

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/04-01/06

Date: 14 March 2012

**TRIAL CHAMBER I**

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

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

**Public**

**Judgment pursuant to Article 74 of the Statute**

**Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

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**Other**

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Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (“*Lubanga* case”), issues the following Judgment pursuant to Article 74 of the Statute:

## I. THE CHARGES

1. On 29 January 2007, Pre-Trial Chamber I issued its Decision on the Confirmation of Charges.<sup>1</sup> It confirmed that there was sufficient evidence to establish substantial grounds to believe that:

Thomas Lubanga Dyilo is responsible, as co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 25(iii)(a) of the Statute from early September 2002 to 2 June 2003.<sup>2</sup>

Additionally, the Pre-Trial Chamber confirmed that there was sufficient evidence to establish substantial grounds to believe that:

Thomas Lubanga Dyilo is responsible, as co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) of the Statute from 2 June to 13 August 2003.<sup>3</sup>

2. Under the Rome Statute (“Statute”)<sup>4</sup> and the Rules of Procedure and Evidence (“Rules”), the charges include a description of the relevant facts and circumstances, and the facts are legally characterised. Therefore the charges are made up of factual and legal elements.
3. Pursuant to Article 74(2) of the Statute, the judgment “shall not exceed the facts and circumstances, described in the charges and any

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<sup>1</sup> Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-796-Conf-tEN, and public version: ICC-01/04-01/06-803-tEN (“Decision on Confirmation of Charges” or “Confirmation Decision”). The public version of the Decision is referred to hereinafter.

<sup>2</sup> ICC-01/04-01/06-803-tEN, page 157.

<sup>3</sup> ICC-01/04-01/06-803-tEN, page 158.

<sup>4</sup> Where “Article” is used herein it refers to the Rome Statute unless otherwise indicated.

amendments to the charges". The charges and any amendments thereto establish the factual scope of the Decision pursuant to Article 74(2).

4. By Regulation 55(1) of the Regulations of the Court ("Regulations"), "the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28". However, it shall not exceed the facts and circumstances described in the charges and any amendments to the charges.
5. Regulation 52(b) of the Regulations establishes what needs to be included in the document containing the charges: "[a] statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court".
6. The Appeals Chamber has defined what are "the facts" in this context:

In the view of the Appeals Chamber, the term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61 (5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged. The Appeals Chamber emphasises that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in article 67 (1) (a) of the Statute.<sup>5</sup>

7. It follows that the accused cannot be convicted on a basis that

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<sup>5</sup> Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, ICC-01/04-01/06-2205, footnote 163.



exceeds the factual circumstances that were identified in the Confirmation Decision as supporting each of the legal elements of the crimes charged.

8. The two paragraphs of the Decision on the Confirmation of Charges cited above contain the legal characterisation of the facts, including the mode of liability, the temporal framework of the crimes and the fact that the alleged conscription and enlistment was “into” the *Force Patriotique pour la Libération du Congo* (“FPLC”). The Pre-Trial Chamber, in this section, did not expressly identify the facts that supported each of the legal elements of the crimes charged. However, they were referred to in other sections of the Decision and the Trial Chamber has ensured that the present Judgment does not exceed the facts and circumstances established by the Pre-Trial Chamber.

## II. BRIEF CASE HISTORY, JURISDICTION AND PARTICIPATION BY VICTIMS

### *Jurisdiction*

9. Pursuant to Article 19 of the Statute, the “Court shall satisfy itself that it has jurisdiction in any case brought before it.”<sup>6</sup> The Democratic Republic of the Congo (“DRC”) became a State party on 11 April 2002 and, pursuant to Article 14, President Kabila referred the situation in the DRC to the Prosecutor in March 2004.<sup>7</sup> Pre-Trial Chamber I concluded that the case falls within the Court’s jurisdiction,<sup>8</sup> and the Appeals Chamber confirmed the Pre-Trial Chamber’s Decision on the accused’s challenge to the jurisdiction of the Court.<sup>9</sup> The personal, temporal, territorial and subject-matter elements that are relevant to the Court’s jurisdiction have not altered since the Decision on the Confirmation of the Charges, and the issue has not been raised by the parties or any State before the Trial Chamber.

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<sup>6</sup> See also Article 8(1) of the Statute: “The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes”, and Pre-Trial Chamber’s II decision that “the term ‘in particular’ makes it clear that the existence of a plan, policy or large scale commission is not a prerequisite for the Court to exercise jurisdiction over war crimes but rather serves as a practical guideline for the Court”, *The Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 211.

<sup>7</sup> See Decision assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I, ICC-01/04-1, 5 July 2004 (notified on 6 July 2004), page 4.

<sup>8</sup> Decision on the Prosecutor’s Application for Warrant of Arrest, Article 58, 10 February 2006, ICC-01/04-01/06-1-US-Exp, reclassified as public on 17 March 2006, ICC-01/04-01/06-8-Corr; Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute, 3 October 2006 (notified on 4 October 2006), ICC-01/04-01/06-512; ICC-01/04-01/06-803-tEN, paras 164-166.

<sup>9</sup> Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772. See also *The Prosecutor v. Katanga and Ngudjolo*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497, paras 85 and 86.

*Case history*

10. The first status conference before the Trial Chamber was held on 4 September 2007, and thereafter there were 54 status conferences prior to the commencement of the trial.<sup>10</sup> A list of the main decisions of the Chamber is set out in Annex A. However, it is appropriate to mention in this section four major procedural events which had a significant impact on the course of the proceedings:

- i) On 13 June 2008, the Chamber stayed the proceedings *inter alia* as a consequence of the failure by the Office of the Prosecutor (“prosecution” or “OTP”) to disclose a significant body of potentially exculpatory evidence covered by certain confidentiality agreements that had been entered into on the basis of Article 54(3)(e) of the Statute.<sup>11</sup> After a considerable delay, the materials that had been withheld were disclosed, and following a review of them by the Chamber, the stay of proceedings was lifted on 18 November 2008.<sup>12</sup> The prosecution called its first witness on 28 January 2009 after the parties and legal representatives of the victims had completed their opening statements on

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<sup>10</sup> ICC-01/04-01/06-T-50-ENG (4 September 2007) to ICC-01/04-01/06-T-106-ENG (22 January 2009). The Appeals Chamber held 3 hearings to deliver decisions during this period of time. All transcripts are referred to hereinafter as “T-[RELEVANT NUMBER]” with an appropriate indication of level of confidentiality, language and version. The most up-to-date version (corrected as appropriate) is the version referred to.

<sup>11</sup> Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401. The Decision was confirmed by the Appeals Chamber on 21 October 2008: ICC-01/04-01/06-1486.

<sup>12</sup> T-98-ENG, page 2, line 23 to page 4, line 1.

26 and 27 January 2009.<sup>13</sup>

- ii) The presentation of oral evidence by the prosecution concluded on 14 July 2009,<sup>14</sup> and thereafter the Majority of the Chamber (Judge Fulford dissenting) issued a Decision notifying the parties and participants that the legal characterisation of the facts may be subject to change, pursuant to Regulation 55 of the Regulations of the Court.<sup>15</sup> The Chamber granted leave to appeal the Decision on 3 September 2009<sup>16</sup> and adjourned the presentation of evidence and any further consideration of Regulation 55 pending the outcome of the interlocutory appeal.<sup>17</sup> The Appeals Chamber issued its judgment reversing the 14 July 2009 Decision on 8 December 2009.<sup>18</sup> The presentation of evidence resumed on 7 January 2010 with the testimony of the third expert called by the Chamber.<sup>19</sup> 28 witnesses testified before the Chamber between 7 January and 8 July 2010, including 3 victims called by their legal

<sup>13</sup> T-107-ENG and T-109-ENG.

<sup>14</sup> 31 witnesses testified between 28 January and 14 July 2009: 29 witnesses called by the prosecution and 2 experts called by the Chamber.

<sup>15</sup> Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, 14 July 2009, ICC-01/04-01/06-2049, and Minority Opinion of Judge Fulford, ICC-01/04-01/06-2069.

<sup>16</sup> Decision on the prosecution and the defence applications for leave to appeal the “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 3 September 2009, ICC-01/04-01/06-2107.

<sup>17</sup> Decision adjourning the evidence in the case and consideration of Regulation 55, 2 October 2009, ICC-01/04-01/06-2143.

<sup>18</sup> Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, ICC-01/04-01/06-2205.

<sup>19</sup> T-223-ENG; see also T-222-ENG (transcript of status conference on 9 December 2009).

representative and 3 prosecution witnesses (see below). The presentation of the defence evidence commenced on 27 January 2010.

- iii) On 8 July 2010, the Trial Chamber imposed a second stay of proceedings because of the prosecution's non-compliance with an order for the disclosure of the name of Intermediary 143.<sup>20</sup> The Appeals Chamber concluded that the orders of a Chamber are binding and the Prosecutor is obliged to comply with them (the Prosecutor's "wilful non-compliance constituted a clear refusal to implement the orders of the Chamber"),<sup>21</sup> but it reversed the stay of proceedings on 8 October 2010 (indicating that a different sanction, namely a financial penalty, should have been considered).<sup>22</sup> The presentation of evidence resumed on 25 October 2010. Seven witnesses testified between 25 October and 1 December 2010.
- iv) On 10 December 2010, the defence filed an application seeking a permanent stay of proceedings, arguing, *inter alia*, that four of the

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<sup>20</sup> Decision on the Prosecution's Urgent Request for Variation of Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, 8 July 2010, ICC-01/04-01/06-2517-Red. See also Decision on Intermediaries, 12 May 2010, ICC-01/04-01/06-2434-Red2 (public redacted version issued on 31 May 2010).

<sup>21</sup> Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, ICC-01/04-01/06-2582, para. 46.

<sup>22</sup> Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, ICC-01/04-01/06-2582.

intermediaries used by the prosecution had prepared false evidence and the Prosecutor was aware that some of the evidence connected to these individuals was untruthful, and moreover he failed in his obligation to investigate its reliability.<sup>23</sup> Prior to receiving the application, the Chamber had heard 30 witnesses relevant to this issue, including 3 intermediaries. The Chamber issued a Decision dismissing the defence application on 23 February 2011.<sup>24</sup> The presentation of the defence evidence resumed on 28 March 2011 and five final defence witnesses testified before the evidence formally closed on 20 May 2011.

11. As set out above, the presentation of evidence in the case started on 28 January 2009 and was formally closed on 20 May 2011.<sup>25</sup> The Trial Chamber heard 67 witnesses, and there were 204 days of hearings.<sup>26</sup> The prosecution called 36 witnesses, including 3 experts,<sup>27</sup> and the defence called 24 witnesses.<sup>28</sup> Three victims were called as witnesses following a request from their legal representatives. Additionally the Chamber called four experts.<sup>29</sup> The prosecution submitted 368 items of evidence, the defence 992, and the legal representatives 13 (1373 in

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<sup>23</sup> Requête de la Défense aux fins d'arrêt définitif des procédures, ICC-01/04-01/06-2657-tENG-Red (translation of public redacted version filed on 12 August 2011).

<sup>24</sup> Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings", ICC-01/04-01/06-2690-Conf, 23 February 2011, and public redacted version issued on 7 March 2011 (notified on 8 March 2011), ICC-01/04-01/06-2690-Red2.

<sup>25</sup> T-110-Red-ENG and T-355-ENG.

<sup>26</sup> This figure includes status conferences held in the course of the trial, the oral closing submissions and an additional hearing held on 15 November 2011 (T-107 to T-358).

<sup>27</sup> 3 witnesses were recalled; 2 witnesses testified by way of deposition; and 5 were female. Prosecution witnesses are hereinafter referred to as "P-0000 [relevant number]".

<sup>28</sup> 4 were female. Defence witnesses are hereinafter referred to as "D-0000 [relevant number]".

<sup>29</sup> Ms Elisabeth Schauer ("CHM-0001"), Mr Roberto Garretón ("CHM-0002"), Ms Radhika Coomaraswamy ("CHM-0003"), and Prof. Kambayi Bwatshia ("CHM-0004").

total). In addition to the written submissions,<sup>30</sup> the oral closing arguments of the parties and participants were heard on 25 and 26 August 2011. Since 6 June 2007, when the record of the case was transmitted to the Trial Chamber,<sup>31</sup> the Chamber has delivered 275 written decisions and orders and 347 oral decisions.<sup>32</sup>

12. Article 76(2) provides that “the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence”. The defence requested that the Chamber holds an additional hearing in the event of a conviction.<sup>33</sup> In an oral Decision delivered on 25 November 2008, the Chamber decided there would be a separate sentencing hearing if the accused is convicted.<sup>34</sup>

#### *Participation by victims*

13. The Rome Statute permits victims to participate in proceedings before the ICC. In accordance with Article 68(3) of the Statute, victims have participated in the present case, and in particular they have

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<sup>30</sup> The prosecution filed its closing submissions on 1 June 2011, ICC-01/04-01/06-2748-Conf (public redacted version filed on 21 July 2011, ICC-01/04-01/06-2748-Red). The legal representatives of the victims filed their closing submissions on 1 June 2011: ICC-01/04-01/06-2744-Conf, see also public redacted version ICC-01/04-01/06-2744-Red-tENG (Office of Public Counsel for Victims); ICC-01/04-01/06-2746-Conf-Corr, see also public redacted version ICC-01/04-01/06-2746-Red-tENG (legal representatives V01); ICC-01/04-01/06-2747-Conf, see also public redacted version ICC-01/04-01/06-2747-Red-tENG (legal representatives V02). The defence filed its submissions on 15 July 2011: ICC-01/04-01/06-2773-Conf; public redacted version filed on 11 August 2011 (ICC-01/04-01/06-2773-Red); see also ICC-01/04-01/06-2773-Red-tENG. The prosecution filed a response to the defence submissions on 1 August 2011: ICC-01/04-01/06-2778-Conf (and public redacted version filed on 16 August 2011, ICC-01/04-01/06-2778-Red). The defence replied on 15 August 2011: ICC-01/04-01/06-2786-Conf and public redacted version notified on 17 August 2011, ICC-01/04-01/06-2786-Red; see also ICC-01/04-01/06-2786-Red-tENG. The public redacted versions of the briefs are referred to whenever possible hereinafter.

<sup>31</sup> Decision transmitting the pre-trial record of proceedings in the case of *The Prosecutor v Thomas Lubanga Dyilo* to Trial Chamber I, ICC-01/04-01/06-920, 5 June 2007 (notified on 6 June 2007).

<sup>32</sup> Information provided by the Registry (excluding Orders for the redaction of transcripts and translations) – based on Registry’s Tableau de bord.

<sup>33</sup> Observations de la Défense sur l’interprétation et l’application de l’Article 76, 31 March 2008, ICC-01/04-01/06-1250, para. 4.

<sup>34</sup> T-99-ENG, page 39, lines 22-23.

applied to introduce evidence, they have questioned witnesses and they have advanced written and oral submissions (with the leave of the Chamber), assisted by their legal representatives.

14. In the “Decision on victims’ participation” (Judge Blattmann separately and partially dissenting), the Chamber issued general guidelines concerning the participation by victims during the trial.<sup>35</sup> This Decision was appealed.<sup>36</sup> The Appeals Chamber partially confirmed and partially reversed the Decision.<sup>37</sup> The following overall criteria have been established in the decisions of the Trial and the Appeals Chambers:

- i) Bearing in mind the current situation in the DRC and the potential difficulties in obtaining or producing copies of official identity documents, applicants may establish proof of their identity by way of a range of official and non-official documents.<sup>38</sup>
- ii) Using Principle 8 of the Basic Principles<sup>39</sup> as guidance, a victim is someone who experienced personal harm, individually or collectively with others, directly or indirectly, in a variety of different ways such as physical or mental injury, emotional suffering or economic loss.<sup>40</sup>
- iii) Participation by victims at trial will first and foremost take place by way of the procedure established in Rule 89(1) of the Rules.

<sup>35</sup> Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119, paras 106 - 109.

<sup>36</sup> Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432.

<sup>37</sup> Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432.

<sup>38</sup> ICC-01/04-01/06-1119, para. 87.

<sup>39</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the United Nations General Assembly, resolution 60/147, 16 December 2005.

<sup>40</sup> ICC-01/04-01/06-1119, paras 90-92 and ICC-01/04-01/06-1432, paras 31-39.



- iv) Only those who suffered harm as a result of the crimes charged may be considered victims in the case. Applicants need to demonstrate a link between the harm they suffered and the crimes faced by the accused,<sup>41</sup> and they should demonstrate in written applications that they are victims of these offences.
- v) “[P]ursuant to Article 68(3) of the Statute, victims will first have to demonstrate that their personal interests are affected by the trial in order to be permitted to present their views and concerns at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial.”<sup>42</sup> Participation is to be decided on the basis of the evidence or issues under consideration at any particular stage in the proceedings and victims wishing to participate should set out in a discrete written application the nature and the detail of the proposed intervention.<sup>43</sup>
- vi) In accordance with Rule 131(2) of the Rules, victims have the right to consult the record of the proceedings, including the index, subject to any restrictions concerning confidentiality and the protection of national security information. In principle, victims have the right to access and receive notification of all public filings and those confidential filings which concern them (as identified by the parties), insofar as this does not breach any protective measures that are in place.<sup>44</sup>
- vii) Victims may request the Chamber to use its broad powers to call all the material it considers relevant for the determination of the

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<sup>41</sup> ICC-01/04-01/06-1432, paras 62-64.

<sup>42</sup> ICC-01/04-01/06-1432, para. 61.

<sup>43</sup> ICC-01/04-01/06-1119, paras 101-104.

<sup>44</sup> ICC-01/04-01/06-1119, paras 105-107.

truth, in order that the evidence identified by victims concerning the guilt or innocence of the accused is introduced (to the extent appropriate). Victims may tender evidence, examine witnesses and challenge the admissibility or relevance of evidence during the trial so long as: (i) they submit a discrete application; (ii) notice is given to the parties; (iii) the personal interests of one or more victims are affected by the evidence; (iv) there is compliance with their “disclosure obligations and [any] protection orders”;<sup>45</sup> (v) the Chamber determines this course is appropriate and (vi) there is consistency with the rights of the accused and a fair trial.<sup>46</sup>

- viii) Victims have the right to participate in public hearings and to file written submissions, and they may be permitted to participate in closed or *ex parte* hearings or to file confidential or *ex parte* submissions, depending on the circumstances.<sup>47</sup>
- ix) Victims’ views and concerns may be presented by a common legal representative in order to provide for the fairness and expeditiousness of the trial.<sup>48</sup>
- x) Victims may apply to the Chamber for leave to call evidence relating to reparations during the trial under Regulation 56 of the Regulations of the Court.<sup>49</sup>
- xi) Anonymous victims may participate in the trial. However, the greater the extent and significance of the proposed participation, the more likely it will be that the Chamber will require the

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<sup>45</sup> ICC-01/04-01/06-1432, para. 104.

<sup>46</sup> ICC-01/04-01/06-1119, paras 108-111; ICC-01/04-01/06-1432, paras 93-104.

<sup>47</sup> ICC-01/04-01/06-1119, para. 113.

<sup>48</sup> ICC-01/04-01/06-1119, paras 115 – 116 and 123 – 126.

<sup>49</sup> ICC-01/04-01/06-1119, paras 119-122.

victim to identify himself or herself.<sup>50</sup>

15. The total number of individual victims authorised to participate in the proceedings is 129 (34 female and 95 male victims).<sup>51</sup> Once the Chamber received the parties' observations on their applications and reviewed the reports prepared by the Victims Participation and Reparations Section under Regulation 86(5) of the Regulations of the Court,<sup>52</sup> it concluded, on a *prima facie* basis, that each of these individuals were victims of the crimes charged against the accused.<sup>53</sup> In accordance with the Statute the Trial Chamber examined, on a case-by-case basis, the link between the harm allegedly suffered, the victims' personal interests and the charges against the accused.
16. While all 129 victims claimed they had suffered harm as a result of the enlistment or conscription of children under the age of 15, or their use to participate actively in the hostilities, many also alleged they had

<sup>50</sup> ICC-01/04-01/06-1119, paras 130-131.

<sup>51</sup> Given that in the case of 6 victims, one of their parents who was authorised to participate received the same reference number as the primary victim, there are 123 reference numbers. Approximately 28 victims were under 18 at the time of the Chamber's Decision authorising them to participate in the proceedings.

<sup>52</sup> In total, the Chamber received 6 reports and 3 supplementary reports: ICC-01/04-01/06-1275-Conf-Exp; ICC-01/04-01/06-1380-Conf-Exp; ICC-01/04-01/06-1501-Conf-Exp; ICC-01/04-01/06-1503-Conf-Exp; ICC-01/04-01/06-1532-Conf-Exp; ICC-01/04-01/06-1823-Conf-Exp; ICC-01/04-01/06-2000-Conf-Exp; ICC-01/04-01/06-2474-Conf-Exp; ICC-01/04-01/06-2695-Conf-Exp.

<sup>53</sup> The first ruling is the "Decision on the applications by victims to participate in the proceedings", issued on 15 December 2008, corrigendum issued on 13 January 2009, ICC-01/04-01/06-1556-Corr with public Anx1. The confidential *ex parte* annex and the redacted confidential annex with the case-by-case analysis of the applications covered by this first decision are contained in ICC-01/04-01/06-1563, Conf-Exp-AnxA1 and ConfAnxA2 respectively. The public redacted annex with the case-by-case analysis of this first decision is ICC-01/04-01/06-1861-AnxA1. The second decision is the "Decision on the applications by 3 victims to participate in the proceedings", 18 December 2008, ICC-01/04-01/06-1562. The confidential *ex parte* annex and the redacted confidential annex with the case-by-case analysis of the applications covered by the second decision are included in ICC-01/04-01/06-1564-Conf-Exp-AnxA1 and Conf-AnxA2 respectively. The public redacted annex with the case-by-case analysis of this second decision is ICC-01/04-01/06-1861-AnxA2. The third decision is the "Decision on the applications by 7 victims to participate in the proceedings", 10 July 2009, ICC-01/04-01/06-2035, with Conf-ExpAnxA containing the confidential *ex parte* case-by-case analysis of these applications. The confidential and public redacted annexes of this third decision are ICC-01/04-01/06-2065-Conf-Anx1 and Anx2. The fourth decision is the "Decision on the applications by 15 victims to participate in the proceedings", 13 December 2010, public redacted version of the corrigendum of the decision issued on 8 February 2011, ICC-01/04-01/06-2659-Corr-Red with AnxA-Red2. The fifth decision is the "Decision on the applications by 7 victims to participate in the proceedings", 30 June 2011, public redacted version issued on 25 July 2011, ICC-01/04-01/06-2764-Red and AnxA-Red.

suffered harm as a result of other crimes, such as sexual violence and torture or other forms of ill treatment, which are not the subject of charges against the accused.<sup>54</sup>

17. The victims who have been granted permission to participate in this trial are, in the main, alleged former child soldiers, although some are the parents or relatives of former child soldiers and one is a school. Since some of the victims were still children when they submitted their applications, their parents, relatives or others have acted on their behalf. The Chamber accepted that the individual who acted for a child did not need to be their parent or legal guardian – indeed it permitted children to participate directly without an adult representing them.<sup>55</sup>

18. Many of the victims in the case were granted protective measures and, in particular, anonymity because of their vulnerable position living in areas of ongoing conflict. Consequently, of 129 victims, the identities of only 23 have been disclosed to the parties and participants in the proceedings. However, the Chamber found that:

[w]hile the safety and security of victims is a central responsibility of the Court, their participation in the proceedings cannot be allowed to undermine the fundamental guarantee of a fair trial. The greater the extent and the significance of the proposed participation, the more likely it will be that the

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<sup>54</sup> 30 victims (18 female and 12 male) referred to acts of sexual violence which they either suffered or witnessed. These are victims a/0078/06, a/0056/07, a/0007/08, a/0047/06, a/0048/06, a/0057/07, a/0063/07, a/0124/08, a/0126/08, a/0059/07, a/0055/07, a/0058/07, a/0226/06, a/0162/07 (see ICC-01/04-01/06-1563-Conf-Exp-AnxA1), a/0407/08 (see ICC-01/04-01/06-1564-Conf-Exp-AnxA1), a/0026/10, a/0027/10, a/0028/10, a/0029/10, a/0030/10, a/0031/10, a/0033/10, a/0035/10, a/0037/10, a/0333/10, a/0334/10, a/0336/10, a/0738/10, a/0739/10, a/0740/10 (see ICC-01/04-01/06-2659-AnxA-Red2). 30 victims (5 female, 25 male) referred to acts of torture which they either suffered or witnessed. These are victims a/0050/06, a/0237/06, a/0238/06, a/0054/07, a/0056/07, a/0060/07, a/0229/06, a/0230/06, a/0224/06, a/0123/08, a/0047/06, a/0048/06, a/0052/06, a/0122/08, a/0124/08, a/0125/08, a/0126/08, a/0130/08, a/0058/07, a/0236/06, a/0227/06, a/0221/06 (see ICC-01/04-01/06-1563-Conf-Exp-AnxA1) and a/0249/09, a/0060/09, a/0053/09, a/0249/09 (see ICC-01/04-01/06-2035-Conf-Exp-AnxA), a/0031/10, a/0333/10, a/0336/10, a/0738/10 (see ICC-01/04-01/06-2659-AnxA-Red2).

<sup>55</sup> Public Annex 1 to Corrigendum to "Decision on the applications by victims to participate in the proceedings", 13 January 2009, ICC-01/04-01/06-1556-Corr-Anx1, paras 67-72.

Chamber will require the victim to identify himself or herself. Accordingly, when resolving a request for anonymity by a victim who has applied to participate, the Chamber will scrutinise carefully the precise circumstances and the potential prejudice to the parties and other participants. [...] <sup>56</sup>

19. The Chamber formulated certain key principles for those individuals with dual status as victims and witnesses.<sup>57</sup> Whilst the Chamber indicated that their security should not be compromised, it also established that individuals with dual status do not accrue rights above and beyond those of someone who is solely a victim or a witness.<sup>58</sup>

20. Common legal representatives have appeared in court for the participating victims, who have been divided into two groups represented by two teams of external counsel.<sup>59</sup> Additionally, the Office of Public Counsel for Victims (“OPCV”) was authorised to continue representing four dual status victims.<sup>60</sup> Through their legal representatives the victims made opening statements,<sup>61</sup> examined witnesses<sup>62</sup> and requested leave to introduce evidence.<sup>63</sup> They were permitted to make written and oral submissions.

