article 3, nor do the* chapeaux *of article 8 (2) (b) or (e) stipulate such a requirement*".[560] The crimes under Article 8 are distinct war crimes, and there is no indication that the drafters intended to avoid such overlap in the sub-paragraphs.[561] Thus, rape and sexual slavery, as opposed to "*other forms of sexual violence*" are, by definition, crimes of a gravity comparable to that of a grave breach of the Geneva conventions or serious violation of Common Article 3.[562]

175. Regarding the status requirement, the Appeals Chamber ruled that the Geneva Conventions I and II, which protect the wounded, sick and shipwrecked at sea respectively, provide protection in all circumstances, irrespective of their belonging to enemy armed forces.[563] Common Article 3 provides for unqualified protection against inhumane treatment irrespective of a person's affiliation, requiring only that the persons were taking no active part in hostilities at the material time; a

on the Defence's Challenge to the jurisdiction of the Court in respect of Counts 6 and 9', ICC-01/04-02/06-892", No. ICC-01/04-02/06-1040 OA2, 30 November 2015, paras. 10 *et seq*.

[556] See the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda", *supra* note 53, para. 80.

[557] See the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", No. ICC-01/04-02/06-1707, 4 January 2017, para. 54.

[558] See the "Judgment on the appeal of Mr Ntaganda against the 'Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9'", No. ICC-01/04-02/06-1962 OA5, 15 June 2017, para. 2.

[559] *Idem*.

[560] *Ibidem*, para. 46.

[561] *Ibid*., para. 48.

[562] *Ibid*., para. 49.

[563] *Ibid*., para. 59.

conclusion supported by the ICRC commentary.[564] After closely examining the various case-law and principles, the Appeals Chamber concluded that international humanitarian law does not contain a general rule that categorically excludes members of an armed group from protection against crimes committed by members of the same armed group.[565]

176. Furthermore, the prohibition of rape and sexual slavery in armed conflict are without a doubt well established under international humanitarian law. The Appeals Chamber confirmed that engaging in sexual violence can never be justified, irrespective of whether or not the person may be liable to be targeted and killed under international humanitarian law. Consequently, there is no status requirement when it comes to these war crimes.[566]

4.4.2. Relevant facts

177. [REDACTED] testified that she was raped by the Accused on several occasions. [REDACTED].[567] She clarified, the Accused "*penetrated* [her] *vagina without using a condom*"[568] and that refusing sexual intercourse with him was impossible because, as her commander, he had authority and thus it was not conceivable to show resistance of any kind, even if, at first, she tried to leave the room.[569] According to her, "[REDACTED]".[570] [REDACTED].[571] [REDACTED].[572]

178. This evidence has to be analysed in context. As reported by expert P-0453, sexual violence is a source of shame and is often under-reported and not admitted by

[564] *Ibid*., paras. 60-61.
[565] *Ibid*., para. 63.
[566] *Ibid*., paras. 64-66.
[567] [REDACTED].
[568] [REDACTED].
[569] [REDACTED].
[570] [REDACTED].
[571] [REDACTED].
[572] [REDACTED].

the victims.[573] [REDACTED] testified that the Accused had authority and it was not possible to even show some sign of refusal.[574] She was also raped by commanders such as [REDACTED], and so were the other girls sharing the hut with her[575] In fact, many girls were raped by [REDACTED] as well, who was known to be extremely violent.[576] [REDACTED] [REDACTED][577] [REDACTED].[578] She never witnessed soldiers being disciplined for having raped female soldiers (or civilians).[579] P-0963 even reported that PMFs were punished for having spent the night with the trainers rather than the trainers themselves.[580] ABELANGA was also known to rape PMFs (and at least one male soldier) and was never punished for it.[581] His reputation was well-known, and the Accused knew that ABELANGA raped child soldiers.[582] He even witnessed an instance of rape by ABELANGA.[583]

179. Submitting oneself to forced sexual relationships was seen by PMFs as executing orders. Hierarchy and compliance with orders were important within the UPC/FPLC and the targeted victims were, given their age and/or gender, overly vulnerable. In fact P-0963, for instance, explained that orders were not to be discussed and that the fear of severe punishment was a daily reality inside the

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[573] See No. ICC-01/04-02/06-T-178-Red-ENG, pp. 74 and 82-83. Moreover, the issue of the relationship between commanders and the PMFs is succinctly explained in a MONUC report: "*All the armed groups in Ituri recruited girls (very often forcibly) into their ranks, although few have been brought forward for official separation. Once released, a climate of denial, shame and fear prevents many of them from seeking assistance. Tenuous links with military commanders sometimes persist even after release. The girls have played a range of roles. Trained to handle weapons they have taken part in combat and worked as escorts and domestics*". See DRC-OTP-0074-0422, para. 151.

[574] [REDACTED].

[575] [REDACTED].

[576] [REDACTED].

[577] [REDACTED].

[578] [REDACTED]. See also [REDACTED], and [REDACTED].

[579] [REDACTED].

[580] See No. ICC-01/04-02/06-T-80-Red-ENG, pp. 27-28.

[581] See No. ICC-01/04-02/06-T-153-Red-ENG, pp. 73-75.

[582] The Accused claimed that ABELANGA was a courageous soldier but did not act in appropriate fashion when he was drunk. See No. ICC-01/04-02/06-T-214-Red-ENG WT, p. 10. But he was put in detention for looting goods only. See No. ICC-01/04-02/06-T-213-Red-ENG WT, pp. 13-14.

[583] [REDACTED] was raped by ABELANGA while he was detained. NTAGANDA was present during the rape and told ABELANGA "*you're going to die because of those practices of yours*". ABELANGA was never punished for said crime: [REDACTED].

camps.[584] He even went further by clearly stating that even as regard sexual relationships between PMFs and trainers, it was not a matter of choice but also of '*jeshi ni order*'.[585] The same witness also felt that some female *kadogos* who were not used as 'house girls' were being sexually exploited by the commanders.[586] P-0888 stated that the PMFs in Mandro explained to him that they could not refuse sexual relations as the orders were coming from high-ranking commanders.[587] Likewise, P-0898 had the impression that the girls were not in a position to refuse sexual favours to the commanders.[588]

180. P-0046 reported that the girls who could be under 15 were also raped by commanders mostly, and sometimes by soldiers, or were taken as a commander's "*wife*".[589] Some of them also reported having had abortions as a result.[590] The witness further explained that stigma made it difficult for these girls to return to their parents and communities with a fatherless child, for instance. Stigma was also attached where they did not have a child, as said communities rightly assumed that they had undergone sexual abuses.[591]

