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THE APPEALS CHAMBER

Before: Judge Howard Morrison, Presiding Judge
Judge Chile Eboe-Osuji
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public Document

**Public lesser redacted version of “Observations of the Common Legal Representative of the Former Child Soldiers on Part II of Mr Ntaganda’s Appeal against the Judgment pursuant to Article 74 of the Rome Statute”
(ICC-01/04-02/06-2526-Conf A)**

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I. INTRODUCTION

1. On 8 July 2019, Trial Chamber VI (the “Chamber”) convicted Mr Ntaganda of 18 counts of crimes against humanity and war crimes including the conscription, enlistment, active use in hostilities, rape and sexual slavery of child soldiers under 15 years of age.¹ The Chamber’s findings concerning crimes against child soldiers were based on a substantial body of credible evidence, including in particular the testimony of former child soldiers who testified about the crimes they were subjected to while in the UPC/FPLC’s ranks and the consequences on them of those crimes.

2. The Defence raised 15 appeal grounds against Mr Ntaganda’s conviction,² including several pertaining to the crimes he committed against child soldiers. The appeal should be dismissed in its entirety, as it misapprehends the evidence, the Trial Chamber’s reasoning, and the applicable legal framework. Moreover, it repeats arguments considered and dismissed at trial, and it fails to identify any discernible error on the Chamber’s part and often simply disagrees with the Chamber’s assessment of the evidence before it and the credibility of specific witnesses.

3. Due to the stringent page limit imposed and with a view to avoiding duplications, the Common Legal Representative of the former Child Soldiers (the “Legal Representative”) will limit her observations to some of the issues arising from the Defence appeal which directly concern the interests of her clients, endorsing the persuasive arguments by the Prosecution for the remaining issues.³

II. CONFIDENTIALITY

4. Pursuant to regulations 23bis(1) of the Regulations of the Court, the present observations are classified as “confidential” since they contain potentially identifying information in relation to witnesses. A public redacted version thereof will be provided in

¹ See the [Judgment](#), pp. 537-538.

² See the [Notice of Appeal](#), the [First Appeal Brief](#) and the [Second Appeal Brief](#).

³ The Legal Representative endorses, in particular, the Prosecution’s arguments concerning the applicable standard of review and substantiation of arguments on appeal. See the [Prosecution Second Response](#), paras. 4-22.

due course. Annexes 1 (Procedural Background) and 2 (Glossary and List of Authorities) are filed as public since they do not contain confidential information.

III. SUBMISSIONS

A. Ground 7: The Chamber properly assessed the evidence

5. The Legal Representative agrees with the compelling arguments advanced by the Prosecution to the effect that the Trial Chamber properly assessed Mr Ntaganda's testimony,⁴ including in particular that there was no undue differential treatment compared to the testimony of Prosecution witnesses⁵ and that the Chamber properly took into account his interest in the outcome of the case⁶ and the timing of his testifying.⁷

6. The Legal Representative notes that Mr Ntaganda's decision to take the stand was part of a deliberate defence strategy. Mr Ntaganda's testimony was presented as a way to expedite the Defence case, as he chose to mount his defence on the basis of a handful of individuals, including himself, when he originally planned to call some 110 fact witnesses, together with [REDACTED] expert witnesses.⁸ The Defence should not be permitted to use the present appeal against Mr Ntaganda's conviction as an attempt to remedy the shortcomings in its trial defence strategy, which was adopted with full knowledge of its implications and potential risks.⁹

7. Accordingly, Ground 7 should be dismissed.

B. Ground 9: Mr Ntaganda's escort included children under the age of 15

8. The Trial Chamber reasonably and correctly concluded that Mr Ntaganda's escort included children under the age of 15.¹⁰ The Defence appeal against this finding is largely based on a repetition of the arguments advanced at trial and a mere disagreement with the

⁴ See the [Prosecution Second Response](#), paras. 118-127. See also the [Second Appeal Brief](#), paras. 136-141.

⁵ See the [Prosecution Second Response](#), para. 122.

⁶ *Ibid.*

⁷ *Idem*, para. 127. See the arguments advanced in this respect in the [CLR1 Closing Brief](#), paras. 14-16.

⁸ See e.g. the [Defence Corrected Final List of Witnesses](#), paras. 9-16.

⁹ See e.g. the [Decision on Mr Ntaganda's Testimony](#), para. 27-28.

¹⁰ See the [Judgment](#), paras. 386-391.

Chamber's assessment of evidence, often coupled with a misapprehension of said evidence or the Chamber's reasoning.¹¹

9. The Legal Representative agrees with the Prosecution that the Chamber properly relied on several types of corroborating evidence in its age assessment, including witness testimony and video recordings. The Chamber was competent to assess the age of child soldiers on this basis, duly explained its reasoning and, by allowing for a “*large*” and “*wide margin of error*”,¹² applied the approach developed by the Court in previous cases and endorsed by the Appeal Chamber.¹³ In light of the applicable page limit, the Legal Representative's observations focus on the specific points raised by the Defence in relation to the Trial Chamber's finding that three specific members of Mr Ntaganda's escort were under 15 years of age at the relevant time beyond reasonable doubt, which was both reasonable and correct.

1. ‘Lamama’ was under 15 years of age

10. The Trial Chamber was satisfied beyond reasonable doubt that an individual identified as ‘Lamama’ who worked as an escort for Mr Ntaganda was “*manifestly under the age of 15*” around February 2003.¹⁴ It reached this conclusion while “*allowing for a large margin of error*”.¹⁵ The testimony of P-0010,¹⁶ as well as the Chamber's own assessment of Lamama's appearance in two video excerpts presented during trial,¹⁷ and particularly her “*size and physical features*”,¹⁸ were all factors on which the Chamber relied to reach its conclusion.

¹¹ See the [Second Appeal Brief](#), paras. 231-249.

¹² See the [Judgment](#), paras. 387-388.

¹³ See the [Prosecution Second Response](#), paras. 175-190.

¹⁴ See the [Judgment](#), para. 387.

¹⁵ *Ibid.*

¹⁶ *Idem*, footnotes 1099 and 1101; and P-0010: [T-47](#), pp. 59-62, and [T-48](#), pp. 11-15.

¹⁷ See DRC-OTP-0120-0293, at 00:22:49-00:23:22 (Lamama was identified as the person with a bigger hat, and a visor, and arms folded) and 00:06:44 (Lamama was identified as the person in military uniform and hat, holding an SMG).

¹⁸ See the [Judgment](#), footnote 1099.

a. The Chamber properly relied on video-imagery to assess Lamama's age

11. The Defence argues that “[n]o reasonable Trial Chamber, applying the proper degree of caution, could have concluded that [Lamama was] under 15 based on the video-imagery”.¹⁹

12. According to the Defence, domestic case law suggests that “it is possible on the basis of visual images alone to distinguish beyond reasonable doubt between a ‘pre-pubescent’ and an adult – a margin of six to eight years – but not between a 15 and 18-year old”.²⁰ The two domestic cases cited by the Defence, however, do not support said contention. The United States Fifth Circuit Court of Appeals decision in *Katz*,²¹ simply suggests that expert testimony “may well be necessary” in some cases to assist the trier of fact in determining whether a person who “is post-puberty but appears quite young” is less than 18 years old.²² In the Canadian case of *Loring*,²³ Wilson J. declined to make a finding that unidentified persons in a video recording were minors based on his lack of expertise in assessing the age of young persons.²⁴ Subsequent attempts to draw, from that decision, a general principle that “a judge may never make a decision on ‘apparent age’ without the assistance of expert evidence” have been rejected by Canadian Courts,²⁵ stressing that “the burden on the Crown is proof beyond a reasonable doubt, not beyond any doubt [...] [J]udges might still, in appropriate cases, accept ‘apparent age’ as a sufficient basis to find that the Crown’s case has been proven”.²⁶

13. In fact, the jurisprudence of both international and domestic tribunals confirms that a trier of fact is competent to assess the age of individuals based on their appearance, without requiring expert evidence. As noted by the Appeals Chamber in the *Lubanga* case, “the

¹⁹ See the [Second Appeal Brief](#), paras. 239-240.

²⁰ *Idem*, para. 238.

²¹ *Idem*, footnote 641.

²² See [Katz](#), para. 21.

²³ See the [Second Appeal Brief](#), footnote 642.

²⁴ See [Loring](#), para. 15.

²⁵ See [Lanning](#), para. 23.

²⁶ *Idem*, where the Judge was unable to conclude beyond reasonable doubt that the persons depicted in photographs presented to him were minors because they were “in [his] view mature enough to reasonably be 18 or older”.

*question of whether video evidence can be relied upon to establish the element of age is a question of fact”.*²⁷

14. The Defence reference to the margin of error concerning age assessments by way of medical testing of an individual’s teeth and bones²⁸ is irrelevant to the Trial Chamber’s assessment of Lamama’s age through an entirely different method – visual examination of video imagery. Nor do the news reports and photographs referenced by the Defence advance Mr Ntaganda’s case.²⁹ The Defence states, misleadingly,³⁰ that “*despite an appearance that might suggest the contrary*”, none of the individuals depicted “*have been found to be over 18 years of age*” in domestic asylum proceedings.³¹ Even taking the Defence’s assertion at face value, the Legal Representative notes that this material, which is not in evidence,³² pertains to young male individuals of different backgrounds and ethnic origins, whose age had to be assessed against a different threshold (*i.e.*, whether they were above or below the age of 18) and in different contexts. The Defence fails to explain how said photographs “*may be usefully compared to those of ‘LAMAMA’*”,³³ a female from the Ituri region found to be under 15 years of age.³⁴ Ultimately, the Defence’s contention appears to boil down to a generic argument to the effect that some individuals may look older or younger than their age, a point that is not in dispute and is indeed reflected by the Trial Chamber’s application of a “*wide margin of error*” in its age assessment.³⁵

²⁷ See the [Lubanga Appeal Judgment](#), para. 221. See also the [Prosecution Second Response](#), para. 179.

²⁸ See the [Second Appeal Brief](#), para. 238, and footnotes 643 and 645.

²⁹ *Idem*, paras. 238-239.

³⁰ Information provided by Mr Ntaganda as part his closing brief indicates that (i) some of these pictures were taken long after the relevant asylum decision, and provide therefore no indication as to the individual’s appearance when he was allegedly found not to be over 18 years of age (see *e.g.* the [Annex F to Defence Closing Brief](#), p. 3 and p. 5), and (ii) another photograph depicts individuals still awaiting decisions as to their asylum claim, with no indication that their age had been assessed by domestic bodies (see the [Annex F to Defence Closing Brief](#), p. 4).

³¹ See the [Second Appeal Brief](#), para. 238.

³² There is no suggestion that said material meets the requirements for the admission of additional evidence on appeal as set out by the Appeals Chamber in the *Lubanga* case. See the [Lubanga Appeal Judgment](#), para. 1. In that case, the Appeals Chamber refused to consider arguments concerning specific errors in the first instance assessment of the age of individuals appearing in specific video excerpts where these were dependent on additional evidence which was not admitted. See the [Lubanga Appeal Judgment](#), para. 224.

³³ See the [Second Appeal Brief](#), para. 239.

³⁴ The Legal Representative also notes that the video imagery relied on by the Chamber, unlike the screenshots provided by the Defence, reflected the child’s movements, body posture, relative size and facial features.

³⁵ See the [Judgment](#), paras. 387-388 and 1190.