21. The Chamber authorised three victims to give evidence as witnesses during the trial and evidence was presented on behalf of a school.<sup>64</sup> These three witnesses, who testified in January 2010, were granted in-court protective measures that included voice and face distortion and

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<sup>56</sup> ICC-01/04-01/06-1119, para. 131.

<sup>57</sup> ICC-01/04-01/06-1119, paras 132-134.

<sup>58</sup> Decision on certain practicalities regarding individuals who have the dual status of witness and victim, 5 June 2008, ICC-01/04-01/06-1379, para. 52.

<sup>59</sup> Referred to as V01 and V02 team(s) or group of victims hereinafter.

<sup>60</sup> T-105-ENG, page 12, line 23 to page 13, line 12.

<sup>61</sup> T-107-ENG, page 36, line 5 *et seq.*

<sup>62</sup> The Chamber allowed the legal representatives to question 25 witnesses (the 4 Chamber witnesses, 14 prosecution witnesses and 7 defence witnesses).

<sup>63</sup> The Chamber authorised the legal representatives of the victims to submit 13 items of evidence.

<sup>64</sup> Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, 26 June 2009, ICC-01/04-01/06-2002-Conf paras 39-40; public redacted version filed on 9 July 2009, ICC-01/04-01/06-2032-Anx.

pseudonyms.<sup>65</sup> The position of these three witnesses is discussed in greater detail below.

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<sup>65</sup> See T-225-Red-ENG, T-227-Red-ENG, T-228-Red-ENG, T-230-Red-ENG, T-234-Red-ENG, T-235-Red-ENG.

### III. OVERVIEW OF THE PARTIES AND PARTICIPANTS SUBMISSIONS

#### A. PROSECUTION SUBMISSIONS

22. The principal factual allegations against the accused commence on 15 September 2000 when it is suggested he became President of the *Union des Patriotes Congolais* (“UPC”). It is said that he held this position at all material times thereafter. His ambition is described as gaining power in Ituri, but since he was leading a rebel movement this was unachievable without a military force. In unequivocal terms, it is the prosecution’s assertion that the accused agreed with others to gain power in Ituri through the recruitment of “young persons”. It is alleged that the co-perpetrators were establishing an army, notwithstanding their public promise to end years of ethnic fighting.<sup>66</sup>

23. The prosecution asserts that in reality the recruitment began when military training in Uganda became a possibility in 2000. The accused and his co-perpetrators launched the first wave of young Hema fighters who would later become the armed wing of the UPC. This led the accused and his co-perpetrators to become closely associated with the UPC and the Hema militia (which are said to have been indistinguishable) and it is alleged they used children to gain power in Ituri.<sup>67</sup>

24. His Hema connections enabled Thomas Lubanga to cultivate an external profile as a key political player in Iturian politics, and this included the declaration he sent to the political authorities of Uganda on behalf of the co-perpetrators and others who had revolted against

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<sup>66</sup> ICC-01/04-01/06-2748-Red, para. 7.

<sup>67</sup> ICC-01/04-01/06-2748-Red, para. 8.

the *Armée Populaire Congolaise* (“APC”), the armed wing of the *Rassemblement Congolais pour la Démocratie – Kisangani/Mouvement de Libération* (“RCD-ML”),<sup>68</sup> in the summer of 2000. The accused became Minister of Defence in the RCD-ML, the government then in power in the DRC, in 2001. It is alleged that together with his co-perpetrators he broke away from the RCD-ML in April 2002.<sup>69</sup>

25. The UPC and its military wing, the FPLC,<sup>70</sup> took power in Ituri in September 2002. It is said that at this stage Thomas Lubanga acknowledged that the UPC/FPLC had had a joint military and political profile since 2000. In particular, in April and August 2002 he recognised the group’s military actions, and in October 2002 he wrote to the DRC government asking for national recognition, having described his power and territorial reach in Ituri.<sup>71</sup>

26. The need for a more substantial army led to increased recruitment of young people – regardless of age – by targeting schools and the general public, and through coercive campaigns in the villages. It is suggested that during the relevant period this inevitably led to the conscription, enlistment and use of children below 15 years of age, even if they were not specifically targeted. Furthermore, no attempt was made to check the ages of the recruits.<sup>72</sup>

27. The FPLC – which, as set out above, became the UPC’s military wing – was formally created in September 2002. The prosecution

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<sup>68</sup> The Chamber refers herein to the RCD-ML. However, on occasion, the acronym RCD/KIS-ML has been used when necessary.

<sup>69</sup> ICC-01/04-01/06-2748-Red, para. 9.

<sup>70</sup> The letters “RP” were added to the end of “UPC” in September 2002. See T-342-ENG, page 35, lines 15 – 16 (D-0019) and T-125-Red-ENG, page 17, line 19 to page 19, line 20 (P-0041). However, the Chamber notes that the witnesses usually referred to the “UPC” and often treated the UPC and FPLC interchangeably. Herein, the Chamber refers to the UPC and the UPC/RP as “UPC”, and the UPC with its army the FPLC as the UPC/FPLC.

<sup>71</sup> ICC-01/04-01/06-2748-Red, para. 10.

<sup>72</sup> ICC-01/04-01/06-2748-Red, para. 11.



argues this was the final phase of the execution of the common plan to take over Ituri by military means.<sup>73</sup> It is suggested that it was a professional body, with trained officers and soldiers. It had an intricate and organised hierarchy, with headquarters in Bunia; three sectors and several brigades (with approximately 1000 soldiers in each); and up-to-date communications systems.<sup>74</sup>

28. During the following 11 months, Thomas Lubanga (who it is contended was jointly President of the UPC and Commander-in-chief of the FPLC) directed the military to complete the conquest of Ituri. He is said to have given the orders for the battles at Mongbwalu, Bambi, Lipri and Kobu, and, by controlling the finances, it is suggested he ensured that the military was properly equipped with funds, ammunition, weapons and vehicles.<sup>75</sup>

29. It is the prosecution's submission that, together with his Chief of Staff and other military commanders, the accused orchestrated campaigns in order to recruit soldiers of all ages, including those below the age of 15 years who were trained and sent to the front line.<sup>76</sup>

30. The accused gained, and thereafter used, the support of Gegere wise men to raise awareness in the villages. The FPLC recruited children by abduction, and it put pressure on the population to permit recruitment and to accept the enlistment of children during the recruitment campaigns.<sup>77</sup>

31. Eric Mbabazi, a G5 and top military commander who headed the morale and discipline division of the FPLC, is alleged to have been

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<sup>73</sup> ICC-01/04-01/06-2748-Red, para. 12.

<sup>74</sup> ICC-01/04-01/06-2748-Red, para. 12.

<sup>75</sup> ICC-01/04-01/06-2748-Red, para. 13.

<sup>76</sup> ICC-01/04-01/06-2748-Red, para. 14.

<sup>77</sup> ICC-01/04-01/06-2748-Red, para. 15.

particularly responsible for recruiting children. He reported any difficulties that arose to his superiors.<sup>78</sup>

32. Following their recruitment, the children were sent to one of 20 military camps set up throughout Ituri where they received standard military training from UPC/FPLC commanders.<sup>79</sup> It is alleged they were beaten, whipped, imprisoned and inadequately fed, and young girls were raped. They were encouraged to drink alcohol and to take drugs, leading to frequent intoxication.<sup>80</sup>

33. It is contended Thomas Lubanga either knew that children under 15 years of age were being conscripted or enlisted or he was at least aware that this was an inevitable consequence of what was occurring. Despite this knowledge, the recruitment drive continued, as part of the execution of the joint plan. He frequently saw child soldiers, and even his own personal protection unit included children aged between 13 and 17. The accused apparently received a copy of a document from one of the national secretaries to Eric Mbabazi which referred to the presence of child soldiers who were aged between 10 and 16 years.<sup>81</sup>

34. The prosecution alleges that the use of young people, including children under the age of 15, continued throughout the period of the charges. This escalated when the fighting was intense and it drew the attention of the Organisation of the United Nations ("UN") and various humanitarian organisations to this phenomenon. It is argued that in order to dispel the concerns of the international community about the use of child soldiers, the accused issued false demobilisation orders, while, in reality, the position remained unchanged. Thomas

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<sup>78</sup> ICC-01/04-01/06-2748-Red, para. 16.

<sup>79</sup> ICC-01/04-01/06-2748-Red, para. 17.

<sup>80</sup> ICC-01/04-01/06-2748-Red, para. 18.

<sup>81</sup> ICC-01/04-01/06-2748-Red, para. 19.

Lubanga visited a training camp two weeks after issuing an order of this kind where children significantly under the age of 15 were visible, including amongst the bodyguards of the senior commanders.<sup>82</sup>

35. The prosecution submits that the crimes were committed in the context of a conflict of a non-international character, and the involvement and influence of various States did not internationalise the armed conflict to which Mr Lubanga's UPC/FPLC was a party at the relevant time.<sup>83</sup>

36. Not all the facts included in this summary fall within the parameters of the facts and circumstances described in the charges as confirmed in the Decision on the Confirmation of Charges. For instance, as noted by the Chamber in various previous decisions, the use of girl soldiers as sexual slaves together with the resulting unwanted pregnancies have not been included. As already indicated, the Chamber has ensured that this Judgment does not exceed the facts and circumstances described in the charges.

## **B. DEFENCE SUBMISSIONS**

37. The defence presented a bifurcated case. The first part, which was introduced between 27 January 2010 and 1 December 2010, challenged the testimony of all the prosecution's child soldier witnesses. The prosecution, in turn, called various rebuttal witnesses.<sup>84</sup> In light of the evidence given at this stage, the defence argued that the proceedings should be stayed because they had been "irremediably vitiated by serious breaches of the fundamental principles of justice [and] the

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<sup>82</sup> ICC-01/04-01/06-2748-Red, para. 20.

<sup>83</sup> ICC-01/04-01/06-2748-Red, paras 21-60.

<sup>84</sup> One further witness related to this part of the defence was called from 14 to 18 April 2011.

norms of a fair trial” .<sup>85</sup>

38. The three main contentions of the defence in this regard were (i) that four of the prosecution’s intermediaries (Intermediary 143, P-0316, P-0321, and P-0031) were involved in soliciting false testimony from all the prosecution witnesses who were called to give evidence as former child soldiers;<sup>86</sup> (ii) one of the participating victims (said to be an important Congolese politician) solicited false testimony, and the Congolese authorities fraudulently intervened in the investigations;<sup>87</sup> and (iii) the prosecution failed to fulfil its obligations either to investigate all the relevant exculpatory circumstances or to effect timely and appropriate disclosure.<sup>88</sup>

39. In its closing submissions, the defence requests the Chamber to consider, *mutatis mutandis*, the facts and arguments rehearsed in this application for a permanent stay of the proceedings, which have demonstrated “numerous serious failures” on the part of the prosecution.<sup>89</sup> In particular, the defence sets out what it argues to be the lack of any proper investigation by the prosecution into the reliability of the evidence it called (including the failure to verify the identity of its witnesses or the credibility of their allegations), along with the use of documents which lacked any guarantee of reliability.<sup>90</sup> It is suggested that in light of this alleged misconduct, it is impossible for the Chamber to attach sufficient weight, *i.e.* “beyond a reasonable doubt”, to any of the evidence introduced by the prosecution, thereby

<sup>85</sup> ICC-01/04-01/06-2657-tENG-Red, para. 5.

<sup>86</sup> ICC-01/04-01/06-2657-tENG-Red, paras 21, 29 – 68, 75 – 137, 149 – 183 and 184 – 195; and ICC-01/04-01/06-2773 Red-tENG, paras 5 – 9.

<sup>87</sup> ICC-01/04-01/06-2657-tENG-Red, paras 25, 200 – 228 and ICC-01/04-01/06-2773-Red-tENG, paras 10 – 12.

<sup>88</sup> ICC-01/04-01/06-2657-tENG-Red, paras 23, 263 - 285 and ICC-01/04-01/06-2773-Red-tENG, paras 13 – 17.

<sup>89</sup> ICC-01/04-01/06-2773-Red-tENG, paras 3 and 14.

<sup>90</sup> ICC-01/04-01/06-2657-tENG-Red, paras 229 *et seq.*

rendering a guilty verdict unsustainable.<sup>91</sup>

40. The second part of the defence evidence (presented between 30 March and 14 April 2011) focussed on the individual criminal responsibility of Mr Lubanga. Five defence witnesses, including four UPC insiders, testified on various aspects of the substantive allegations against the accused.

41. The defence argues in its final submissions that none of the evidence presented at trial proves beyond reasonable doubt that children under the age of 15 were enlisted and conscripted by the FPLC, or were used to participate actively in hostilities, during the period covered by the charges.<sup>92</sup> It is further argued the Prosecutor failed to call any former child soldiers who were under the age of 15 at the relevant time, and this, taken alone, casts doubt over the merits of the prosecution's submissions.<sup>93</sup> It is also submitted that the allegation of the prosecution that the UPC had 20 camps is unfounded: D-0019 mentioned that the UPC only had 3 camps (Mandro, Rwampara and Bule), and the witnesses who refer to other camps are said to be unreliable.<sup>94</sup>

42. The defence submits that i) between September 2002 and May 2003 the conflict in Ituri was international in character,<sup>95</sup> and ii) there was no conflict (either international or non-international) in Ituri between late May 2003 and 13 August 2003. On this basis, it is suggested the crimes charged under Article 8 of the Statute could not have been

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<sup>91</sup> ICC-01/04-01/06-2773-Red-tENG, para. 17.

<sup>92</sup> ICC-01/04-01/06-2773-Red-tENG, paras 700 – 763.

<sup>93</sup> ICC-01/04-01/06-2773-Red-tENG, para. 736.

<sup>94</sup> ICC-01/04-01/06-2773-Red-tENG, paras 762, 808 – 809.

<sup>95</sup> ICC-01/04-01/06-2773-Red-tENG, paras 681 and 689.

committed during that latter period.<sup>96</sup>

43. It is argued that the “common plan”, which forms the basis of charging the accused as a co-perpetrator, was not criminal and the allegation in this regard is, in any event, founded on inaccurate facts.<sup>97</sup> The defence denies the accused formed a political and military alliance with APC dissidents between July 2000 and March 2002.<sup>98</sup> It is said the UPC was not a military organisation in 2000,<sup>99</sup> and Mr Lubanga did not personally contribute to the armed rebellion in Bunia between April and August 2002.<sup>100</sup> The defence contends that the accused was in custody outside Ituri when the common plan was implemented,<sup>101</sup> and there is no evidence that he was involved in its formulation.<sup>102</sup> The defence submits his participation in government (as President of the UPC) cannot be equated with participation in a common plan for the purposes of criminal liability for these alleged offences. It is emphasised that the UPC executive, which included Mr Lubanga, was chased out of Bunia in March 2003, and as a result the accused was not in the DRC for the majority of the period between March and May 2003. During this time, the UPC executive was unable to meet, and it is suggested there is no evidence that its members were in a position to communicate. Therefore, it is argued there is no support for the existence of a “common plan” between March and May 2003.<sup>103</sup>

44. It is contended the accused did not play a central role in the military

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<sup>96</sup> ICC-01/04-01/06-2773-Red-tENG, paras 694 – 699 and ICC-01/04-01/06-2786-Red-tENG, paras 105 – 109.

<sup>97</sup> ICC-01/04-01/06-2773-Red-tENG, paras 764 – 772.

<sup>98</sup> ICC-01/04-01/06-2773-Red-tENG, paras 773 – 776.

<sup>99</sup> ICC-01/04-01/06-2773-Red-tENG, paras 777 – 786.

<sup>100</sup> ICC-01/04-01/06-2773-Red-tENG, paras 787 – 801.

<sup>101</sup> ICC-01/04-01/06-2773-Red-tENG, para. 784.

<sup>102</sup> ICC-01/04-01/06-2773-Red-tENG, para. 787.

<sup>103</sup> ICC-01/04-01/06-2773-Red-tENG, paras 797 – 801.

structure of the FPLC (which was headed by Floribert Kisembo)<sup>104</sup> and that he did not personally contribute to the recruitment or training of recruits, or to their allocation or use.<sup>105</sup> The defence suggests that although Mr Lubanga visited the Rwampara training camp in February 2003, the speech he gave on that occasion does not constitute an “essential contribution” to the process of recruitment. Further, it is said that he did not visit any other training camps or participate in any of the recruitment operations.<sup>106</sup> On the contrary, it is submitted the enlistment, training and use of FPLC soldiers was within the sole jurisdiction of the military hierarchy under the leadership of dissident soldiers of the APC and Chief Kahwa.<sup>107</sup> Accordingly, the defence submits the accused did not make an “essential contribution” to the commission of the crimes with which he is charged.<sup>108</sup>

45. The defence argues that the testimony of several witnesses demonstrates there were no children under the age of 15 amongst the soldiers assigned to guard the accused.<sup>109</sup>

46. As to the mental element, the defence contends there is no evidence to suggest the accused either knew or should have known that there were children under the age of 15 in the FPLC, or that he was obliged by his position as President and Commander-in-chief of the UPC/RP to ensure all the recruits were over the age of 15.<sup>110</sup> It is further submitted there is no evidence demonstrating that he was aware of any widespread practice of compulsory conscription of children under the

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<sup>104</sup> ICC-01/04-01/06-2773-Red-tENG, paras 802 – 817.

<sup>105</sup> ICC-01/04-01/06-2773-Red-tENG, paras 821 – 857.

<sup>106</sup> ICC-01/04-01/06-2773-Red-tENG, paras 827 – 845.

<sup>107</sup> ICC-01/04-01/06-2773-Red-tENG, paras 849 – 857.

<sup>108</sup> ICC-01/04-01/06-2773-Red-tENG, para. 857.

<sup>109</sup> ICC-01/04-01/06-2773-Red-tENG, paras 846 – 848.

<sup>110</sup> ICC-01/04-01/06-2773-Red-tENG, paras 858 – 889.

age of 15 or their use by way of participation in the hostilities.<sup>111</sup>

47. The defence argues that “at no time did the accused approve, accept or tolerate the enlistment of children under the age of 15 years old” and that “each time he found himself in a position to exert his authority” Mr Lubanga implemented measures prohibiting the recruitment of child soldiers and ensuring their demobilisation.<sup>112</sup> Between September 2002 and March 2003, and between the end of May and 13 August 2003, the accused is said to have issued a formal ban on the enlistment of minors and to have been active in implementing demobilisation measures for anyone under the age of 18 years in the FPLC and the other armed groups.<sup>113</sup> Accordingly, it is submitted the accused did not have the intention required by Article 30 for the crimes with which he is charged.<sup>114</sup>

48. Moreover, the defence contends that the accused’s position as the UPC President (and *de jure* Commander-in-Chief of the FPLC) does not lead to the conclusion that he was in a position to ensure that every recruit was older than 15 years of age, particularly since he is not charged with responsibility as a commander under Article 28 of the Statute but instead he is prosecuted under Article 25(3)(a). The defence argues it is impermissible for the accused to be convicted on any basis other than as someone with responsibility under Article 25(3)(a). As set out above, it is the defence submission that the evidence demonstrates that when Mr Lubanga received information that there were children under the age of 18 within the FPLC, he immediately

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<sup>111</sup> ICC-01/04-01/06-2773-Red-tENG, paras 881 – 889.

<sup>112</sup> ICC-01/04-01/06-2773-Red-tENG, paras 890 – 957.

<sup>113</sup> ICC-01/04-01/06-2773-Red-tENG, paras 890 – 957.

<sup>114</sup> ICC-01/04-01/06-2773-Red-tENG, para. 957.



took steps to ensure they were demobilised.<sup>115</sup> It is submitted there is no evidence demonstrating that the accused ordered the recruitment of children under 15 or their use in hostilities. To the contrary, it is argued the only instructions he gave were to order their demobilisation.<sup>116</sup> The defence suggests the prosecution is prohibited from relying on any alleged omissions by the accused as part of its theory of “control” (in the sense that he allegedly failed to prevent recruitment by his subordinates).<sup>117</sup> Further, it is contended that the prosecution has not demonstrated how any contribution by the accused amounted to the *sine qua non* necessary for the commission of these alleged crimes.<sup>118</sup>

49. The defence highlights certain items of evidence in this regard. It is suggested it was simply a matter of conjecture on the part of P-0041 that the accused presided over any of the military meetings – indeed, it is said there was no basis for this supposition.<sup>119</sup> It is argued that the UPC logbooks reveal that the Chief of Staff took all the relevant decisions and, as a result, their relationship fails to provide evidence of “effective control” on his (the accused’s) part.<sup>120</sup> The defence submits P-0055 indicated that he had not witnessed meetings between Mr Lubanga and the Chief of Staff or other commanders. It is said P-0055 merely asserted that the G5 was able to meet with the Chief of Staff and the accused, without indicating whether this happened.<sup>121</sup> The defence relies on the suggested acceptance by the prosecution that the troops of Commander Kakwavu only remained in the UPC between

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<sup>115</sup> ICC-01/04-01/06-2773-Red-tENG, paras 858-864.

<sup>116</sup> ICC-01/04-01/06-2773-Red-tENG, paras 806 and 890 *et seq.*

<sup>117</sup> ICC-01/04-01/06-2773-Red-tENG, para. 818.

<sup>118</sup> ICC-01/04-01/06-2773-Red-tENG, paras 802 – 845.

<sup>119</sup> ICC-01/04-01/06-2786-Red-tENG, paras 33 – 34.

<sup>120</sup> ICC-01/04-01/06-2786-Red-tENG, para. 35.

<sup>121</sup> ICC-01/04-01/06-2786-Red-tENG, paras 36 – 37 and 43.

August 2002 and 6 March 2003. On this basis, it is argued Mr Lubanga is not responsible for any recruitment by this group.<sup>122</sup> It is contended that the monthly report relied on by the prosecution does not indicate that forced recruitment occurred in the villages. On the contrary, it is suggested it proves that the recruitment was voluntary and, additionally, there is no evidence it was seen by the accused.<sup>123</sup>

50. The defence submits that the demobilisation orders were meant to be executed, having been transmitted down the chain of command. However, difficulties were encountered, and although the accused asked for reports and to be kept up-to-date, the military leadership found that implementation was difficult, particularly vis-à-vis the self-defence forces.<sup>124</sup>

51. As regards the suggested order from the accused on his return to Ituri that all children under 18 should be demobilised, it is said the evidence demonstrates that during the fighting in May 2003 to regain Bunia from the Ugandans, there were fighters from a number of groups (FPLC members loyal to Floribert Kisembo, *Parti pour l'Unité et la Sauvegarde de l'Intégrité du Congo* ("PUSIC") dissidents loyal to Chief Kahwa, commanders Tchaligonza and Kasangaki, the self defence groups and armed civilians) who render it impossible to determine which fighters, including children, were part of the UPC. The defence argument, therefore, is that the accused – in good faith – ordered demobilisation, albeit in difficult circumstances.<sup>125</sup> In the context of the assertion by the prosecution that from September 2002 the self-defence forces were part of the UPC/FPLC, the accused does not contest the

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<sup>122</sup> ICC-01/04-01/06-2786-Red-tENG, para. 38.

<sup>123</sup> ICC-01/04-01/06-2786-Red-tENG, paras 41 – 42.

<sup>124</sup> ICC-01/04-01/06-2773-Red-tENG, paras 890 – 928.

<sup>125</sup> ICC-01/04-01/06-2773-Red-tENG, paras 934 – 948.

suggestion that in September 2002 the forces of Chief Kahwa and dissidents from the APC joined together to form the FPLC. However, it is alleged there is no evidence that all the villages of Ituri with self-defence forces joined the FPLC, thereby removing the opportunity of guaranteeing their own security. The defence relies on Mr Lubanga's meeting with the leaders of the self-defence forces in February 2003, in order to discuss demobilisation, in support of its argument that the self-defence forces were still in existence at that time and were acting autonomously (it is noted that the summary of this meeting is not contested by the prosecution).<sup>126</sup>

### C. VICTIMS SUBMISSIONS

52. The OPCV, in its capacity as legal representative of victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 addressed as part of its closing submissions the various issues of law that have arisen in the case, along with the matters that directly concern the four participating victims it represents. Summaries of these discrete arguments are set out at the appropriate stage of this judgment. Counsel has particularly rehearsed in detail the evidence that is said to corroborate the evidence of these dual-status witnesses.<sup>127</sup>

53. On the substantive factual matters arising in the case, the OPCV takes issue with the defence contentions as regards the documents that it is claimed call into question elements of the identifying information for these four victims. It is argued that the practices at the civil registry and in other organisations within the DRC have had an adverse impact on the position of the participating victims. It is suggested there is general recognition that documents relating to identity from

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<sup>126</sup> ICC-01/04-01/06-2773-Red-tENG, paras 922 – 933.

<sup>127</sup> ICC-01/04-01/06-2744-Red-tENG, paras 48 *et seq.*

the period relevant to the charges are at risk of containing serious flaws, and the defence arguments on this issue are described as being, certainly in part, speculative.<sup>128</sup> Otherwise, it is contended the oral testimony of these four participating victims should be accorded more weight than the out-of-court statements that they or other witnesses have made. The OPCV maintains that credible explanations exist for the various contradictions and inconsistencies in their accounts,<sup>129</sup> and the criticisms of their evidence do not reduce the weight and probative value of their testimony, which is purportedly corroborated.<sup>130</sup>

54. It is suggested the evidence given by the participating victims has demonstrated that children under 15 years were trained in military camps between early September 2002 and 1 – 3 August 2003,<sup>131</sup> and that they were used to participate actively in hostilities involving the armed forces of the UPC/FPLC.<sup>132</sup> It also alleged that children were taken to training camps in Centrale, Mandro, Rwampara, Irumu, Bule, Bogoro and Sota.<sup>133</sup>

55. As to the accused's alleged criminality, it is argued he was *de jure* and *de facto* President of the UPC (with the FPLC as its armed wing). As Commander-in-Chief of the armed forces it is said he was informed of all the military operations that were implemented by the general staff, and he had responsibility for "logistical organisation" and securing supplies. The OPCV argues that he "maintained direct and regular contact with the ranking military leaders of the UPC/FPLC",

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<sup>128</sup> ICC-01/04-01/06-2744-Red-tENG, paras 32 and 33.

<sup>129</sup> ICC-01/04-01/06-2744-Red-tENG, para. 46.

<sup>130</sup> ICC-01/04-01/06-2744-Red-tENG, para. 47.

<sup>131</sup> ICC-01/04-01/06-2744-Red-tENG, paras 38 - 51.

<sup>132</sup> ICC-01/04-01/06-2744-Red-tENG, paras 42 – 45.