181. P-0901 confirmed that the notion of 'commander's wife' did not imply consent on the PMFs' part. The commanders simply abused their powers, forced them to become their wives and raped them.[592] In the same vein, P-0907 explained that

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[584] See No. ICC-01/04-02/06-T-79-Red-ENG, pp. 24-25, and No. ICC-01/04-02/06-T-80-Red-ENG, pp. 26-27.
[585] See No. ICC-01/04-02/06-T-80-Red-ENG, p. 41.
[586] *Idem*, pp. 29 and 33.
[587] See No. ICC-01/04-02/06-T-105-Red-ENG, pp. 39-40.
[588] See No. ICC-01/04-02/06-T-155-Red-ENG, p. 57.
[589] One of the MONUC reports also states that "[t]*hese girls are commonly referred to as 'war wives'. In many ways the girls suffer a double jeopardy, many reportedly serving both as fighting elements in active combat and concomitantly being used to satisfy the sexual appetites of their commanders. Some, however, were reportedly abducted solely for use as sexual slaves* […]". See DRC-OTP-0074-0422, para. 152.
[590] See No. ICC-01/04-02/06-T-101-Red-ENG, pp. 67-69.
[591] *Idem*, p. 85.
[592] See No. ICC-01/04-02/06-T-29-Red-ENG, pp. 57-58.

bodyguards were taken as wives (or second wives) and never did the witness refer to the notion of consent in the process.[593]

182. P-0898, who was a young recruit at the time, recalled that the PMFs were also 'commanders' wives' as "*some of the commanders loved some of the young girls*".[594] He described how in the evenings, after the end of the training sessions, they would go towards the commanders' huts.[595]

183. P-0768 witnessed a young PMF, under the age of 15, belonging to the Accused's unit, crying in the Accused's apartment claiming that she had been raped by Commander MUSEVENI. No punishment followed.[596]

184. P-0017, who saw two young female escorts named [REDACTED] and [REDACTED] accompanying ABELANGA, was told by Commander SAMY (referred also by his call sign 'Sierra Mike') that they were raped by their commander on a regular basis since their training in Mandro.[597] The fact that [REDACTED] was raped by soldiers in the camps was confirmed by P-0887 who heard many of them talk about the fact that they had sexual intercourse with her.[598] P-0907 reported that [REDACTED] [REDACTED] as a result of the multiple rapes she was subjected to.[599]

185. P-0758 was raped on several occasions by high-ranking officers, before being forced to follow the military training in Lingo,[600] and during her military training.[601] She and other recruits were raped there on a regular basis.[602] She recalled that one of

[593] See No. ICC-01/04-02/06-T-89-Red-ENG, pp. 64-65.
[594] See No. ICC-01/04-02/06-T-153-Red-ENG, pp. 72-73.
[595] *Idem*, p. 73.
[596] See No. ICC-01/04-02/06-T-34-Red-ENG, pp. 55-56.
[597] See No. ICC-01/04-02/06-T-58-Red-ENG, pp. 51-52.
[598] See No. ICC-01/04-02/06-T-93-Red-ENG WT, p. 40.
[599] See No. ICC-01/04-02/06-T-89-Red-ENG, pp. 55 and 63-64.
[600] [REDACTED].
[601] [REDACTED].
[602] [REDACTED].

the rapists was [REDACTED].[603] P-0758 also testified that PMFs were called '*guduria*' which designates a cooking pot and meant that soldiers just had to help themselves to have sex.[604] The rapes did not stop once she moved to [REDACTED] and she could not report the rapes since they were committed by the commanders.[605]

186. [REDACTED] explained that during his work with the [REDACTED], he also took care of female child soldiers in the transit centre [REDACTED].[606] P-0365 reported that, during [REDACTED], she met with a former female child soldier of Hema ethnicity captured at the age of 14 who was in charge within the UPC/FPLC to carry ammunitions and was also taken as a commander's wife.[607] She further explained that organisations such as COOPI and other transit centres would assist women associated with armed groups, referring to women who were for instance used as 'commanders' wives' or would assist by carrying ammunitions, war booty, or by spying[608] which concerned mainly female escorts and PMFs' 'tasks' within the UPC/FPLC as described *supra*.[609] After the war, the former child soldier she was referring to was assisted by COOPI;[610] so was [REDACTED].[611]

4.5. On the criminal responsibility of the Accused with regard to counts 6, 9, 14, 15 and 16

4.5.1. Principles of law

187. In their respective decisions on the Prosecutor's applications for warrants of arrest, Pre-Trial Chambers I and II decided that there were reasonable grounds to believe that Mr NTAGANDA was criminally responsible for a total of 12 crimes as an

[603] [REDACTED]. The rapes continued when she became [REDACTED]. [REDACTED].
[604] [REDACTED]. See also P-0010's testimony, No. ICC-01/04-02/06-T-47-Red-ENG, pp. 38-43.
[605] [REDACTED].
[606] [REDACTED].
[607] [REDACTED].
[608] [REDACTED].
[609] See *supra* paras. 146-147.
[610] [REDACTED].
[611] [REDACTED].

indirect co-perpetrator under Article 25(3)(a).[612] In its decision, Pre-Trial Chamber II indicated as well that the liability of the suspect as an indirect co-perpetrator "*does not prejudice any subsequent finding regarding the applicability of a different mode of liability at a later stage of the proceedings*".[613] Pursuant to the Document containing the Charges, alternative modes of liability have been charged and subsequently confirmed.[614] In this regard, the Chambers *Practice Manual* is clear that it is for the Trial Chamber to resolve questions of concurrence of offences,[615] including concurrent modes of liability.

188. The determination of the mode(s) of responsibility for which the Accused is liable for punishment is not merely terminological: distinguishing between principals and accessories to a crime at the level of attribution of liability is important because it expresses a distinctive degree of blameworthiness.[616] Moreover, the different modes of accessory liability encompass distinct forms and extents of contribution to a crime. Since the blameworthiness of the Accused is directly dependent on the extent to which he actually contributed to the crime[617], it is therefore crucial to make proper distinctions at the stage of attribution of accessory liability.