15. The Defence claims that the Trial Chamber should have found there was a reasonable possibility of Lamama being 15 years or above based on the testimony of witness P-0017.³⁶ P-0017's testimony in this respect, however, was ambiguous at best: he testified that the person depicted in a brief video excerpt³⁷ "*could be 14, 15 or more*" and [REDACTED].³⁸ Further, neither P-0017 nor any other witness testified that the person depicted in that video is the same as that appearing in a different video who was identified by P-0010 as Lamama,³⁹ and found to be under the age of 15.⁴⁰ The Trial Chamber duly noted that "*there is no evidence to the effect that this person is the same person as the person identified by P-0010 as Lamama*".⁴¹ The Defence's unsupported assertion as to the person's identity, combined with the ambiguous testimony concerning his or her age, does not invalidate the Chamber's finding that Lamama was beyond reasonable doubt under the age of 15.⁴² And indeed, in the *Lubanga* case, the Appeals Chamber dismissed a similar Defence argument to the effect that three persons depicted in different video frames were in fact the same individual, absent any witness testimony in this respect, on the basis that "*Mr Lubanga [did] not substantiate his arguments in a manner that would allow the Appeals Chamber to reach an informed decision on this issue*".⁴³

16. None of the arguments put forward in the Second Appeal Brief support therefore the contention that "[n]o reasonable judge applying the proper caution could have concluded beyond reasonable doubt on the basis of these images that [Lamama] was under 15 at the time".⁴⁴ The Trial Chamber correctly applied a "large" and "wide margin of error" in reaching this conclusion,⁴⁵ and did so not only on the basis of the video-imagery presented at trial, but also of witness testimony,⁴⁶ carrying out an holistic evaluation of the relevant

³⁶ See the [Second Appeal Brief](#), para. 241.

³⁷ See DRC-OTP-2058-0251, at 00:48:22; admitted into evidence as DRC-D18-0001-0506.

³⁸ See P-0017: [T-62](#), pp. 52:10-53:6; and the [Judgment](#), footnote 1099. Another witness, P-0976, on whose evidence the Chamber relied in the Judgment, stated that the person depicted in this excerpt appeared to be "*between 11 and 13 years old*". See P-0976: [T-153](#), p. 10:3-13.

³⁹ See DRC-OTP-0120-0293, at 00:22:49-00:23:22 and 00:06:44. The Defence failed to show the excerpt to P-0010, or to question her in this respect.

⁴⁰ See the [Judgment](#), para. 387.

⁴¹ *Idem*, footnote 1099.

⁴² Reasonable doubt must be based on logic and common sense, and have a rational link to the evidence. See the [Ngudjolo Appeal Judgment](#), paras. 109 *et seq.*; and the [Rutaganda Appeal Judgment](#), para. 488.

⁴³ See the [Lubanga Appeal Judgment](#), para. 226.

⁴⁴ See the [Second Appeal Brief](#), para. 240.

⁴⁵ See the [Judgment](#), paras. 387-388 and 1190.

⁴⁶ *Idem*, footnotes 1099 and 1101.

evidence as prescribed by the Appeals Chamber's caselaw,⁴⁷ rather than the piecemeal approach put forward by the Defence.

b. The Chamber properly relied on P-0010's testimony concerning Lamama's age

17. The Defence argues that “no reasonable trier of fact [sic] could have accorded any corroborative weight to P-0010's testimony regarding the age of anyone, since the Chamber found that she had lied about her own age to falsely claim that she had been a child soldier”.⁴⁸ The Legal Representative endorses the persuasive arguments by the Prosecution confirming that the Trial Chamber's reliance on P-0010's testimony concerning Lamama's age was reasonable and in line with relevant jurisprudence,⁴⁹ and will therefore limit her observations to two specific points.

18. First, the Defence misapprehends the Judgment when he states that “the Chamber found [P-0010] had lied about her own age”.⁵⁰ The Trial Chamber did not find that P-0010 had lied about her date of birth, or about any other aspect of her testimony.⁵¹ After reviewing the relevant evidence in detail, the Chamber found that some discrepancies concerning P-0010's age remained unanswered,⁵² and concluded therefore that it could not “establish beyond reasonable doubt that she was under 15 at the time of the events”.⁵³ As correctly noted by the Defence in other sections of the Second Appeal Brief, the Trial Chamber's reaching this conclusion only means that – in its assessment – a “reasonable possibility that [P-0010] has reached her 15th birthday” existed, even though it may be equally or more likely that she was indeed under 15 at the time.⁵⁴

19. Second, based on the incorrect premise that “P-0010 was willing to lie about her own age [...]”, the Defence asserts that “she would be inclined to do the same thing in respect of

⁴⁷ See the [Lubanga Appeal Judgment](#), para. 22; and the [Bemba et al. Appeal Judgment](#), para. 1195.

⁴⁸ See the [Second Appeal Brief](#), para. 243.

⁴⁹ See the [Prosecution Second Response](#), paras. 185-187.

⁵⁰ See the [Second Appeal Brief](#), para. 232. See also para. 243.

⁵¹ See the [Judgment](#), paras. 89-105, particularly para. 94 and para. 98 (“the Chamber cannot exclude the possibility that P-0010 misrepresented the truth when stating that she was abducted by the UPC when she was 13 years old, and then followed training with the UPC in the Rwampara and Mandro training camps”).

⁵² *Idem*, para. 93.

⁵³ *Idem*, para. 94.

⁵⁴ See the [Second Appeal Brief](#), para. 240. See also the [Prosecution Second Response](#), para. 248.

others”, including Lamama, in order “to give her own lie more credibility”.⁵⁵ The Legal Representative notes that P-0010 testified that some of her fellow members of Mr Ntaganda’s escort, including Lamama, were younger than her, while others were older, and [REDACTED].⁵⁶ P-0010’s testimony that Lamama was younger than her is consistent with [REDACTED].⁵⁷ Further, and in any event, the Trial Chamber was fully aware that “P-0010’s statement that certain escorts of Mr Ntaganda were younger than her [...] cannot, alone, support a finding that Mr Ntaganda’s escort included individuals under 15”,⁵⁸ given its finding that it could not be established beyond reasonable doubt that P-0010 was under the age of 15 at the time of the events.⁵⁹

20. The Defence failed to prove that the Chamber erred in giving corroborative weight to P-0010’s testimony concerning Lamama’s age. On the contrary, the Trial Chamber’s decision to rely only on part of P-0010’s testimony, based on a detailed assessment of its credibility and reliability in respect of specific issues,⁶⁰ is fully in line with the jurisprudence of the Court and of other international tribunals.⁶¹

2. Another member of Mr Ntaganda’s escort was under 15 years of age

21. The Trial Chamber was satisfied beyond reasonable doubt that an individual identified by P-0010 as “one of our kadogos” who had worked as an escort for Mr Ntaganda was “manifestly under the age of 15” around February 2003.⁶² It reached this conclusion while again “allowing for a large margin of error”,⁶³ and based on the testimony of P-0010,⁶⁴ as well as the Chamber’s own assessment of the person’s appearance in a video excerpt presented during trial, and particularly the “size of the individual”.⁶⁵

⁵⁵ See the [Second Appeal Brief](#), para. 243.

⁵⁶ See P-0010: [T-47](#), p. 6:3-17.

⁵⁷ [REDACTED].

⁵⁸ See the [Judgment](#), para. 386 (emphasis added).

⁵⁹ *Idem*, para. 386.

⁶⁰ *Idem*, para. 80.

⁶¹ See the [Lubanga Trial Judgment](#), paras. 104 and 339; the [Katanga Judgment](#), para. 84; the [Ngudjolo Appeal Judgment](#), para. 168; the [Bemba et al. Trial Judgment](#), paras. 202 and 204. See also e.g. the [Haradinaj et al. Appeal Judgment](#), para. 201 and the [Renzaho Appeal Judgment](#), para. 425.

⁶² See the [Judgment](#), para. 387.

⁶³ *Ibid.*

⁶⁴ *Idem*, footnote 1100. See also P-0010: [T-48](#), p. 15, referring to DRC-OTP-0120-0293, at 00:37:25.

⁶⁵ *Ibid.*

22. The Defence’s arguments on this ground of appeal largely overlap with those advanced in relation to Lamama, and addressed *supra*.⁶⁶ It further argues that the Trial Chamber could not assess the unidentified *kadogo*’s age by reference to his size alone and that it misinterpreted P-0010’s testimony.⁶⁷

23. First, the Trial Chamber was entitled to determine the age of the unidentified *kadogo* by reference to his size, compared to other persons and objects surrounding him. The Defence’s argument that “[a]ge assessment based on size alone, without even visible facial features, is nothing more than a guess” has been unequivocally rejected by the Appeals Chamber in the *Lubanga* case. There, Trial Chamber I took into account the “size and general appearance” of two individuals, and particularly the fact that they were shorter than other persons depicted in a video, to come to the conclusion that the two were “significantly under the age of fifteen years”.⁶⁸ The Appeals Chamber found that it was not unreasonable for the Trial Chamber to reach that conclusion without making reference to the facial features of the individuals concerned, and noted that:

*“the size of an individual, when compared to the other individuals present in the video excerpt, can be a determining factor for finding that the person is under the age of fifteen years, if considered in connection with their general appearance”.*⁶⁹

24. Following the same reasoning in the present case, the Trial Chamber was entitled to rely on the unidentified *kadogo*’s size, noting that he was “significantly smaller than the soldiers around him and barely taller than the wheel of the vehicle on which he can be seen loading his weapon”, to conclude that he was “manifestly under 15” at the time of the events.⁷⁰

25. Further, the Trial Chamber properly relied on P-0010’s testimony concerning the unidentified *kadogo*’s age. In addition to its general arguments concerning P-0010’s credibility,⁷¹ the Defence argues that “not even P-0010’s unreliable testimony supports the

⁶⁶ See *supra*, para. 17.

⁶⁷ See the [Second Appeal Brief](#), paras. 244-245.

⁶⁸ See the [Judgment](#), para. 228.

⁶⁹ *Idem*, para. 229.

⁷⁰ *Idem*, footnote 1100.

⁷¹ See *supra*, paras. 19-20.

view that the unidentified person was under 15”, since “she merely says that he was a ‘kadogo’, which the Chamber itself acknowledged referred to individuals up to 18 years of age”.⁷² The Legal Representative notes Mr Ntaganda’s vain attempts to suggest, at trial, that ‘kadogo’ meant a person of small size⁷³ and that there were no children under the age of 18 within the UPC/FPLC’s ranks.⁷⁴ Despite these outlandish suggestions on Mr Ntaganda’s part, the Trial Chamber was clear as to the meaning of the term ‘kadogo’, which was used within the UPC/FPLC to refer to child soldiers of a very young age but not necessarily below the age of 15 years.⁷⁵ Contrary to Mr Ntaganda’s suggestion, in addition to referring to the individual as a ‘kadogo’, P-0010 also testified that he was younger than her,⁷⁶ and it was *inter alia* on this piece of evidence that the Trial Chamber relied in its age assessment.⁷⁷

3. ‘Tipe’ was a member of Mr Ntaganda’s escort and under 15 years of age

26. The Trial Chamber was satisfied beyond reasonable doubt that an individual identified by P-898 as ‘Tipe’ who had worked as an escort for Mr Ntaganda was “*manifestly under the age of 15*” around May 2003.⁷⁸ It reached this conclusion while “*allowing for a wide margin of error*”,⁷⁹ and based on the testimony of P-0898,⁸⁰ as well as the Chamber’s own assessment of the person’s appearance in a video excerpt presented during trial,⁸¹ and particularly his “*facial features*”.⁸²

27. The Defence appeal against the Trial Chamber’s finding that Tipe was under 15 years of age consists exclusively of a generic assertion that “*no reasonable trier of fact could have concluded that there is no reasonable possibility that the person could have reached his 15th birthday*”.⁸³ The Defence fails to show that the Chamber erred in its assessment of Tipe’s age based on the relevant video-imagery, corroborated by the credible testimony of P-0898.