<sup>133</sup> ICC-01/04-01/06-2744-Red-tENG, para. 50, and ICC-01/04-01/06-2747-Red-tENG, para. 59.

either by way of meetings at his residence or via Motorola radios.<sup>134</sup>

56. It is alleged that children under the age of 15 were amongst his bodyguard and, to his knowledge, within the bodyguards of other “ranking military leaders”. Similarly, the OPCV argues he would have been aware of their presence amongst the recruits at the various UPC/FPLC training camps, given his regular visits.<sup>135</sup> He is said to have provided them with encouragement.<sup>136</sup>

57. Evidence is identified to the effect that the accused “issued public calls” to mobilise the Hema population, and he allegedly implemented or contributed to a policy of encouraging young recruits (including those under 15 years of age) to participate in the war effort.<sup>137</sup>

58. On the issue of the steps taken to demobilise child soldiers, the OPCV submits these only began in February 2003, and that prior to that time the self-defence committees in Ituri regularly sent recruits for training, many of whom joined the UPC/FPLC.<sup>138</sup>

59. It is alleged the accused is a “direct perpetrator” of the alleged crimes,<sup>139</sup> most particularly because he invited the Hema population to send children who were below the age of 15 for military training<sup>140</sup> and because he had recruits of that age in his own bodyguard. Additionally, it is argued that he is guilty as a “co-perpetrator”<sup>141</sup> on the basis of his capacity as President of the UPC and Commander-in-

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<sup>134</sup> ICC-01/04-01/06-2744-Red-tENG, para. 52.

<sup>135</sup> ICC-01/04-01/06-2744-Red-tENG, para. 53.

<sup>136</sup> ICC-01/04-01/06-2744-Red-tENG, para. 54.

<sup>137</sup> ICC-01/04-01/06-2744-Red-tENG, para. 54.

<sup>138</sup> ICC-01/04-01/06-2744-Red-tENG, para. 55.

<sup>139</sup> ICC-01/04-01/06-2744-Red-tENG, para. 56.

<sup>140</sup> ICC-01/04-01/06-2744-Red-tENG, para. 57.

<sup>141</sup> ICC-01/04-01/06-2744-Red-tENG, para. 58.

Chief.<sup>142</sup>

60. Finally, it is suggested that various acts of inhuman or cruel treatment, along with allegations of sexual slavery, should be borne in mind when “considering” his criminal responsibility.<sup>143</sup>

61. The legal representatives of the V01 group of victims similarly advanced submissions on various legal and factual matters that have been addressed at the appropriate stages of this judgment. They join the OPCV in its submissions as to the accused’s alleged criminal responsibility, particularly regarding his role as President and Commander-in-Chief of the UPC when a campaign to recruit minors under the age of 15 years was launched and pursued.<sup>144</sup> Broadly similar arguments are advanced as regards demobilisation, in which it is emphasised that these initiatives were allegedly not implemented.<sup>145</sup>

62. It is suggested that the presence of children in the ranks of the UPC was part of a “phenomenon of child soldiers [that] was seen in the Democratic Republic of the Congo as from the time of the war triggered by the AFDL in 1996-1997”,<sup>146</sup> and “the use of child soldiers in armed groups was the rule, not the exception”.<sup>147</sup>

63. It is contended the use of child soldiers was a deliberate policy of which the accused was aware,<sup>148</sup> and that as a result young recruits were sent to military training camps; children below 15 years of age fought in battles; and some of the victims endured severe

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<sup>142</sup> ICC-01/04-01/06-2744-Red-tENG, para. 59.

<sup>143</sup> ICC-01/04-01/06-2744-Red-tENG, paras 61 and 62.

<sup>144</sup> ICC-01/04-01/06-2746-Red-tENG, paras 30 – 32.

<sup>145</sup> ICC-01/04-01/06-2746-Red-tENG, paras 34 – 37.

<sup>146</sup> ICC-01/04-01/06-2746-Red-tENG, para. 44.

<sup>147</sup> ICC-01/04-01/06-2746-Red-tENG, para. 47.

<sup>148</sup> ICC-01/04-01/06-2746-Red-tENG, paras 49 – 51.

mistreatment, which took different forms.<sup>149</sup> It is argued the conditions at the camps were closer to a concentration camp than to barracks.<sup>150</sup>

64. Broadly similar arguments have been deployed on behalf of the V02 group of victims. The accused's position and his alleged authority is particularly emphasised,<sup>151</sup> as is the recruitment policy that is said to have resulted in "a large number of children under the age of fifteen years [being compelled] to join the FPLC, which forcibly recruited groups of children in several locations in Ituri [...] in August 2002."<sup>152</sup> The personal involvement of FPLC commanders and (on one occasion) the accused is stressed,<sup>153</sup> along with the instances of "voluntary" enlistment.<sup>154</sup> As with other representatives, the ineffective nature of the demobilisation programme is emphasised.<sup>155</sup>

65. Generally, it is suggested "there are substantial grounds to believe that the FPLC used children under the age of 15 years to participate actively in the hostilities."<sup>156</sup> The core of these submissions are set out as follows:

[...] Thomas Lubanga Dyilo was present at the time and place of the forcible enlistment of children under the age of fifteen years into the FPLC, and, as President and Commander-in-Chief of the FPLC and the coordinator of the implementation of the common plan with other members of the hierarchy with a view to bolstering the UPC/RP and FPLC war effort, he even gave a speech before the young FPLC recruits, including those under the age of fifteen years, urging them to complete their military training and to prepare to participate in military operations.<sup>157</sup>

66. In this context it is suggested that the accused's criminal liability as

<sup>149</sup> ICC-01/04-01/06-2746-Red-tENG, para. 62.

<sup>150</sup> ICC-01/04-01/06-2746-Red-tENG, para. 64.

<sup>151</sup> ICC-01/04-01/06-2747-Red-tENG, paras 20 – 22.

<sup>152</sup> ICC-01/04-01/06-2747-Red-tENG, para. 47.

<sup>153</sup> ICC-01/04-01/06-2747-Red-tENG, para. 48.

<sup>154</sup> ICC-01/04-01/06-2747-Red-tENG, para. 49.

<sup>155</sup> ICC-01/04-01/06-2747-Red-tENG, paras 51 – 52.

<sup>156</sup> ICC-01/04-01/06-2747-Red-tENG, para. 58 *et seq.*

<sup>157</sup> ICC-01/04-01/06-2747-Red-tENG, para. 98.

a co-perpetrator under Article 25(3)(a) of the Statute has been established.<sup>158</sup>

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<sup>158</sup> ICC-01/04-01/06-2747-Red-tENG, page 22.



## IV. FACTUAL OVERVIEW

### A. THE BACKGROUND TO THE CONFLICT IN ITURI

67. This case is concerned with events that took place between early September 2002 and 13 August 2003 in Ituri in the DRC. Ituri is a district of Orientale Province in the north east of the DRC, bordering Uganda, with population estimates ranging from 3.5 to 5.5 million people.<sup>159</sup> Beginning in 1999, ethnic tensions and competition for resources in the district escalated into a devastating conflict.<sup>160</sup> Events that occurred during the latter part of this turmoil are the subject of this case. The following short summary draws, in the main, on undisputed evidence in this case that includes the testimony of the Chamber's expert witness Roberto Garretón (CHM-0002) and the prosecution's expert Gérard Prunier (P-0360), in addition to a number of other prosecution and defence witnesses. The Chamber has indicated the extent to which the evidence or the issues in this context are in dispute.

68. It is to be observed at the outset that the defence challenges the general reliability of the evidence of Gérard Prunier (P-0360), criticising his lack of adequate sources and alleging that some of the information in his report is biased against Thomas Lubanga, the UPC or indeed the Hema community as a whole.<sup>161</sup> However, the defence

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<sup>159</sup> Report by expert witness Roberto Garretón (CHM-0002), EVD-CHM-00005, page 15 (the translated English version can be found in ICC-01/04-01/06-1655-Anx-tENG, page 13); Report of expert witness Gérard Prunier (P-0360), EVD-OTP-00403 at DRC-OTP-0203-0091; EVD-OTP-00623, para. 12.

<sup>160</sup> EVD-OTP-00403 at DRC-OTP-0203-0091 to DRC-OTP-0203-0099. This conflict was extensively documented in the "Special report on the events in Ituri, January 2002 – December 2003" by the United Nations Organization Mission in the Democratic Republic of the Congo ("MONUC report") of 16 July 2004, admitted into evidence in this case as EVD-OTP-00623.

<sup>161</sup> ICC-01/04-01/06-2773-Red-tENG, paras 664 – 666.

also relies on his evidence as regards the involvement of the governments of the DRC, Uganda, and Rwanda in the conflict in Ituri during the period of the charges,<sup>162</sup> the security situation in Ituri at the time,<sup>163</sup> the UN Mission in the DRC (“MONUC”)<sup>164</sup> and the UPC’s political strategy.<sup>165</sup>

69. Overall, bearing in mind the totality of the evidence in this area and the witness’s response to questioning, the Chamber found Gérard Prunier (P-0360) to be a credible and reliable witness and has relied on his testimony and his report to establish the factual background set out in this section, as well as to assist with the analysis of the nature of the armed conflict in part IX.

70. The two expert witnesses addressed the DRC’s colonial past in considerable detail. Regardless of whether the origins of the conflict the Chamber is concerned with are to be found in that history, it is essentially too remote to be of direct relevance to the present charges. Instead, a convenient starting point is May 1997, when following a war that lasted nine months, Laurent Kabila came to power in Zaire which was re-named the “Democratic Republic of Congo”.<sup>166</sup> President Kabila was assassinated in 2001, and he was succeeded by his son, Joseph Kabila.<sup>167</sup> By this time, there were at least ten conflicts within the country involving nine national armies and nineteen irregular armed forces.<sup>168</sup> Six of these conflicts took place either in Orientale Province

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<sup>162</sup> ICC-01/04-01/06-2773-Red-tENG, paras 668 – 673.

<sup>163</sup> ICC-01/04-01/06-2773-Red-tENG, para. 674.

<sup>164</sup> ICC-01/04-01/06-2773-Red-tENG, paras 675 – 677.

<sup>165</sup> ICC-01/04-01/06-2773-Red-tENG, para. 678.

<sup>166</sup> EVD-CHM-00005, pages 8 and 12 (ICC-01/04-01/06-1655-Anx-tENG, pages 8 and 11).

<sup>167</sup> EVD-CHM-00005, page 10 (ICC-01/04-01/06-1655-Anx-tENG, page 9).

<sup>168</sup> EVD-CHM-00005, page 11 (ICC-01/04-01/06-1655-Anx-tENG, page 10).

(in which Ituri is located) or in Ituri itself.<sup>169</sup>

## **B. THE HEMA-LENDU CONFLICT**

71. Ituri is fertile and rich in resources such as gold, diamonds, oil, timber and coltan,<sup>170</sup> which many groups, inside and outside the DRC, sought to exploit.<sup>171</sup>

72. Experts have suggested that much of the violence in Ituri during the period from 1999 to 2003 was initially economically motivated, and that the conflict was due in significant part to the involvement of members of the Ugandan national army (the Ugandan People's Defence Force or "UPDF"), who exploited social unrest for their own economic advantage.<sup>172</sup> In August 1998, members of the UPDF supporting the RCD rebels occupied Orientale Province as part of the effort to overthrow President Kabila, and by November 1998 the UPDF had established a base in Bunia.<sup>173</sup>

73. The DRC has close to 450 different ethnic groups within its borders.<sup>174</sup> In Ituri alone there are approximately 18 different ethnic groups, including the Lendu, the Ngiti and the Hema (and its sub-clan, the Gegere or Hema North).<sup>175</sup>

74. Belgian colonial rule had emphasised the ethnic divisions between the Hema and the Lendu, whilst favouring the former.<sup>176</sup> Even after

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<sup>169</sup> EVD-CHM-00005, page 11 (ICC-01/04-01/06-1655-Anx-tENG, page 10).

<sup>170</sup> EVD-CHM-00005, page 15 (ICC-01/04-01/06-1655-Anx-tENG, page 14); T-193-ENG, page 61, lines 2 – 11 and page 88, line 16 to page 89, line 8 (CHM-0002); EVD-OTP-00403 at DRC-OTP-0203-0092.

<sup>171</sup> EVD-OTP00623, paras 16 and 27; EVD-OTP-00403 at DRC-OTP-0203-0096 and DRC-OTP-0203-102.

<sup>172</sup> EVD-OTP-0405 at DRC-OTP-0203-0019 to DRC-OTP-0203-022 and EVD-OTP-0403 at DRC-OTP-0203-0115; EVD-OTP-00623, para. 6.

<sup>173</sup> EVD-OTP-00623, para. 18 and Annex II; EVD-OTP-00403 at DRC-OTP-0203-0095.

<sup>174</sup> EVD-CHM-00005, page 5 (ICC-01/04-01/06-1655-Anx-tENG, page 4).

<sup>175</sup> EVD-OTP-00623, para. 12; EVD-OTP-00403 at DRC-OTP-0203-0092 to DRC-OTP-0203-0093.

<sup>176</sup> EVD-OTP-00403 at DRC-OTP-0203-0093 to DRC-OTP-0203-0094.

Congo declared its independence from Belgium, the Hema remained the landowning and business elite.<sup>177</sup> In 1999, 75 of the 77 large farms formerly owned by Belgian colonists before President Mobutu's "Zairisation" programme belonged to members of the Hema community.<sup>178</sup> Powerful Hemas involved in business transported goods from Ituri across the border into Uganda without paying import taxes.<sup>179</sup>

75. In 1998/1999, some Hema concessionaires reportedly tried to evict Lendu inhabitants forcibly from their land, which led to armed confrontation.<sup>180</sup> The violence gradually spread throughout the district of Ituri, and the conflict widened into a confrontation between the Hema and Lendu communities.<sup>181</sup> In addition, soldiers from the UPDF initially supported certain Hema landowners and were allegedly responsible for attacks on Lendu villages.<sup>182</sup> The Lendu began to create self-defence forces and these militias attacked Hema villages with the support of individual Ugandan officers, the Congolese pre-transition government and certain rebel movements.<sup>183</sup> The Hema also created self-defence committees for their own protection.<sup>184</sup> The nature of the self-defence forces and their relationship with the UPC/FPLC (particularly whether they continued to operate independently of the

<sup>177</sup>EVD-OTP-00403 at DRC-OTP-0203-0094; and ICC-01/04-01/06-0096 and EVD-CHM-00005, page 16 (ICC-01/04-01/06-1655-Anx-tENG, page 15).

<sup>178</sup> EVD-OTP-00403 at DRC-OTP-0203-0094.

<sup>179</sup> T-153-Red-ENG, page 83, line 4 to page 88, line 16 and T-154-Red-ENG, page 8, lines 10 – 25 (P-0043); EVD-OTP-0403 at DRC-OTP-0203-0096 (footnote 82).

<sup>180</sup> EVD-OTP-00403 at DRC-OTP-0203-0096 to DRC-OTP-0203-0097; T-156-ENG, page 39, line 4 to page 41, line 9 (P-0360); EVD-OTP-00623, paras 4, 17 and 19.

<sup>181</sup> EVD-OTP-00623, paras 4, 5 and 18 - 26.

<sup>182</sup> EVD-OTP-00403 at DRC-OTP-0203-0097 and DRC-OTP-0203-0101; EVD-OTP-00623, paras 19 – 21.

<sup>183</sup> EVD-OTP-00403 at DRC-OTP-0203-0098 to DRC-OTP-0203-0101 and EVD-OTP-00623, para. 4.

<sup>184</sup> T-160-Red2-ENG, page 38, line 11 to page 39, line 25 (testimony of P-0017). It was also reported that in some Hema localities each family was supposedly given weapons to defend themselves, EVD-OTP-00623, para. 21.

UPC/FPLC after September 2002) are addressed below.<sup>185</sup>

76. From 1999 to the middle of 2003, a series of opposing rebel faction leaders struggled for political power in Ituri.<sup>186</sup> According to a MONUC report, “[t]he competition for the control of natural resources by combatant forces, exacerbated by an almost constant political vacuum in the region, [was] a major factor in prolonging the crisis in Ituri.”<sup>187</sup> The same report suggested that the local ethnic problems “would not have turned into massive slaughter without the involvement of national and foreign players” including the Ugandan and Rwandan armies.<sup>188</sup>

77. In 1999, the rebel group with nominal control in Ituri at the time, the RCD, split into two factions, the RCD-Kisangani headed by Ernest Wamba dia Wamba and supported by Uganda, and the RCD-Goma (“RCD-G”), supported by Rwanda.<sup>189</sup>

78. Soon afterwards in October 1999, the UPDF decided to create a new province called “Kibali-Ituri”<sup>190</sup> and General James Kazini, the commander in charge of the Ugandan army in the DRC, appointed a Hema activist named Adèle Lotsove Mugisa as the provisional governor of the new province.<sup>191</sup>

79. After this decision, violence escalated in Ituri. By November 1999,

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<sup>185</sup> See Section X(B)(5)(h).

<sup>186</sup> EVD-OTP-00623, para. 6.

<sup>187</sup> EVD-OTP-00623, para. 7.

<sup>188</sup> EVD-OTP-00623, para. 19.

<sup>189</sup> EVD-OTP-00403 at DRC-OTP-0203-0098; EVD-OTP-00623, paras 18 and Annex I B.

<sup>190</sup> However, the province continued to be referred to as simply “Ituri”.

<sup>191</sup> Later, Adèle Lotsove was replaced by Ernest Uringi Pa Ndolo, and then in 2002, Jean-Pierre Molondo-Lompondo was installed as governor. T-179-Red-ENG, page 20, line 24 to page 22, line 24; EVD-OTP-0403 at DRC-OTP-0203-0097 and DRC-OTP-0203-0099 to DRC-OTP-0203-0102; and EVD-OTP-00623, para. 20.

7,000 people had been killed and 100,000 displaced by the fighting.<sup>192</sup> Over the next year and a half, a series of political upheavals and rapidly shifting military alliances helped to fuel the continued conflict.<sup>193</sup>

80. In March 2000, a UN inter-agency assessment mission in Ituri reported that the humanitarian situation was “close to catastrophic”.<sup>194</sup>

### C. THE UPC

81. Against this background, the UPC was created on 15 September 2000.<sup>195</sup> Although Thomas Lubanga was one of the UPC’s founding members and its President from the outset,<sup>196</sup> the nature of the group when it was created is a matter of dispute in this case.

82. In the summer and fall of 2000, there was a mutiny of Hema officers and soldiers in the APC (the military wing of the RCD-ML) against Ernest Wamba dia Wamba.<sup>197</sup> Members of this mutiny included Bosco Ntaganda, commanders Tchaligonza, Kasangaki and Bagonza, Floribert Kisembo and Chief Kahwa Panga Mandro.<sup>198</sup> Following negotiations with the Ugandan authorities, in the summer of 2000 the mutineers left for training in Uganda.<sup>199</sup>

<sup>192</sup> EVD-OTP-0403 at DRC-OTP-0203-0098.

<sup>193</sup> EVD-OTP-0403 at DRC-OTP-0203-0098 to DRC-OTP-0203-0102 and EVD-OTP-00623, paras 5 – 6 and 20 – 23.

<sup>194</sup> EVD-OTP-00623, Annex II.

<sup>195</sup> EVD-OTP-00661 (UPC Statute) (another version of the UPC Statute dated 15 September 2000 was given EVD-OTP-00715); EVD-OTP-00662 (UPC Programme); T-342-ENG, page 9, line 21 to page 10, line 7 and T-343-ENG, page 41, lines 20 – 23 (D-0019).

<sup>196</sup> Thomas Lubanga’s name or signature appears on the list of UPC founders in documents EVD-OTP-00662 (in this document his signature appears under the designation “Le President”), EVD-OTP-00726 and EVD-OTP-00661. Additionally, Thomas Lubanga’s *curriculum vitae* indicates that he was the UPC President since 2000, EVD-OTP-00621.

<sup>197</sup> T-156-ENG, page 56, lines 4 – 6 (P-0360); T-343-ENG, page 4, lines 1 – 11 and page 6, lines 7 – 10 (D-0019); EVD-OTP-00623, Annex I B.

<sup>198</sup> T-168-Red-ENG, page 19, lines 3 – 14 and page 37, lines 11 – 25 (P-0012); T-343-ENG, page 3, line 25 to page 4, line 11 (D-0019).

<sup>199</sup> T-343-ENG, page 13, lines 7 – 16 (D-0019); T-168-Red-ENG, page 33, lines 3 – 25 (P-0012).

83. The precise nature of the UPC at that time and the identity of those responsible for the training in Uganda are disputed issues in the case. These topics are analysed in greater detail below in the chapter dealing with the individual criminal responsibility of the accused.<sup>200</sup>
84. On 6 November 2000, Ernest Wamba dia Wamba was overthrown by Mr Mbusa Nyamwisi, who was supported by the Hema leader Jean Tibasima and the Hema militia.<sup>201</sup> In January 2001, the Ugandan Colonel Edison Muzoora of the UPDF seized control of the province of Ituri.<sup>202</sup>
85. By January 2001, a number of smaller splinter militias had emerged, which had ties with the Ugandan, Rwandan or Congolese forces and the rebel groups.<sup>203</sup> As a result, by the end of 2001 there had been a sharp increase in ethnically-targeted attacks on villages and violence against civilians.<sup>204</sup>
86. In early 2002, Thomas Lubanga occupied the position of Minister of Defence in the RCD-ML (the group that controlled Ituri at the time).<sup>205</sup>
87. During the Sun City Peace negotiations in South Africa in April 2002, Mr Mbusa Nyamwisi, as President of the RCD-ML, shifted his allegiance to the Kinshasa government and he decided to create an

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<sup>200</sup> See Section XI.

<sup>201</sup> T-168-Red-ENG, page 34, line 2 to page 36, line 18 (P-0012); EVD-OTP-00403 at DRC-OTP-0203-0100 to DRC-OTP-0203-0101.

<sup>202</sup> EVD-OTP-00403 at DRC-OTP-0203-0101.

<sup>203</sup> EVD-OTP-00623, paras 18 and 23. In addition, Uganda created the *Front de Libération du Congo* (“FLC”) at this time in order to try to unite Ugandan-supported rebel groups in one organisation under the leadership of Jean-Pierre Bemba. EVD-OTP-0403 at DRC-OTP-0203-0101 to DRC-OTP-0203-0102.

<sup>204</sup> EVD-OTP-0403 at DRC-OTP-0203-0101 and EVD-CHM-00005, pages 16 and 20 – 21 (ICC-01/04-01/06-1655-Anx-tENG, pages 15 and 19).

<sup>205</sup> EVD-OTP-00621 (*curriculum vitae of Thomas Lubanga*); T-124-Red-ENG, page 78, lines 2 – 14 (testimony of P-0041, stating that in April 2002, Thomas Lubanga was the Minister of Defence for the RCD-ML); T-168-Red-ENG, page 27, lines 6 – 24 (testimony of P-0012, stating that by February or March 2002, Thomas Lubanga had already been appointed the Minister of Defence); T-344-Red-ENG, page 8, lines 11 – 18 (D-0019).

integrated Hema-Lendu army for the RCD-ML.<sup>206</sup>

88. Thereafter, certain individuals (allegedly the accused was among them) decided to abandon the RCD-ML<sup>207</sup> and a number of new militias were organised. As a consequence, the conflict in Ituri was driven to “new extremes of ethnic fragmentation”.<sup>208</sup> On 17 April 2002 a political declaration was issued calling for the departure of Mr Mbusa Nyamwisi.<sup>209</sup> Following this declaration, Hema militia members including Chief Kahwa,<sup>210</sup> Floribert Kisembo, Bosco Ntaganda, commanders Tchaligonza, Kasangaki and Bagonza and others, mutinied against the RCD-ML.<sup>211</sup> The alleged participation of the accused in these events and his relationship with the aforesaid individuals is analysed in the chapter dealing with individual criminal responsibility.<sup>212</sup>

89. In June 2002,<sup>213</sup> when the accused was in Kampala in order to attend a meeting with a group that included John Tinanzabo, Richard Lonema, Jean-Pascal Ndukute, and Nestor Bamaraki,<sup>214</sup> the Ugandan authorities arrested Thomas Lubanga and nine of his companions, later transferring them to Kinshasa where they were kept under house

<sup>206</sup> T-179-Red-ENG, page 37, lines 14 – 25 (P-0014); EVD-OTP-0403 at DRC-OTP-0203-0102 to DRC-OTP-0203-0106.

<sup>207</sup> T-340-ENG, page 37, line 7 to page 41, line 4; T-343-ENG, page 49, line 25 to page 52, line 6 and page 69, lines 12 – 15 (D-0019).

<sup>208</sup> EVD-OTP-0403 at DRC-OTP-0203-0103 to DRC-OTP-0203-0106. See also T-179-Red-ENG, page 37, line 14 to page 39, line 23 (P-0014). This is, at least in part, a contentious issue in the case, namely whether Thomas Lubanga personally organized the overthrow of the RCD-ML.

<sup>209</sup> EVD-D01-00050; T-343-ENG, page 62, line 13 to page 63, line 17 and page 66, line 21 to page 67, line 10 (D-0019).

<sup>210</sup> T-340-ENG, page 53, line 13 to page 54, line 22 (D-0019).

<sup>211</sup> T-168-Red-ENG, page 29, lines 3 – 13 (P-0012); T-340-ENG, page 55, line 15 to page 57, line 2 and T-343-ENG, page 76, line 10 to page 77, line 9 (D-0019).

<sup>212</sup> See Section XI.

<sup>213</sup> T-344-Red-ENG, page 17, lines 4 – 7 (D-0019); T-179-Red2-ENG, page 79, lines 12 – 16 (P-0014); T-125-Red-ENG, page 9, lines 6 – 9; T-126-Red-ENG, page 7, lines 21 – 24 (P-0041).

<sup>214</sup> T-179-Red2-ENG, page 80, line 21 to page 81, line 9 (P-0014) and T-125-CONF-ENG, page 2, lines 16 – 24 and T-125-Red2-ENG, page 4, line 18 to page 5, line 12 (P-0041).



arrest.<sup>215</sup> The conditions of detention of Mr Lubanga and the delegation of tasks to, and communication on his part with, his alleged co-perpetrators and other UPC members are considered in detail in the chapter dealing with individual criminal responsibility.<sup>216</sup>

90. In early August 2002, RCD-ML dissidents (backed by Uganda), attacked Bunia and, after several days of fighting,<sup>217</sup> took control of the town, ousting Mr Mbusa Nyamwisi and the RCD-ML.<sup>218</sup> The APC forces were driven out and Governor Lompondo fled the city on foot.<sup>219</sup> It is, however, a matter of contention in this case whether the UPC was responsible for forcing the RCD-ML out of Bunia. This, as with other contested issues, is discussed below.<sup>220</sup>

91. Within this context, the prosecution submits that the accused, jointly with his co-perpetrators, committed the crimes of conscription, enlistment and use of children under the age of 15, from 1 September 2002 to 13 August 2003.