189. As described in the Updated Document Containing the Charges, alternative modes of liability have been set out for each count.[618] Accordingly, Mr NTAGANDA has been accused for the war crimes of rape, sexual slavery and conscription of children below 15 under Articles 25(3)(a) "*indirect co-perpetration*", 25(3)(d)(i) or (ii), or 28(a); for enlistment of children below 15 under 25(3)(a) "*direct perpetration and/or*

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[612] See the "Decision on the Prosecution Application for a Warrant of Arrest" (Pre-Trial Chamber I), No. ICC-01/04-02/06-1-Red-tENG, 22 August 2006, para. 57 and p. 34; and the "Decision on the Prosecutor's Application under Article 58" (Pre-Trial Chamber II), No. ICC-01/04-02/06-36-Red, 13 July 2012, p. 36.
[613] See the "Decision on the Prosecutor's Application under Article 58", *idem*, para. 66.
[614] See the *Ntaganda* Decision on the confirmation of charges, *supra* note 53 and the "Document Containing the Charges", No. ICC-01/04-02/06-203-AnxA, 10 January 2014. See also the "Updated Document Containing the Charges", No. ICC-01/04-02/06-458-AnxB, 16 February 2015, para. 11.
[615] See the Chambers Practice Manual, May 2017, p. 19.
[616] See the *Lubanga* Appeal Judgment, *supra* note 27, para. 462.
[617] *Idem*, para. 468.
[618] See the Updated Document Containing the Charges, *supra* note 614, pp. 61-62 and 64-65.

indirect co-perpetration", 25(3)(d)(i) or (ii), or 28(a); and for use of children to actively participate in hostilities under Articles 25(3)(a) "*direct perpetration and/or indirect co-perpetration*", 25(3)(b), 25(3)(d)(i) or (ii), or 28(a).

190. As set out consistently in the jurisprudence of the ICTY Appeals Chamber, "*trial chambers are not inherently precluded from entering a conviction for a crime on the basis of more than one mode of liability, if this is necessary to reflect the totality of an accused's criminal conduct*".[619] The alternative charging needs to be resolve taking into account that, for one and the same set of facts, it is possible that all elements of more than one mode of liability be met. In order to resolve any such overlap or "concurrence", the Legal Representative respectfully request the Chamber to follow the principles, endorsed by the Appeals Chamber:

- where one offence falls entirely within the ambit of another the more specific provision should be upheld;[620]
- one mode of attribution may be fully consumed by another or be subsidiary to it.[621]

191. Where the law, or its interpretation, requires for one mode of attribution a larger contribution to a crime, that mode should be preferred over the less intense one. For instance, direct, indirect and joint perpetration all require that the contribution be essential to the crime/plan and they take precedence (speciality) over the forms of accessorial liability.

192. In resolving the concurrence between Articles 25(3)(b) and (d), the Chamber should take into account that Article 25(3)(d) contains a 'residual' form of accessory

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[619] See *Prosecutor v. Đorđević*, IT-05-87/1-A, Appeal Judgement, 27 January 2014, para. 831 and *Prosecutor v. D. Milošević*, IT-98-29/1-A, Appeal Judgement, 12 November 2009, para. 274. See also the *Nahimana* et al. Appeal Judgement, *supra* note 204, para. 483; *Prosecutor v. Ndindabahizi*, ICTR-01-71-A, Appeal Judgement, 16 January 2007, para. 122; and *Prosecutor v. Kamuhanda*, ICTR-99-54A-A, Appeal Judgement, 19 September 2005, para. 77.

[620] See the *Bemba* et al. Appeal Judgment, *supra* note 29, para. 750 referring to the *Delalić* et al. Appeal Judgement, *supra* note 192, paras. 409, 412 and 413.

[621] See the *Bemba* et al. Appeal Judgment, *supra* note 29, para. 751.

liability;[622] one applicable to persons who *in any other way* contribute to the commission of a crime. As set out *infra*, unlike the ICTY jurisprudence,[623] the ICC jurisprudence does not require inducement and ordering to have had a *substantial effect* in the commission of the crime. The distinguishing element is rather that they constitute special forms of causal contributions to a crime; performed by exerting influence over another person. Therefore, according to the subsidiarity and speciality principles, Article 25(3)(b) takes precedence over Article 25(3)(d).

193. The Legal Representative notes that the current jurisprudence of the *ad hoc* International Tribunals tends not to impose a conviction under both command responsibility and principal/accessory liability.[624] The superior position of the Accused is considered an aggravating factor in sentencing.[625] Conversely, past jurisprudence of the Tribunals did accept the cumulative imposition of command and other modes of liability.[626]

194. Article 28 sets out that that responsibility of commanders operates "*in addition to other grounds of criminal responsibility*". Clearly, the plain reading of this text does not prevent imposing cumulative convictions. The drafting history of the provision does not fully clarify its meaning, although it demonstrates that the competing options at the time proposed the text to reflect that commanders should be considered principals (the so called "option 3") or that the provision of command responsibility should merely regulate the principle that commanders are not immune

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[622] See the *Katanga* Judgment, *supra* note 34, para. 1618.

[623] See, in relation to instigation, *Prosecutor v. Nzabonimana*, ICTR-98-44D-A, Appeal Judgement, 29 September 2014, para. 146; and in relation to ordering, *Prosecutor v. Setako*, ICTR-04-81-A, Appeal Judgement, 28 September 2011, para. 240.

[624] See the *Setako* Appeal Judgement, *supra* note 623, para. 266. See also *Prosecutor v. Renzaho*, ICTR-97-31-A, Appeal Judgment, 1 April 2011, para. 564; and the *Nahimana* et al. Appeal Judgement, *supra* note 204, para. 487.

[625] *Idem*.

[626] See *Prosecutor v. Kambanda*, ICTR 97-23-S, Judgement and Sentence, 4 September 1998, para. 40; and *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1, Judgment, 21 May 1999, paras. 210 and 551-569. See also *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-T, Judgment, 26 February 2001, paras. 831 and 842 *et seq*; the *Musema* Judgement and Sentence, *supra* note 33, paras. 901-906; and the *Delalić* et al. Appeal Judgement, *supra* note 192, para. 745.

for the acts of their subordinates (option 2). Against this background, what the drafters seem to have meant with the introductory sentence under discussion was to make it clear that command responsibility is a discrete ground of criminal responsibility (option 1).[627]

195. As such, the decision on whether, regarding one and the same set of facts, command responsibility may be imposed cumulatively with other modes of liability should be made upon application of the rule of specialty, consumption and subsidiarity endorsed by the Appeals Chamber.[628] The Legal Representative is of the view that Article 28(1) clearly contains distinct elements compared to the other modes of attribution under considerations and that it is not subsidiary to any of them. Indeed, although the responsibility of a commander is linked to the crimes committed by his subordinates he is not the one who "commits" the crimes.[629] Rather, command responsibility reflects the powers and duties of control over subordinates, based on international humanitarian law, that are imposed on commanders for purposes of safeguarding protected persons and objects during armed conflict.[630] It is the commander's failure to properly exercise control over his subordinates, in disregard of said duties and powers, which makes him responsible for those crimes committed by his subordinates. And this element, which is central to command responsibility, is not properly expressed by the other forms of liability.[631]

196. As accepted by Trial Chamber III in the *Bemba* Judgment, "*in certain circumstances, a commander's conduct may be capable of satisfying a material element of one*