⁷² See the [Second Appeal Brief](#), para. 245 (references omitted).

⁷³ See D-0300: [T-209](#), pp. 34-35; and [T-211](#), p. 24.

⁷⁴ See D-0300: [T-239](#), p. 83.

⁷⁵ See the [Judgment](#), para. 359.

⁷⁶ See P-0010: [T-48](#), p. 15:20.

⁷⁷ See the [Judgment](#), footnote 1100.

⁷⁸ *Idem*, para. 388.

⁷⁹ *Ibid.*

⁸⁰ *Idem*, footnote 1102.

⁸¹ *Idem*, para. 388 and DRC-OTP-0103-0008, at 00:32:20-00:32:27.

⁸² *Idem*, footnote 1100.

⁸³ See the [Second Appeal Brief](#), para. 246.

28. Further, the Defence argues that the Trial Chamber's finding, based on P-0898's testimony, that Tipe had been part of Mr Ntaganda's escort is unsafe because the Prosecution failed to seek corroboration from other witnesses.⁸⁴ The Legal Representative agrees with the Prosecution that corroboration of clear, unambiguous testimony from P-0898, a credible witness with first-hand knowledge,⁸⁵ was not required.⁸⁶ For instance, in the *Lubanga* case, Mr Lubanga challenged a finding by Trial Chamber I that individuals depicted in certain video excerpts were under the age of 15, arguing that the Prosecution had failed to question potentially relevant witnesses on the identity or age of those individuals.⁸⁷ The Appeals Chamber rejected this argument, noting that Mr Lubanga had failed to identify any legal basis that would require the Prosecutor to put specific questions to witnesses and that he "was in a position to challenge the evidence and to question [the witness] himself".⁸⁸ The same conclusion applies in the present circumstances.

4. The Chamber reasonably relied on age assessments by witnesses concerning members of Mr Ntaganda's escort

29. The Trial Chamber reasonably relied on the testimony of several witnesses to conclude that "*Mr Ntaganda's escort comprised kadogos, including individuals under 15 years of age*".⁸⁹ By arguing that the Chamber "*erred in giving any weight to estimates of age by witnesses in the absence of any basis on which [it] could assess the accuracy of those estimates*",⁹⁰ the Defence effectively seeks to introduce an additional requirement of corroboration of witness' testimonies concerning age that has been correctly excluded by the Trial Chamber,⁹¹ in accordance with the approach adopted by the Court in earlier cases,⁹² and by other international tribunals.⁹³ By simply repeating arguments raised at trial and rejected

⁸⁴ *Idem*, para. 247.

⁸⁵ See the [Judgment](#), paras. 203-208.

⁸⁶ See the [Prosecution Second Response](#), paras. 183-184. See the [Judgment](#), paras. 75-76, explaining the Trial Chamber's approach to corroboration, fully in line with established jurisprudence.

⁸⁷ See the [Lubanga Appeal Brief](#), paras. 160, 169, and 182-183.

⁸⁸ See the [Lubanga Appeal Judgment](#), para. 209.

⁸⁹ See the [Judgment](#), paras. 389-391.

⁹⁰ See the [Second Appeal Brief](#), para. 248.

⁹¹ See the [Judgment](#), paras. 75-76.

⁹² See the [Lubanga Appeal Judgment](#), paras. 188-189, 196-198, and 234-235; the [Lubanga Trial Judgment](#), paras. 641-731; the [Katanga Judgment](#), paras. 1062 and 1084-1088. See also, most recently, the [Yekatom & Ngaissona Confirmation Decision](#), paras. 145-146, relying on age assessments by witnesses in the context of confirmation of charges.

⁹³ See e.g. the [Sesay et al. Appeal Judgment](#), paras. 918-919.

by the Chamber,⁹⁴ and insisting on proof of elements such as the identity and exact age of each victim, which are not required,⁹⁵ the Defence fails to prove that no reasonable Chamber could have relied on the testimony presented at trial to conclude that Mr Ntaganda had children under the age of 15 in his escort.

30. For all these reasons, Ground 9 should be dismissed.

C. Ground 10: Witnesses P-0883 and P-0898 were under the age of 15

31. The Trial Chamber reasonably, and correctly, found that P-0883 and P-0898 were enlisted in the UPC/FPLC and actively used in hostilities when under the age of 15.⁹⁶ The Defence disagrees with the Chamber's assessment of the credibility of said witnesses, particularly with respect to their age.⁹⁷

32. At the outset, the Legal Representative notes that this ground of appeal, as set out in the Second Appeal Brief, differs significantly from the corresponding ground outlined in the Notice of Appeal. In the Notice of Appeal, the Defence described this ground of appeal as a challenge against the Chamber's findings that "*children under the age of fifteen years were used to participate actively in hostilities, or that Mr. Ntaganda possessed the necessary mens rea*",⁹⁸ without any mention of P-0883, P-0898 or the charges of enlistment and conscription in Counts 14 and 15. Further, Ground 10 as set out in the Notice of Appeal refers to entirely different sections of the Judgment than those challenged under the corresponding ground in the Second Appeal Brief.⁹⁹ To the extent said ground of appeal as pleaded in the Second Appeal Brief exceeds the scope of the Notice of Appeal, the Legal Representative invites the Appeals Chamber to consider whether the requirements for a variation of grounds of appeal

⁹⁴ See the [Defence Closing Brief](#), paras.1389-1398 and 1439-1491 and the [Judgment](#), footnotes 1105-1115.

⁹⁵ See the [Lubanga Appeal Judgment](#), paras. 196-198; the [Katanga Judgment](#), paras. 1065 and 1084; and the [Ngudjolo Appeal Judgment](#), paras. 509-516.

⁹⁶ See the [Judgment](#), paras. 174-189 and 200-208.

⁹⁷ See the [Second Appeal Brief](#), paras. 250-257.

⁹⁸ See the [Notice of Appeal](#), p. 14.

⁹⁹ In particular, Ground 10 the Notice of Appeal sets out an appeal against the Trial Chamber's findings at "*para. 458, fn. 1310; para. 511; para. 649, fn. 2073; para. 655*" and "*paras. 811, 1194*" of the Judgment. See the [Notice of Appeal](#), p. 14. These sections of the Judgment refer to the testimony of several different witnesses as well as documentary evidence, but only include one cursory reference to P-0898 and none to the testimony of P-0883. See the [Judgment](#), footnote 1508. By contrast, Ground 10 in the Second Appeal Brief pertains exclusively to the credibility of P-0883 and P-0898, and refers to "*paras. 174, 174, 179, 200-208*" of the Judgment as the object of Mr Ntaganda's appeal. See [Second Appeal Brief](#), para. 250 and footnote 674.

set out in regulation 61 of the Regulations of the Court and in the jurisprudence of the Court are met.¹⁰⁰

33. Should this ground of appeal be considered on the merits, the Legal Representative notes that the Appeals Chamber has recognised that “*the Trial Chamber has the primary role in assessing the credibility of witnesses and the reliability of their evidence*”.¹⁰¹ Accordingly, “*when reviewing the Trial Chamber’s credibility assessments, the Appeals Chamber will not easily disturb the Trial Chamber’s findings unless it is demonstrated that no reasonable trier of fact could have reach this factual finding*”.¹⁰² In the present case, the Trial Chamber acted reasonably in relying on the testimony of P-0883 and P-0898, as well as other credible evidence, to conclude that they were under the age of 15 years at the relevant time.¹⁰³ This ground of appeal should thus be dismissed.

1. The Chamber reasonably relied on P-0883’s testimony

34. The Trial Chamber analysed the testimony of P-0883 in minute detail, devoting almost eight pages of its Judgment to the assessment of her credibility.¹⁰⁴ The Defence argues that the Chamber erred in this assessment as it found that P-0883’s account of her abduction “*was untrue*”, but “*failed to expressly find, as it should have, that P-0883 had lied under oath*” and “*without even discussing this perjury, found her testimony as to age reliable*”.¹⁰⁵ In doing so, the Defence misapprehends the Judgment and the jurisprudence of the Court on the assessment of a witness’ credibility.

35. First, with respect to P-0883’s initial abduction, the Trial Chamber did not find that her account “*was untrue*”.¹⁰⁶ It simply noted discrepancies between her testimony and other evidence on the record,¹⁰⁷ including P-0883’s victim application forms which were only

¹⁰⁰ See e.g. the [Lubanga Appeal Variation Decision](#).

¹⁰¹ See the [Bemba et al. Appeal Judgment](#), para. 1023.

¹⁰² *Ibid.* See also the [Bemba Separate Opinion of Judge Eboe-Osuji](#), paras. 79-80; the [Delalić et al. Judgment](#), para. 597; and the [Karadžić Judgment](#), para. 17.

¹⁰³ See the [Judgment](#), paras. 174-179 and 202.

¹⁰⁴ *Idem*, paras. 174-188. The Appeals Chamber has previously recalled that a Trial Chamber “*is not required to set out in detail why it accepted or rejected a witness’s testimony, or justify its evaluation of testimony in cases where there are discrepancies in the evidence*”. See [Ngudjolo Appeal Judgment](#), para. 182, citing [Muhimana Appeal Judgment](#), para. 176.

¹⁰⁵ See the [Second Appeal Brief](#), para. 251.

¹⁰⁶ *Ibid.*

¹⁰⁷ See the [Judgment](#), paras. 180-185.

ascribed “*limited evidentiary value*”,¹⁰⁸ and concluded on that basis that it “*it [could] not rely on the witness’s accounts concerning her abduction and the period immediately following the abduction*”.¹⁰⁹ By equating the Chamber’s refusal to rely on P-0883’s account with a positive finding that said account was “*untrue*”, the Defence disregards the ‘beyond reasonable doubt’ standard duly applied by the Chamber.

36. Further, even if P-0883’s account of the events surrounding her abduction were to be considered untrue, this would not imply – as the Defence suggests – that she deliberately lied under oath.¹¹⁰ In particular, the Trial Chamber recognised that the passage of time since the events, the young age of some witnesses at the time and the trauma they suffered may give rise to “*particular difficulties in providing a coherent, complete and logical account*”.¹¹¹ The Legal Representative also notes that, while the Chamber reached widely different conclusions as to the credibility of various witnesses, including an outright rejection of the entirety of the testimony provided by some of them,¹¹² it did not positively conclude that any of them had lied under oath, nor did it discuss potential issues of perjury.¹¹³ The Defence fails to provide any reasons why such conclusions should have been reached only in relation to P-0883.¹¹⁴

37. As for the Defence’s argument that no reasonable Trial Chamber, having decided not to rely on P-0883’s account of her abduction, could have found her testimony concerning age reliable,¹¹⁵ the Legal Representative reiterates that the Chamber was entitled to rely on parts

¹⁰⁸ *Idem*, paras. 85 and 185.

¹⁰⁹ *Idem*, para. 185.

¹¹⁰ See the [Second Appeal Brief](#), para. 251.

¹¹¹ See the [Judgment](#), para. 79. See also the [Lubanga Trial Judgment](#), para. 103; the [Bemba et al. Trial Judgment](#), para. 203; the [Bemba Trial Judgment](#), para. 230; the [Katanga Judgment](#), para. 83; the [Ngudjolo Trial Judgment](#), para. 49; the [Sesay et al. Trial Judgment](#), paras. 532-536; and the [Taylor Trial Judgment](#), paras. 1379-1393.

¹¹² See *e.g.* the [Judgment](#), paras. 250-255, in relation to D-0017.