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<sup>215</sup> T-125-Red2-ENG, page 8, line 11 to page 11, line 4 and T-126-Red-ENG, page 7, lines 21 to page 9, line 9 (P-0014); T-181-Red2-ENG, page 8, line 25 to page 9, line 14 (P-0014); T-168-Red-ENG, page 40, lines 4 – 5 and page 41, lines 21 –24 (P-0012); T-340-ENG, page 45, lines 1 – 25 and T-344-Red-ENG, page 18, line 23 to page 19, line 12 (D-0019); T-174-Red2-ENG, page 30 line 18 to page 31, line 2 (P-0055).

<sup>216</sup> See Section XI.

<sup>217</sup> EVD-OTP-0403 at DRC-OTP-0203-0104 to DRC-OTP-0203-0105; T-344-Red-ENG, page 2, line 19 to page 3, line 7. The rebels call themselves the *Front pour la Réconciliation et la Paix* (“FRP”) in their declaration, EVD-OTP-00386/ EVD-OTP-00663. The extent to which the FRP was the UPC under another name is contested in this case. Thomas Lubanga’s role in the takeover of Bunia is also contested. The prosecution alleges that he orchestrated and oversaw the attack whereas the defence alleges that he was not involved in the armed rebellion that overthrew Mr Mbusa Nyamwisi (it is observed that Mr Lubanga was detained in Kinshasa at the time) and instead it is suggested he merely took political advantage of a rebellion which he did not lead, in order to take power after its success.

<sup>218</sup> T-156-ENG, page 55, lines 15 – 19 (P-0360); EVD-OTP-00386/EVD-OTP-00663, T-125-Red-ENG, page 13, line 1 to page 15, line 2 (P-0041); T-179-Red2-ENG, page 76, lines 11 – 17 (P-0014); T-168-Red-ENG, page 42, line 18 to page 43, line 9 (P-0012); T-340-ENG, page 59, line 24 to page 62, line 5 (D-0019); T-160-Red2-ENG, page 73, lines 2 – 5 and T-162-CONF-ENG, page 5, lines 5 – 10 (P-0002).

<sup>219</sup> EVD-OTP-00403 at DRC-OTP-0203-0105 and T-168-ENG, page 43, lines 5 – 7.

<sup>220</sup> See Section XI.

## V. THE EVALUATION OF EVIDENCE

### *Burden of Proof*

92. Under Article 66 of the Statute, the accused is presumed to be innocent until the Prosecutor has proved his guilt.<sup>221</sup> For a conviction, each element of the particular offence charged must be established “beyond reasonable doubt”.<sup>222</sup>

### *Evidence*

93. Evidence was introduced during the trial in oral, written and audio-visual form. This included the *viva voce* testimony of sixty-seven witnesses (including expert witnesses) who appeared before the Chamber in person and via a video link. Two witnesses gave their evidence by way of sworn depositions (Article 69(2) of the Statute and Rule 68 of the Rules). Written statements were admitted pursuant to Rule 68 of the Rules.<sup>223</sup> Documents and other material such as transcripts of interviews, videos, the records from a variety of organisations, letters, photographs and maps were either introduced during the oral evidence of witnesses or by counsel (in the latter case, following a written application).

94. This Judgment is based on the entire proceedings and the Chamber’s evaluation of the evidence under Article 74(2) of the Statute. The Chamber has assessed the reliability of individual pieces

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<sup>221</sup> Article 66(1) and (2) of the Statute.

<sup>222</sup> Article 66(3) of the Statute.

<sup>223</sup> See, e.g., Decision on the prosecution’s application for the admission of the prior recorded statements of two witnesses, 15 January 2009, ICC-01/04-01/06-1603. A French translation was filed on 27 January 2011: Décision relative à la requête de l’Accusation aux fins d’admission des déclarations préalablement enregistrées de deux témoins, 15 January 2009, ICC-01/04-01/06-1603-tFRA.

of evidence and their probative value in the context of any other admissible and probative material.

95. The parties and participants were responsible for identifying the evidence that is relevant to the Article 74 Decision in their final submissions. During the course of giving directions as to the timetable for the closing stages of the case on 1 April 2011, the Chamber stated:

So far as the bar table documents are concerned, it is likely that we will only consider them to the extent that they are referred to in your written closing submissions. So if there are bar table documents which at the end of the case you consider to have relevance and importance, you must identify the part of the document that you rely on, and you must set out a short explanation of the point or points that you make in relation to that document and the section of it that you have identified. If you fail to refer to a bar table document or you fail to refer to parts of a bar table document, you should work on the basis that there is a very real risk that we will simply not take it into consideration. We do not intend to read each and every one of the documents that you have respectively submitted, guessing at what might be the unexplained relevance of the particular piece of paper. These proceedings should not be conducted on the basis of judicial guesswork.

Similarly, we have heard a great deal of oral evidence. Some of it, on analysis, may well prove to have greater relevance than other parts of the evidence that we have heard, and there is a duty on you all to indicate the principal facts, the principal parts of the oral evidence that we have heard that you rely on, coupled with a sufficient explanation as to why you say the particular piece of evidence or section of evidence has relevance to your case, either in support of the case that you are making or by way of criticism of the case for the other side.

Now, it may be that the Bench will consider some of the evidence that you have not identified. That, of course, is a matter entirely for us if we choose to do so. But for those parts that you consider to be relevant, you must flag it up, and I hope that's clear.<sup>224</sup>

96. In the Order on the timetable for closing submissions, dated 12 April 2011, the Chamber set out as follows:

5. For the documents that have been admitted into evidence without having been introduced during the examination of a witness (*viz.* the bar table documents), as set out by the Chamber during the hearing on 1 April 2011 in

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<sup>224</sup> T-342-ENG, page 64, line 6 to page 65, line 7.

their final submissions the parties and participants are to identify the documents, or parts thereof, that are relied on, and to provide a sufficient explanation of relevance.

6. Similarly, the parts of the oral evidence relied on by the parties and participants and the documents relied on during the examination of witnesses must be clearly identified. There is a duty on the parties and participants to indicate the principal facts arising out of the oral evidence that are relied on, and to provide a sufficient explanation of relevance.<sup>225</sup>

97. These directions were not the subject of objection or suggested variation. The Chamber has focussed particularly on the matters raised by the parties and participants in their closing submissions, and it reviewed other items of evidence as appropriate.

98. Article 74(2) of the Statute directs the Chamber to “base its decision only on evidence submitted and discussed before it at the trial”. In the Chamber’s view, the phrase “discussed before it at the trial” encompasses not only the oral testimony, together with any documents and other items, such as video recordings, that were “discussed” during the hearings, but also any items of evidence that were “discussed” in the written submissions of the parties and the participants at any stage during the trial (*e.g.* documents introduced by counsel pursuant to a written application). The key is that the evidence upon which the Chamber bases its Article 74 Decision must have been introduced during the trial and have become part of the trial record, through the assignment of an evidence (EVD) number.

99. Article 74(2) of the Statute must also be read in conjunction with Article 69(4), which provides that:

The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of

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<sup>225</sup> ICC-01/04-01/06-2722.

Procedure and Evidence.

100. The Appeals Chamber has held that Article 69(4) of the Statute is a mandatory provision that requires the Trial Chamber to rule on the admissibility of each item of submitted evidence “at some point in the proceedings”.<sup>226</sup> The determination of admissibility is to be made in light of “the relevance, probative value and the potential prejudice of each item of evidence”.<sup>227</sup>

101. The combined effect of Articles 69(4) and 74(2) of the Statute is that the Chamber’s Article 74 Decision is to be based only on evidence that (i) has been “submitted”; (ii) has been “discussed [...] at trial”, in the sense that it is part of the trial record; and (iii) has been found to be admissible by the Chamber.<sup>228</sup> In reaching its verdict, the Chamber has considered only the materials that satisfy these three criteria.

*Oral Evidence*

102. When evaluating the oral testimony of a witness, the Chamber has considered the entirety of the witness’s account; the manner in which he or she gave evidence; the plausibility of the testimony; and the extent to which it was consistent, including as regards other evidence in the case. The Chamber has assessed whether the witness’s evidence conflicted with prior statements he or she had made, insofar as the relevant portion of the prior statement is in evidence. In each instance the Chamber has evaluated the extent and seriousness of the inconsistency and its impact on the overall reliability of the witness.

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<sup>226</sup> *The Prosecutor v. Bemba*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 3 May 2011, ICC-01/05-01/08-1386, para. 37.

<sup>227</sup> ICC-01/05-01/08-1386, para. 37; see also Article 69(4) of the Statute.

<sup>228</sup> Rule 64(3) of the Rules (“Evidence ruled irrelevant or inadmissible shall not be considered by the Chamber”).

103. The Chamber has made appropriate allowance for any instances of imprecision, implausibility or inconsistency, bearing in mind the overall context of the case and the circumstances of the individual witnesses. For example, the charges relate to events that occurred in 2002 and 2003. Memories fade, and witnesses who were children at the time of the events, or who suffered trauma, may have had particular difficulty in providing a coherent, complete and logical account. There are other potential reasons why a witness's evidence may have been flawed and the Chamber, when assessing his or her testimony, has taken these considerations into account and they are reflected in its overall assessment of the account in question.

104. In certain instances, the Chamber has not relied on part of a witness's account whilst accepting other aspects of his or her evidence, thereby acknowledging that it is possible for a witness to be accurate on some issues and unreliable on others. Nonetheless, when the Chamber rejected part of a witness's testimony, it has invariably considered the impact of that decision as regards the reliability of the remainder of the individual's evidence.

105. The Chamber called a psychologist who gave expert testimony on the psychological impact of a child having been a soldier and the effect of trauma on memory.<sup>229</sup> This provided useful background evidence when the Chamber assessed the accounts of the individuals in this category.

106. The Chamber has considered the individual circumstances of each witness, including his or her relationship to the accused, age, vulnerability, any involvement in the events under consideration, the

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<sup>229</sup> See T-166-ENG and EVD-CHM-00001 and EVD-CHM-00002.

risk of self-incrimination, possible prejudice for or against the accused and motives for telling the truth or providing false testimony.

*Evidence other than direct oral evidence*

107. The Rome Statute framework provides the Chamber with a considerable degree of flexibility as regards the evidence it receives, as analysed by the Chamber in its Decision on the admissibility of four documents:<sup>230</sup>

19. There are four key factors arising from the provisions contained within the statutory framework which provide the necessary starting-point for an investigation of the Trial Chamber's general approach to this issue (*the admissibility of evidence other than direct oral evidence*).

20. First, the chamber's statutory authority to request the submission of all evidence that it considers necessary in order to determine the truth: Article 69(3).

21. Second, the Chamber's obligation to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused: Article 64(2).

22. Third, although the Rome Statute framework highlights the desirability of witnesses giving oral evidence - indeed, the first sentence of Article 69(2) requires that "[t]he testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or the Rules of Procedure and Evidence" - the second and third sentence of Article 69(2) provide for a wide range of other evidential possibilities: "[t]he Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused." Therefore, notwithstanding the express reference to oral evidence from witnesses at trial, there is a clear recognition that a variety of other means of introducing evidence may be appropriate. Article 68, which is expressly referred to in the first sentence of Article 69(2) as providing instances when there may be a departure from the expectation of oral evidence, deals directly with the particular exigencies of trials before the ICC, and most particularly there is an express recognition of the potential vulnerability of victims and witnesses, along with the servants and agents of a State, which may require "special means" to be used for introducing evidence. The Court is enjoined to

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<sup>230</sup> ICC-01/04-01/06-1399-Corr, 13 June 2008 (corrigendum issued on 20 January 2011).

consider the range of possibilities that exist to afford protection, subject always to the rights of the accused and the need for the trial to be fair and impartial.

23. Fourth, Article 69(4) of the Statute confers on the Chamber a broad power to make decisions as regards evidence: "[t]he Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of witness, in accordance with the Rules of Procedure and Evidence" and by Article 64(9) the Trial Chamber has the power to "[r]ule on the admissibility or relevance of any evidence." Therefore, the Court may rule on the relevance or admissibility of evidence, and Rule 63(2) provides that "[a] Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9 to assess freely all evidence". It follows that the Chamber has been given a wide discretion to rule on admissibility or relevance and to assess any evidence, subject to the specified issues of "fairness".

24. Therefore, summarising these four key factors, the drafters of the Statute framework have clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited - at the outset - the ability of the Chamber to assess evidence "freely". Instead, the Chamber is authorised by statute to request any evidence that is necessary to determine the truth, subject always to such decisions on relevance and admissibility as are necessary, bearing in mind the dictates of fairness. In ruling on admissibility the Chamber will frequently need to weigh the competing prejudicial and probative potential of the evidence in question. It is of particular note that Rule 63(5) mandates the Chamber not to "apply national laws governing evidence". For these reasons, the Chamber has concluded that it enjoys a significant degree of discretion in considering all types of evidence. This is particularly necessary given the nature of the cases that will come before the ICC: there will be infinitely variable circumstances in which the court will be asked to consider evidence, which will not infrequently have come into existence, or have been compiled or retrieved, in difficult circumstances, such as during particularly egregious instances of armed conflict, when those involved will have been killed or wounded, and the survivors or those affected may be untraceable or unwilling - for credible reasons - to give evidence.

108. With evidence other than direct oral evidence, the Chamber has made allowance for the potential problems that accompany any lack of opportunity to question the individual(s) who originally supplied the information. The extent to which this is relevant and may cause prejudice depends on the nature and circumstances of the particular evidence. The situations (as indicated in the preceding quotation) are infinitely variable and the Chamber has approached this issue on a



case-by-case basis.

109. With documents, the Chamber has assessed the contents of the particular document, its provenance and any other relevant material. To the extent known, the Chamber has considered the document's author, as well as his or her role in the relevant events and the chain of custody from the time of the document's creation until it was submitted to the Chamber. The indicia of reliability have been assessed on a broad basis and the Chamber has borne in mind that a document, although authentic, may be unreliable.

#### *Corroboration*

110. Rule 63(3) of the Rules prohibits the Chamber from "impos[ing] a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court". The extent to which a piece of evidence, standing alone, is sufficient to prove a fact at issue is entirely dependent on the issue in question and the strength of the evidence. Accordingly, once again the Chamber has adopted a case-by-case approach.

#### *Circumstantial Evidence*

111. Nothing in the Rome Statute framework prevents the Chamber from relying on circumstantial evidence. When, based on the evidence, there is only one reasonable conclusion to be drawn from particular facts, the Chamber has concluded that they have been established beyond reasonable doubt.<sup>231</sup>

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<sup>231</sup> *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 3 February 2010, ICC-02/05-01/09-73, para. 33.

*Expert Witnesses*

112. When assessing the testimony of expert witnesses, the Chamber has considered factors such as the established competence of the particular witness in his or her field of expertise, the methodologies used, the extent to which the findings were consistent with other evidence in the case and the general reliability of the expert's evidence.

*Interpretation and Translation*

113. Simultaneous interpretation has been used throughout the trial because the evidence in this case was given in a number of different languages. While this has generally been of an appropriate standard, on some occasions concerns were expressed as to its accuracy.<sup>232</sup> Following a breakdown of the recording equipment during the trial, the Registry introduced various measures to ensure the interpretation was correct, and it conducted a full revision of a large number of the Swahili transcripts.<sup>233</sup> While no complaint was made in the final submissions regarding the accuracy of the interpretation, the Chamber has borne in mind that this was a problem that needed to be addressed on a number of occasions.

114. In addition, the Chamber has borne in mind the difficulties that sometimes arose when interpreting or understanding particular words, such as the names of people and places.

*Protective Measures*

115. Measures to protect the identity of many of the witnesses in this

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<sup>232</sup> See, e.g., Decision on discrepancies between the English and the French Transcripts and related issues, 18 June 2009, ICC-01/04-01/06-1974.

<sup>233</sup> See, e.g., Registry report to the Chamber on Swahili interpretation matters, 11 May 2010, ICC-01/04-01/06-2431 (reclassified as "public" on instruction of Trial Chamber I dated 17 May 2010).

case were ordered by the Chamber due to concerns for their personal safety or that of their families.<sup>234</sup> For similar reasons, many witnesses are referred to in this Judgment by number rather than by name and certain details that might reveal their identities have been omitted. It is to be emphasised that whenever the Chamber ordered protective measures for witnesses, the parties and participants were aware of the relevant identifying information.

116. To ensure the effectiveness of the protective measures ordered by the Chamber, testimony was frequently heard in “private session”, which the public was unable to follow. Pursuant to Articles 64(7) and 67(1) of the Statute, the Chamber has instructed the parties and, to the extent necessary, the participants to undertake a comprehensive review of the transcripts of the closed-session testimony, and it has ordered the public reclassification of any portions that do not contain information which may create a security risk. Confidential information has been included to the greatest extent possible in this Judgment, whilst avoiding creating any security risks, and in some instances it has been necessary to cite the parties’ submissions rather than the relevant transcript references.

117. In addition to the in-court protective measures discussed above, the Chamber authorised redactions to certain documents, which the parties requested in order to protect various categories of sensitive information. These redactions were reviewed by the Chamber and some were lifted during the course of the trial. The Chamber is satisfied that no further disclosure is possible under the present circumstances.

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<sup>234</sup> All expert witnesses testified without protective measures, as did 7 prosecution witnesses and 14 defence witnesses.

*The Accused's Statement*

118. The accused chose not to testify under oath, as is his right under Article 67(1)(g) of the Statute. No adverse inference has been drawn from this decision. The accused opted to make an unsworn statement to the Chamber in accordance with Article 67(1)(h) of the Statute.<sup>235</sup>

*The defence challenge to the entirety of the prosecution's evidence*

119. In its final submissions, the defence asserts that the prosecution failed to fulfil its obligations as regards disclosure and to investigate exculpatory circumstances, arguing that these suggested failures “impair the reliability of the entire body of evidence presented at trial by the Prosecution” to such an extent that it cannot support findings “beyond all reasonable doubt”.<sup>236</sup> The prosecution argues that it met its disclosure and investigative obligations, and it is submitted that the proceedings have not been vitiated in the manner complained of.<sup>237</sup>

120. The Chamber is unpersuaded by the suggested violations of the prosecution's statutory duties, particularly since the Chamber took measures throughout the trial to mitigate any prejudice to the defence whenever these concerns were expressed. Additionally, the Chamber kept these obligations on the part of the prosecution permanently under review.

121. Throughout the trial, the Chamber addressed any potential prejudice to the accused arising from incomplete or late disclosure.

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<sup>235</sup> T-357-ENG, page 48, line 16 to page 49, line 19.

<sup>236</sup> ICC-01/04-01/06-2773-Red-tENG, paras 13-18.

<sup>237</sup> ICC-01/04-01/06-2778-Red, paras 108-110.

Taking incomplete disclosure first, amongst other measures, the Trial Chamber stayed the proceedings on two occasions when it concluded that the lack of disclosure rendered a fair trial impossible.<sup>238</sup> When the prosecution invoked Article 54(3)(e) of the Statute as a basis for non-disclosure of certain materials, the Chamber ordered the disclosure of alternative evidence or summaries, in order to prevent any unfairness to the accused.<sup>239</sup>

122. Late disclosure was addressed in a number of other ways. For example, following the disclosure of documents relevant to the questioning of witness P-581 after his testimony had finished, the Chamber granted the defence request for the witness to be recalled.<sup>240</sup> Another example is provided by the prosecution's late disclosure of documents in early 2011. On that occasion, even though the agenda for closing submissions had been set, the Chamber indicated to the defence that it would be permitted to raise this issue if it "considered that there are consequences that need to be addressed evidentially following any order of disclosure that we make".<sup>241</sup>

123. Whenever violations of the prosecution's statutory obligations have

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<sup>238</sup> See Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution for the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401; *see also* Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with VWU, 8 July 2010, ICC-01/04-01/06-2517-Conf. A public redacted version was issued on 8 July 2010, ICC-01/04-01/06-2517-Red.

<sup>239</sup> Reasons for Oral Decision lifting the stay of proceedings, 23 January 2009, ICC-01/04-01/06-1644, and Decision issuing Annex accompanying Decision lifting the stay of proceedings of 23 January 2009, 23 March 2009, ICC-01/04-01/06-1803.

<sup>240</sup> T-310-Red2-ENG, page 69, line 13 to page 70, line 7 and T-316-ENG, page 9, lines 13 – 19 and page 11, lines 17 – 22; *see also* T-326-ENG, page 3, line 3 to page 4, line 5; page 6, line 12 to page 7, line 12 and page 9, lines 3 – 11 (ordering the prosecution to provide a report on disclosure-related issues following the late disclosure of a document relating to witness P-0031); Decision on the prosecution's disclosure obligations arising out of an issue concerning witness DRC-OTP-WWWW-0031, 7 December 2010, ICC-01/04-01/06-2656-Conf. A public redacted version was issued on 20 January 2011, ICC-01/04-01/06-2656-Red.

<sup>241</sup> T-352-Red-ENG, page 17, line 24 to page 18, line 17.

been demonstrated, the Chamber has evaluated whether, and to what extent, they affect the reliability of the evidence to which they relate. In each instance, any problems that have arisen have been addressed in a manner which has ensured the accused has received a fair trial.

## VI. THE DEVELOPMENT OF THE PROSECUTION'S INVESTIGATION

124. Given the specific circumstances of the case, and in particular the defence submissions that the reliability of the entire body of prosecution evidence is affected,<sup>242</sup> the Chamber has set out the history to the investigations extensively in order to demonstrate the extent of the problems the investigators faced and the background to the considerable reliance that the prosecution placed on certain intermediaries (as addressed in a later section).

### A. THE OPENING OF THE INVESTIGATION

125. The investigation by the Office of the Prosecutor was opened on 23 June 2004, following the referral of the case from the DRC.<sup>243</sup> In the Decision on Intermediaries, the Chamber ordered the prosecution to call an appropriate representative "to testify as to the approach and the procedures applied to intermediaries".<sup>244</sup> As a result, Bernard Lavigne (P-0582), who had been recruited to lead the relevant investigation team,<sup>245</sup> and one of the investigators, Nicolas Sebire (P-0583), were called to give evidence. Although they were not necessarily accurate on every issue, the Chamber found both of these witnesses to be essentially reliable, and unless the contrary is indicated, the Chamber has accepted their testimony (as set out

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<sup>242</sup> ICC-01/04-01/06-2773-Red-tENG, paras 1 – 18.

<sup>243</sup> Prosecution's Response to the Defence's « Requête de la Défense aux fins d'arrêt définitif des procédures », 31 January 2011, ICC-01/04-01/06-2678-Conf (public redated version filed 29 March 2011, ICC-01/04-01/06-2678-Red), para. 1.

<sup>244</sup> ICC-01/04-01/06-2434-Red2, para. 146.

<sup>245</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 7, line 23 to page 9, line 8 and page 13, line 2 to page 14, line 20.

below).<sup>246</sup>

## B. THE CREATION OF THE TEAM

126. The Deputy Prosecutor decided the investigation team for the DRC was to be led by a francophone magistrate,<sup>247</sup> in order to provide “legal control” of their work so as to avoid some of the difficulties encountered at other similar institutions,<sup>248</sup> and the Prosecutor appointed P-0582 as the “team leader” (*chef d’enquête, responsable d’équipe*).<sup>249</sup> His first task was to recruit a team,<sup>250</sup> given that when he arrived in June 2004 there were only two people working on the case.<sup>251</sup> Overall, approximately 12 team members were recruited.<sup>252</sup> They included individuals who had worked for various non governmental organisations (“NGOs”),<sup>253</sup> or who had other experience in the field of international justice<sup>254</sup> and human rights.<sup>255</sup>

127. Between 2004 and 2007,<sup>256</sup> P-0582 focussed, *inter alia*, on the

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<sup>246</sup> This conclusion is equally relevant to the sections in which the evidence of P-0582 and P-0583 is set out below.

<sup>247</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 13, lines 11 – 14.

<sup>248</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 13, lines 15 – 19.

<sup>249</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 13, lines 5 – 7.

<sup>250</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 14, line 12.

<sup>251</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 14, lines 14 – 16.

<sup>252</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 16, lines 14 – 16.

<sup>253</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 37, line 23; Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 42, lines 14 – 18; Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 42, lines 18 – 20.

<sup>254</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 42, lines 21 – 22.

<sup>255</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 42, lines 23 – 24.

<sup>256</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 8, lines 12 – 21.



protection of witnesses,<sup>257</sup> and he set up a protection programme within the OTP.<sup>258</sup>

128. Michael De Smedt was P-0582's direct supervisor, and he reported to the Prosecutor of the Court.<sup>259</sup>

### C. THE INITIAL PROCESS OF GATHERING EVIDENCE

129. The process of gathering evidence began following P-0582's arrival at the Court.<sup>260</sup> He indicated that they verified or cross-checked the material already in their possession against "open sources", as well as by reference to items on the internet and other general documentation.<sup>261</sup> They were assisted in the task of gathering and analysing this information by the technical and logistical support section.<sup>262</sup> They received several reports and documents about the DRC,<sup>263</sup> including from well-known international,<sup>264</sup> and various local, NGOs.<sup>265</sup> However, P-0582 was surprised by the differences between the reports from the NGOs and the situation that confronted the investigation team during its work.<sup>266</sup>

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<sup>257</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 13, line 25 to page 14, line 2.

<sup>258</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 14, lines 16 – 17.

<sup>259</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 14, lines 22 – 23.

<sup>260</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 17, lines 13 – 14.

<sup>261</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 17, lines 14 – 19.

<sup>262</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 17, lines 20 – 22.

<sup>263</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 17, lines 22 – 25.

<sup>264</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 18, lines 1 – 3.

<sup>265</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 18, lines 3 – 5.

<sup>266</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 47, lines 14 – 18.