[627] See the Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume II, Compilation of Proposals, UN doc. A/51/22[VOL.II](SUPP), 13 September 1996, pp. 85-86 and footnote 14.
[628] See the *Bemba* et al. Appeal Judgment, *supra* note 29, para. 750 *et seq*.
[629] See the *Bemba* Judgment, *supra* note 37, para. 173.
[630] *Idem*, para. 172.
[631] In this sense, see HENQUET (T.), "Convictions for Command Responsibility Under Articles 7(1) and 7(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia", *Leiden Journal of International Law*, Vol. 15, Issue 4 (December 2002), p. 830.

or more modes of liability".[632] In the present case, it is indeed necessary to enter a conviction for the crimes charged without excluding command responsibility. To do otherwise would fail to reflect the Accused's global criminal conduct for, at least, two reasons:

- First, it would not express the commander's enduring failure to prevent and repress the crimes, against the duties arising from international humanitarian law (and the Statute) which in turn lead to encouraging subordinates to believe that crimes against children were acceptable in the UPC/FPLC. Admittedly, had the charges included Article 25(3)(b) amongst the modes of attribution, this aspect of the case would be properly accounted for. Notably however, inducement is not part of the charges except in relation to the crime of using children under the age of 15 to actively participate in hostilities.
- Second, as a commander, the Accused had an obligation not to recruit and use children; as well as an obligation to prevent his subordinates from committing crimes against children generally, including sexual crimes. Specifically however, where he is responsible for the state of vulnerability that is inherent to the recruitment of children in the UPC/FPLC, his duty to exercise proper control over subordinates requires particular measures to prevent these children from being subject to a variety of abuses, including sexual violence. This aspect of the case is not be properly covered by the other forms of criminal liability discussed in the present brief.

197. The principles set out *supra* apply in circumstances where all elements of more than one mode of liability apply to the same set of facts or conduct. Conversely, when considering *different sets of facts,* it may be appropriate to consider the Accused a principal in relation to one set of events and an accessory in relation to another set of events. For instance, the evidence may prove that the Accused raped or recruited various children directly (*i.e.* under Article 25(3)(a)) and failed to prevent the rape or

[632] See the *Bemba* Judgment, *supra* note 37, para. 174.

recruitment of other children (*i.e.* under Article 28(a)). In relation to these crimes he can be properly found responsible under Articles 25(3)(a) and 28(a).

198. There might also be situations where the volume of evidence does not readily allow a clear compartmentalisation of the facts; and in such occurrences a practical approach is permissible. Yet again, even where a broad definition may lead to grouping facts and considering them "*essentially the same*",[633] maintaining a conviction under cumulative modes of liability is appropriate where the facts are sufficiently compelling such that one mode of responsibility may not fully encapsulate the criminal conduct of the Accused.[634]

199. As a final note, it is appropriate to recall that according to the Confirmation Decision and contrary to the *Lubanga* Trial and Appeal Judgments, no substantial grounds to believe that Mr NTAGANDA be considered criminally responsible as a *direct* co-perpetrator for any of the crimes charged were found.[635] Therefore, the submissions *infra* do not address that mode of attribution of liability.

200. The Legal Representative advances *infra*, concisely, various issues which she considers important for the interpretation of some of the modes of liability applicable in the present case. The Legal Representative does not discuss each of the alternative modes of liability confirmed by Pre-Trial Chamber II. This should not be understood as an opposition of the victims on behalf of whom the Legal Representative acts to the applicability of any of the alternatives not discussed.

4.5.1.1. Article 25(3)(a) – Commission as an individual

201. Pursuant to Article 25(3)(a), "*a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction if that person commits* [the] *crime* […] *as an*

[633] See *Kamuhanda* Appeal Judgement, *supra* note 619, para. 77.
[634] *Idem*. See also Portugal, Informal note on Concurrence of offences, 2 June 2000.
[635] See the *Ntaganda* Decision on the confirmation of charges, *supra* note 53, para. 97 *in fine*.

individual". As set out in the jurisprudence of the *ad hoc* International Tribunals and the Hybrid Courts, this mode of liability refers to the physical perpetration of the crime by the offender himself.[636] Moreover, the Court already established that the commission "*as an individual*", requires that the Accused undertakes the physical carrying out of the elements of the crime.[637]

202. This mode of attribution is applicable when, for instance, the Accused himself rapes a female child soldier, conscripts or enlists children under the age of 15 in the UPC/FPLC or use them as bodyguards.

4.5.1.2. Article 25(3)(b) – Inducement

203. Pursuant to Article 25(3)(b), "*a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction if that person* […] *induces the commission of such a crime which in fact occurs or is attempted*". In the jurisprudence of the *ad hoc* International Tribunals, instigation means prompting another person, by action or omission,[638] to perpetrate a crime[639] intentionally or being aware of the substantial likelihood that the perpetration of the crime would result from the instigation,[640] said

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[636] See *Prosecutor v. Tadić*, IT-94-1-A, Appeal Judgement, 15 July 1999, para. 188; *Prosecutor v. Renzaho*, ICTR-97-31-T, Judgement and sentence, 14 July 2009, para. 739; *Co-Prosecutors v. Kaing Guek Eav* alias *Duch*, 001/18-07-2007/ECCC/TC, Judgment, 26 July 2010, paras. 479-481; and STL-11-01/1/I/AC/R176bis, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 216.

[637] See the *Bemba* et al. Appeal Judgment, *supra* note 29, para. 706; the *Lubanga* Appeal Judgment, *supra* note 27, para. 467; the "Decision on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-01/04-01/07-717, 30 September 2008, para. 488; the *Lubanga* Decision on the confirmation of charges, *supra* note 399, para. 332; and the *Bemba* Judgment, *supra* note 37, para. 58.

[638] See the *Limaj* et al. Judgement, *supra* note 32, para. 514; *Prosecutor v. Karemera* et al., ICTR-98-44, Judgement and Sentence, 2 February 2012, para. 1427; and the *Taylor* Judgement, *supra* note 83, para. 472.

[639] See *Prosecutor v. Boškoski & Tarčulovski*, IT-04-82, Appeal Judgement, 19 May 2010, para. 157; the *Nahimana* et al. Appeal Judgement, *supra* note 204, para. 480; and the *Taylor* Judgement, *supra* note 83, para. 471.