¹¹³ The legal framework of the Court bestows the power to initiate the investigation of Article 70 offences to the Prosecutor only, whether he acts *proprio motu* or on the basis of information communicated to him. See *e.g.* rule 165 of the [Rules of Procedure and Evidence](#); the [Katanga & Ngudjolo Oral Decision](#), p. 3; and the [Lubanga Oral Decision](#), pp. 16-17.

¹¹⁴ See also the [Katanga & Ngudjolo Oral Decision](#), p. 5 (“*inconsistencies pointed out by the Defence in the testimony of [the witness] are related before everything on the credibility of his testimony, rather than on a belief that he intentionally lied to the Court*”) and [Bemba Decision on Witness Evidence](#), para. 17 (“*the evidence before the Chamber may raise doubts as to [a part of the witness’ testimony] [...] the Chamber is not persuaded that [he] ... intentionally tried to mislead the Court during his testimony*”). The Legal Representative notes that, in any event, an appeal against the Judgment is not the appropriate avenue to raise such arguments.

¹¹⁵ See the [Second Appeal Brief](#), para. 251.

of a witness's testimony and not others.¹¹⁶ The Appeals Chamber has found that this holds true even in extreme cases where a witness is known to have previously given false testimony,¹¹⁷ and applies *a fortiori* where this is not the case, as for P-0883. In particular, the Trial Chamber explained in detail why it concluded that inconsistencies concerning P-0883's abduction did not cast doubt on other aspects of her testimony and determined on a case-by-case basis which elements could be relied upon, including her age.¹¹⁸

38. P-0883 consistently provided the same date of birth, [REDACTED], since her initial engagement with the Court [REDACTED],¹¹⁹ and her testimony in this respect was assessed to be credible.¹²⁰ All her personal identification documents presented at trial refer to that date,¹²¹ even though two of them could not serve as independent corroboration because they recorded a date of birth based largely or exclusively on the applicant's own declaration.¹²² The Defence presented testimony concerning alleged flaws in this documentation, on which the Chamber placed limited weight, but no evidence to suggest that P-0883 was born on a different date and was over the age of 15 at the time of the events.

39. The Defence also claims that the Trial Chamber “*misappreciat[ed] the evidence in assessing that there was ‘no indication’ that P-0883 had been involved in producing [...] a tampered version of an original/authentic school record*”.¹²³ The Legal Representative emphasises that the Chamber acted reasonably in finding – correctly – that there was no indication of any such involvement. P-0883 was forthcoming, consistent and specific in her testimony about her approaching [REDACTED], the school she attended prior to her abduction.¹²⁴ Following initial contacts with the Prosecution, P-0883 visited the school, met with the director, asked to see her records and was allowed to consult “*school reports from*

¹¹⁶ See the [Lubanga Trial Judgment](#), paras. 104 and 339; the [Katanga Judgment](#), para. 84; the [Ngudjolo Appeal Judgment](#), para. 168; the [Bemba et al. Trial Judgment](#), paras. 202 and 204. See also e.g. the [Haradinaj et al. Appeal Judgment](#), para. 201; and the [Renzaho Appeal Judgment](#), para. 425.

¹¹⁷ See the [Bemba et al. Appeal Judgment](#), para. 1019.

¹¹⁸ See the [Judgment](#), para. 188.

¹¹⁹ See DRC-OTP-2079-1430-R02. [REDACTED].

¹²⁰ See the [Judgment](#), paras. 176-179. See also the [Prosecution Second Response](#), para. 193.

¹²¹ See DRC-OTP-2078-2736-R02; DRC-OTP-2094-0656; and DRC-OTP-2094-0655.

¹²² See the [Judgment](#), para. 177.

¹²³ See the [Second Appeal Brief](#), para. 252.

¹²⁴ See the [Judgment](#), para. 178.

the third and fourth year”.¹²⁵ [REDACTED].¹²⁶ She was not shown the school record for 1997, which forms the basis of the Defence’s argument, [REDACTED].¹²⁷ Both version of that school record were provided to the Prosecution by the DRC authorities, without any involvement by P-0883.¹²⁸ Further, when shown the original version of said record in court, P-0883 clarified that it recorded, in the row corresponding to her name, an incorrect date of birth, [REDACTED],¹²⁹ [REDACTED].¹³⁰

40. The Defence argues that the Chamber failed to duly consider two indications of P-0883’s involvement in tampering with the school record, namely the fact that the tampered document gives a date of birth of 11 May 1990, corresponding to P-0883’s stated date of birth, and that it was “*procured*” (presumably meaning provided by the DRC to the Prosecution) after [REDACTED].¹³¹ Far from being “*strong [...] circumstantial indications*” of P-0883’s involvement, these elements suggest at most that the alterations were made by someone with knowledge of P-0883’s situation and her actual date of birth, possibly with a view to correcting the inaccurate date reflected in register. It was thus reasonable for the Chamber to conclude that there was no indication of P-883’s involvement and, more broadly, no evidence that she was above the age of 15, as the date listed in the original document prior to its alteration would in fact make P-0883 a year younger than she actually is.

2. The Chamber reasonably relied on P-0898’s testimony

41. The Defence argues that the Chamber acted unreasonably in finding that P-0898’s testimony could be “*fully relied upon*”, and “*in particular that he was under 15 when he was enlisted and participated in hostilities*”.¹³² The Trial Chamber found, based on P-0898’s credible testimony and extensive documentary evidence,¹³³ that he was

¹²⁵ See P-0883: [T-168](#), p. 54. See [DRC-OTP-2097-0449-R01](#), para. 19.

¹²⁶ [REDACTED].

¹²⁷ See P-0883: [T-168](#), p. 54; and [T-169](#), pp. 34-35 and 53.

¹²⁸ See the [Judgment](#), footnote 433 and the [Prosecution Second Response](#), para. 194.

¹²⁹ See P-0883: [T-169](#), p. 70..

¹³⁰ [REDACTED].

¹³¹ See the [Second Appeal Brief](#), para. 252.

¹³² See the [Second Appeal Brief](#), para. 253. The Legal Representative notes that Mr Ntaganda did not dispute P-0898’s age or date of birth at trial. See the [Judgment](#), para. 202.

¹³³ See P-0898: [T-153](#), pp. 29-30; and [T-154](#), p. 41; DRC-OTP-2078-2318-R01; DRC-OTP-2078-2320-R01; DRC-OTP-2077-0264-R01; and DRC-OTP-2082-0563. [REDACTED]

less than 15 years of age at the time of the relevant events.¹³⁴ Despite its stated objective to challenge the Chamber's finding as to P-0898's age "*in particular*",¹³⁵ the Defence puts forward no argument concerning his age or date of birth, and instead generally challenges P-0898's credibility based on two specific documents.

42. First, the Defence refers to P-0898's school report cards for the 2002-2003 school year,¹³⁶ which include marks for each term, even though he did not attend school for an extensive period that year (including the entirety of the first semester) due to his recruitment and use by the UPC/FPLC.¹³⁷ P-0898 explained – and the Trial Chamber accepted – that after his return to school marks for the first term were included in the report cards taking into account those from the second term, so that the report would not be empty and with a view to encouraging former child soldiers willing to return to their studies.¹³⁸

43. The Defence challenges this conclusion on the basis that D-0201, [REDACTED], "*unambiguously denied that this ever happened*", and claims that the Chamber acted unreasonably in relying on P-0898's "*plausible*" explanation while failing to reject D-0201's inconsistent testimony, as it was required to do.¹³⁹ The Legal Representative agrees with the Prosecution that the Defence's arguments in this respect simply demonstrate a misunderstanding of the applicable standard of proof and of the Chamber's duty to assess the evidence holistically.¹⁴⁰ In this context, the Chamber acted reasonably and fully in line with international jurisprudence¹⁴¹ by considering the plausibility, or implausibility, of a witness's explanation of potentially conflicting evidence in assessing the credibility of his or her testimony.¹⁴²

¹³⁴ See the [Judgment](#), para. 202.

¹³⁵ See the [Second Appeal Brief](#), para. 253.

¹³⁶ See DRC-OTP-2082-0562 to DRC-OTP-2082-0579.

¹³⁷ See *e.g.* DRC-OTP-2082-0572.

¹³⁸ See P-0898: [T-153](#), pp. 43- 44; and [T-155](#), p. 47.

¹³⁹ See the [Second Appeal Brief](#), paras. 254-255.

¹⁴⁰ See the [Prosecution Second Response](#), para. 196.

¹⁴¹ See *e.g.* the [Lubanga Trial Judgment](#), para. 344, and the [Lubanga Appeal Judgment](#), para. 352.

¹⁴² See the [Judgment](#), paras. 206-207, as well as paras. 205 and 222). See also the [Second Appeal Brief](#), para. 254.

44. The Legal Representative also disputes the Defence's assertion that D-0201's and P-0898's testimonies on the point are "*mutually exclusive*".¹⁴³ In particular, the Trial Chamber found that:

*"ii) [...] D-0201's testimony on the consequences of a student's absence for a school record was very general and does not exclude modifications on an individual basis; (iii) D-0201 was not able to confirm that P-0898 attended school during the relevant time-frame".*¹⁴⁴

45. Indeed, D-0201's testimony was in line with P-898's explanation in many respects, including his recognition that schools in Bunia were not functioning properly in 2002/2003,¹⁴⁵ and that it was possible for students to go through the school year if their absence from school was justified.¹⁴⁶ D-0201 also confirmed that he had no independent recollection of P-0898's school attendance that year.¹⁴⁷ The Defence provides no authority in support of the purported duty of the Trial Chamber to reject non-mutually-exclusive testimony such as that of D-0201 in order to reach a conclusion beyond reasonable doubt in the present circumstances.

46. Second, the Defence claims the Chamber erred "*by finding that P-0898's reliability was enhanced by his purported recognition of [a] registration document*" on whose authenticity the Chamber expressed serious doubts.¹⁴⁸ In fact, as pointed out by the Prosecution,¹⁴⁹ the Trial Chamber simply noted – as part of its assessment of P-0898's credibility – that he had been consistent in his description of the registration process applied at the Mandro training camp.¹⁵⁰ The fact that P-0898 may have been mistaken as to whether the lists provided by P-0911 were fabrications, as opposed to the original lists compiled at Mandro, does not call into question his credibility, particularly since – as noted

¹⁴³ See the [Second Appeal Brief](#), para. 254.

¹⁴⁴ See the [Judgment](#), footnote 497.

¹⁴⁵ See D-201: [T-246](#), p. 51:11-12, and p. 78:19-21. See also P-551: DRC-OTP-1054-0031-R01, p. 0033, para.13.

¹⁴⁶ See D-201: [T-246](#), p. 73:9-13. See also P-551: [T-197](#), p. 68:18-28 and p. 71:15-25. The head of the school – not D-0201 – could assess whether being forcibly recruited into an armed group would be considered a justifiable reason. See [T-246](#), p. 74:2-7, and pp. 89:21-90:6.

¹⁴⁷ See D-201: [T-246](#), p. 78:1-15, p. 79:14-21, p. 80:8-10, p. 84:14-25, and pp. 86:13-87:19.

¹⁴⁸ See the [Second Appeal Brief](#), para. 256.

¹⁴⁹ See the [Prosecution Second Response](#), para. 198.

¹⁵⁰ See the [Judgment](#), para. 205.

by the Trial Chamber – P-0898 had never seen the lists before his preparation session.¹⁵¹ It is on that basis that the Chamber reasonably found that “*the reliability of [P-0898’s] testimony in this regard is not affected by the Chamber’s conclusion regarding [the lists’] authenticity*”.¹⁵² Accordingly, it was reasonable for the Trial Chamber to regard P-0898’s testimony in this respect as credible and to rely on it.