130. P-0582 in an interview with the War and Peace Institute<sup>267</sup> stated the following:

[...] Investigators also sometimes find it difficult to corroborate information provided by human rights groups who are eager to call international attention to crises. The gap between the assessment of the human rights groups and the evidence was sort of a surprise," says Mr Lavigne, a French magistrate and former police detective, who heads the Congo investigation team. Mr Pace considered that "human rights and humanitarian organizations are lousy criminal investigators. They are not producing forensic evidence that can be used by a prosecutor."<sup>268</sup>

131. P-0582 confirmed that this reflects what he said.<sup>269</sup> As regards the comments of William R. Pace,<sup>270</sup> the Coalition for the ICC convenor, P-0582 said that although he would not go so far as to say that humanitarian groups are "lousy" investigators, nonetheless investigations carried out by humanitarian groups, in his opinion, are more akin to general journalism than a legal investigation.<sup>271</sup>

132. P-0583 stated that at the beginning of their work, the only information available to the investigation team was an analysis of the DRC prepared by the OTP, which included a list of potential incidents.<sup>272</sup> This information related specifically to the Ituri region of the DRC.<sup>273</sup>

133. In particular, documentary material was not available to the investigators, especially in the first months, which would have enabled them to understand the geographical and historical context of

<sup>267</sup> EVD-D01-00774 is the relevant article from the Wall Street Journal.

<sup>268</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 46, lines 14 – 20.

<sup>269</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 46, line 23.

<sup>270</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 47, lines 5 – 6.

<sup>271</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 47, lines 6 – 9.

<sup>272</sup> T-334-Red2-ENG, page 11, lines 4 – 14.

<sup>273</sup> T-334-Red2-ENG, page 11, lines 15 – 17.

the issues they were dealing with. However, they participated in meetings aimed at providing information about the country. A regional expert offered some minimal information and the MONUC reports on the situation were reasonably precise.<sup>274</sup> Debriefings followed the first reports of the missions.<sup>275</sup> Therefore, from the outset there were informal mechanisms for passing on information regarding the situation in Ituri, both then and earlier.<sup>276</sup>

134. The investigative team was subject to significant pressure, including from within the OTP as well as the Court more generally, because it was felt necessary to make progress.<sup>277</sup> The first major group of reports were analysed in 2004.<sup>278</sup>

135. The initial missions were very difficult for a number of reasons,<sup>279</sup> but most particularly because of the lack of external support for the Court's activities in the field.<sup>280</sup> At a local level, various UN agencies helped the investigation team.<sup>281</sup> However, there were contradictions and inconsistencies in the approach of the UN that created real problems for the OTP's investigators, and when assistance was sought the UN sometimes declined or imposed excessive constraints.<sup>282</sup>

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<sup>274</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 53, line 22 to page 54, line 6.

<sup>275</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 54, lines 7 – 9.

<sup>276</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 54, lines 9 – 11.

<sup>277</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 54, line 23 to page 55, line 3.

<sup>278</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 55, line 4.

<sup>279</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 23, lines 2 – 4.

<sup>280</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 23, lines 5 – 8.

<sup>281</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 23, lines 8 – 12.

<sup>282</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 23, lines 12 – 24.

Because of these difficulties, it was impossible to find witnesses quickly,<sup>283</sup> and the team was unable to provide them with security.<sup>284</sup> Nonetheless, following the first exploratory missions, they gathered information, documentation and the names of certain potential witnesses,<sup>285</sup> and the UN frequently provided assessments to the investigative teams.<sup>286</sup>

#### D. THE FOCUS OF THE INVESTIGATION

136. By 2004 the emerging focus was Ituri:<sup>287</sup> the OTP analysts proposed (and the Prosecutor accepted) that they should work particularly in this region of eastern Congo.<sup>288</sup> Therefore, although the OTP continued to consider other provinces within the DRC, this is where the investigative team began working.<sup>289</sup> However, the relevant documentation arrived in a piecemeal fashion.<sup>290</sup>

137. P-0582 gave evidence that they identified the militia groups that appeared to bear responsibility for acts of violence within the jurisdiction of the Court.<sup>291</sup> At the relevant time, there were a number of different groups. Some were set up on the initiative of particular individuals; others were created by neighbouring countries or were

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<sup>283</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 23, line 25 to page 24, line 1.

<sup>284</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 24, lines 1 – 2.

<sup>285</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 24, lines 3 – 4.

<sup>286</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 36, lines 18 – 20.

<sup>287</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 55, lines 4 – 8.

<sup>288</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 19, lines 9 – 14.

<sup>289</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 55, lines 8 – 19.

<sup>290</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 55, lines 19 – 24.

<sup>291</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 20, lines 1 – 4.

the result of splits within the militias.<sup>292</sup> However, in his view, the only militias were, in essence, the UPC<sup>293</sup> (primarily drawn from the Hema population),<sup>294</sup> the *Front des Nationalistes Intégrationnistes* (“FNI”) and the *Force de Résistance Patriotique en Ituri* (“FRPI”) (comprising, in the main, members of the Lendu community and some Alur).<sup>295</sup>

138. Individuals were recruited from particular ethnic groups,<sup>296</sup> and P-0582 suggested that they committed acts of violence of all types, including pillage and murder.<sup>297</sup> The armed groups created systematic insecurity,<sup>298</sup> and different militias controlled the various regions within Ituri.<sup>299</sup> For instance, Mudzipela was a Hema-dominated neighbourhood to which the UPC had easier access than other armed groups, and therefore P-0582 considered it was highly probable that UPC soldiers contributed to the prevailing insecurity.<sup>300</sup>

139. Ultimately they decided to focus on two specific militia groups,<sup>301</sup> the UPC and the FNI/FRPI, and the first mission to Bunia took place in September 2004.<sup>302</sup>

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<sup>292</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 26, lines 1 – 6.

<sup>293</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 26, lines 8 – 9.

<sup>294</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 26, lines 13 – 14.

<sup>295</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 26, lines 10 – 12.

<sup>296</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 26, lines 15 – 17.

<sup>297</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 26, lines 17 – 19.

<sup>298</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 36, lines 8 – 10.

<sup>299</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 36, lines 14 – 15.

<sup>300</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 36, lines 10 – 13.

<sup>301</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 20, lines 3 – 4.

<sup>302</sup> T-334-Red2-ENG, page 11, lines 15 – 23.

140. P-0582 said that they travelled to Kinshasa as part of an official visit, during which they began meeting various people who were potentially useful for their investigations.<sup>303</sup> They were unable to visit east Congo,<sup>304</sup> but they received assurances as to collaboration by the DRC,<sup>305</sup> and they met field officers from MONUC.<sup>306</sup>

141. They acted under the requirement imposed on the prosecution by the Statute to investigate both incriminating and exculpatory evidence,<sup>307</sup> and they exercised a degree of caution about the documents they received, given their role was not the same as that of representatives of NGOs.<sup>308</sup>

142. P-0582 suggested that although they began working in 2004, they did not discover any material to justify an investigation before 2005.<sup>309</sup> There was a degree of international and local pressure, once it was known that officials from the Court had arrived in the country.<sup>310</sup> The OTP needed to carry out its investigations, notwithstanding the continued presence of the militias in Ituri in 2004<sup>311</sup> (*e.g.* in Bunia there were militias in some of the neighbourhoods), and the UN did not

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<sup>303</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 18, lines 18 – 21.

<sup>304</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 18, lines 18 – 19.

<sup>305</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 18, lines 23 – 24.

<sup>306</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 18, lines 24 – 25.

<sup>307</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 20, lines 14 – 19.

<sup>308</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 20, line 20 to page 21, line 2.

<sup>309</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 21, lines 10 – 12.

<sup>310</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 21, lines 13 – 15.

<sup>311</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 21, lines 15 – 17.

consistently maintain peace throughout the territory.<sup>312</sup> The first missions encountered considerable difficulties because arrangements for their arrival had not been put in place.<sup>313</sup>

143. They met activists, including certain “militant activists”, during their initial mission who wanted to provide information, and this led them to identify the first intermediaries.<sup>314</sup> It follows that from the outset they selected individuals who could assist with potential witnesses, because direct contact was not always possible.<sup>315</sup> Furthermore, given the security issues for the witnesses, the prosecution rapidly decided that it was necessary to use intermediaries (this issue is addressed in considerably greater detail hereafter).<sup>316</sup>

144. In 2005 the investigation teams began to determine their objectives, although these varied because of changes in the choices of the OTP and the way in which it conducted its cases<sup>317</sup> (as a result, inconsistent requests were made to the investigators) and it was difficult for them to determine clear goals, along with the means to attain them.<sup>318</sup> P-0582 suggested that the OTP hesitated in formulating its objectives and the steps to be taken to attain them.<sup>319</sup> On occasion, the investigators

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<sup>312</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 21, lines 17 – 19.

<sup>313</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 22, lines 7 – 9.

<sup>314</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 22, lines 14 – 20.

<sup>315</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 22, line 21 to page 23, line 1.

<sup>316</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 22, line 24 to page 23, line 1. See, paras 151 to 168.

<sup>317</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 24, lines 8 – 10.

<sup>318</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 24, lines 10 – 24.

<sup>319</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 24, lines 20 – 24.

focussed on a single militia or a single incident whereas, at other times, they concentrated on several militias or the use of children generally.<sup>320</sup>

145. However, eventually a decision was made to pursue a principal charge and thereafter the investigation teams knew exactly what had to be done, and they were able to investigate and identify the potential witnesses.<sup>321</sup> Their first objective was to ensure the safety of these individuals.<sup>322</sup>

146. P-0582 did not recall when the Prosecutor decided to prosecute Thomas Lubanga for child-soldier-related offences,<sup>323</sup> although the witness remembered there was a meeting when it was decided that they would only try to prosecute the accused on this basis,<sup>324</sup> following an evaluation of the available documentation.<sup>325</sup> The analysts concluded that Ituri during the relevant period was where the most significant acts of violence had occurred, for which up to three militias were responsible.<sup>326</sup>

147. At the time of the investigations, UN agencies had received information to the effect that some individuals were falsely presenting themselves at demobilisation centres as former child soldiers from the militias in order to join the reintegration programme.<sup>327</sup> The

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<sup>320</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 28, lines 8 – 23.

<sup>321</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 24, line 25 to page 25, line 3.

<sup>322</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 25, lines 3 – 8.

<sup>323</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 29, lines 20 – 23.

<sup>324</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 29, lines 23 – 25.

<sup>325</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 30, lines 4 – 6.

<sup>326</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 30, lines 6 – 12.

<sup>327</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 13, lines 13 – 22.



investigation team was aware that the militias often included very young people, although P-0582 was not personally aware of individuals having falsely claimed that they had been child soldiers in the militias.<sup>328</sup> Nonetheless, the witness acknowledged that it became known in Bunia that a threatened witness might be relocated and some individuals treated this as an opportunity to secure free re-housing.<sup>329</sup>

#### **E. THE DETAILED PROCESS OF GATHERING EVIDENCE**

148. The interviews with witnesses in Bunia did not start before 2005.<sup>330</sup>

The investigators in the field were responsible for identifying witnesses and they visited various locations in order to gather information, by way of a screening exercise which required taking statements.<sup>331</sup>

149. The screened information was provided to the analysts,<sup>332</sup> together with a broader team within the OTP. These individuals were responsible for determining whether a statement should be taken (leading potentially to testimony before the Court) and assessing the status of the individual.<sup>333</sup> If someone became a suspect, his or her rights were protected by securing the assistance of counsel, in

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<sup>328</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 13, line 22 to page 14, line 7.

<sup>329</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 41, lines 17 – 20.

<sup>330</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 33, lines 22 – 23.

<sup>331</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 5, lines 7 – 11.

<sup>332</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 5, lines 11 – 13.

<sup>333</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 5, lines 14 – 19.

accordance with Article 55(2) of the Statute.<sup>334</sup>

150. After the screening process, the investigators and the Prosecutor's team considered whether to call the witness at trial.<sup>335</sup> If it was decided the individual should testify, there would be a further, longer interview.<sup>336</sup>

## F. SECURITY ISSUES

151. During 2004 and 2005, the security situation in Bunia and the rest of Ituri evolved in an inconsistent manner.<sup>337</sup> During P-0582's first visit to Bunia, he heard gunfire from AK-47s in the neighbourhood of Mudzipela;<sup>338</sup> indeed, every evening during the course of that mission he was aware of the sound of shooting.<sup>339</sup>

152. MONUC was operating in Bunia: it conducted security assessments and it liaised with the investigators on the security situation.<sup>340</sup> Their ability to go outside the central UN base was limited, both in order to leave Bunia and to travel at night.<sup>341</sup> P-0582 was told by his contacts within the justice system and the police force that armed groups were still active, particularly on the outskirts of Bunia and more generally

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<sup>334</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 5, lines 20 – 24.

<sup>335</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 76, lines 1 – 4.

<sup>336</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 76, lines 9 – 11.

<sup>337</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 34, lines 10 – 13.

<sup>338</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 34, lines 15 – 17.

<sup>339</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 34, lines 18 – 19.

<sup>340</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 34, lines 24 – 25.

<sup>341</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 34, line 25 to page 35, line 4.

within Ituri.<sup>342</sup> P-0583 indicated that according to intelligence received from the MONUC security forces, the UPC and FRPI militia forces were still active in those areas and that violent incidents had occurred at the beginning of 2005.<sup>343</sup>

153. P-0582 gave evidence that armed groups established roadblocks on the routes linking Bunia with the other towns or with the border, where they collected “taxes”.<sup>344</sup> This hindered – indeed, effectively stopped – the delivery of supplies by road.<sup>345</sup> P-0583 provided a broadly similar account.<sup>346</sup> He indicated that the security situation had a marked impact on the office’s ability to undertake its work because it was impossible for the team to go to the villages and meet with potential witnesses, and there were limited meeting places.<sup>347</sup> P-0583 said the only way of contacting these individuals was to rely on intermediaries.<sup>348</sup>

154. The serious security situation affected the investigators’ duty of protection.<sup>349</sup> P-0582 indicated that operating in an open way was effectively impossible because the local population and the press were aware of the arrival of investigators from the Court and the nature of their work.<sup>350</sup> Any foreigner seen in Bunia was assumed to be from the

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<sup>342</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 35, lines 5 – 7.

<sup>343</sup> T-334-Red2-ENG, page 12, lines 18 – 25.

<sup>344</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 35, lines 8 – 11.

<sup>345</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 35, lines 11 – 12.

<sup>346</sup> T-334-Red2-ENG, page 11, line 24 to page 12, line 7.

<sup>347</sup> T-334-Red2-ENG, page 13, lines 1 – 8.

<sup>348</sup> T-334-Red2-ENG, page 15, lines 1 – 8.

<sup>349</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 35, lines 15 – 17.

<sup>350</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 37, lines 5 – 8.

ICC.<sup>351</sup> This made the investigators' job particularly delicate and it created risks. Indeed, they did everything possible to hide the fact that they were conducting an investigation.<sup>352</sup> Their position was made more problematic because the local population did not distinguish between officials from the Registry, the OTP and other sections from within the Court.<sup>353</sup>

155. P-0582 indicated that MONUC soldiers were attacked by militia groups and he estimated that more than twelve of its soldiers were killed "after skirmishes with the militia groups" in 2005.<sup>354</sup> MONUC soldiers accompanied the investigators on visits outside Bunia.<sup>355</sup> One of the investigators reported that his vehicle was hit by bullets during a mission to a village, when he was escorted by armoured vehicles from MONUC.<sup>356</sup> The investigators were at risk of being attacked during their investigations or of becoming involved in confrontations between MONUC troops, who accompanied regular Congolese soldiers of the *Forces Armées de la République Démocratique du Congo* ("FARDC"), and the armed opposition groups.<sup>357</sup> Therefore, the witness suggested that Bunia was insecure, particularly given the lack of a police force capable of maintaining law and order.<sup>358</sup> The work of the Court was not always welcome, which led to the risk of attacks on

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<sup>351</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 37, lines 11 – 14.

<sup>352</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 37, lines 20 – 23.

<sup>353</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 37, line 24 to page 38, line 3.

<sup>354</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 38, lines 7 – 9.

<sup>355</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 38, line 10.

<sup>356</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 38, lines 11 – 12.

<sup>357</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 38, lines 13 – 16.

<sup>358</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 38, lines 17 – 18.

investigators or their abduction.<sup>359</sup>

156. It was considered that all the witnesses – not just from the prosecution – were at risk, regardless of whether individual threats were credible.<sup>360</sup> Given these clear dangers, the witnesses quickly expressed their anxiety lest their identities or the fact that they were in contact with the investigators became known.<sup>361</sup> This led to the adoption of a very specific and rigorous policy for investigators and witnesses<sup>362</sup> – which slowed down the work of the OTP<sup>363</sup> – because the priority was their security.<sup>364</sup>

157. A team was established, called the GCU (the Gender and Children’s Unit),<sup>365</sup> which dealt with psychological support and other issues relating to witnesses.<sup>366</sup> However, P-0582 indicated that the Operational Support Unit (“OSU”) was specifically responsible for witness protection, although it did not become operational until mid 2005 as regards assessing security and witness protection.<sup>367</sup> P-0582 suggested that prior to its establishment, the OSU nonetheless existed in an early form with responsibilities that were limited to providing

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<sup>359</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 38, lines 21 – 25.

<sup>360</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 41, lines 13 – 15.

<sup>361</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 39, lines 7 – 11.

<sup>362</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 39, lines 11 – 12.

<sup>363</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 39, lines 18 – 20.

<sup>364</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 39, lines 20 – 21.

<sup>365</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 43, lines 1 – 3.

<sup>366</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 42, lines 3 – 4.

<sup>367</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 43, lines 9 – 13 and 16 – 17.

support for investigations in the field.<sup>368</sup>

158. The Victims and Witnesses Unit (“VWU”), as a unit of the Registry, was created at the outset,<sup>369</sup> and it worked with the prosecution’s investigation team in Bunia.<sup>370</sup> The system proposed by the investigators, if there were risks or threats to witnesses following an assessment into the security situation, was to react by way of an initial rapid response by the OTP followed by intervention on the part of the witness protection unit of the Registry.<sup>371</sup> P-0582’s work, particularly in 2006, was to resolve any difficulties between the OTP and the Registry as regards witness protection,<sup>372</sup> and there were some notable disagreements between the VWU and the OTP as to the protection to be provided to certain individuals.<sup>373</sup>

159. Several militias were investigated for threatening witnesses.<sup>374</sup> However, the real problem was not the threat from the various groups but rather the risk of an individual being identified by members of his or her community, village or family as having cooperated with the Court.<sup>375</sup> In particular, those who assisted were worried about being identified by the people they had spoken about,<sup>376</sup> given most of the

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<sup>368</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 43, lines 13 – 17.

<sup>369</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 43, lines 21 – 22.

<sup>370</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 43, lines 22 – 23.

<sup>371</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 44, lines 2 – 5.

<sup>372</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 44, lines 7 – 9.

<sup>373</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 44, lines 21 – 25.

<sup>374</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 46, lines 23 – 25.

<sup>375</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 47, lines 11 – 13.

<sup>376</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 47, lines 13 – 16.

witnesses mentioned the names of the militia leaders who did not want to be implicated.<sup>377</sup> The witnesses were at risk from these individuals, who were in a position to threaten them.<sup>378</sup>

160. The OTP did not normally contact the families of witnesses, given the danger that information would be provided to the political or military leaders who were still in Bunia,<sup>379</sup> thereby exposing the witness to the risk of immediate abduction.<sup>380</sup> Security became the primary concern of the investigation team.<sup>381</sup>

161. For similar reasons, the investigators did not go to the schools the children had allegedly attended and they did not try to secure any school records.<sup>382</sup> The Hema community in Bunia had a reputation as being the best educated and they ran well-organised schools.<sup>383</sup> The investigators did not want to raise the suspicions of the Hema intellectuals who may have had links with the political or military movements,<sup>384</sup> and the investigators would have been immediately identified if they had visited the neighbourhoods.<sup>385</sup>

162. There was no field office in 2004 and 2005 at the time when P-0582

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<sup>377</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 47, lines 17 – 22.

<sup>378</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 47, line 22 to page 48, line 3.

<sup>379</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 32, line 13 to page 33, line 6.

<sup>380</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 33, lines 1 – 3.

<sup>381</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 33, lines 8 – 11.

<sup>382</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 33, lines 12 – 23.

<sup>383</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 33, lines 15 – 19.

<sup>384</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 33, lines 20 – 21.

<sup>385</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 33, lines 21 – 23.

went to interview the first group of witnesses.<sup>386</sup> The office was set up over a period until it was fully operational in 2006.<sup>387</sup> At the outset, it was necessary, but not always easy, to find premises that were sufficiently discreet for meetings with the witnesses.<sup>388</sup> Until the field office was set up, the investigators identified a variety of different places for the interviews.<sup>389</sup> Churches were sometimes used, but caution had to be exercised because of the role of clergy in the political life in Ituri and the need not to attract attention,<sup>390</sup> and locations such as libraries, schools, deserted areas and rented houses were utilised.<sup>391</sup> Although the UN refused to provide space, the investigators nonetheless needed to be protected by an armed force such as MONUC.<sup>392</sup> Eventually, a solution was found.<sup>393</sup>

163. Some NGOs refused to cooperate with the Court,<sup>394</sup> whilst others were interested in assisting either informally or formally.<sup>395</sup> NGOs asked the investigators to treat the information they provided on a confidential basis.<sup>396</sup> Some representatives of the UN, in contrast with certain members of the organisation's hierarchy, provided the

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<sup>386</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 72, lines 14 – 18.

<sup>387</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 72, lines 18 – 19.

<sup>388</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 73, lines 2 – 3.

<sup>389</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 77, lines 5 – 7.

<sup>390</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 77, lines 8 – 11.

<sup>391</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 77, lines 12 – 15.

<sup>392</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 72, lines 20 – 22.

<sup>393</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 72, line 23 to page 73, line 1.

<sup>394</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 70, lines 16 – 23 and page 71, lines 3 – 4.

<sup>395</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 71, lines 4 – 6.

<sup>396</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 71, lines 7 – 9.



investigators with considerable assistance.<sup>397</sup>

164. The investigators relied on UN flights since they could not use the internal Congolese airlines.<sup>398</sup> At the beginning, they rented cars rather than utilise UN vehicles because the latter were immediately identifiable.<sup>399</sup> Eventually, the Court purchased vehicles similar in type to the sizeable number used by NGOs, which were unidentifiable.<sup>400</sup>

165. On average an investigator stayed in the field for ten days, although this varied because, for instance, some interviews lasted longer than others; on occasion the interviews were cancelled at the last minute; or a new witness needed to be interviewed urgently.<sup>401</sup> The investigators lost motivation given the absence of a field office and the need to find apartments,<sup>402</sup> which sometimes provided them with only a floor and a duvet, and no shower; these were not the best long-term conditions, although things improved considerably after the field office was built.<sup>403</sup>

166. The investigation teams tried to work in rotation. There was a team member in the field as frequently as possible during the first months,<sup>404</sup> but because there were only a few investigators it was not possible to have someone in the field permanently. This would have been the

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<sup>397</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 71, lines 9 – 13.

<sup>398</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 73, lines 6 – 9.

<sup>399</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 74, lines 18 – 21.

<sup>400</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 74, lines 21 – 25.

<sup>401</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 75, lines 3 – 6.

<sup>402</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 75, lines 8 – 10.

<sup>403</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 75, lines 10 – 13.

<sup>404</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 75, lines 14 – 16.

correct approach, according to P-0582.<sup>405</sup>

167. To summarise, from the outset of the investigation, human rights activists gave the investigators the names of potential witnesses, since they had “seen these people and they knew what they were going to say”.<sup>406</sup> Because of their long-term presence,<sup>407</sup> it was considered that the activists were better placed than the investigators, and particularly it did not cause any surprise when the activists spoke with representatives of MONUC or had discussions with villagers.<sup>408</sup> The investigators could not move about freely without being threatened<sup>409</sup> and witnesses were endangered if the investigators spoke directly with them. As a result, the investigating team or some of the activists suggested the latter should act as intermediaries.<sup>410</sup> Therefore, from early on, even with the assistance of the intermediaries, the investigators were restricted as to the timing and the location of any meetings,<sup>411</sup> and they had to act discreetly.<sup>412</sup> P-0583 gave evidence that the only solution to the security problem was to use intermediaries, who enabled the team to contact witnesses.<sup>413</sup>

168. The implications of the choices made in the course of the investigation are discussed as necessary in the relevant sections. Many

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<sup>405</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 75, lines 16 – 18.

<sup>406</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 48, lines 9 – 13.

<sup>407</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 48, lines 13 – 15.

<sup>408</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 48, lines 15 – 20.

<sup>409</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 48, lines 21 – 22.

<sup>410</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 48, line 22 to page 49, line 2.

<sup>411</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 49, lines 3 – 5.

<sup>412</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 49, lines 5 – 7.

<sup>413</sup> T-334-Red2-ENG, page 13, lines 9 – 11.

– although by no means all – of the evidential difficulties in this case as far as the prosecution is concerned have been the result of the involvement of three particular intermediaries (P-0143, P-0316 and P-0321), in the circumstances that are described below.

## G. DETERMINING THE AGES OF CHILDREN

169. A recurring issue in the context of this part of the evidence is whether some of the intermediaries encouraged a number of young witnesses to lie about aspects of their past, including their ages.

170. P-0582 indicated that at the relevant time, the civil administration in the DRC functioned only to a limited extent,<sup>414</sup> and the conditions the team were operating under were not ideal for establishing, with ease, the age of the alleged child soldiers.<sup>415</sup> This issue was the subject of ongoing internal discussions within the OTP as to the policy to be adopted for collecting evidence in this context.<sup>416</sup> P-0582, as an investigation leader, was not alone in considering that a prosecution forensic expert should be instructed immediately, in order to provide at least an approximate idea of age.<sup>417</sup> However, the Executive Committee within the OTP was of the view that the statements given by the witnesses sufficiently indicated that the relevant individuals were below 15 years of age.<sup>418</sup> It was also anticipated that confirmation would be provided in the interviews with the officers (or with others with responsibility) that there was general awareness that children

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<sup>414</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 14, lines 20 – 21.

<sup>415</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 14, line 22 to page 15, line 1.

<sup>416</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 15, lines 1 – 4.

<sup>417</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 15, lines 11 - 23.

<sup>418</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 15, line 21 to page 16, line 2.

under 15 years were involved.<sup>419</sup> P-0582 indicated that there was an important debate within the OTP on this problem once the forensic expert raised the issue at the very start of the investigations (at the end of 2004).<sup>420</sup>

171. When the investigators had finally identified 5 or 6 children who came within the classification of child soldiers on the basis of their statements, it was considered necessary to confirm their ages through objective evidence.<sup>421</sup> The investigators requested civil status documents, although they did not personally collect them from the relevant offices of the civilian administration in Bunia<sup>422</sup> (this issue is developed elsewhere).<sup>423</sup> A doctor saw the children,<sup>424</sup> and the investigators were informed that, within the Hema community, children could not be baptised before a certain age.<sup>425</sup>

172. Against the background that P-0582 was involved personally, as a team leader, with 5 or 6 alleged former child soldiers, it is important to note that the investigators did not speak with their families to arrange interviews with the children or their relatives.<sup>426</sup> The main concern of the investigators was the security of the children, particularly if they were attacked because of their contact with the investigators.<sup>427</sup>

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<sup>419</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 16, lines 3 – 5.