[640] See *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, Appeal Judgement, 17 December 2004, paras. 29 and 32.

instigation having made a substantial contribution to the commission of the crime.[641] At the Court, the attribution of liability pursuant to "inducement" requires:

- the person to exert influence over another person to either commit a crime which in fact occurs or is attempted or to perform an act or omission as a result of which a crime is carried out;
- a causal relationship to exist between the act of instigation and the commission of the crime, in the sense that the Accused's actions prompted the principal perpetrator to commit the crime or offence;
- the person to be at least aware that the crimes will be committed in the ordinary course of events as a consequence of the realisation of the act or omission; which "*does not accommodate a lower standard than the one required by* dolus directus in the second degree".

Moreover,

- the instigation does not need to be performed directly on the principal perpetrator, it may be committed through intermediaries; and
- the instigation to the commission of a crime can be performed by any means, either by implied or express conduct.[642]

204. This mode of attribution is applicable when, for instance, the Accused extensively uses child soldiers as his bodyguards, thereby inducing other military commanders to follow the example and use children for similar functions.

4.5.1.3. Article 25(3)(b) – Ordering

205. Pursuant to Article 25(3)(b), "*a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction if that person* [o]*rders* […] *the commission of such a crime which in fact occurs or is attempted*". Ordering is aggravated form of

[641] *Idem*, para. 27; *Prosecutor v. Karadžić*, IT-95-5/18-T, Judgement, 24 March 2016, para. 572; the *Akayesu* Judgement, *supra* note 533, paras. 481-482; *Prosecutor v. Rutaganda*, ICTR-96-3, Judgement and Sentence, 6 December 1999, para. 38; and the *Musema* Judgement and Sentence, *supra* note 33, para. 120.

[642] See the *Bemba* et al. Appeal Judgment, *supra* note 29, para. 848. See also the *Ntaganda* Decision on the confirmation of charges, *supra* note 53, para. 153 (and footnote 625).

inducement. The distinguishing feature of ordering is the 'authority requirement'. This authority requires neither *de jure* nor *de facto* superior/subordinate relationship between the person who orders the crime and those who execute the order.[643] At the Court, the imputation of liability under "ordering" requires:

- the person is in a position of authority;
- the person instructs another person in any form to either
  - commit a crime which in fact occurs or is attempted; or
  - perform an act or omission in the execution of which a crime is carried out;
- the order had an effect on the commission or attempted commission of the crime;[644] and
- the person is at least aware that the crime will be committed in the ordinary course of events as a consequence of the execution or implementation of the order.[645]

206. This mode of attribution becomes applicable when, for instance, the Accused orders the deployment in armed confrontation of a battalion that includes child soldiers; thereby ordering the use of children under the age of 15 to actively participate in hostilities.

4.5.1.4. Article 25(3)(d)(i) – Contributing in any other way

207. Pursuant to Article 25(3)(d)(i), "*a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction if that person*", under certain conductions, "*contributes*" "*in any other way*" "*to the commission or attempted commission of a crime by a group of persons acting with a common purpose*". Before the Court, the elements of this mode of liability are:

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[643] See OLASOLO (H.) & CARNERO ROJO (E.), "Forms of accessorial liability under article 25(3)(b) and (c)", in STAHN (C.) (ed.), *The Law and practice of the International Criminal Court*, Oxford University Press, 2015, p. 562.

[644] The causality requirements developed in relation to instigation apply to the attribution of liability under ordering. See the *Bemba* et al. Appeal Judgment, *supra* note 29, para. 848

[645] See the *Ntaganda* Decision on the confirmation of charges, *supra* note 53, para. 145.

- a crime within the jurisdiction of the Court was attempted or committed;
- the attempt to commit or the commission of the crime was made by a group of persons acting with a common purpose;
- the individual contributed to the crime, in any way other than those set out in Article 25(3)(a) to (c); and
- said contribution was:
    - intentional; and
    - made with the aim of furthering the criminal activity or criminal purpose of the group, where they involve the commission of a crime falling under the jurisdiction of the Court.[646]

208. In order to understand the type of contributions that may trigger responsibility under this mode of imputation, the Legal Representative posits it is important to recall the jurisprudence of the Appeals Chamber in relation to co-perpetration. Co-perpetration requires "*control over the crime*" and an "*essential contribution*" to the crime.[647] The "*essential contribution*" does not need to be made at the execution stage and, therefore, it is clear that acts that do not, as such, form the *actus reus* of the crime or offence in question may nevertheless be taken into account when determining whether the Accused made an essential contribution to the relevant crime or offence. The essential contribution may take many forms and need not be criminal in nature.[648]

209. The contribution to the commission of a crime by a group of persons does not represent principal but accessorial liability. Those who contribute to the commission of the crime need not possess control over the crime. The contribution that is relevant to this mode of liability needs *a fortiori* not be made at the execution stage of the common purpose nor be criminal in nature.

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[646] *Idem*, para. 158.
[647] See the *Bemba* et al. Appeal Judgment, *supra* note 29, para. 848.
[648] *Idem*.

210. Finally, it is important to mention that Article 25(3)(c) requires that the aider and abettor acts "[f]*or the purpose of facilitating the commission of* […] *a crime*". In the jurisprudence of the Appeals Chamber, this does not mean that the aider and abettor must know all the details of the crime in which he/she assists. A person may be said to be acting for the purpose of facilitating the commission of a crime, even if he/she does not know all the factual circumstances in which it is committed.[649]

211. Similarly, in relation to Article 25(3)(d)(i), the aim of furthering the criminal activity or criminal purpose of the group where such an activity or purpose involves the commission of *a* crime[650] does not require that the person be aware of the specific crime intended by the group.

212. This mode of attribution becomes applicable when the Accused, for instance:

- supplied, organised and supervised training camps in a militia where children were made available for sexual crimes as part of the reward obtained by soldiers, particularly those who were promoted in the militia;
- participated or contributed in recruitment campaigns, with or without exerting direct force, or provided speeches to boost the morale of the trainees in the military camps.

4.5.1.5. Article 28(a) – Acting as a military commander

213. Pursuant to Article 28(a), a person acting as a military commander may be criminally responsible for crimes committed by his/her subordinates. The attribution of command responsibility requires:

- the accused to be either a military commander or a person effectively acting as such;

[649] *Ibidem*, para. 1400.
[650] See AMBOS (K.), "Article 25", in TRIFFTERER (O.) (ed.), *op. cit.*, *supra* note 11, p. 1015

- the accused to have effective command and control, or effective authority and control over the forces (subordinates) who committed one or more of the crimes set out in Articles 6 to 8;
- the crimes committed by the forces (subordinates) to result from the accused's failure to exercise control properly over them;
- the accused either to know or, owing to the circumstances at the time, to have known that the forces (subordinates) were committing or about to commit one or more of the crimes set out in Articles 6 to 8; and
- the accused to fail to take the necessary and reasonable measures within his/her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution.[651]

214. This mode of attribution becomes applicable cumulatively with other modes of liability when the Accused, for instance, fails to prevent or punish:

- the crimes of rape and sexual slavery of children recruited in the UPC/FPLC;
- the enlistment, conscription or use of children under the age of 15 to actively participate in hostilities.