47. For all these reasons, Ground 10 should be dismissed.

D. Ground 11: Child soldiers were raped and sexually enslaved

48. The Trial Chamber found that the following incidents were established beyond reasonable doubt: “*the repeated rapes of P-0883, a girl under 15 years of age, by UPC/FPLC soldiers at Camp Bule; the rapes of Mave, a girl under the age of 15 who was assigned to Floribert Kisémbu, who was raped by UPC/FPLC soldiers on a regular basis; and the rape of Nadège, a girl of approximately nine years old, who was raped at the Lingo training camp*”.¹⁵³ It convicted Mr Ntaganda for sexual slavery of child soldiers as a war crime in relation to Mave and P-0883, and rape as a war crime in relation to all three victims.¹⁵⁴

49. Contrary to the Defence’s argument that “*no reasonable trier of fact could have found that these incidents occurred, or that Mr. Ntaganda knew about them*”,¹⁵⁵ the Chamber acted reasonably in its assessment of and reliance on clear witness testimony in reaching its conclusion on the rape and sexual slavery of the three above-mentioned child soldiers.

50. As a preliminary matter, the Legal Representative notes the Defence’s references, throughout the present ground of appeal, to the “*uncorroborated*” nature of the evidence supporting the Chamber’s findings.¹⁵⁶ While broad and unfounded claims of lack of corroboration are a recurring theme in the Second Appeal Brief, the Legal Representative avers that these arguments are of particular concern in the context of sexual violence offences. Rule 63(4) of the Rules of Procedure and Evidence, in line with the corresponding

¹⁵¹ *Ibid.*, citing [T-155](#), p. 11.

¹⁵² See the [Judgment](#), para. 205.

¹⁵³ See the [Judgment](#), para. 974 (references omitted).

¹⁵⁴ See the [Judgment](#), p. 528.

¹⁵⁵ See the [Second Appeal Brief](#), para. 259.

¹⁵⁶ *Idem*, *inter alia* paras. 258, 259, 265, 268, and 271.

provisions concerning other international criminal courts,¹⁵⁷ states that “*a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence*”.¹⁵⁸ The specific reference to sexual violence crimes in this context was intended to emphasise that the testimony of a victim¹⁵⁹ of sexual assault should be accorded “*the same presumption of reliability as the testimony of victims of other crimes, something long denied to victims of sexual assault by the common law*”,¹⁶⁰ where specific requirements of corroboration were often imposed.¹⁶¹ Accordingly, the Trial Chamber correctly proceeded on the basis that it could consider, in appropriate circumstances, that the testimony of a single witness was sufficient to prove one or more facts beyond reasonable doubt,¹⁶² including in the context of Counts 6 and 9.

51. The Legal Representative also notes that, while some of the Trial Chamber’s findings concerning the three individuals mentioned *supra* were based – reasonably and correctly – on the testimony of a single witness, they were in line with abundant “*other evidence about rape of PMFs under 15 by UPC/FPLC soldiers or commanders*”,¹⁶³ which led the Chamber to find that “*such conduct against female members was a common practice in the UPC/FPLC during this time period*”.¹⁶⁴

52. The Trial Chamber’s findings concerning sexual violence crimes committed against former child soldiers Nadège, P-0883 and Mave are reasonable and correct. The Defence

¹⁵⁷ See e.g. rule 96(i) of the [ICTY Rules](#); rule 96(i) of the [ICTR Rules](#); rule 118(i) of the [IRMCT Rules](#). See also e.g. the [Musema Judgment and Sentence](#), paras. 44-45.

¹⁵⁸ See rule 63(4) of the [Rules of Procedure and Evidence](#) (emphasis added); and the [Judgment](#), para. 75.

¹⁵⁹ The same principles apply to the testimony of witnesses who are not victims. See the [Rutaganda Judgment and Sentence](#), para. 18.

¹⁶⁰ See the [Tadić Opinion and Judgment](#), para. 536.

¹⁶¹ See [Oosterveld \(2014\)](#), p. 9; [McGlyn \(2010\)](#), pp. 143-150; [Goldstone \(2002\)](#), p. 283; and [Weiner \(2013\)](#), pp. 1229-1230. It has also been noted that “*the very logic underpinning the inclusion of Rule 63(4) [as a whole] was to ease the crippling practical and logistical challenges obstructing the collection of relevant forensic or documentary evidence months if not years after the commission of crimes, in situations of ongoing conflict or post-conflict dysfunction, challenges which are even more pronounced when it comes to evidence of sexual or gender-based violence*”. See [Stahn \(2015\)](#), p. 833.

¹⁶² See e.g. the [Lubanga Appeal Judgment](#), paras. 218 and 418-423. See also the [Akayesu Trial Judgment](#), para. 135; the [Kunarac Trial Judgment](#), para. 268; the [Muhimana Judgment and Sentence](#), paras. 288-292; the [Gacumbitsi Judgment](#), paras. 213-215; the [Stakić Judgment](#), paras. 791-805; the [Habré Trial Judgment](#), paras. 719-736 and 1577-1582; and [Stahn \(2015\)](#), p. 833.

¹⁶³ See the [Judgment](#), footnote 1161 and para. 1196.

¹⁶⁴ See the [Sentencing Judgment](#), para. 108.

simply repeats arguments advanced at trial, and rejected, and fails to demonstrate that the Trial Chamber erred in assessing the evidence before it and the credibility of the relevant witnesses. Accordingly, this ground of appeal should be dismissed.

1. *P-0883 was raped and sexually enslaved*

53. The Trial Chamber reasonably found that P-0883 was raped and sexually enslaved by UPC/FPLC soldiers at Camp Bule when she was under 15 years of age.¹⁶⁵ The Defence claim that this finding is unsound is based largely on the same arguments as raised in relation to P-0883's credibility in the context of Ground 10 of the present appeal, and suffers from the same flaws.¹⁶⁶ In particular, the Defence statements that P-0883 "*had lied about the circumstances of her abduction*" and "*gave [...] false testimony in asserting that she had been abducted by the UPC/FPLC*"¹⁶⁷ do not reflect the Chamber's findings in this respect.¹⁶⁸

54. As for the Defence's argument that the Chamber failed to address the implications of its decision not to rely on P-0883's evidence concerning her abduction on the credibility of her testimony concerning rape, the Judgment demonstrates that the Chamber considered this in detail. Having decided not to rely on P-0883's account related to her abduction and the period immediately thereafter, it resolved to "*determine on a case-by-case basis which remaining aspects of her testimony can be relied upon [...] paying particular attention to assessing the timeframe of the relevant event*".¹⁶⁹

55. With regard to P-0883's overall credibility, the Trial Chamber noted the clarity and detailed nature of her accounts, the consistency of her narrative, her ability to focus on matters she had personally experienced and refrain from general comments and approximations, and the fact that certain aspects of her testimony were consistent with the experience of UPC/FPLC recruits in other camps.¹⁷⁰ P-0883 provided both negative and positive information concerning Mr Ntaganda, leading the Chamber to conclude that her

¹⁶⁵ See the [Judgment](#), paras. 409 and 974.

¹⁶⁶ See *supra* paras. 34-40.

¹⁶⁷ See the [Second Appeal Brief](#), paras. 260 and 267. See also *idem*, para. 268, referring to "*the Chamber's own finding that she had lied under oath about the group that had conscripted her*" and "[i]ts failure to recognize the indications that P-0883 had committed an article 70 offence". See *supra*, para. 36.

¹⁶⁸ See *supra* paras. 35 *et seq.*

¹⁶⁹ See the [Judgment](#), para. 188.

¹⁷⁰ *Idem*, para. 175.

testimony could “*not be seen as deliberately exaggerating or incriminatory vis-à-vis the accused*”.¹⁷¹

56. The Chamber also clarified the basis for its distinction between, on the one hand, P-0883’s account of her abduction and its immediate aftermath, which the Chamber decided not to rely on, and, on the other hand, the subsequent period in the UPC/FPLC training camp in Bule, where she was raped and sexually enslaved, for which her testimony was found to be credible.¹⁷² Among various factors justifying said differential treatment, the Chamber noted that there were discrepancies, some of which unexplained, between P-0883’s testimony and earlier application forms from 2011 and 2013 in relation to the armed group responsible for her abduction and the locations she was taken to immediately thereafter. By contrast, no such discrepancy exists concerning the period P-0883 spent in Bule. And while no information is available concerning other locations mentioned by P-0883, evidence on the case record supported the existence of a UPC/FPLC military training camp in Bule during the relevant timeframe.¹⁷³ Further, P-0883 was able to recall specific details of her training in Bule, including Mr Ntaganda’s role and his visit to the camp, and the details she provided were “*broadly consistent with the testimony of other former recruits*”.¹⁷⁴

57. Concerning sexual violence crimes in particular, the Trial Chamber noted that P-0883’s testimony was both nuanced and detailed, including in the description of the events and of the consequences thereof on her health and that of her child.¹⁷⁵ In these circumstances, it was entirely reasonable for the Chamber to rely on P-0883’s testimony concerning the rape and sexual slavery she was subjected to while in the Bule training camp.

2. ‘Nadège’ was raped

58. The Trial Chamber reasonably found, based on P-0758’s testimony, that Nadège, a female child soldier of approximately nine years old, was raped at the Lingo camp.¹⁷⁶

¹⁷¹ *Idem*, footnote 450.

¹⁷² *Idem*, para. 186.

¹⁷³ *Idem*, para. 183.

¹⁷⁴ *Idem*, para. 186.

¹⁷⁵ *Idem*, para. 187.

¹⁷⁶ *Idem*, para. 410.

Following the rapes, there was pus coming out of Nadège’s vagina, and she died as a result.¹⁷⁷ The Defence claims that no reasonable Chamber could have relied on P-0758’s testimony concerning Nadège since she had “*lied about highly incriminating and material facts [...] and [her] testimony about her own rape was not even deemed worthy of discussion by the Chamber*”.¹⁷⁸ Once again, the Defence misapprehends the Chamber’s findings and their implications.

59. First, the Chamber did not find that P-0758 had “*lied about her own age and her conscription into the FLPC*”,¹⁷⁹ it simply found that “*it [could] not be established beyond reasonable doubt that [P-0758] was under 15 years old when she joined the UPC/FPLC*”, due to inconsistencies as to the circumstances and timing of her abduction.¹⁸⁰

60. Following an in-depth analysis of P-0758’s overall credibility,¹⁸¹ and a discussion of the inconsistencies mentioned *supra*,¹⁸² the Chamber dealt with the arguments advanced by the Defence¹⁸³ and explained the basis for its decision to rely on P-0758’s testimony on certain issues, including “*the names and ages of specific victims of sexual violence, including details of injuries sustained by one of these girls*” and “*sexual violence allegedly committed by UPC/FPLC soldiers*”.¹⁸⁴ Contrary to the Defence’s assertion that the Chamber “*failed to say one word*” about the findings *supra* in accepting “*the Nadège story*”,¹⁸⁵ the Chamber specifically referred to the issue and concluded that P-0758’s testimony concerning Nadège

¹⁷⁷ *Ibid.* The Chamber did not convict Mr Ntaganda of sexual slavery in relation to this victim, as it had “*very limited evidence concerning the victim’s personal circumstances, notably no information on the length of time she spent at the Lingo training camp, or the individuals who raped her*”. See the [Judgment](#), para. 981.

¹⁷⁸ See the [Second Appeal Brief](#), para. 265.