<sup>420</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 16, lines 6 – 9.

<sup>421</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 16, lines 14 – 17.

<sup>422</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 16, lines 17 – 23.

<sup>423</sup> See para. 173.

<sup>424</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 16, line 24.

<sup>425</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 17, lines 1 – 6.

<sup>426</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 17, lines 8 – 12.

<sup>427</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 17, lines 21 – 25.

Therefore, the policy of the OTP was to not meet with the families in order to avoid endangering them: it was feared that a member of the extended family might reveal to the militia leaders the identity of the individual who had provided the information.<sup>428</sup> This policy was applied to all the witnesses and it was only varied on an exceptional basis.<sup>429</sup>

173. P-0582 did not ask the village chiefs (*chefs de collectivité*) about the child soldiers, given their close association with the militias that were under investigation (although there were some discussions on other issues).<sup>430</sup> Additionally, the investigators did not request the files of the alleged child soldiers from the headmasters or directors of the relevant schools, in order to cross-check their ages.<sup>431</sup> However, Intermediary 143 (who was one of the principal intermediaries), in the context of the general problems relating to children, was asked by the investigators whether he was aware of school registers that listed the children, thereby potentially establishing whether individual children could be linked with particular classes of students within identified age ranges.<sup>432</sup> Intermediary 143 carried out some research and provided certain documents, which were photocopied.<sup>433</sup> He was directed not to try to obtain birth certificates from the Mayor's Office in Bunia or

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<sup>428</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 18, lines 5 – 9.

<sup>429</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 18, lines 15 – 18.

<sup>430</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 18, line 19 to page 19, line 7.

<sup>431</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 19, lines 12 – 15.

<sup>432</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 19, lines 16 – 24.

<sup>433</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 20, lines 3 – 7.

Mudzipela.<sup>434</sup> Instead, particular families were asked if birth certificates could be obtained, and, if so, Intermediary 143 requested them from the authorities, in order to pass these documents to the investigators.<sup>435</sup>

174. It is important to note that the prosecution was not seeking to verify whether particular children were listed in the relevant school registers; instead – bearing in mind that the Hema community was supposed to be better educated than other communities – they wanted to establish whether, at a particular age, a child would be in an identified class.<sup>436</sup> Therefore, P-0582 did not attempt to go to the schools where the relevant individuals had indicated they had been enrolled.<sup>437</sup>

175. The Independent Electoral Commission of the DRC (“IEC”), the body that issues voter I.D. cards, was set up during this time,<sup>438</sup> but, according to P-0582, it only provided the ages of parents rather than their children:<sup>439</sup> he suggested that children were not registered in the electoral lists.<sup>440</sup> The Chamber notes, however, that P-0582 was wrong in this regard, given the IEC documents containing their names shown to P-0007, P-0008, P-0010 and P-0294, which were introduced into evidence by the defence.<sup>441</sup> Moreover, the evidence before the Chamber

<sup>434</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 21, lines 5 – 8.

<sup>435</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 21, lines 8 – 12.

<sup>436</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 20, lines 13 – 17.

<sup>437</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 20, lines 17 – 21.

<sup>438</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 21, lines 15 – 16.

<sup>439</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 21, lines 16 – 18.

<sup>440</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 21, lines 18 – 19.

<sup>441</sup> Material from the Independent Electoral Commission relating to these witnesses were admitted into evidence by the Chamber’s decision ICC-01/04-01/06-2664-Conf of 17 December 2010 (a public redacted version was issued on 16 March 2011, ICC-01/04-01/06-2664-Red): EVD-D01-01005, EVD-

was that the investigators did not know the members of the electoral commission and they did not want to contact them in an indiscreet way.<sup>442</sup> Whilst acknowledging the difficult circumstances in the field at the time of the investigation, this failure to investigate the children's histories has significantly undermined some of the evidence called by the prosecution.

176. The prosecution relies on expert reports relating to the X-ray examination of bones and teeth, and it is suggested that these may help determine the age of witnesses P-0007, P-0008, P-0010, P-0011, P-0157, P-0213, P-0294, P-0297 and P-0298.<sup>443</sup> The defence submits that the experts recognised the limitations of assessing age in this way, and argues that it is necessary for the Chamber to approach this evidence with caution.<sup>444</sup> These examinations were not meant to determine a person's age with precision; furthermore, the model is based on European and American populations rather than those from Sub-Saharan Africa, and the methodology has not been updated for 50 years. Therefore, it is suggested this approach will only provide an

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D01-01006, EVD-D01-01025, EVD-D01-01026, EVD-D01-01027, EVD-D01-01028, EVD-D01-01030 and EVD-D01-01031. An earlier decision ICC-01/04-01/06-2596-Conf of 26 October 2010 had admitted into evidence another voting card (EVD-D01-00762). A public redacted version of this latter decision was issued on 17 November 2010 (ICC-01/04-01/06-2596-Red). The Chamber notes that the probative value of the material from the Independent Electoral Commission is disputed by the legal representative of victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06, who are P-0007, P-0008, P-0010, and P-0011 respectively. Counsel submits that the voting cards and the personal information contained in the database of the DRC Independent Electoral Commission lack probative value because, at the time in Ituri, the administrative procedures for issuing identity documents were seriously flawed and it was possible for anyone to obtain identity documents "containing information which may or may not have been accurate, at his or her convenience" (ICC-01/04-10/06-2744-Red-tENG, para. 33). Statements by witnesses P-0007, P-0008 and P-0010 on the circumstances of obtaining voting cards (with inaccurate information) were admitted into evidence by decision ICC-01/04-01/06-2694 of 2 March 2011 (corrigendum of the decision issued 9 March 2011, ICC-01/04-01/06-2694-Corr): EVD-OTP-00655, EVD-OTP-00658 and EVD-OTP-00660 with related material EVD-OTP-00656, EVD-OTP-00657 and EVD-OTP-00659.

<sup>442</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 21, lines 19 – 23.

<sup>443</sup> ICC-01/04-01/06-2748-Red, paras 358 and 359.

<sup>444</sup> ICC-01/04-01/06-2773-Red-tENG, paras 92 – 94.

approximate answer, particularly given it is not an exact science.<sup>445</sup> The Chamber accepts that this material needs to be treated with care, not least because analysis of this kind, based on X-rays, was principally developed to measure biological rather than chronological age.<sup>446</sup> Catherine Adamsbaum (P-0358), a forensic expert, stated that this means of measurement becomes less precise after 15 years of age,<sup>447</sup> and the extent of the range, or the margin, of error is uncertain.<sup>448</sup> There may be differences depending on ethnicity, and the Chamber accepts the evidence that “[...] the x-ray evaluation of a bone age is to be used with great caution. It is not a precise method, far from it, but it still can give us an indication as to the bone-maturation age of an individual.”<sup>449</sup> Socio-economic factors can also have an effect.<sup>450</sup> P-0358 testified that in this field “medical assessment is not an exact science”, and all estimates were based on age ranges.<sup>451</sup> There are no reasons for doubting the validity of this approach.

177. Furthermore, the Court notes that the prosecution invited the Chamber to draw conclusions as to the age of various witnesses when it had presented markedly contradictory evidence on this issue.<sup>452</sup> The

<sup>445</sup> ICC-01/04-01/06-2773-Red-tENG, paras 93 – 96.

<sup>446</sup> T-172-Red-ENG, page 88, line 17 to page 89, line 25.

<sup>447</sup> T-172-Red-ENG, page 90, lines 18 – 19.

<sup>448</sup> T-172-Red-ENG, page 91, lines 12 – 16.

<sup>449</sup> T-172-Red-ENG, page 92, lines 4 – 25.

<sup>450</sup> T-172-Red-ENG, page 93, lines 16 – 22.

<sup>451</sup> T-173-ENG, page 43, line 7 to page 44, line 5.

<sup>452</sup> For example, for P-0008, see EVD-OTP-00428, T-172-Red-ENG, page 47, line 7 *et seq.* The expert concluded that the witness was aged at least 19 on 5 December 2007 and was therefore born before December 1988, contrary to the witness’ account which was 1989 (T-135-Red3-ENG, page 64, lines 12 – 14). The prosecution relies on the evidence of this witness as to his age at ICC-01/04-01/06-2748-Red, para. 425. For P-0157, see EVD-OTP-00435, T-172-Red-ENG, page 53, lines 13-22: the expert report indicates the witness was born before December 1988 (thereby contradicting the witness who said he was born in 1991, see T-185-Red2-ENG, page 63, line 7). The prosecution relies on the evidence of this witness as to his age at ICC-01/04-01/06-2748-Red, para. 511. For P-0294, see EVD-OTP-00440 and T-172-Red-ENG, page 69, line 23 to page 70, line 11: the expert report indicates the witness was born before December 1989 (contradicting his testimony that he was born in 1991, see T-150-Red2-ENG, page 44, lines 13 – 14; T-151-Red2-ENG, page 53, lines 15 – 17). The prosecution relies on the evidence of this witness as to his age at ICC-01/04-01/06-2748-Red, para. 365.



evidence on the age of specific children is discussed in the relevant sections.

## VII. INTERMEDIARIES

### A. THE ISSUE

178. The fundamental question raised by the defence under this heading is whether, during the investigations leading to this trial, four of the intermediaries employed by the prosecution suborned the witnesses they dealt with, when identifying or contacting these individuals or putting them in touch with the investigators, and whilst carrying out risk assessments.<sup>453</sup> It is suggested, *inter alia*, that if this possibility is established, then any witnesses the intermediaries had dealings with should not be relied on. Indeed, it is argued that if this impropriety is substantively made out, the reliability of the prosecution's contentions in this case as a whole will be called into question.<sup>454</sup>

179. This issue was the central focus of the defence application seeking a permanent stay of the proceedings for abuse of process.<sup>455</sup> In its decision on this aspect of the defence application, the Chamber held that:

197. This is undoubtedly an important and a highly contentious issue in the case, but in the judgment of the Chamber the alleged abuse on the part of the prosecution, even taken at its highest, would not justify staying the case at this stage. Given the ability of the Court to resolve all the relevant factual issues in due course [...] and bearing in mind this application only relates to one, albeit significant, area of a wider case, it would be a disproportionate reaction to discontinue the proceedings at this juncture.

198. Contrary to the submission of the defence, the Chamber will be able, in due course, to reach final conclusions on the alleged impact of the involvement of the intermediaries on the evidence in this case, as well as on the wider alleged prosecutorial misconduct or negligence based on the suggested failure by the Office of the Prosecutor to supervise or control the

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<sup>453</sup> ICC-01/04-01/06-2657-tENG-Red, paras 27 and 28.

<sup>454</sup> ICC-01/04-01/06-2773-Red-tENG, paras 1 – 18.

<sup>455</sup> ICC-01/04-01/06-2657-tENG-Red.

individual intermediaries and to act on indications of unreliability (together with the consequences of any adverse findings in this regard, which the defence alleges taints all the prosecution's evidence).<sup>456</sup>

180. It needs to be emphasised that with many of the witnesses in this category who came into contact with the intermediaries, the Chamber has recognised that they may well have given a truthful account as to elements of their past, including their involvement with the military, whilst at the same time – at least potentially – lying about particular crucial details, such as their identity, age, the dates of their military training and service, or the groups they were involved with. As regards this aspect of the case, the Chamber needs to be persuaded beyond reasonable doubt that the alleged former child soldiers have given an accurate account on the issues that are relevant to this trial (*viz.* whether they were below 15 at the time they were conscripted, enlisted or used to participate actively in hostilities and the circumstances of their alleged involvement with the UPC).

181. For the reasons analysed above, the prosecution submits that, due to the difficulties in the DRC and the OTP's lack of a police force, it was necessary to rely on intermediaries.<sup>457</sup> It is suggested that their role was limited, in the sense that the intermediaries were excluded from the decision-making process and, save exceptionally, when the witnesses were screened and interviewed.<sup>458</sup>

182. It is argued by the Prosecutor in those circumstances that the intermediaries simply played a supporting role.<sup>459</sup>

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<sup>456</sup> ICC-01/04-01/06-2690-Red2.

<sup>457</sup> ICC-01/04-01/06-2678-Red, para. 14.

<sup>458</sup> ICC-01/04-01/06-2678-Red, para. 17.

<sup>459</sup> ICC-01/04-01/06-2678-Red, para. 38.

## B. THE DEVELOPING USE OF INTERMEDIARIES

183. P-0582 testified that there was an instruction that the intermediaries were not supposed to know the objectives of the investigation team.<sup>460</sup> It was suggested that in order to survive, the intermediaries had to avoid being aware of too many details.<sup>461</sup> To the extent possible, the investigators did not provide them with information,<sup>462</sup> in order to ensure that the intermediary, the investigator and the witness would not be compromised.<sup>463</sup> Therefore, it was suggested that the intermediaries were not given any substantive information about the case.<sup>464</sup> Indeed, it was asserted that the latter was too complicated to enable discussion with anyone who was not a member of the investigation division.<sup>465</sup> Additionally, the differences and variations in the objectives meant that many intermediaries ceased asking for information about the investigators' activities and focussed instead on getting to know the witnesses.<sup>466</sup> P-0582 indicated that the intermediaries were unaware of the questions that the witnesses were asked.<sup>467</sup>

184. It was accepted that, in reality, the intermediaries were activists, most of whom were fully aware of developments within the sphere of

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<sup>460</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 63, lines 4 – 5.

<sup>461</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 63, lines 6 – 9.

<sup>462</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 63, lines 12 – 13.

<sup>463</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 63, lines 13 – 17.

<sup>464</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 15, lines 13 – 16.

<sup>465</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 15, lines 17 – 19.

<sup>466</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 15, lines 19 – 22.

<sup>467</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 15, lines 23 – 24.

international criminal justice and the objectives of the investigators.<sup>468</sup> P-0582 acknowledged that the intermediaries consulted internet sites in order to keep up-to-date with the progress of the investigations (along with broader issues concerning international criminal justice just referred to) even before the investigators arrived in the DRC.<sup>469</sup> However, P-0582 said the investigators were reluctant to discuss their developing objectives.<sup>470</sup>

185. Although P-0582 was not present at all the screenings or during the interviews – and accordingly he could not say if intermediaries were ever present – nonetheless they were not authorised to participate.<sup>471</sup> Indeed, P-0582 said that it was out of the question for intermediaries to be present.<sup>472</sup>

186. After each witness was screened, a representative of the prosecution division, as opposed to the intermediary<sup>473</sup> (who did not contribute to this process),<sup>474</sup> decided whether he or she should be interviewed.

187. P-0582 indicated that to his knowledge, no member of the office asked intermediaries to tell potential witnesses to lie to the investigators during their interviews or in court.<sup>475</sup> Indeed, he said that he was unaware of any information that demonstrated that

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<sup>468</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 63, line 25 to page 64, line 2.

<sup>469</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 64, lines 2 – 4.

<sup>470</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 64, lines 5 – 8.

<sup>471</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 16, lines 1 – 3.

<sup>472</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 16, lines 5 – 7.

<sup>473</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 16, lines 12 – 17.

<sup>474</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 17, lines 3 – 6.

<sup>475</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 17, lines 7 – 12.

intermediaries had asked witnesses to lie during the screening process or in court.<sup>476</sup> The quality of work of the intermediaries he was aware of, coupled with their correct behaviour (as he assessed it) indicated that the information received from them was valid.<sup>477</sup>

188. P-0582 explained that it was considered necessary to avoid intermediaries who were not serious in their offer to help the Court, and the investigators did not use intermediaries who were trying to gain publicity or money by introducing witnesses to the OTP.<sup>478</sup>

189. During the identification phase, depending on the competence of the intermediary, the latter might be shown photographs so as to establish if an individual was known or lived in a particular area.<sup>479</sup>

190. P-0582 explained that there were two categories of intermediaries.<sup>480</sup> Those in the first category assisted in identifying witnesses and they facilitated contact between the witnesses and the investigators.<sup>481</sup> They helped with health problems, issues relating to threats and any lack of understanding on relevant issues.<sup>482</sup> These individuals, who were often activists, were said to be reasonably professional in their management of the safety and security of the witnesses.<sup>483</sup>

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<sup>476</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 17, lines 18 – 23.

<sup>477</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 17, line 23 to page 18, line 2.

<sup>478</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 49, lines 21 – 25.

<sup>479</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 66, lines 4 – 8.

<sup>480</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 49, line 10.

<sup>481</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 49, lines 11 – 13.

<sup>482</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 49, lines 14 – 16, and page 65, lines 13 – 14..

<sup>483</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 49, lines 17 – 20.

191. Intermediaries in this category generally contacted the investigators because of information in their possession or because they knew witnesses who could be helpful.<sup>484</sup> Following a request from the investigators, the intermediaries would collect the witnesses from their homes, organise meetings and ensure they were not seen with the investigators.<sup>485</sup>

192. It was important to compile a reasonably accurate file on each witness without raising suspicions within his or her family or village.<sup>486</sup> These were extremely delicate missions, and an error could lead to the identification of the individual and abduction or assault at the hands of one of the militias.<sup>487</sup> Additionally, the work of the investigators would have been undermined if it was alleged that a witness had been tracked down by soldiers following contact with the Court.<sup>488</sup> P-0582 suggested that the intermediaries, through their professionalism, made it possible to introduce the investigators to children in the best possible circumstances.<sup>489</sup>

193. The second category of intermediaries assisted by contributing to the evaluation of the security situation.<sup>490</sup> These individuals included, *inter alia*, some members of MONUC; soldiers of the Congolese armed forces; and anyone with useful information, for instance, on the

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<sup>484</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 61, line 25 to page 62, line 2.

<sup>485</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 62, lines 10 – 15.

<sup>486</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 62, lines 15 – 17.

<sup>487</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 62, lines 18 – 20.

<sup>488</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 62, lines 20 – 22.

<sup>489</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 62, line 22 to page 63, line 1.

<sup>490</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 50, lines 17 – 21.

security situation.<sup>491</sup>

194. P-0582 stressed that the two categories of individuals overlapped.<sup>492</sup>

The term “intermediary” began to be used in the summer of 2004, but intermediaries only received contracts much later.<sup>493</sup>

195. There was no formal recruitment procedure for selecting intermediaries.<sup>494</sup> An intermediary was simply someone who could perform this role; there was no process of candidacy or application and instead it was a matter of circumstance.<sup>495</sup> Two or three activists became intermediaries simply because they quickly offered to identify potential witnesses.<sup>496</sup> P-0583 stated that the criteria used to identify suitable individuals to act in this capacity depended on the opportunities and the events confronting them. However, the team could not use those who had been involved in the fighting or who had perpetrated crimes.<sup>497</sup>

196. Over time, when it was felt necessary to place the relationship with the intermediaries on a more formal basis, limited contracts of employment were proposed.<sup>498</sup> However, there was a tension between the need to give a more formal appearance to the intermediaries’

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<sup>491</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 51, line 22 to page 52, line 5.

<sup>492</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 68, lines 1 – 8.

<sup>493</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 53, lines 9 – 12.

<sup>494</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 53, line 14.

<sup>495</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 53, lines 14 – 16.

<sup>496</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 53, lines 17 – 20.

<sup>497</sup> T-334-Red2-ENG, page 15, lines 9 – 18.

<sup>498</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 53, lines 21 – 23.



function and the risks they ran in the field.<sup>499</sup> They did not want the latter to be subordinated to the former.<sup>500</sup> It was suggested that the highest investigative standards expected by the Court did not reflect the reality of the situation in the field,<sup>501</sup> and the central problem of the security of the witnesses. The intermediaries were an integral part of the protection system.<sup>502</sup> In this context, P-0582 indicated his belief that the intermediaries' security was a primary constraint.<sup>503</sup>

197. The investigation team carried out some verification of the intermediaries, based on the information available to them.<sup>504</sup> In some instances (in the absence of contrary information), their background was sufficiently demonstrated by the reports on their human rights activities in the field (as confirmed by the NGOs) along with the risks they had taken in order to conduct successful investigations.<sup>505</sup> This approach was not applicable to intermediaries who were not recognised human rights activists, and who were, for instance, engaged in more discreet activities.<sup>506</sup> The investigators attempted as far as possible to obtain information on the intermediaries, but obtaining information was risky because it could expose them to a

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<sup>499</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 54, lines 1 – 3.

<sup>500</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 54, lines 4 – 5.

<sup>501</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 54, lines 5 – 10.

<sup>502</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 54, lines 10 – 12.

<sup>503</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 54, lines 13 – 14.

<sup>504</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 55, lines 4 – 5.

<sup>505</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 55, lines 5 – 9.

<sup>506</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 55, lines 10 – 12.

disproportionate level of risk.<sup>507</sup>

### C. PAYMENT TO INTERMEDIARIES

198. P-0582 suggested that the majority of the intermediaries were not paid<sup>508</sup> and did not request payment.<sup>509</sup> However, if they travelled as part of their activities, their expenses for transport and communication were reimbursed.<sup>510</sup> “Up to a certain point” it had not been proposed to pay intermediaries for their work, because it was undertaken on a voluntary basis.<sup>511</sup> P-0582 suggested the investigators were very stringent when reimbursing costs.<sup>512</sup>

199. P-0582 indicated that in the majority of cases intermediaries were reimbursed in the most transparent manner possible, either because they had the documents justifying the claim, or in the absence of documents, a flat rate was paid based on the investigators’ understanding of the local situation.<sup>513</sup> For example, in relation to a trip by an intermediary using a motorcycle from Bunia to Mongbwalu, the investigators would establish the cost of the trip with officers from organisations such as MONUC.<sup>514</sup>

200. All the reimbursements to intermediaries were on the basis of an

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<sup>507</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 55, lines 12 – 16.

<sup>508</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 58, lines 8 – 10.

<sup>509</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 58, line 10.

<sup>510</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 58, lines 11 – 14.

<sup>511</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 58, lines 15 – 17.

<sup>512</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 58, lines 18 – 21.

<sup>513</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 58, line 25 to page 59, line 3.

<sup>514</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 59, lines 4 – 8.

expense declaration form.<sup>515</sup> Initially, investigators paid an advance to the intermediaries,<sup>516</sup> but later it was decided that these payments were to be set out and justified in a document, to which the supporting material such as invoices or statements had been attached.<sup>517</sup> This was recorded in the OTP's database.<sup>518</sup>

201. The arrangements, as described by P-0582, covered the period from 2004, when the Court was still in its infancy, until 2007 when it became an operational institution.<sup>519</sup>

202. P-0582 stressed that witnesses were not paid to answer questions.<sup>520</sup> If they received money, it was compensation for expenses, such as transport, meals and communications; this was on a fixed basis because it was very difficult to estimate particular costs.<sup>521</sup> If the individual was staying at a hotel or with a family, they were given an allowance to cover additional expenses.<sup>522</sup> The investigative team was concerned primarily with not being viewed as paying extravagant amounts to witnesses, thereby seeming to promise money in exchange for evidence.<sup>523</sup> Striking the right balance was not easy, and one of the

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<sup>515</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 60, lines 1 – 2.

<sup>516</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 60, lines 2 – 4.

<sup>517</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 60, lines 5 – 10.

<sup>518</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 60, lines 10 – 11.

<sup>519</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 60, lines 15 – 17.

<sup>520</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 14, lines 12 – 13.

<sup>521</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 14, lines 13 – 19.

<sup>522</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 14, lines 20 – 21.

<sup>523</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 14, lines 21 – 24.

intermediaries gave the investigators an indication of certain costs.<sup>524</sup> Although the investigators often had documents setting out the amounts for certain items (such as the use of telephones),<sup>525</sup> for costs such as food and lodging, the intermediaries assisted in assessing the relevant level of compensation.<sup>526</sup>

#### D. CONTRACTS WITH INTERMEDIARIES

203. With time it became apparent that certain intermediaries were so indispensable that they had to be provided with some form of more appropriate compensation.<sup>527</sup> A special contract was devised that spelt out the duties of the intermediary, including the protection of the witnesses.<sup>528</sup>

204. Whilst P-0582 worked for the OTP, three intermediaries were employed under these contracts.<sup>529</sup> The three intermediaries who signed contracts with the Court were P-0316, Intermediary 143 and Intermediary 154.<sup>530</sup>

205. P-0582 was aware of the risk that the intermediaries might manipulate the investigators they dealt with.<sup>531</sup> For instance, it was suggested that the initial approval of P-0316 as an intermediary was based on the value of the information he provided, which was rapidly

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<sup>524</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 15, lines 1 – 6.

<sup>525</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 15, lines 6 – 8.

<sup>526</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 15, lines 8 – 10.

<sup>527</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 59, lines 9 – 11.

<sup>528</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 59, lines 11 – 15.

<sup>529</sup> Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 59, lines 16 – 18.

<sup>530</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 59, line 25 to page 60, line 5.

<sup>531</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 19, lines 18 – 19.

confirmed, enabling the investigators to advance their knowledge of the case.<sup>532</sup> This intermediary came from the government.<sup>533</sup> P-0582 acknowledged that with informers there was a bias in the information they provided (that, it was said, was clear to the investigators),<sup>534</sup> and checks were made with other sources to establish if P-0316 was engaging in a degree of manipulation.<sup>535</sup>

## E. INDIVIDUAL INTERMEDIARIES

206. As set out above, in the Chamber's Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings", the Chamber described the evidence relating to the allegations raised by the defence against the prosecution intermediaries. At that stage of the proceedings, the Chamber found that even if the defence submissions were accepted at their highest "that the Prosecutor knew that there were doubts as to the integrity of the four intermediaries, staying the proceedings, as an exercise of judgment, would be disproportionate".<sup>536</sup> The Chamber decided that it would be able to reach final conclusions on the alleged impact of the involvement of the intermediaries (and the wider alleged prosecutorial misconduct or negligence) during the later stages of the trial.<sup>537</sup>

207. In order to assess the role played by each of the four main intermediaries discussed below, and to determine whether the evidence given by the witnesses they had contacts with is reliable, the

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<sup>532</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 19, lines 6 – 9.

<sup>533</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 19, lines 10 – 11.

<sup>534</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 19, lines 11 – 14.

<sup>535</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 19, lines 15 – 18.

<sup>536</sup> ICC-01/04-01/06-2690-Red2, para. 199.