4.5.2. Relevant facts

215. Given the page limit constraints imposed on the Legal Representative, she submits that the Prosecutor is better placed to demonstrate the existence of plan or common purpose for the UPC/FPLC to assume military and political control over Ituri during the timeframe relevant to the charges, *i.e.* from on or about 6 August 2002 to 31 December 2003.[652]

[651] See the *Ntaganda* Decision on the confirmation of charges, *supra* note 53, para. 164.
[652] See also *supra* paras. 18-19.

216. She however posits that in order to accomplish this overall objective, the Accused, together with a group of persons acting with a common purpose, undertook a number of steps which included the commission of various crimes within the jurisdiction of the Court, including the crimes of enlistment and conscription of children under the age of 15 and their use to participate actively in hostilities, and acts of rape and sexual committed against the children recruited in the UPC/FPLC. In addition, the Accused failed to prevent and repress crimes he knew were about to be committed or were being committed.

217. The Accused himself testified that the UPC/FPLC had an established structure and hierarchy. Indeed, the structure was of such a level of organisation that it has been qualified as an armed group.[653] The FPLC was a fully-functioning army with its main staff headquarters located in Bunia. It mirrored the conventional structure of a traditional army, within which the Accused discharged significant military functions. It was comprised of sectors, brigades, battalions, companies, platoons and sections situated throughout Ituri, with each brigade containing between approximately 1000-1500 soldiers.[654] Its senior leadership, including LUBANGA, KISEMBO, RAFIKI, KASANGAKI, BAGONZA, TCHALIGONZA and Chief KAHWA held authority, command and control over the organisation and its soldiers. Training and a harsh disciplinary system ensured that orders down the chain of command were complied with.[655] A communication system, via satellite communications and Motorola 'radio-phonies' ('manpacks'), ensured that orders to UPC/FPLC forces and information about events on the ground were transmitted and received.[656] There were structured and efficient reporting mechanisms, which enabled the UPC/FPLC hierarchy,

[653] See the *Lubanga* Judgment, *supra* note 35, paras. 543 and 550.
[654] See *e.g.* DRC-D18-0001-5521; DRC-D18-0001-5522; DRC-D18-0001-5523; DRC-D18-0001-5524; DRC-D18-0001-5525; DRC-D18-0001-5526; DRC-D18-0001-5527; DRC-D18-0001-5528; DRC-D18-0001-5529; and DRC-D18-0001-5530.
[655] See *e.g.* No. ICC-01/04-02/06-T-60-Red-ENG, p. 7; No. ICC-01/04-02/06-T-79-Red-ENG, pp. 24-25; No. ICC-01/04-02/06-T-80-Red-ENG, pp. 26-27; and No. ICC-01/04-02/06-T-225-Red-ENG, p. 80.
[656] See *e.g.* No. ICC-01/04-02/06-T-225-Red-ENG, pp. 79-80; No. ICC-01/04-02/06-T-216-ENG_CT2_WT, pp. 27-28 and 66; and No. ICC-01/04-02/06-T-222-ENG_CT_WT, pp. 32-33. See also *supra* paras. 139 and 150.

including the Accused, to be informed of all critical developments. Access to financing, weapons and ammunitions enough to pursue the common plan was available.[657]

218. Within this hierarchy and structure, the Accused was a military commander with effective command and control over the UPC/FPLC troops.[658] As such he possessed the ability and power to prevent, repress and punish the commission of the crimes charged. He had the power to appoint, promote, demote, remove and punish commanders and soldiers, or to recommend that such measures be taken. He had the power to plan attacks, to instruct commanders and soldiers, and to command operations. He had the power to provide the UPC/FPLC forces with weapons, to deploy or withdraw troops, and to ensure his subordinates complied with his orders. He praised himself of having a very well-organized army where, thanks to his contribution, respect of hierarchy was demanded and expected from all the soldiers.[659]

219. The UPC/FPLC required a constant supply of soldiers to fill its ranks.[660] To meet this need, the UPC/FPLC implemented a campaign of conscripting and enlisting soldiers in large numbers, including men, women and children without regard to their age.[661] This included children who by their physical appearance were manifestly under the age of 15.[662]

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[657] See *e.g.* No. ICC-01/04-02/06-T-214-Red-ENG_WT, pp. 41-49.
[658] See *e.g.* No. ICC-01/04-02/06-T-222-ENG_CT_WT, pp. 4-5. See also *e.g.* DRC-D18-0001-5521; DRC-D18-0001-5522; DRC-D18-0001-5523; DRC-D18-0001-5524; DRC-D18-0001-5525; DRC-D18-0001-5526; DRC-D18-0001-5527; DRC-D18-0001-5528; DRC-D18-0001-5529; and DRC-D18-0001-5530.
[659] See *e.g.* No. ICC-01/04-02/06-T-225-Red-ENG, p. 49.
[660] See DRC-OTP-2054-4494, p. 4589 and DRC-OTP-2054-6975, pp. 7035-7036. See also No. ICC-01/04-02/06-T-97-Red-ENG, pp. 31-39.
[661] See No. ICC-01/04-02/06-T-100-Red-ENG, pp. 94-95. See also DRC-OTP-0074-0422, para. 143.
[662] See *supra* paras. 33-43 and 92-96.

220. The Accused did not take the appropriate measures to prevent that no children under the age of 15 were being recruited.[663] To his own admission – and as corroborated by several witnesses[664] – he did not order their age to be properly verified.[665] In fact some commanders were not even aware of an age limit allegedly imposed on recruitment. As stated by P-0901 "*there was no particular criterion for the recruitment of children. There were young people, old people. Anyone who came to the training camp was welcome in our different units*".[666] P-0046 also reported that there was a large number of children who would just enter the camps without any screening.