¹⁷⁹ *Idem*, paras. 259 *et seq.*

¹⁸⁰ See the [Judgment](#), para. 160.

¹⁸¹ *Idem*, para. 149.

¹⁸² *Idem*, paras. 150-158.

¹⁸³ *Idem*, para. 159. In particular, the Chamber referred to the Defence submission that her testimony relating to the circumstances and timing of her abduction was “*motivated by an intention [...] to obtain victim status and related expected benefits*”. The Legal Representative notes that the same alleged motivation (of which there is no evidence) would not support conclusion that she lied concerning Nadège.

¹⁸⁴ *Idem*, footnote 379.

¹⁸⁵ *Idem*, para. 266.

could be relied upon as it was “*coherent, spontaneous and detailed [...] and largely consistent with the testimony of other witnesses who had comparable experiences*”.¹⁸⁶

61. The Defence also contends that P-0758’s testimony that she was herself raped was not discussed in the Judgment. The Legal Representative agrees with the Prosecution that the Chamber did not reach a finding in this respect not because, as the Defence would have it, P-0758’s testimony “*was deemed unworthy of belief*”,¹⁸⁷ but because, given the reasonable doubts existing as to P-0758’s age at the time of the events, any sexual violence crime she personally suffered would have fallen outside the scope of Counts 6 and 9, which regrettably only encompass victims under the age of 15.¹⁸⁸

3. ‘Mave’ was raped and sexually enslaved

62. The Trial Chamber found that a girl called Mave, who was under 15 years of age and was assigned as an escort to Floribert Kisembo, was raped by many different soldiers on a regular basis, including at the *Appartements* camp in Mongbwalu.¹⁸⁹

63. The Defence argues that the finding that Mave was under the age of 15 at the relevant time is “*manifestly unreasonable*”, as it was based on allegedly contradictory evidence. However, as explained by the Prosecution, the Defence misattributes testimony to different witnesses and wrongly refers to age assessments clearly pertaining to a different PMF named Mave.¹⁹⁰ In fact, the evidence before the Chamber as to Mave’s age was credible and consistent. P-0907, a former UPC/FPLC member found by the Chamber to be fully credible,¹⁹¹ testified that Floribert Kisembo had an escort named Mave who was “*about 12 years old*”,¹⁹² “*very young*”¹⁹³ and “*no more than 12 years of age*”,¹⁹⁴ based on her

¹⁸⁶ *Idem*, para. 159 and footnote 379. See also, *idem*, footnote 1170: “*The Chamber recalls its observations concerning the details provided by P-0758 in the context of her testimony concerning sexual violence witnessed at Lingo training camp, and therefore considers that her evidence in this regard can be relied upon*”.

¹⁸⁷ See the [Second Appeal Brief](#), para. 259.

¹⁸⁸ See the [Judgment](#), para. 970. See the [Prosecution Second Response](#), para. 203.

¹⁸⁹ See the [Judgment](#), para. 411.

¹⁹⁰ See the [Prosecution Second Response](#), para. 208. While there are other references within the evidence in the case record to young PMFs named ‘Mave’, there are no indications that these relate to the same person, *i.e.* Kisembo’s escort. See [REDACTED]: [T-58](#), pp. 51-52.

¹⁹¹ See the [Judgment](#), para. 224.

¹⁹² See P-0907: [T-89](#), p. 52:21-22.

¹⁹³ *Idem*, p. 55:11, and p. 57:3.

¹⁹⁴ *Idem*, p. 55:11.

behaviour and her appearance.¹⁹⁵ He also testified that Mave was referred to by Kisembo in a gathering as “*a child*”, “*no more than 12 years old*”, and “*not even a teenage girl*”.¹⁹⁶ P-0907’s wife, P-0887, confirmed that Mave “*was still very young*” and that “*her breasts hadn’t even started to develop*”.¹⁹⁷ The Chamber reasonably relied on the evidence of P-0907 and P-0887, both of whom were familiar with Mave,¹⁹⁸ and had a “*good opportunity [...] to assess her age*”.¹⁹⁹ The Defence fails to demonstrate an error on the Trial Chamber’s part or indeed point to any inconsistent evidence concerning Mave’s age.

64. The Defence also contends that the crimes against Mave occurred “*after the defeat and dispersal of FPLC forces by the Ugandan army in early March 2003*” and that “[t]he Chamber made no findings, and had no evidence to indicate that Mr. Ntaganda had any knowledge of how Kisembo’s forces, or Kisembo himself, were conducting themselves”.²⁰⁰ Thus, the Defence argues, the Chamber erred in finding that Mr Ntaganda would have foreseen that the rape of Mave would occur in the ordinary course of events.²⁰¹ The Legal Representative concurs with the Prosecution that the Defence mischaracterises the Chamber’s finding that Mave was raped repeatedly and on a regular basis, both in March 2003 and prior to that date.²⁰² Further, the Defence appears to misunderstand the applicable *mens rea* standard, to the extent it suggests that actual knowledge about the specific incidents of rape and sexual enslavement for which Mr Ntaganda was convicted, and their specific victims, was required. In fact, as explored in further detail in Grounds 12 and 13,²⁰³ in cases of indirect co-perpetration, the applicable *mens rea* is established where the accused was aware that the implementation of the common plan would, in the ordinary course of events, result in the commission of the *type* of crimes charged. It is not necessary to prove that he

¹⁹⁵ *Idem*, p. 57:3-4 (“*she just played with the other children*”); and p. 57:8-9 (“*you could really see that by her face*”).

¹⁹⁶ *Idem*, 57.

¹⁹⁷ See P-0887: [T-93](#), p. 40:2.

¹⁹⁸ [REDACTED]. [REDACTED].

¹⁹⁹ See the [Judgment](#), footnote 1135.

²⁰⁰ See the [Second Appeal Brief](#), para. 270.

²⁰¹ *Ibid.*

²⁰² See the [Judgment](#), para. 411; and the [Prosecution Second Response](#), para. 210.

²⁰³ The Legal Representative notes that Mr Ntaganda raises closely connected arguments in the [Sentencing Appeal Brief](#), paras. 46-52.

was aware of the specific incidents and victims that ultimately resulted from the implementation of the common plan.²⁰⁴

65. For all these reasons, Ground 11 should be dismissed.

E. Ground 12: Mr Ntaganda knew that children under the age of 15 were recruited and used to actively participate in hostilities

66. The Defence argues that the Chamber erred in law and in fact in finding Mr Ntaganda had the requisite *mens rea* in relation to the crimes of recruitment and active use in hostilities of children under the age of 15.²⁰⁵

1. The Chamber correctly defined and applied the mens rea requirements for indirect co-perpetration

67. The Second Appeal Brief appears to refer, at times, to a *mens rea* standard that does not reflect the one established by the jurisprudence of the Court. For instance, the Defence alleges that “no reasonable judge could have inferred that Mr Ntaganda intended to recruit children under the age of 15” and that “none of his speech reflects any direct intention to recruit individuals under the age of 15”.²⁰⁶ The Chamber was not required to reach any such finding.²⁰⁷

68. The Legal Representative notes that the Trial Chamber correctly defined and applied the *mens rea* requirements for indirect co-perpetration²⁰⁸ of the crimes of conscription,

²⁰⁴ See e.g. the [Bemba et al. Appeal Judgment](#), para. 1308.

²⁰⁵ See the [Second Appeal Brief](#), paras. 272-277.

²⁰⁶ See the [Second Appeal Brief](#), paras. 275 and 277.

²⁰⁷ See e.g. [Yanev \(2019\)](#), confirming that the legal framework of the Court does “not require that the accused shared a purpose/direct intent to commit the collective crime: mutual awareness and acceptance that the crime would be committed suffices”, and citing, the [Lubanga Confirmation of Charges Decision](#), paras. 343-367; the [Abu Garda Confirmation of Charges Decision](#), paras. 160-161; the [Banda & Jerbo Confirmation of Charges Corrigendum](#), paras. 128, 150 and 159; the [Lubanga Trial Judgment](#), para. 1018; the [Bemba et al. Trial Judgment](#), para. 70; the [Confirmation of Charges Decision](#), para. 121; the [Gbagbo Confirmation of Charges Decision](#), para. 238; the [Bemba Confirmation of Charges Decision](#), para. 369; and the [Blé Goudé Confirmation of Charges Decision](#), footnote 384. See also [Kiss \(2018\)](#), para. 28; and [Knoops \(2017\)](#), pp. 40 *et seq.*

²⁰⁸ The Defence claims that the application of the “should have known” standard in the [Elements of Crimes](#) would have violated the language of Article 30, “which plainly requires that the material elements of a crime be committed ‘with intent and knowledge’”. See the [Second Appeal Brief](#), para. 274. The Legal Representative notes that Article 30 only provides for the application of the “intent and knowledge” standard “unless otherwise provided” and that, based on the jurisprudence of the Court, the application of the lower negligence standard set out in the elements of crime in relation to the victims’ age element of the offence in Article 8(2)(e)(vii) has

enlistment and active use in hostilities of child soldiers as delineated by the jurisprudence of the Court.²⁰⁹ It found, as it was required to, that Mr Ntaganda's own conduct constituting his essential contribution to the common plan was intentional,²¹⁰ and that:

*“Mr Ntaganda meant for the UPC/FPLC soldiers and commanders to engage in the relevant conducts, and was aware that, in the ordinary course of events, and during the relevant period, in relation to the consequence, children under the age of 15 years would be enlisted, conscripted and used to participate actively in hostilities within the UPC/FPLC ranks (Counts 14 to 16) [...] and was aware of the relevant circumstances”.*²¹¹

2. Mr Ntaganda “necessarily knew” that the UPC/FPLC would recruit children under the age of 15 and use them in hostilities

69. According to the Defence, the Chamber concluded that Mr Ntaganda “necessarily knew” that children under 15 were enlisted, conscripted and used to participate actively in hostilities based on (1) his proximity with members of his escort who were erroneously found to be manifestly under the age of 15, and (2) public statements that – the Defence argues – could also be reasonably interpreted to call for the recruitment of young individuals above the age of 15.²¹² The Defence incorrectly suggests that the Trial Chamber's *mens rea* finding was based exclusively on those two elements. As explored in further detail *infra*,²¹³ Mr Ntaganda's proximity with child soldiers in his escort and his public statements at recruitment rallies were but two of many elements considered by the Trial Chamber in reaching its conclusion.

70. Further, and in any event, the Defence's arguments are not substantiated.

71. First, as discussed *supra*,²¹⁴ the Defence failed to show any discernible error vitiating the Trial Chamber's findings that individuals under the age of 15 – including but not limited to the three individuals specifically discussed in Ground 9 – were part of Mr Ntaganda's

only been excluded in cases based on indirect co-perpetration. See [Lubanga Confirmation of Charges](#), para. 365.

²⁰⁹ See *supra* footnote 207.

²¹⁰ See the [Judgment](#), paras. 1174-1175.

²¹¹ See the [Judgment](#), para. 1198.

²¹² See the [Second Appeal Brief](#), paras. 272-277.

²¹³ See *infra* Section III.F. See also the [Prosecution Second Response](#), para. 213.