<sup>537</sup> ICC-01/04-01/06-2690-Red2, para. 198.

Chamber has considered each intermediary's involvement with the OTP and the relevant witnesses, as well as the particular evidence given by those witnesses.

## 1. Intermediary 143

### a) Background

208. In its Decision on Intermediaries, the Chamber described the evolution of the position of Intermediary 143 leading to an order for disclosure of his identity to the defence.<sup>538</sup> It set out the evidence relating to Intermediary 143's involvement with the prosecution witnesses,<sup>539</sup> and concluded that it was strictly necessary to disclose his identity to the defence for the purposes of conducting necessary and meaningful investigations and to secure a fair trial for the accused.<sup>540</sup> The Chamber also found that the evidence did not meet the criteria for ordering him to be called as a witness in the proceedings.<sup>541</sup> However, the prosecution was instructed to call a witness who could give evidence on the approach and the procedures applied by the prosecution in relation to intermediaries during the investigations.<sup>542</sup> In addition, the prosecution was ordered to provide further information on the intermediaries and to disclose the known contacts between the intermediaries and the witnesses, and between the intermediaries.<sup>543</sup>

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<sup>538</sup> ICC-01/04-01/06-2434-Red2, paras 40 and 41.

<sup>539</sup> ICC-01/04-01/06-2434-Red2, paras 43 – 47.

<sup>540</sup> ICC-01/04-01/06-2434-Red2, para. 143.

<sup>541</sup> ICC-01/04-01/06-2434-Red2, para. 143.

<sup>542</sup> ICC-01/04-01/06-2434-Red2, paras 146 and 150 (iv).

<sup>543</sup> ICC-01/04-01/06-2434-Red2, paras 147 and 150 (i, ii and v).

209. Intermediary 143 introduced numerous witnesses to the OTP,<sup>544</sup> five of whom were called by the prosecution.<sup>545</sup> It is noteworthy that, according to a contact chart provided by the prosecution,<sup>546</sup> the following lengthy list of potential witnesses were first contacted via Intermediary 143: DRC-OTP-WWWW-0006, trial witness P-0007, trial witness P-0008, DRC-OTP-WWWW-0009, trial witness P-0010, trial witness P-0011, trial witness P-0031 (who was also an intermediary), DRC-OTP-WWWW-0132, DRC-OTP-WWWW-0137, DRC-OTP-WWWW-0155, DRC-OTP-WWWW-0170, DRC-OTP-WWWW-0176, DRC-OTP-WWWW-0179, DRC-OTP-WWWW-0216, DRC-OTP-WWWW-256, DRC-OTP-WWWW-267, DRC-OTP-WWWW-0278, DRC-OTP-WWWW-0279, DRC-OTP-WWWW-0280, DRC-OTP-WWWW-0281, DRC-OTP-WWWW-0282 and DRC-OTP-WWWW-287.<sup>547</sup> In addition, he had contact with the following witnesses: DRC-OTP-WWWW-0028, DRC-OTP-WWWW-0030, DRC-OTP-WWWW-0156, DRC-OTP-WWWW-0178, DRC-OTP-WWWW-0243. Finally, he was in touch with intermediaries P-0316 and P-0321, amongst others.<sup>548</sup>

**b) The evidence from P-0582 and P-0583**

210. P-0582 considered that Intermediary 143 must have introduced himself to the investigators, but he was not sure exactly how.<sup>549</sup> P-0582 suggested that Intermediary 143 made it possible for the investigators

<sup>544</sup> Table of contacts, EVD-D01-01039, No. 72.

<sup>545</sup> P-0007, P-0008, P-0010, P-0011 and P-0031. Intermediary 143 also introduced prosecution witnesses P-0006 and P-0009, who were withdrawn.

<sup>546</sup> Table of contacts, EVD-D01-01039, No. 72.

<sup>547</sup> EVD-D01-01039, No. 72.

<sup>548</sup> T-324-Red2-ENG, page 24, line 24 to page 26, line 16 and EVD-D01-01039, No. 72.

<sup>549</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 18, lines 22 – 24.

to identify several children who could testify.<sup>550</sup>

211. Intermediary 143 identified a number of child witnesses who, according to their statements, were under 15 years of age.<sup>551</sup> Thereafter he maintained contact with the witnesses, and informed the investigators as to the state of their health, and any difficulties they were experiencing.<sup>552</sup> Additionally, Intermediary 143 provided more general information about the security situation in Bunia,<sup>553</sup> and he resolved individual problems (such as threats to witnesses and organising medical treatment).<sup>554</sup>

212. As far as the investigators were concerned, the former child soldiers introduced to the OTP by Intermediary 143 had been recruited into the military apparatus of the UPC.<sup>555</sup> P-0582 suggested that Intermediary 143 was aware that the investigators were looking for children who were under the age of 15 at the relevant time,<sup>556</sup> against the background that determining age was not easy.<sup>557</sup>

213. During the early months, the objectives of the investigation were not precisely formulated because the investigators were collecting information and they were open to any suggestions, depending on the

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<sup>550</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 5, lines 2 – 4.

<sup>551</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 21, line 22 to page 22, line 1.

<sup>552</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 22, lines 2 – 7.

<sup>553</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 22, lines 8 – 9 and 19 - 19.

<sup>554</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 22, lines 20 – 25.

<sup>555</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 25, lines 11 – 13.

<sup>556</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 25, lines 16 – 18.

<sup>557</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 25, lines 19 – 21.



documentation they received.<sup>558</sup> Indeed, at the outset they thought that they were going to be dealing with massacres and other atrocities.<sup>559</sup> However, once they received information from Intermediary 143 and others (*e.g.* investigators from the UN) that during the fighting children under the age of 15 had been used systematically, a decision was taken by the OTP to investigate this issue further.<sup>560</sup> Intermediary 143 was not provided with any particular criteria, given the investigators were open to any new information.<sup>561</sup>

214. Although Intermediary 143 made suggestions as to individuals the investigators might meet,<sup>562</sup> he did not establish the criteria for identifying witnesses but instead he had been asked if he knew militia members,<sup>563</sup> and, following a request from the investigators, he introduced children who were to be assessed by them.<sup>564</sup> However, in practice, Intermediary 143 often identified children for the prosecution before investigators asked him to do so,<sup>565</sup> although P-0582 did not know the precise manner in which this occurred.<sup>566</sup>

215. The OTP asked Intermediary 143 to provide documents for the child

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<sup>558</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 24, lines 4 – 8.

<sup>559</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 24, lines 11 – 16.

<sup>560</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 24, line 17 to page 25, line 3.

<sup>561</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 25, lines 4 – 8.

<sup>562</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 23, lines 11 – 12.

<sup>563</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 23, lines 9 – 10.

<sup>564</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 23, lines 17 – 19.

<sup>565</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 26, lines 2 – 7.

<sup>566</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 26, lines 6 – 9.

soldiers because he was in the best position to obtain them.<sup>567</sup> The children or their legal guardians were asked for their civil status documents, which were given to the investigators by the intermediaries.<sup>568</sup> The evidence set out hereafter reveals that this process of verification was often not undertaken satisfactorily as regards the witnesses who had contact with the principal intermediaries dealt with in this section.

216. P-0582 indicated that on the basis of several meetings, as well as the assessment of the investigators who had direct links with Intermediary 143, he was quite content with the management of the child soldier witnesses and any relevant security measures.<sup>569</sup> P-0582 explained that Intermediary 143 undertook the work assigned to him and they discussed his future role.<sup>570</sup> It was P-0582's estimation that Intermediary 143 had a "really high idea of his activities and responsibilities and the fact that he was working for a cause that [...] was dear to him".<sup>571</sup> The children never mentioned any problems with him.<sup>572</sup>

217. The relationship between P-0031 (a trial witness and intermediary as noted above) and Intermediary 143 was not good. Although they were both human rights activists, one of them accused the other of

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<sup>567</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 26, line 24 to page 27, line 2.

<sup>568</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 27, lines 6 – 8.

<sup>569</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 29, lines 18 – 22.

<sup>570</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 29, lines 23 – 24.

<sup>571</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 29, line 24 to page 30, line 1.

<sup>572</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 30, lines 3 – 5.

wanting to poison him.<sup>573</sup>

### c) The Other Evidence

218. The defence argues that the evidence overall demonstrates that Intermediary 143 suborned prosecution witnesses.<sup>574</sup>

219. It has been established that the Office of the Prosecutor employed Intermediary 143 under contracts that were regularly renewed between 1 June 2005 and 2010.<sup>575</sup>

220. P-0581 stated that Intermediary 143 arranged travel and transport for witnesses on behalf of the OTP,<sup>576</sup> and he obtained identification papers.<sup>577</sup> He secured the consent of some of the witnesses' guardians in order to take X-rays. As discussed above Intermediary 143 was involved with issues concerning the safety and the health of some of the witnesses. He also acted on behalf of some victims.<sup>578</sup>

221. The prosecution called Witnesses P-0007, P-0008, P-0010 and P-0011 (all introduced to the OTP by Intermediary 143), each of whom claimed at trial to have been recruited into the UPC when they were under the age of 15. Intermediary 143 also introduced P-0006 and P-0009 to the Office of the Prosecutor, who were withdrawn from the list of trial witnesses but whose written statements were before the Pre-

<sup>573</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 20, lines 9 – 11.

<sup>574</sup> ICC-01/04-01/06-2657-tENG-Red, para. 149. See also ICC-01/04-01/06-2773-Red-tENG, para. 5.

<sup>575</sup> EVD-D01-01053; EVD-D01-01040, No. 202; EVD-D01-01052; EVD-D01-01051; EVD-D01-01046; EVD-D01-01047; EVD-D01-01049; and EVD-D01-01050.

<sup>576</sup> See, e.g., EVD-D01-00932, EVD-D01-00784, EVD-D01-00891, EVD-D01-00893 and EVD-D01-00931.

<sup>577</sup> Intermediary 143 assisted P-0297 in obtaining an identity card. T-302-CONF-ENG, page 53, line 20 to page 54, line 21 and EVD-D01-00295. Intermediary 143 also provided the birth certificates for Witnesses P-0007 (EVD-OTP-00085), P-0008 (EVD-D01-00055), P-0010 (EVD-D01-01102) and P-0011 (EVD-D01-00059). This is recorded in the metadata of the aforesaid exhibits. See also EVD-D01-00926, a receipt reimbursing Intermediary 143 for birth certificates obtained.

<sup>578</sup> First Report to Trial Chamber I on Victims' Applications Under Regulation 86(5) of the Regulations of the Court, 11 April 2008, ICC-01/04-01/06-1275-Conf-Exp-Anx2, pages 6, 8, 12 and 216.

Trial Chamber at the stage of the confirmation of charges.<sup>579</sup> All six individuals were authorised to participate in the current proceedings as victims (P-0006 is a/0051/06, P-0007 is a/0047/06, P-0008 is a/0048/06, P-0009 is a/0049/06, P-0010 is a/0050/06, and P-0011 is a/0052/06).<sup>580</sup>

*(1) The evidence of P-0007 and P-0008 and  
evidence relevant to their assessment*

**(a) P-0007**

222. P-0007 and P-0008 are alleged former child soldiers who have also been authorised to participate in the proceedings. P-0007 testified that although during his meeting with representatives from the OTP in 2005 (having been introduced by Intermediary 143) he confirmed that all of his answers were accurate, in fact at the time he did not know his true date of birth.<sup>581</sup> In August 2005, the witness apparently told the IEC that his year of birth was 1986, and he gave them a name that differed from the one provided by him to the prosecution.<sup>582</sup> His birth certificate (dated November 2005) records the year of his birth as 1990.<sup>583</sup>

223. Although the witness gave his names in evidence, he explained that his parents, brothers and sisters call him by different names, and later in his testimony he indicated that he had used two further names.<sup>584</sup> He also stated that he was born in 1987<sup>585</sup> (he repeated this date in

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<sup>579</sup> ICC-01/04-01/06-803tEN.

<sup>580</sup> ICC-01/04-01/06-1861-AnxA1.

<sup>581</sup> T-148-Red2-ENG, page 34, lines 6 – 18.

<sup>582</sup> EVD-D01-01031 (extract from the IEC database).

<sup>583</sup> EVD-D01-01103.

<sup>584</sup> T-148-Red2-ENG, page 17, lines 20 – 24; T-149-Red2-ENG, page 47, line 5 to page 48, line 18.

<sup>585</sup> T-148-Red2-ENG, page 18, lines 14 – 17.

November 2010).<sup>586</sup>

224. In these circumstances his reliability is profoundly called into question, given the considerable, and essentially unexplained, differences as to the date of birth of this witness, in his oral testimony and in the documentary evidence.

225. The witness gave contradictory testimony concerning the names of his father (this is discussed further below).

226. The witness testified that when he was 15 years old (during his second year of secondary education), soldiers from the UPC abducted him outside his school.<sup>587</sup> Thereafter, he was sent for military training (this was at the beginning of 2003).<sup>588</sup> He stayed at a training centre in Irumu<sup>589</sup> for about a month.<sup>590</sup> Later, he became a bodyguard in Bunia to a UPC commander,<sup>591</sup> once he had spent two to three months at the camp at Mandro,<sup>592</sup> and he fought in battles at Bogoro,<sup>593</sup> Lipri and Bunia.<sup>594</sup> It follows from the above that he completed his training in March or April 2003.

227. It is suggested by the defence that P-0007 gave an implausible account regarding certain aspects of his time in the UPC. He said that Chief Kahwa and Mr Bagonza were both commanders at the material time.<sup>595</sup> Similarly P-0007 maintained that Commander Bagonza was

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<sup>586</sup> EVD-OTP-00655.

<sup>587</sup> T-148-Red2-ENG, page 22, line 17 to page 24, line 3.

<sup>588</sup> T-148-Red2-ENG, page 21, lines 6 – 16.

<sup>589</sup> T-149-Red2-ENG, page 67, lines 4 – 16.

<sup>590</sup> T-148-Red2-ENG, page 54, line 25 to page 55, line 1; T-149-Red2-ENG, page 80, lines 10 – 12.

<sup>591</sup> T-148-Red2-ENG, page 59, lines 20 – 23.

<sup>592</sup> T-148-Red2-ENG, page 56, lines 10 – 13; T-149-Red2-ENG, page 44, lines 18 – 20.

<sup>593</sup> T-149-Red2-ENG, page 9, lines 15 – 20; T-150-Red2-ENG, page 19, line 17 to page 20, line 4.

<sup>594</sup> T-149-Red2-ENG, page 18, lines 6 – 13.

<sup>595</sup> ICC-01/04-01/06-2773-Red-tENG, paras 122 - 124, T-148-Red2-ENG, page 58, lines 11 – 12 and T-149-Red2-ENG, p. 7, lines 2 – 3.

present at meetings at the residence of the UPC Chief of Staff.<sup>596</sup> The defence suggests that the evidence has established that Commander Bagonza was killed in 2002.<sup>597</sup> However, although there is evidence that Mr Bagonza died, there is no clear evidence as to the date of his death and the Chamber accordingly discounts this particular criticism.

228. P-0007 stated that Chief Kahwa was in charge while he was at the camp in Mandro in early 2003.<sup>598</sup> Furthermore, he maintained that Thomas Lubanga and Chief Kahwa were present at the end of his training at Mandro, around March or April 2003.<sup>599</sup> The defence relies on the testimony of D-0019 to argue that the evidence establishes that Chief Kahwa left the UPC at the end of 2002.<sup>600</sup> The defence also refers to a UPC decree dated 2 December 2002 formally removing Chief Kahwa from his position as UPC defence minister.<sup>601</sup> It is not disputed by either party that this document originates from the UPC, and the Chamber accepts its authenticity. This evidence thus contradicts P-0007's testimony that Chief Kahwa was present at, and in charge of, Mandro camp in 2003.

229. Further, it is significant that when P-0007 met with prosecution investigators in 2005, he did not mention that he had participated in, and had been wounded during, the battle of Dele, which he described as the "most difficult" battle he had fought in.<sup>602</sup> When questioned about this omission by the defence, the witness suggested that he

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<sup>596</sup> T-149-Red2-ENG, page 6, line 14 to page 7, line 3.

<sup>597</sup> ICC-01/04-01/06-2773-Red-tENG, referring to testimony of D-0026.

<sup>598</sup> T-148-Red2-ENG, page 56, lines 4 – 9, and page 58, lines 1 – 13.

<sup>599</sup> T-148-Red2-ENG, page 50, line 2 to page 53, line 9; T-149-Red2-ENG, page 43, lines 22 – 25 and page 44, lines 6 – 8.

<sup>600</sup> ICC-01/04-01/06-2773-Red-tENG, referring to T-340-ENG, page 48, line 9 to page 49, line 14, in which it is stated that Chief Kahwa resigned from the UPC at the end of October 2002 (testimony of D-0019).

<sup>601</sup> EVD-D01-01089.

<sup>602</sup> T-150-Red2-ENG, page 10, lines 14 – 18.

failed to refer to this battle at that stage because he had spoken about many events that had happened in his life, and he felt that it was not necessary to say anything about it and, additionally, if he talked about it he would be asked a lot of questions.<sup>603</sup> He also suggested that he remembered telling the investigators in 2005 that he had been injured during the battle of Dele.<sup>604</sup> This is contradicted by the fact that during questioning by the prosecution in 2005, the witness is recorded as having said he was injured near Lipri (the first battle).<sup>605</sup> As read out in court, at paragraph 50 of his 2005 statement to OTP investigators, he gave an account of the wound and its consequences which was at variance with his testimony before the Court.<sup>606</sup> Accordingly, the Chamber does not consider that his account on these issues is reliable.

230. When asked to explain the discrepancies between his in-court testimony and his earlier statements to the prosecution, P-0007 stated that "I told [the investigators] certain things, but I also withheld a certain amount of information, because I was afraid that such information would reveal my identity and I will be at danger."<sup>607</sup>

**(b) P-0008**

231. P-0008 is an alleged former child soldier who has also participated in the proceedings as a victim. P-0008 maintained, during his evidence, that he was the cousin of Witness P-0007,<sup>608</sup> and he gave a name that differs slightly from the one on his voting card.<sup>609</sup> He said he was born

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<sup>603</sup> T-150-Red2-ENG, page 10, line 8 to page 11, line 11.

<sup>604</sup> T-150-Red2-ENG, page 11, lines 15 – 17.

<sup>605</sup> T-150-Red2-ENG, page 17, line 21 to page 18, line 12.

<sup>606</sup> T-150-Red2-ENG, page 18, line 21 to page 19, line 16.

<sup>607</sup> T-149-Red2-ENG, page 93, lines 3 – 8.

<sup>608</sup> T-135-Red3-ENG, page 4, line 25 – page 5, line 6.

<sup>609</sup> Compare T-135-CONF-ENG, page 64, lines 14 – 16 with EVD-OTP-00659.

in 1989<sup>610</sup> and he provided the names of his parents.<sup>611</sup> P-0008's testimony before the Court on this issue partially contradicts the information on his birth certificate (obtained by P-0143 on 11 August 2005), which states that he was born in 1991 and lists names for his parents that, to an extent, differ from those given in Court.<sup>612</sup> The witness's electoral card indicates that he was born in 1987.<sup>613</sup>

232. P-0008 suggested that soldiers from the UPC forcibly enlisted him at the beginning of 2003, whilst he was attending school.<sup>614</sup> He underwent military training for two weeks<sup>615</sup> at the UPC camp in Irumu,<sup>616</sup> at the conclusion of which he was deployed as a bodyguard.<sup>617</sup> He fought at the battles of Lipri<sup>618</sup> and Barrière.<sup>619</sup> However, his account, viewed overall, is contradictory and implausible. The description of his abduction changed significantly, in that in evidence he said that he was taken by soldiers after he fled home from school,<sup>620</sup> whilst in his statement of July 2005 he said "[o]ne day at the beginning of 2003, on a date I am not able to give, the UPC militia arrived in the village, at the time, when I lived with my family, to have a meeting with the civilian population. I don't know why this meeting nor what was discussed at the meeting took place because I didn't take part in it. On the evening of the same day, a group of these militias arrived at my home and

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<sup>610</sup> T-135-CONF-ENG, page 65, lines 12 – 14.

<sup>611</sup> T-135-CONF-ENG, page 64, line 25 to page 65, line 11.

<sup>612</sup> EVD-D01-00055 and metadata.

<sup>613</sup> See extract of the IEC database, EVD-D01-01028. See also the declaration on the electoral card, EVD-OTP-00658.

<sup>614</sup> T-135-Red3-ENG, page 7, lines 2 – 18 and page 12, lines 13 – 16 and T-137-Red-ENG, page 21, line 19 to page 22, line 5.

<sup>615</sup> T-137-Red2-ENG, page 47, lines 18 – 20. However, in his 2005 interview with the prosecution he claimed he was trained for two months: ICC-01/04-01/06-T-137-Red2-ENG, page 47, line 10.

<sup>616</sup> T-135-Red3-ENG, page 9, lines 10 – 16.

<sup>617</sup> T-135-Red3-ENG, page 22, line 23 to page 23, line 3.

<sup>618</sup> T-135-Red3-ENG, page 24, lines 14 – 15 and lines 18 – 21.

<sup>619</sup> T-135-Red3-ENG, page 24, line 17.

<sup>620</sup> T-135-Red3-ENG, page 7, line 2 to page 8, line 1.



ordered me to follow them to undergo military training.”<sup>621</sup>

233. In his witness statement he suggested that they walked to the camp at Irumu from Sota (a distance that was not very far),<sup>622</sup> whilst in evidence his account was that they went by vehicle (taking about two hours).<sup>623</sup> P-0008 claims that Chief Kahwa and Mr Bagonza were commanders at the time at which he states he became a member of the UPC, at the beginning of 2003.<sup>624</sup> As with P-0007, the defence argues that the evidence has established that Chief Kahwa left the UPC at the end of 2002.<sup>625</sup> The defence also contends that the witness’s allegations as regards Mr Bagonza are implausible since he was killed in 2002.<sup>626</sup> As set out above, the Chamber considers that there is insufficient evidence as to the date of Commander Bagonza’s death. However, there is evidence that Chief Kahwa was not a UPC commander in 2003.

234. P-0008 suggested that he failed to tell the investigators in his statement of July 2005 that he had fought at Barrière because of the amount he had to say, and (“probably”) because of lack of time and the amount of information.<sup>627</sup> In evidence, the witness said that he stayed at Mandro for a single day<sup>628</sup> whilst in his 2005 statement he suggested he was there for 2 months.<sup>629</sup> He suggested he was unable to give names for any of his siblings because he has not seen them for

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<sup>621</sup> T-137-Red2-ENG, page 34, lines 19 – 25.

<sup>622</sup> T-137-Red2-ENG, page 41, lines 1 – 5.

<sup>623</sup> T-135-Red3-ENG, page 9, line 22 to page 10, line 18 and T-137-Red-ENG, page 41, line 13 to page 42, line 12.

<sup>624</sup> T-135-CONF-ENG, page 12, line 16 and page 40, lines 18 - 23.

<sup>625</sup> ICC-01/04-01/06-2773-Red-tENG, para. 125.

<sup>626</sup> ICC-01/04-01/06-2773-Red-tENG, para. 125.

<sup>627</sup> T-137-Red2-ENG, page 73, lines 13 – 19.

<sup>628</sup> T-138-Red2-ENG, page 5, lines 3 – 5.

<sup>629</sup> T-137-Red2-ENG, page 72, lines 13 – 18.

“such a long time”.<sup>630</sup> Similarly, he could not recall whether he saw his parents after he joined the UPC.<sup>631</sup>

235. The prosecution argues that “the fact that P-0008 admitted in open court that he had raped a girl during one of the battles in which he was fighting ought to be a factor in assessing his credibility”.<sup>632</sup>

**(c) Matters common to P-0007 and P-0008**

236. P-0031 testified that he had been in close contact with P-0007 and P-0008 soon after they left the army, and that at the time they indicated they had been enlisted by the UPC/FPLC.<sup>633</sup> He also gave evidence about a record that was kept of children who had been associated with armed groups, indicating that P-0007 was 14 years old and P-0008 11 years old on the date that they arrived at the centre, although he did not know which social worker had drafted the document.<sup>634</sup> However, during questioning by the defence, P-0031 stated that although P-0008 gave the age of 11 when he arrived at the centre, “over time we discovered that the child’s age was not 11 years” and in fact he was older, although P-0031 could not remember the precise age.<sup>635</sup>

237. Moreover, documentary evidence tends to demonstrate that P-0007 and P-0008 lied about having attended school in a particular town in the year 2001-2002 and at the beginning of the 2002-2003 academic year, because the records establish they were both at school in a different location altogether. The relevant documents indicate that P-0007 and P-0008 were in the 1<sup>st</sup> year of secondary school in 2001-2002

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<sup>630</sup> T-137-Red2-ENG, page 13, lines 4 – 6.

<sup>631</sup> T-137-Red2-ENG, page 14, lines 19 – 25.

<sup>632</sup> ICC-01/04-01/06-2748-Red, para. 427.

<sup>633</sup> T-201-CONF-ENG, page 72, line 22 to page 74, line 25.

<sup>634</sup> T-200-Red2-ENG, page 89, line 1 to page 90, line 18, referring to EVD-OTP-00474.

<sup>635</sup> T-202-CONF-ENG, page 67, line 14 to page 69, line 4.

at a school other than the one they claimed to have attended. The names of the two witnesses are to be found under “*Classe 2e C/O*” [2<sup>nd</sup> Year of Secondary School], under Section V “left during the course of the year”.<sup>636</sup> There are no sustainable reasons for concluding that these records are forgeries or that they are inaccurate.

238. Witnesses P-0007 and P-0008 were re-interviewed by the prosecution on 7 and 8 January 2010,<sup>637</sup> following their evidence before the Chamber.<sup>638</sup> They accepted that the family relationships were significantly different from the description provided by each of them earlier.<sup>639</sup> The re-interview also demonstrates that P-0008 had lied in the relevant documents as to his mother’s name.<sup>640</sup> Similarly, P-0007 appears to have lied in evidence as to his father’s name.<sup>641</sup> During these post-testimony interviews they each provided various names for their siblings<sup>642</sup> that had not been forthcoming during their oral evidence.<sup>643</sup>

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<sup>636</sup> EVD-D01-00181, page 4243 and EVD-D01-00182, page 4231. See also EVD-D01-00183.

<sup>637</sup> Prosecution’s Omnibus Application Concerning Disclosure by the Defence and other procedural issues related to the Prosecution’s preparation for the Defence case, 2 October 2009, public redacted version filed 5 October 2009, ICC-01/04-01/06-2144-Red and Second Decision on Disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 19 November 2009, public redacted version issued 20 January 2010, ICC-01/04-01/06-2192-Red, para. 66.