221. The Accused provided a number of contributions to this endeavour as demonstrated *supra*. These contributions included:

- recruiting, training and using young persons, including under the age of 15, to participate actively in hostilities.
    - Training camps were organised as part of the common purpose of the group. The Accused did not dispute the existence of training camps.[667] He visited and inspected these training camps where he saw the children being trained and encouraged them in training.[668]
        - He personally recruited children to join his troops[669] and he trained them in Mandro[670] to become his escorts or to deploy the young recruits to the battlefield as chief of operations.[671]
        - Training lasted up to two months and included basic military training such as discipline, saluting, drill and weapons

[663] See *supra* paras. 36-43 and 92-96.
[664] See *e.g.* No. ICC-01/04-02/06-T-50-Red-ENG, p. 60; No. ICC-01/04-02/06-T-29-Red-ENG, p. 53; and No. ICC-01/04-02/06-T-34-Red-ENG, pp. 48-49.
[665] See *supra* para. 34.
[666] See No. ICC-01/04-02/06-T-34-Red-ENG, p. 49.
[667] See No. ICC-01/04-02/06-T-239-Red-ENG_CT_WT, pp. 51-52. See also *supra* para. 87.
[668] See *supra* paras. 105-108.
[669] See *supra* paras. 75-96.
[670] See *supra* para. 88. See also P-888's testimony in which he explained that the Accused was also ordering commanders to train the young recruits, No. ICC-01/04-02/06-T-105-Red-ENG, pp. 31-32. P-0769 even claimed that NTAGANDA was the real leader of the camp even if he was not always there and was present for numerous parades, No. ICC-01/04-02/06-T-120-Red-ENG, pp. 53-54.
[671] See *supra* paras. 120-145.

exercises. The aim of the training was to prepare the children for active participation in hostilities. At the training camps, children were routinely beaten and forced to partake in drug and substance abuse. Discipline was harsh and included whipping. Child soldiers died as a result of such punishment. Cruel treatment, forced addiction and punishment were regular measures taken against children to ensure discipline and compliance with orders. This abuse was an inherent part of the training and thus part of the common purpose.[672]

- He, together with other members of the group, pressured Hema families to contribute to the war effort by providing children to the UPC/FPLC. These efforts were successful, given a series of factors which included:
  - the desire for revenge of orphans whose families were killed or allegedly killed by the militias opposing the UPC/FPLC;
  - the effects of social and community pressures;
  - the desire to protect their family;
  - the appeal of a military role; and
  - coercive circumstances such as urgent needs for protection and food.[673]
- he presided at ceremonies to mark the beginning of their use as soldiers.[674] After completion of training, the Accused provided children with a military uniform and a personal weapon;[675] and
- he participated in the recruitment campaigns.[676]

[672] See *supra* paras. 99-104.
[673] See *supra* paras. 79 and 85-86.
[674] See *supra* para. 107. See also No. ICC-01/04-02/06-T-71-Red-ENG WT, pp. 33-34; and No. ICC-01/04-02/06-T-214-Red-ENG WT, pp. 43-44.
[675] *Idem*, pp. 41-49.
[676] See *supra* paras. 105-108.

- planning the attacks and ordering and encouraging UPC/FPLC troops, which included children under the age of 15, to engage in hostilities:

  - the Accused was in constant communication with the leadership and his subordinates, whether at headquarters or in the field by Motorola radio, satellite phone and long-distance radio;[677]
  - the Accused conceived and planned military operations, in his role as Deputy Chief of Staff. He created sectors, deployed troops to the field and was a key commander of military operations;[678]
  - he was responsible for securing and distributing weapons and ammunition in advance of and during attacks, deploying troops, commanding operations, communicating with superiors and subordinates on military matters; his own residence in Bunia was the site of a weapons depot. Weapons would come from Rwanda and the Accused would collect and distribute them;[679]
  - he gave direct orders to the soldiers to strike and loot, for instance:
    - in the operations in Lipri, Kobu and Bambu which could not have been proceeded without NTAGANDA'S consent as deputy chief of staff.[680] The Accused confirmed that he deployed the troops as a commander in charge of operations and later as general chief of staff.[681] Also, he had the power to discipline those who refused to participate in operations.[682]

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[677] See *e.g.* No. ICC-01/04-02/06-T-225-Red-ENG, pp. 79-80; No. ICC-01/04-02/06-T-216-ENG_CT2_WT, pp. 27-28 and 66; and No. ICC-01/04-02/06-T-222-ENG_CT_WT, pp. 32-33. See also *e.g.* DRC-OTP-2102-3854; DRC-OTP-2102-3828; and DRC-OTP-2102-3854. His call sign was 'Tango-Romeo'. See also *supra* paras. 139 and 150.

[678] See *e.g.* No. ICC-01/04-02/06-T-213-Red-ENG_WT, p. 8; No. ICC-01/04-02/06-T-214-Red-ENG_WT, pp. 56 and 58; No. ICC-01/04-02/06-T-215-ENG_CT_WT, pp. 7-8, 27, 69 and 74-75; and No. ICC-01/04-02/06-T-218-Red-ENG WT, pp. 79-80.

[679] See *e.g.* No. ICC-01/04-02/06-T-214-Red-ENG_WT, pp. 41-49.

[680] See No. ICC-01/04-02/06-T-60-Red-ENG, p. 7.

[681] See *supra* note 678.

[682] See *e.g.* No. ICC-01/04-02/06-T-228-Red-ENG_WT, pp. 2-6 and 9-11.

- during the first attack in Mongbwalu, where children under the age of 15 participated;[683]
- during the Mongbwalu attack in November 2002, he deployed troops, briefed them in advance of the attack and gave specific instructions to carry out criminal activities;[684]
- it is claimed that the expression '*kupiga na kuchaji*' was an order for the troops to charge and to take all the equipment left by the enemy in order to reinforce their stocks. However, no distinction was made between civilian goods and military equipment.[685]

- facilitating and/or encouraging and/or inducing the commission of crimes by the UPC/FPLC through his own criminal actions and by failing, while under a duty stemming from his position, to take adequate steps to prevent, repress or punish the perpetrators of such crimes.[686]

222. Moreover, the Accused used child soldiers in his personal escort.[687] This amounts to direct perpetration of the crime of use of children under the age of 15 to actively participate in hostilities, pursuant to Article 25(3)(a). In addition, UPC leaders and FPLC commanders used children under the age of 15 to participate actively in hostilities, including as bodyguards.[688] Their tasks included guaranteeing physical protection, including during military deployments.[689] In this respect, given the Accused's own use of children as bodyguards and his position within the chain

[683] See *supra* paras. 134-135.
[684] See *supra* para. 137.
[685] See *supra* paras. 133, 138 and 148.
[686] See *supra* paras. 137 and 182.
[687] See No. ICC-01/04-02/06-T-101-Red-ENG, pp. 70-71; No. ICC-01/04-02/06-T-136-Red-ENG, p. 38; No. ICC-01/04-02/06-T-71-Red-ENG_WT, p. 84; No. ICC-01/04-02/06-T-47-Red-ENG, p. 6; No. ICC-01/04-02/06-T-29-Red-ENG, p. 56; No. ICC-01/04-02/06-T-34-Red-ENG, pp. 54-55; No. ICC-01/04-02/06-T-105-Red-ENG, pp. 62-69; No. ICC-01/04-02/06-T-67-Red-ENG_WT, pp. 3-4, 7-12; No. ICC-01/04-02/06-T-58-Red-ENG, p. 33; and No. ICC-01/04-02/06-T-154-Red-ENG_WT, pp. 5-6.
[688] See No. ICC-01/04-02/06-T-136-Red-ENG, p. 55; No. ICC-01/04-02/06-T-118-Red-ENG, pp. 50-51 and 57; No. ICC-01/04-02/06-T-60-Red-ENG, pp. 31-32; No. ICC-01/04-02/06-T-80-Red-ENG, p. 31; No. ICC-01/04-02/06-T-89-Red-ENG, p. 52; and No. ICC-01/04-02/06-T-161-Red-ENG, pp. 32-33.
[689] See *supra* paras. 120-129.

of command, as set out *supra*, the Accused exerted influence to the effect that other commanders used children under 15 as bodyguards.