²¹⁴ See *supra* Section III.B.

escort and that other children under the age of 15, some “*manifestly*” so, were recruited by the UPC/FPLC and actively used in hostilities.²¹⁵

72. Second, the Defence notes that the public statements attributed to Mr Ntaganda call for the recruitment of “*young people*” or “*kadogos*” which, it argues, could also refer to individuals “*below 18 but above the 15-year old threshold*”.²¹⁶ The Defence advanced no argument to this effect at trial, where Mr Ntaganda consistently claimed that the term ‘*kadogo*’ designated a person of small size, regardless of his or her age,²¹⁷ and that there were simply no individuals under the age of 18 within the UPC/FPLC’s ranks.²¹⁸ Further, the Judgment indicates that the Trial Chamber was fully aware that the term ‘*kadogo*’ was not used to refer exclusively to children under 15.²¹⁹

73. Mr Ntaganda’s public statements referring to “*children*”, as well as “*young people*” and “*kadogos*”, and calling for families to enlist their children must be read in the context of the UPC/FPLC’s large-scale recruitment campaign in Ituri from at least June 2002, “*including individuals under the age of 15*”,²²⁰ and against the background of long-standing, credible allegations of recruitment of child soldiers moved by prominent international organisations towards Mr Ntaganda’s forces as early as in late 2000.²²¹ It was thus entirely reasonable for the Chamber to rely on Mr Ntaganda’s statements at recruitment events to conclude that he necessarily knew that *at least some* individuals under the age of 15 would be recruited by the UPC/FPLC.²²²

74. Finally, contrary to the Defence’s assertion, the Chamber did not “*ignore the evidence*” that the UPC/FPLC applied a physical maturity test as an approximation of age.²²³ In fact, the Trial Chamber considered said evidence in detail,²²⁴ and concluded that “*recruits were screened based on their physical ability, and age as such was not a bar for them to*

²¹⁵ See *supra* Section III.C.

²¹⁶ See the [Second Appeal Brief](#), para. 275.

²¹⁷ See D-0300: [T-209](#), pp. 34-35; and [T-211](#), p. 24.

²¹⁸ See D-0300: [T-239](#), p. 83.

²¹⁹ See the [Judgment](#), para. 359 (“*the Chamber considers this term to refer to the youngest soldiers, by their appearance, including individuals under 15*”).

²²⁰ See the [Judgment](#), Section IV.A.3.a.

²²¹ *Idem*, para. 312.

²²² See also the [Sentencing Judgment](#), para. 474.

²²³ See the [Second Appeal Brief](#), paras. 276-277.

²²⁴ See the [Judgment](#), footnotes 966 and 998.

receive training”.²²⁵ The Defence fails to identify any discernible error in the Chamber’s reasoning, but merely disagrees with its assessment of the evidence.

75. For all these reasons, Ground 12 should be dismissed.

F. Ground 13: The co-perpetrators foresaw crimes against child soldiers as virtually certain to occur

76. Mr Ntaganda has been convicted as ‘indirect co-perpetrator’ of the crimes described under each of the 18 counts for which he was tried, including of rape and sexual slavery as war crimes against children under the age of 15 years incorporated into the UPC/FPLC (Counts 6 and 9) and the recruitment and active use in hostilities of children under the age of 15 years (Counts 14, 15 and 16).²²⁶

1. The Chamber correctly applied the doctrine of indirect co-perpetration to crimes against child soldiers

77. Indirect co-perpetration is a form of co-perpetration whereby a common plan is executed through other persons who act as tools.²²⁷ This notion has been consistently developed in the jurisprudence of the Court²²⁸ and endorsed by the Appeals Chamber.²²⁹

78. Co-perpetration requires, as a basis for the mutual attribution of liability, an agreement or common plan²³⁰ entailing a “critical element of criminality”²³¹ and an essential contribution to the common plan, with the resulting power to frustrate the commission of the crime or crimes.²³² The Trial Chamber, proceeding fully in line with the established jurisprudence of the Court, found beyond reasonable doubt that a common plan existed amongst Mr Ntaganda and “other military leaders of the UPC/FPLC, including Thomas Lubanga and Floribert Kisembo”, an agreement “which tied them together and made them

²²⁵ *Idem*, para. 361.

²²⁶ *Idem*, pp. 535-539.

²²⁷ *Idem*, para. 722.

²²⁸ See the [Gbagbo Confirmation of Charges Decision](#), para. 230; the [Blé Goudé Confirmation of Charges Decision](#), para. 136; and the [Ongwen Confirmation of Charges Decision](#), para. 39.

²²⁹ See the [Lubanga Appeal Judgment](#), footnote 863.

²³⁰ *Idem*, paras. 445 and 722.

²³¹ See the [Judgment](#), para. 776.

²³² See the [Lubanga Appeal Judgment](#), para. 473.

co-perpetrators”.²³³ Mr Ntaganda was found to have made an “*essential contribution*” to the common plan, and had the power to frustrate the commission of the relevant crimes.²³⁴

79. With regard to the commission of a crime through another person, the Judgment resorted to the notion of “*use of an organization*”,²³⁵ a framework used to support the attribution of liability in several cases before the Court.²³⁶ It concluded that the co-perpetrators acted through other persons in that they exercised control over “*the will*” of the direct perpetrators.²³⁷ The UPC/FPLC as a whole, as well as some Hema civilian supporters, “*functioned as a tool in the hands of the co-perpetrators*”.²³⁸

80. The Chamber correctly applied the relevant standard, finding beyond reasonable doubt that “*Mr Ntaganda and other military leaders of the UPC/FPLC, including Thomas Lubanga and Floribert Kisembo, worked together and agreed in the common plan to drive out all the Lendu from the localities targeted during the course of their military campaign against the RCD-K/ML*”.²³⁹ With respect to the crimes committed by the co-perpetrators against child soldiers in particular, the Chamber concluded that:

“[...] as of at least the beginning of August 2002, the co-perpetrators were virtually certain that the implementation of their plan to drive out all the Lendu from the localities targeted during the course of their military campaign against the RCD-K/ML would lead to: (i) the recruitment and active use in hostilities of children under the age of 15 within the UPC/FPLC (Counts 14, 15 and 16); and (ii) the rape and sexual slavery of these children (Counts 6 and 9). Indeed, the Chamber finds that, in the circumstances prevailing in Ituri at the time, the occurrence of these crimes was not simply a risk that they accepted, but crimes they foresaw with virtual certainty”.²⁴⁰

81. The Defence argues that the Chamber erred in convicting Mr Ntaganda for the crimes against child soldiers as an indirect co-perpetrator since it failed to provide adequate reasons

²³³ See the [Judgment](#), para. 808.

²³⁴ *Idem*, paras. 826-857.

²³⁵ *Idem*, para. 778.

²³⁶ See e.g. the [Bemba Arrest Warrant Decision](#), paras. 72-84; the [Katanga Confirmation of Charges Decision](#), paras. 500 *et seq.*; the [Gbagbo Confirmation of Charges Decision](#), para. 230; the [Blé Goudé Confirmation of Charges Decision](#), paras. 137, 149-153 and 158; and the [Ongwen Confirmation of Charges Decision](#), paras. 38-41.

²³⁷ See the [Judgment](#), paras. 774 and 777.

²³⁸ *Idem*, para. 819, and more broadly paras. 812-825.

²³⁹ *Idem*, para. 808.

²⁴⁰ *Idem*, para. 811.

for its finding that the co-perpetrators foresaw with virtual certainty the recruitment and active use in hostilities of children under the age of 15, as well as their rape and sexual enslavement.²⁴¹ According to the Defence, the sole reason provided by the Chamber for extending liability to the crimes covered by Counts 6, 9 and 14-16, which did not “*form [...] part of the common plan*”,²⁴² was that “*in the circumstances prevailing in Ituri at the time*”, these were crimes the co-perpetrator would foresee with virtual certainty.²⁴³

82. As a preliminary point, the Legal Representative notes that, contrary to the Defence submission, the crimes committed against child soldiers are fully “*part of the common plan*” in the present case. The jurisprudence of the Court is clear that the common plan required as a basis for the mutual attribution of liability includes not only the crimes intended and specifically agreed on among the co-perpetrators, but also those they foresaw with virtual certainty.²⁴⁴ The difference is not purely semantic: in cases where the plan concerns the pursuit of a non-criminal goal through non-criminal means, the crimes foreseen by the co-perpetrators with virtual certainty may constitute the plan’s “*critical element of criminality*” required for the imposition of liability.²⁴⁵ Accordingly, in the highly unlikely event that the Appeals Chamber were to depart from the Chamber’s finding that the co-perpetrators *intended* the crimes against the victims of the attacks,²⁴⁶ the crimes against child soldiers which they *foresaw with virtual certainty* would still be sufficient to reflect the existence of a common plan with sufficient elements of criminality to justify Mr Ntaganda’s conviction for Counts 6, 9 and 14-16 as an indirect co-perpetrator.

²⁴¹ *Idem*, paras. 306-309. Once again, the Appeal Brief for Ground 13 manifestly exceeded the scope of the corresponding ground of appeal in the Notice of Appeal, which was limited to Counts 6 and 9 and did not include Counts 14-16, as also reflected in heading of the relevant section of the Appeal Brief, referring to “IV. *The Chamber erred in finding that the co-perpetrators foresaw rape and sexual slavery as a virtual certain consequence of the implementation of the common plan*”, which does not correspond to the arguments developed thereunder. Compare the [Notice of Appeal](#), p. 15, and the [Second Appeal Brief](#), paras. 306-309.

²⁴² See the [Second Appeal Brief](#), para. 306.

²⁴³ *Ibid.*

²⁴⁴ See e.g. the [Lubanga Appeal Judgment](#), paras. 447 *et seq.*; the [Katanga Judgment](#), paras. 774-777; the [Bemba et al. Trial Judgment](#), para. 29; and the [Bemba Confirmation of Charges Decision](#), paras. 357-369.

²⁴⁵ See the [Lubanga Appeal Judgment](#), para. 451; and the [Judgment](#), para. 776. For a detailed analysis, see [Yanev \(2019\)](#).

²⁴⁶ See the [Judgment](#), para. 810.

2. *The co-perpetrators foresaw the crimes against child soldiers as virtually certain*

83. Turning to the merits of the Defence’s arguments, or rather lack thereof, its assertion that the Chamber failed to “*engage in any way with the meaning of ‘virtual certainty’*”²⁴⁷ is factually incorrect. The Chamber did refer to the standard of ‘virtual certainty’, which is well-established in the jurisprudence of the Court; explained that *dolus eventualis*, recklessness and negligence,²⁴⁸ as well as the mere acceptance of a risk of crimes,²⁴⁹ would not be sufficient, and indeed referred to the very same decisions cited by the Defence to define said standard.²⁵⁰

84. The Defence contention that “*the sole reason for extending liability to the [crimes against child soldiers] was ‘the circumstances prevailing at the time’ [...] [t]his is the full extent of the Chamber’s reasoning*” grossly mischaracterises the Judgment. The Legal Representative concurs with the Prosecutor’s submission that “*the Chamber used this phrase as shorthand for its specific findings throughout the Judgment providing the factual context relevant to demonstrating that crimes against child soldiers were foreseeable to the perpetrators as a virtual certainty of implementing the common plan*”.²⁵¹

85. In particular, the Defence seeks to draw comparisons between the approach adopted in other cases and that in the Judgment. It argues that the Trial Chamber failed to take into account a “*multitude of factors*” relevant to assessing the foreseeability of the crimes against child soldiers to Mr Ntaganda and his co-perpetrators, which were instead discussed in the *Lubanga* case and, *mutatis mutandis*, in cases before the ICTY and ICTR.²⁵² In fact, virtually all the factors referred to by the Defence have been duly considered by the Trial Chamber and addressed in appropriate sections of the Judgment.²⁵³ The most salient such findings include those set out in the following paragraphs.

²⁴⁷ See the [Second Appeal Brief](#), para. 309.

²⁴⁸ See the [Judgment](#), footnote 2348.

²⁴⁹ *Idem*, para. 811.

²⁵⁰ Compare the [Second Appeal Brief](#), footnote 813; and the [Judgment](#), footnote 2348.