223. The Accused and other commanders knew that in the ordinary course of events, UPC/FPLC soldiers, including children under the age of 15, would be raped and sexually enslaved by their own commanders and other UPC/FPLC soldiers.[690]. In addition, they routinely exploited girl child soldiers in the UPC/FPLC for domestic chores and for cooking.[691] As soldiers in the UPC/FPLC, PMFs were subjected to sexual abuse in a coercive and harsh military structure; without the possibility to escape the armed group.[692] UPC/FPLC commanders raped their soldiers under threat of death often while the commanders were armed. PMFs in the UPC/FPLC could not resist.[693] Indeed, girls and women who were part of the UPC/FPLC were particularly vulnerable: they were lodged in training camps with male commanders and soldiers who had authority over them; who abused that authority; and who were armed and violent. In addition, no distinctions were made regarding age within the UPC/FPLC; all recruits and trained soldiers were treated in the same way.[694]

224. In the submission of the Legal Representative, given the role of the Accused in the population, organisation and supply of the training camps and his overall role as part of the group of person acting with a common purpose, he contributed to the commission of sexual crimes. Had he not recruited the child soldiers; they would not have been raped or sexually enslaved. Had he not contributed to the establishment and running of the training camps; rapes and sexual enslavements would not have occurred the way they did. The criminal purpose of the group involved the commission of these egregious sexual crimes in that, in the context of an unpaid militia as the UPC/FPLC, the availability of children for sexual purposes was part of the reward obtained by soldiers, including those who were promoted in the militia.

[690] See *supra* paras. 177-186.
[691] See *supra* paras. 155-156.
[692] See *supra* paras. 99-104.
[693] See *supra* paras. 177-186.
[694] See *supra* para. 99.

The contributions made by the Accused furthered this criminal activity. As set out in *supra*, it is unnecessary to show that the Accused knew all details of the specific rapes and acts of sexual enslavement that were committed by the group to establish his criminal liability in this regard.

225. The Accused was aware and accepted that in the manner the common purpose was being pursued, this will result in the commission of crimes against children. He knew that the UPC/FPLC were committing or were about to commit the crimes because:

- he was involved in the preparation, planning and/or execution of such crimes;
- he received information about the commission of such crimes from members of the UPC/FPLC and the international community, the media and/or other persons; and
- he personally observed the commission of crimes and failed to prevent and punish those instances which contributed to encourage the commission of like crimes.[695]

226. In addition, he failed to prevent and punish these crimes; where committed by subordinates under his authority and control. He failed to take all necessary and reasonable measures within his power to prevent or repress these crimes or to punish the perpetrators. The Accused had effective command and control over these troops, who were organised, hierarchical, well-equipped and well-trained. He gave instructions and orders to the UPC/FPLC troops and had the authority to discipline and punish. Had he, as a preventive measure, ordered his soldiers/subordinates not to sexually attack the female child soldiers in the militia and genuinely and specifically condemned this conduct, rape and sexual enslavement would not have occurred in the manner they did. Similarly, this egregious conduct would have been prevented had the Accused taken disciplinary action against anyone who disobeyed.

[695] See *supra* paras. 148-151 and 178.

227. To the contrary, the Accused knew and left instances of rape and sexual enslavement unaddressed. P-0768 mentioned the case of a young escort being raped by MUSEVENI without any consequences, although the Accused was informed.[696] Rapes happened frequently as "[i]*t was considered a normal act*".[697] In the case of [REDACTED] – one of KISEMBO'S very young bodyguards[698] – who was raped on multiple occasions [REDACTED], it was only prohibited to rape her, but no punishment was enforced.[699]

228. [REDACTED] was raped by ABELANGA while he was detained. NTAGANDA was present during the rape and his only concern was Mr ABELANGA's health; his words were: "*you're going to die because of those practices of yours*".[700]

FOR THE FOREGOING REASONS the Legal Representative respectfully requests the Chamber:

- to find that Mr Bosco NTAGANDA is guilty, beyond reasonable doubt, of the war crimes of enlisting and conscripting children under the age of 15 into the UPC/FPLC and using children under the age of 15 to actively participate in hostilities pursuant to Article 8(2)(e)(vii) of the Rome Statute;

- to find that Mr Bosco NTAGANDA is guilty, beyond reasonable doubt, of the war crimes of rape and sexual slavery against UPC/FPLC child soldiers pursuant to Article 8(2)(e)(vi) of the Rome Statute;

- to resolve the concurrence of modes of attribution of criminal liability for each count, within the alternatives confirmed by the Pre-Trial Chamber in

[696] See *supra* para. 183. See also paras. 178, 137-138 and footnote 582.
[697] See No. ICC-01/04-02/06-T-34-Red-ENG, pp. 55-56.
[698] See *supra* para. 41.
[699] [REDACTED].
[700] [REDACTED]. See also *supra* para. 178.

the Confirmation of the Charges Decision,[701] taking into account the observations advanced in the present closing brief.[702]

It is hereby certified that this document contains a total of 34,397 words[703] and hence complies with regulation 36 of the Regulations of the Court combined with footnote 12 of the "Order providing directions related to the closing briefs and statements",[704] upheld in the "Decision providing further directions on the closing briefs".[705]

Sarah Pellet
Legal Representative of the
Former Child Soldiers

Dated this 7st Day of November 2018

At The Hague, The Netherlands

[701] See *supra* para. 189.
[702] See *supra* paras. 187-200.
[703] This statement (103 words) is not included in the word count.
[704] See the "Order providing directions related to the closing briefs and statements" (Trial Chamber VI), No. ICC-01/04-02/06-2170, 28 December 2017, footnote 12.
[705] See the "Decision providing further directions on the closing briefs" (Trial Chamber VI), No. ICC-01/04-02/06-2272, 13 April 2018.