²⁵¹ See the [Prosecution Second Response](#), para. 237.

²⁵² See the [Second Appeal Brief](#), paras. 307-308.

²⁵³ The Defence notes that “[i]n the *Lubanga* case, Trial Chamber I’s consideration of whether Mr. Lubanga was aware that the conscription, enlistment or use of children would occur in the ordinary course of events spanned 74 paragraphs” (see the [Second Appeal Brief](#), para. 307). It is hardly surprising that, in the first case

(a) *Relationship and communications among the co-perpetrators:*²⁵⁴

The Trial Chamber analysed in detail the structure of the UPC/FPLC leadership, including the individuals occupying key positions, their respective responsibilities and the coordination among them.²⁵⁵ It also addressed meetings among the co-perpetrators,²⁵⁶ the various communication means available to them and the fact that Mr Ntaganda had access to each such mean.²⁵⁷

(b) *The co-perpetrators' level of knowledge of and involvement in the crimes:*²⁵⁸

The Chamber found that, during a meeting in Kampala in June 2002, Thomas Lubanga and other UPC political leaders decided that “*each person present at the meeting should mobilise the children in their community in order to join the UPC*”, and that large-scale recruitment efforts followed, including with respect to individuals under the age of 15.²⁵⁹

Further, political and military leaders of the UPC/FPLC, including Thomas Lubanga, Floribert Kisembo and at least eight other soldiers and commanders,²⁶⁰ had children under the age of 15 in their immediate vicinity, most notably as part of their personal escorts.²⁶¹ Commanders and UPC/FPLC leaders including Floribert Kisembo and Thomas Lubanga visited training camps, personally taught recruits and subjected them, including those under the age of 15, to harsh living conditions and violent punishments.²⁶²

before the Court, which concerned exclusively crimes of recruitment and active use in hostilities of child soldiers, Trial Chamber I discussed all considerations relevant to Mr Lubanga's *mens rea* in a single, more extensive section. In the present case, which concerns indirect co-perpetration of a variety of crimes arising from the same common plan, the Chamber duly discussed relevant factors and considerations in different sections of the Judgment, before drawing its conclusion in this respect at paras. 808-811.

²⁵⁴ See the [Second Appeal Brief](#), paras. 307-308.

²⁵⁵ See the [Judgment](#), paras. 285-346, 782-786, 814-815, 843, 848, and 1179.

²⁵⁶ *Idem*, paras. 288 and 429. See also *e.g.*, *idem*, para. 393.

²⁵⁷ *Idem*, paras. 341-346.

²⁵⁸ See the [Second Appeal Brief](#), paras. 307-308.

²⁵⁹ See the [Judgment](#), paras. 347 and 787.

²⁶⁰ *Idem*, paras. 386-391, 398-399, 401 and 1129. See also the [Sentencing Judgment](#), para. 183.

²⁶¹ See the [Judgment](#), paras. 380, 398-402, 788, and 1126.

²⁶² *Idem*, paras. 369, 372, and 790-791.

Further, young female recruits were subjected to a continuous exposure to the risk of sexual abuse. Even though sexual violence against child soldiers was a “common practice”,²⁶³ and “generally known and discussed within the UPC/FPLC”,²⁶⁴ the co-perpetrators failed to take measures to restrain or prevent this practice and to create the necessary condition to ensure a safe environment for the female members of the UPC/FPLC.²⁶⁵ On the contrary, commanders themselves subjected recruits to sexual violence.²⁶⁶ For instance, the Chamber found that co-perpetrator Floribert Kisembo exercised some of the powers attaching to the right of ownership over Mave,²⁶⁷ who was under the age of 15,²⁶⁸ and allowed her to be repeatedly raped by UPC/FPLC members, placing her at the disposal of those who raped her²⁶⁹ and failing to punish any of them even though he was aware of the rapes.²⁷⁰

(c) The Accused’s movements, including attendance to meetings and training.²⁷¹

The Trial Chamber extensively discussed Mr Ntaganda’s movements at the relevant time, including whether he attended specific meetings²⁷² and his presence at rallies and other public events where he made specific calls for young people and children to join UPC/FPLC ranks.²⁷³ The Chamber found that Mr Ntaganda regularly visited UPC/FPLC training camps,²⁷⁴ and was accompanied by escorts under the age of 15 when doing so.²⁷⁵ Graduation

²⁶³ *Idem*, para. 407.

²⁶⁴ *Idem*, para. 1197.

²⁶⁵ *Idem*, paras. 792 and 1196.

²⁶⁶ *Idem*, paras. 792 and 1197.

²⁶⁷ *Idem*, para. 980.

²⁶⁸ *Idem*, para. 411.

²⁶⁹ *Idem*, para. 980.

²⁷⁰ *Idem*, para. 411.

²⁷¹ See the [Second Appeal Brief](#), para. 307.

²⁷² See *e.g.*, *idem*, paras. 288 and 429. See also *e.g. idem*, para. 393.

²⁷³ *Idem*, paras. 356-359.

²⁷⁴ *Idem*, paras. 360, 365, 370, 394, 1126, 1191, and 1195.

²⁷⁵ *Idem*, paras. 394 and 1126. Mr Ntaganda also attended *kitamaduni* sessions in Mandro from time to time, nightly sessions during which songs were sung, including for instance a song “suggesting that soldiers would ‘get’ everything, including women, ‘for free’ in the UPC/FPLC”. See *idem*, para. 372.

ceremonies marking the completion of military training were attended by Mr Ntaganda, *inter alios*, notably at the Mandro and Lingo camps.²⁷⁶

The Chamber also discussed the localities where Mr Ntaganda was based at different times, including Mandro,²⁷⁷ Bunia²⁷⁸ and Mongbwalu,²⁷⁹ and his living arrangements at those locations, particularly by reference to his daily proximity with members of his escort, which included children under the age of 15.²⁸⁰ The Judgment also retraces Mr Ntaganda's movements during armed operations,²⁸¹ including the First Operation where he fought alongside children under the age of 15.²⁸²

(d) *The Accused's knowledge of past actions of the perpetrators:*²⁸³

The Trial Chamber found that, in late 2000, international and non-governmental organisations investigated and sought to end the use of children under the age of 15 in Tchankwanzi by the Chui Mobile Force headed by Mr Ntaganda and many commanders who would subsequently lead the UPC/FPLC.²⁸⁴ Mr Ntaganda was also aware of (and actively contributed to) the large-scale recruitment of young people, including children under the age of 15, by the UPC/FPLC in the months preceding the period covered by the charges.²⁸⁵

(e) *The Accused's knowledge of and involvement in the crimes:*²⁸⁶

The Chamber found that Mr Ntaganda was actively involved in the UPC/FPLC's recruitment efforts²⁸⁷ and responsible for the training of

²⁷⁶ *Idem*, para. 378.

²⁷⁷ *Idem*, para. 364.

²⁷⁸ *Idem*, para. 384.

²⁷⁹ *Ibid.*

²⁸⁰ *Idem*, paras. 758 and 1126.

²⁸¹ See *e.g. idem*, para. 842.

²⁸² *Idem*, paras. 396, 416, 511, 529, 758-759, 1125, and 1191.

²⁸³ See the [Second Appeal Brief](#), para. 308.

²⁸⁴ See the [Judgment](#), paras. 311-312.

²⁸⁵ *Idem*, paras. 705, 787-792, and 1193.

²⁸⁶ See the [Second Appeal Brief](#), para. 308.

²⁸⁷ See the [Judgment](#), paras. 355-356, 830, and 1193.

recruits²⁸⁸ and the establishment of the Mandro training camp,²⁸⁹ as well as the setting up of a company of bodyguards for himself,²⁹⁰ which included children manifestly under the age of 15.²⁹¹ He interacted with his escorts on a daily basis, and participated in combat operation with them.²⁹² Children under the age of 15 were trained as radio operators at Mr Ntaganda's residence.²⁹³ Mr Ntaganda failed to give particular protection to the group's youngest members, who were frequently subject to sexual violence as known and discussed within the UPC/FPLC.²⁹⁴ The Chamber found that, far from punishing the perpetrators of such crimes,²⁹⁵ Mr Ntaganda himself "*had forced sexual intercourses with many female members of his personal guard*",²⁹⁶ [REDACTED].²⁹⁷

(f) Scale, gravity and frequency of the crimes:²⁹⁸

As noted *supra*, the Chamber found that female members of the UPC/FPLC were regularly raped and subjected to sexual violence during their service and that this was a common practice.²⁹⁹ For instance, the Chamber heard evidence of a "*pattern of daily sexual violence perpetrated by Claude Uzauakiliho against Mr Ntaganda's escorts*".³⁰⁰

Further, the UPC/FPLC recruited individuals of all ages in various locations throughout Ituri, including Bunia and the rural areas, from at least June 2002.³⁰¹ The Chamber also found that the crimes against child soldiers were "*committed in the institutionalised coercive environment of the*

²⁸⁸ *Idem*, paras. 831-833, and 1175.

²⁸⁹ *Idem*, paras. 365 and 371.

²⁹⁰ *Idem*, paras. 381 and 1175.

²⁹¹ *Idem*, paras. 389-391, 1126 and 1190.

²⁹² *Idem*, paras. 1191-1192.

²⁹³ *Idem*, para. 1191.

²⁹⁴ *Idem*, para. 1197.

²⁹⁵ *Idem*, para. 412.

²⁹⁶ *Idem*, para. 407 and footnote 3238.

²⁹⁷ *Idem*, footnote 1158.

²⁹⁸ See the [Second Appeal Brief](#), para. 308.

²⁹⁹ See the [Judgment](#), paras. 407, and 1196. See also *supra* para. 24.

³⁰⁰ See the [Judgment](#), para. 1196.

³⁰¹ *Idem*, para. 1117.

*UPC/FPLC, in similar circumstances over a period of time, and not as isolated acts”.*³⁰²

(g) Relevance of demobilisation efforts:³⁰³

The Chamber addressed the alleged involvement of the co-perpetrators, including Mr Ntaganda, in demobilisation efforts concerning child soldiers within the UPC/FPLC’s ranks.³⁰⁴ It concluded that “*the UPC/FPLC did not effectively engage in any systematic demobilisation process*”³⁰⁵ and that “*demobilisation efforts, notably made by Mr Ntaganda and the other leaders of the UPC/FPLC, were isolated initiatives throughout the period of the charges, while the recruitment and reliance on individuals under the age of 15 continued*”.³⁰⁶

86. The factual findings reached by the Chamber throughout the Judgment on each of the issues *supra* underpinned therefore its conclusion that, given the circumstances prevailing in Ituri at the relevant time, “*crimes against child soldiers were foreseeable to the perpetrators as a virtual certainty of implementing the common plan*”.³⁰⁷

87. For all these reasons, Ground 13 should be dismissed.

³⁰² *Idem*, para. 1118.

³⁰³ See the [Second Appeal Brief](#), para. 307.

³⁰⁴ See the [Judgment](#), paras. 417-432, 788, and 1122.

³⁰⁵ *Idem*, paras. 430 and 1122.

³⁰⁶ *Idem*, para. 788.

³⁰⁷ See the [Prosecution Second Response](#), para. 237.

IV. CONCLUSION

88. For these reasons, the Legal Representative submits that Mr Ntaganda's conviction on Counts 6, 9, 14, 15 and 16 was properly entered and should be maintained, and respectfully requests the Appeals Chamber to dismiss Grounds 7 and 9-13 in their entirety.



Sarah Pellet
Common Legal Representative of the
Former Child Soldiers

Dated this 12th Day of February 2021

At The Hague, The Netherlands