<sup>638</sup> P-0007: EVD-D01-00752; EVD-D01-00753 and EVD-D01-00754. P-0008: EVD-D01-00750 and EVD-D01-00751.

<sup>639</sup> EVD-D01-00750, page 0380, lines 286-298 (re-interview of P-0008). EVD-D01-00752, page 0618, lines 3758 - 372 (re-interview of P-0007). See also EVD-D01-00753, page 0633, lines 35 – 56.

<sup>640</sup> P-0008’s birth certificate (obtained by P-0143 in 2005) gives one set of names for his mother, EVD-D01-00055. In his January 2010 interview with the prosecution, P-0008 provided two entirely different names. EVD-D01-00750, page 0380, lines 299 to page 0381, line 317.

<sup>641</sup> In his testimony before the Court, P-0007 suggested two names for his father. T-148-CONF-ENG, page 18, lines 2 – 3. However, P-0007 stated in his re-interview that his father’s name was entirely different from the one he previously set out (EVD-D01-00753, page 0636, lines 146-157 and page 0639, lines 254 -256) and that the name given during his testimony actually belonged to a different, but close, family member. EVD-D01-00753, page 0636, line 169 to page 0637, line 191.

<sup>642</sup> P-0007: EVD-D01-00753, page 0639, line 267 *et seq*; P-0008: EVD-D01-00750, page 0383, line 407 *et seq*.

<sup>643</sup> P-0007 omitted to name several of his brothers and sisters. T-149-CONF-ENG, page 48, line 24 to page 51, line 4. P-0008 stated during his testimony that he had forgotten the names of his brothers and sisters. T-137-Red2-ENG, page 13, lines 5- 6.

**(d) D-0012**

239. The defence relies on the evidence of D-0012 to challenge the credibility of P-0007 and P-0008. D-0012 joined the UPC army after arriving in Bunia.<sup>644</sup> Although he could not recall the year, he went into the military three months before the departure of Governor Lompondo.<sup>645</sup> D-0012 served as a soldier in the UPC until he was demobilised (following the arrival of the French forces).<sup>646</sup> He became a bodyguard for one of the UPC commanders after he joined the army,<sup>647</sup> and in due course he worked for a number of other commanders.<sup>648</sup>

240. D-0012 stated that throughout the time that he was in the army, P-0007 and P-0008 were attending school, although following the disorder only some of the schools were functioning in the town they lived in.<sup>649</sup> The witness believes that P-0007 and P-0008 stayed in that town for one or two years.<sup>650</sup> The prosecution argues that since D-0012 joined the UPC/FPLC army before Governor Lompondo was chased out (*i.e.* before August 2002), and remained there until the French military arrived (*i.e.* July 2003), he would not have known whether P-0007 and P-0008 were soldiers during this period.<sup>651</sup>

241. The Chamber considers that although the witness's evidence was somewhat contradictory as to whether he saw the family of D-0007 and D-0008 during this time,<sup>652</sup> he indicated he had seen them when he

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<sup>644</sup> T-248-Red2-ENG, page 38, line 18 to page 39, line 4.

<sup>645</sup> T-248-Red2-ENG, page 38, line 25 to page 39, line 2.

<sup>646</sup> T-248-Red2-ENG, page 39, lines 5 – 7.

<sup>647</sup> T-248-CONF-ENG, page 39, lines 13 – 17.

<sup>648</sup> T-248-CONF-ENG, page 39, lines 19 – 25.

<sup>649</sup> T-248-CONF-ENG, page 40, lines 15 – 19.

<sup>650</sup> T-248-CONF-ENG, page 40, line 19.

<sup>651</sup> ICC-01/04-01/06-2748-Conf, para. 430.

<sup>652</sup> T-248-CONF-ENG, page 40, lines 20 – 23.

spent a year in the same town D-0007 and D-0008 lived in while he was serving in the army.<sup>653</sup> Even though the witness could not say with complete certainty that P-0007 and P-0008 had not served as soldiers whilst he was away, nevertheless when he left for the army they were not in any armed force and when he returned it was not suggested by anyone that they had joined a military group.<sup>654</sup> Furthermore, in all of the places the witness travelled to as a soldier, there was no mention of P-0007 and P-0008.<sup>655</sup> When the witness returned from Uganda in 2005 or 2006, he was told P-0007 and P-0008 had left to study elsewhere.<sup>656</sup>

242. The prosecution further argues that the evidence of P-0007, P-0008 and D-0012 must be viewed against the information provided by the parents of P-0007 and P-0008, to the effect that they had been pressured by UPC/FPLC members to say that their children had not been in the UPC/FPLC army, along with D-00012's account that he had been visited by two representatives of the UPC prior to testifying.<sup>657</sup>

243. Notwithstanding these contentions by the prosecution, the Chamber has accepted the evidence of D-0012: in contrast with the testimony of P-0007 and P-0008, this witness gave a measured and entirely credible account, which was internally consistent. He met with at least two individuals prior to giving his statement to the OTP,<sup>658</sup> but the Chamber accepts he was not put under any material pressure.<sup>659</sup> While D-0012 could not say definitively that P-0007 and P-0008 were not in the army, he gave credible evidence that, to the best of his

<sup>653</sup> T-248-CONF-ENG, page 40, line 20 to page 41, line 15 and page 43, lines 6 – 9.

<sup>654</sup> T-248-Red2-ENG, page 41, lines 17 – 21.

<sup>655</sup> T-248-Red2-ENG, page 41, lines 22 – 25.

<sup>656</sup> T-248-CONF-ENG, page 42, lines 13 – 19.

<sup>657</sup> ICC-01/04-01/06-2748-Conf, para. 431.

<sup>658</sup> T-249-CONF-ENG, page 6, line 1 to page 7, line 14.

<sup>659</sup> T-249-CONF-ENG, page 7, line 24 to page 8, line 1; T-249-CONF-ENG, page 9, lines 15 – 18.

knowledge, this was not the case.

244. During their re-interviews with the prosecution, P-0007 and P-0008 accepted that they had lied about the relationships within their family.<sup>660</sup>

**(e) P-0496 and P-0497**

245. P-0496 and P-0497 provided written statements which were admitted into evidence on 17 June 2010 following the joint agreement of the parties.<sup>661</sup> These two individuals addressed some of the issues concerning the credibility of P-0007 and P-0008. However, their accounts were not tested by questioning under oath, and this written material does not overcome the profound underlying difficulties with the credibility of these two witnesses, as extensively rehearsed above.

**(f) Conclusions as to P-0007 and P-0008**

246. The prosecution relies on the evidence of these witnesses in its submissions on the facts.<sup>662</sup> In essence, it is argued that they provided detailed and credible evidence as to their abduction, training and participation in hostilities, and it is suggested that there are reasonable explanations for “the few minor discrepancies in their evidence”.<sup>663</sup> The defence submits that P-0007 and P-0008 lied about aspects of their family relationships as well as issues relating to their identity, their schooling, their recruitment in the armed forces and their participation

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<sup>660</sup> EVD-D01-00750, page 0380, lines 286-298 (re-interview of P-0008). EVD-D01-00752, page 0618, lines 3758 - 372 (re-interview of P-0007). See also EVD-D01-00753, page 0633, lines 35 – 56.

<sup>661</sup> T-303-Red-ENG, page 29, line 18 to page 30, line 2.

<sup>662</sup> ICC-01/04-01/06-2748-Red, paras 407-432.

<sup>663</sup> ICC-01/04-01/06-2748-Red, para. 432.

in hostilities.<sup>664</sup> The OPCV submits that corroboration has been provided as regards the names and dates of birth of P-0007 and P-0008 and that the criticisms by the defence as to their identity are based on unreliable documents and hearsay evidence. With reference to its previous submissions in response to the abuse of process application, the OPCV suggests that any apparent contradictions arising from the documentary material should be viewed against the background of the serious faults in the registration system in the DRC.<sup>665</sup> The OPCV further contends that P-0496 has provided relevant confirmatory material.<sup>666</sup> Finally, the OPCV argues that there is no reason for concluding that the evidence that tends to undermine the in-court testimony of these witnesses should be preferred to their sworn evidence.<sup>667</sup>

247. The Chamber's assessment of these two witnesses is that the weaknesses and contradictions in their evidence (particularly as to their ages and true identities) along with the evidence of D-0012 undermine the reliability of their testimony. The difficulties with their accounts are not satisfactorily or sufficiently explained by fears for their safety or that of their family. The Chamber is unable to rely on the evidence of either witness in these circumstances.

*(2) The evidence of P-0010 and evidence relevant  
to her assessment*

**(a) P-0010**

248. P-0010 is an alleged former child soldier who is participating in the

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<sup>664</sup> ICC-01/04-01/06-2773-Red-tENG, paras 97 – 124, 133 – 147 and ICC-01/04-01/06-2786-Red-tENG, paras 81-84.

<sup>665</sup> ICC-01/04-01/06-2744-Red-tENG, paras 31 – 33.

<sup>666</sup> ICC-01/04-01/06-2744-Red-tENG, paras 34 and 35.

<sup>667</sup> ICC-01/04-01/06-2744-Red-tENG, para. 46.

proceedings as a victim. P-0010 was born in the DRC.<sup>668</sup> Although at one stage in her evidence she said that she was born during a particular month in 1989,<sup>669</sup> she also gave evidence that she does not know the day or the month,<sup>670</sup> furthermore, she did not obtain a copy of her birth certificate,<sup>671</sup> and she does not know who provided the copy annexed to her application to participate as a victim.<sup>672</sup> Her birth certificate indicates that she was born in 1988<sup>673</sup> and her electoral card gives a different date: 1986.<sup>674</sup>

249. P-0010 gave evidence that she did not finish her schooling (during the fourth grade) because she was enlisted in the UPC armed forces<sup>675</sup> during 2002.<sup>676</sup> She said this happened after Governor Lompondo had left Bunia,<sup>677</sup> when the witness and her mother fled with a group of people who were trying to reach Beni in order to avoid the Lendu.<sup>678</sup> As part of her testimony she maintained that UPC soldiers enlisted her at Dele (where there is a slaughterhouse), about 7 kilometres outside Bunia on the road to Beni.<sup>679</sup> However, the defence put to the witness that at page 10 of her application to participate in the proceedings as a victim, she gave a radically different account, namely that she had enlisted at the stadium in Bunia, which P-0010 said she did not remember.<sup>680</sup>

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<sup>668</sup> T-144-CONF-ENG, page 12, lines 19-24.

<sup>669</sup> T-144-CONF-ENG, page 12, line 25 to page 13, line 3.

<sup>670</sup> T-145-Red2-ENG, page 47, lines 14 – 22.

<sup>671</sup> T-145-Red2-ENG, page 48, lines 22-25.

<sup>672</sup> T-145-Red2-ENG, page 59, lines 1-7.

<sup>673</sup> EVD-D01-01102.

<sup>674</sup> EVD-D01-00762.

<sup>675</sup> T-144-Red2-ENG, page 14, lines 6-12.

<sup>676</sup> T-144-Red2-ENG, page 35, lines 21-23.

<sup>677</sup> T-145-Red2-ENG, page 3, lines 16-17.

<sup>678</sup> T-144-Red2-ENG, page 18, lines 6-21.

<sup>679</sup> T-144-Red2-ENG, page 14, line 20 to page 15, line 8 and T-145-Red-ENG, page 56, lines 13-14 and page 60, lines 16 – 19.

<sup>680</sup> T-145-Red-ENG, page 56, lines 16-24.



250. The witness testified that she was 13 years old at the time she was abducted.<sup>681</sup> During the examination of the witness, the defence suggested to her that when completing her application to participate as a victim she had set out that she was “barely 15 years old” at the time of her enlistment, which the witness said she did not recall.<sup>682</sup> The witness’s electoral card lists her year of birth as 1986.<sup>683</sup> In a post-testimony interview with the OPCV, the witness stated that she intentionally lied about her date of birth in order to obtain this document.<sup>684</sup> Finally in this regard, the “Individual case story” that relates to this witness gives her birth year as 1987.<sup>685</sup> The Chamber has considered the circumstances in which this was provided, namely when P-0010 met with an official from MONUC.<sup>686</sup>

251. It is suggested in the “Individual case story” that P-0010 was forcibly enlisted by the APC towards the end of 1999,<sup>687</sup> and that she subsequently underwent military training in Rwampara prior to fighting under the orders of a particular commander. It is recorded that she transferred at the end of 2001 to Mahagi, and only joined the UPC when the latter attacked in 2002. Finally, it is set out that she ultimately left the UPC in July 2003.<sup>688</sup> Witness P-0010, whilst denying she met a MONUC agent, identified a representative from another organisation<sup>689</sup> with whom she discussed what happened to her during her time in the army, from her enlistment onwards.<sup>690</sup> However, in her testimony before the Chamber, P-0010 did not agree that she had been

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<sup>681</sup> T-144-Red-ENG, page 15, line 5.

<sup>682</sup> T-145-Red-ENG, page 56, line 25 to page 57, line 5.

<sup>683</sup> EVD-D01-00762.

<sup>684</sup> EVD-OTP-00660.

<sup>685</sup> EVD-D01-00082.

<sup>686</sup> T-208-CONF-ENG, page 39, lines 6 – 11.

<sup>687</sup> EVD-D01-00082.

<sup>688</sup> EVD-D01-00082.

<sup>689</sup> T-145-CONF-ENG, page 70, lines 12 - 16.

<sup>690</sup> T-145-CONF-ENG, page 71, lines 1 - 3.

enlisted in the APC prior to joining the UPC.<sup>691</sup>

252. P-0010's account was that after the UPC soldiers stopped her at Dele, she was sent with others to a training centre at Rwampara<sup>692</sup> for two weeks, and thereafter (during 2002)<sup>693</sup> they were taken to Mandro by Chief Kahwa.<sup>694</sup> When she completed her training, she was appointed as a bodyguard to a particular UPC commander.<sup>695</sup> Again, it is of note that when interviewed by the prosecution in September and October 2005, P-0010 indicated that the commander selected her after she had fought at Libi and Mbau.<sup>696</sup>

253. P-0010 stated that Commander Pepe was the Commander of the (UPC) camp.<sup>697</sup> However, D-0037 and D-0007 testified that he was a member of the APC and not the FPLC.<sup>698</sup>

254. The witness recognised herself in a portion of a video recording<sup>699</sup> as the figure standing in the centre of the screen with her hands together in front of her body.<sup>700</sup> The witness also recognised one of her friends, whom she said was an escort.<sup>701</sup> The witness suggested that this video was filmed in Rwampara.<sup>702</sup> She identified a person who was leading songs as a man she saw when they were visiting Rwampara that day.<sup>703</sup> The witness indicated that Bosco Ntaganda, the accused and the

<sup>691</sup> T-145-Red2-ENG, page 66, line 23 to page 67, line 14 and page 72, line 24 to page 73, line 16.

<sup>692</sup> T-144-Red2-ENG, page 15, lines 2 – 10 and page 21, lines 14-15.

<sup>693</sup> T-144-Red2-ENG, page 35, lines 21-23.

<sup>694</sup> T-144-Red2-ENG, page 15, lines 9 – 11.

<sup>695</sup> T-145-Red2-ENG, page 63, line 8 to page 64, line 1.

<sup>696</sup> T-145-Red2-ENG, page 65, line 2 to page 66, line 13.

<sup>697</sup> T-144-Red2-ENG, page 33, line 17.

<sup>698</sup> T-349-ENG, page 19, lines 19 – 24 (D-0037); T-348-ENG, page 26, lines 4 – 21 (D-0007). The prosecution suggests that there may have been two different Commanders with the name of Pepe, ICC-01/04-01/06-2778-Red, footnote 172.

<sup>699</sup> EVD-OTP-00570.

<sup>700</sup> T-145-Red2-ENG, page 13, lines 2-10.

<sup>701</sup> T-145-Red2-ENG, page 13, line 12 to page 14, line 8.

<sup>702</sup> T-145-Red2-ENG, page 26, lines 9-14.

<sup>703</sup> T-145-Red2-ENG, page 18, line 24 to page 19, line 2.

Minister of Defence had arrived in order to visit the recruits.<sup>704</sup> In one section<sup>705</sup> the witness said the person on the screen was Thomas Lubanga.<sup>706</sup> They were singing battle songs.<sup>707</sup> The witness stated that she saw Thomas Lubanga for this first time during this visit.<sup>708</sup>

255. In another section,<sup>709</sup> the witness said the people moving toward a vehicle in the video were leaving,<sup>710</sup> including Bosco Ntaganda, Thomas Lubanga and the Minister of Defence.<sup>711</sup> The witness also identified a bodyguard in the video: a uniformed soldier, who was shorter than the others.<sup>712</sup> She did not know his name or his age, but said that he was “younger”<sup>713</sup> and a “kadogo”, probably around 10 years old.<sup>714</sup>

256. The witness was asked to identify the people in the video, and she stated that the ones who had sticks and wore military uniforms were almost at the end of their training,<sup>715</sup> unlike those in civilian clothing.<sup>716</sup>

257. There is a body of evidence (considered hereafter) that tends to undermine the reliability of the detail of this witness’s account in certain important respects. However, the video material, to a significant extent, “speaks for itself” and it falls therefore (along with the account of the witness as regards its content) into a separate category.

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<sup>704</sup> T-145-Red2-ENG, page 19, lines 3 to 8.

<sup>705</sup> T-145-Red2-ENG, page 19, line 11.

<sup>706</sup> T-145-Red2-ENG, page 19, lines 11-15.

<sup>707</sup> T-145-Red2-ENG, page 38, lines 6-8.

<sup>708</sup> T-145-ENG, page 24, lines 20-23.

<sup>709</sup> Minutes 00:36:50 to 00:37:42 of Video EVD-OTP-00570 (DRC-OTP-0120-0293); T-145-Red2-ENG, page 21, lines 24-25.

<sup>710</sup> T-145-Red2-ENG, page 21, lines 24 to page 22, line 10.

<sup>711</sup> T-145-Red2-ENG, page 22, line 25 to page 23, line 2.

<sup>712</sup> T-145-Red2-ENG, page 23, lines 12-15.

<sup>713</sup> T-145-Red2-ENG, page 23, lines 16-19.

<sup>714</sup> T-145-Red2-ENG, page 23, line 24 to page 24, line 2.

<sup>715</sup> T-145-Red2-ENG, page 24, lines 3-12.

<sup>716</sup> T-145-Red2-ENG, page 24, lines 12-14.

**(b) D-0005 and D-0006**

258. Witnesses D-0005 and D-0006 gave evidence that they first met P-0010 in Mahagi when she was a soldier in the APC.<sup>717</sup>

259. D-0005 recognized P-0010 in a photograph shown to her in court.<sup>718</sup> She said that P-0010 was already a soldier in the APC armed forces when they met.<sup>719</sup> Furthermore, she confirmed the place of birth indicated by P-0010, although she testified that P-0010 was born in 1985 (and not in 1989 as stated by P-0010 in the course of her testimony).<sup>720</sup> D-0005 gave evidence that P-0010 joined the UPC.<sup>721</sup> In an interview with the prosecution conducted after she had completed her evidence, P-0010 confirmed that she knew D-0005.<sup>722</sup>

260. D-0006 was 17 years of age when he joined the UPC.<sup>723</sup> He recognised P-0010 on the photograph he was shown in the course of his testimony,<sup>724</sup> and he confirmed the place of birth she had given in her testimony.<sup>725</sup> When they met, D-0006 was serving as a soldier in the UPC<sup>726</sup> and P-0010 was a member of the APC;<sup>727</sup> indeed, P-0010 told D-0006 that she had been in the APC for a long time.<sup>728</sup> D-0006 described the APC as an armed group that had been created before the UPC.<sup>729</sup> P-0010, along with others from the APC, joined the UPC when they were

<sup>717</sup> T-261-Red2-ENG, page 17, lines 16 – 20 (D-0005); T-254-Red-ENG, page 49, lines 14 – 24, page 52, line 21 to page 53, line 1 and page 54, lines 10 – 12 (D-0006).

<sup>718</sup> T-261-CONF-ENG, page, 16, line 23 to page 17, line 11 and page 19, lines 18 – 20; EVD-D01-00112.

<sup>719</sup> T-261-Red2, page 17, lines 16 – 24.

<sup>720</sup> T-261-CONF-ENG, page 18, lines 2 – 7.

<sup>721</sup> T-261-Red2-ENG, page 18, line 10 to page 19, line 12.

<sup>722</sup> EVD-D01-00742, page 0379, lines 127-143.

<sup>723</sup> T-254-Red-ENG, page 79, line 23 to page 80, line 4.

<sup>724</sup> T-254-CONF-ENG, page 47, lines 17 – 22 and page 48, lines 3 – 4; EVD-D01-00112.

<sup>725</sup> T-255-CONF-ENG, page 8, line 18. D-0006 stated she was born in one of two localities, one of which corresponds to the place of birth given by P-0010 (T-144-CONF-ENG, page 12, lines 19-24).

<sup>726</sup> T-254-Red-ENG, page 52, lines 6 – 11.

<sup>727</sup> T-254-Red-ENG, page 52, line 21 to page 53, line 1.

<sup>728</sup> T-254-Red-ENG, page 62, line 19 to page 63, line 1.

<sup>729</sup> T-254-Red-ENG, page 54, line 10.

fighting in Mahagi.<sup>730</sup>

261. D-0006 said that P-0010 was either his age or he was a year older, having been born on 18 April 1985,<sup>731</sup> although he later stated that he did not know her age.<sup>732</sup> Following her evidence, P-0010 confirmed that she knew D-0006,<sup>733</sup> although in evidence she had denied knowing anyone by that name.<sup>734</sup> The prosecution advances a detailed argument that the testimony of D-0006 is unreliable.<sup>735</sup> The Chamber does not accept the prosecution's criticisms, in that D-0006 provided an entirely credible account of his knowledge of P-0010. Although he could not give evidence about every aspect of her life,<sup>736</sup> such as information as regards her parents,<sup>737</sup> he testified in detail about other aspects of her history, including other members of her family.<sup>738</sup> The Chamber notes, however, that this evidence did not coincide by any means entirely with the account of P-0010.<sup>739</sup>

262. The Chamber was impressed generally by the detail and internal consistency of the evidence of D-0006, and has determined that he was an essentially credible and reliable witness.

### (c) Conclusions as to P-0010

263. The defence suggests that "the authenticity of [P-0010's electoral

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<sup>730</sup> T-254-Red-ENG, page 49, lines 22 – 24.

<sup>731</sup> T-254-Red-ENG, page 46, lines 1 – 4 (D-0006's age) and page 66, lines 13 – 18 (P-0010's age in relation to D-0006).

<sup>732</sup> T-255-Red2-ENG, page 12, lines 22 – 24.

<sup>733</sup> EVD-D01-00743, page 0396, line 224.

<sup>734</sup> T-145-CONF-ENG, page 74, lines 3 – 8.

<sup>735</sup> ICC-01/04-01/06-2748-Conf, paras 401 – 402.

<sup>736</sup> He did not know P-0010's ethnicity, although he stated she had told him where she came from (T-255-CONF-ENG, page 9, line 25 to page 10, line 2).

<sup>737</sup> T-255-Red2-ENG, page 9, lines 15 – 18 (name of her parents) and page 10, lines 3 – 4 (father's profession).

<sup>738</sup> T-255-CONF-ENG, page 9, lines 19 – 24.

<sup>739</sup> T-145-Red2-ENG, page 47, lines 7 – 10.

card] is established by the extract from the IEC database”<sup>740</sup> and that her explanation – to the effect that she provided false information in order to obtain an official document <sup>741</sup> – is implausible.<sup>742</sup> The prosecution contends that P-0010’s explanation is corroborated by the account of witnesses P-0007 and P-0008 and it is consistent with other evidence.<sup>743</sup> The OPCV submits that any apparent contradictions arising from the documentary material should be viewed against the background of the serious faults in the registration system in the DRC and it suggests that P-0010’s birth certificate has low probative value while the electoral card lacks any probative value.<sup>744</sup>

264. While the defence submits that the “Individual case story” document contains the correct date of birth and refers to D-0005’s testimony of having met a MONUC representative together with P-0010,<sup>745</sup> it is challenged by the prosecution on the basis of P-0010’s own evidence and a discrepancy between the date of the interview on the document and the date of the visit as recounted by D-0005.<sup>746</sup> In addition, the prosecution points out that according to the evidence given by the experts P-0358 and P-0359, “it is scientifically possible for [P-0010] to have been under the age of 15 at the time of her recruitment in late 2002”.<sup>747</sup>

265. The OPCV submits that there is no reason for concluding that the evidence that tends to undermine the in-court testimony of this

<sup>740</sup> ICC-01/04-01/06-2773-Red-tENG, para. 151, referring to EVD-D01-00762.

<sup>741</sup> EVD-OTP-00660.

<sup>742</sup> ICC-01/04-01/06-2773-Red-tENG, para. 154.

<sup>743</sup> ICC-01/04-01/06-2778-Red-tENG, para. 102.

<sup>744</sup> ICC-01/04-01/06-2744-Red-tENG, paras 31 – 33.

<sup>745</sup> ICC-01/04-01/06-2773-Red-tENG, paras 155 and 156.

<sup>746</sup> ICC-01/04-01/06-2748-Red-tENG, para. 399, referring to T-145-Red2-ENG page 69, lines 16 – 21 and page 70, lines 2 – 16 and ICC-01/04-01/06-2778-Red, para. 95.

<sup>747</sup> ICC-01/04-01/06-2748-Red, para. 400, referring to EVD-OTP-00430.

witness should be preferred to her sworn evidence.<sup>748</sup> The defence, on the other hand, points to various contradictions and inconsistencies in the documentary evidence and her testimony concerning her enlistment and activities within the UPC,<sup>749</sup> and emphasises that P-0010 materially benefited, in a significant way, from her participation as a witness in the trial.<sup>750</sup>

266. The defence suggests that P-0010's account of the interruption to her schooling in 2002 during her 4<sup>th</sup> year<sup>751</sup> is contradicted by the relevant school register,<sup>752</sup> which is said to show that in 2002 she was not registered at that institution.<sup>753</sup> In all the circumstances, the Chamber accepts the considerable evidence that this witness was in the APC between 1999 and 2002,<sup>754</sup> which significantly casts doubt over her account of her schooling and the circumstances in which she joined the UPC.

267. The OPCV argues that P-0010's evidence on being enrolled in the FPLC was corroborated by D-0005, and it is not disputed by the defence.<sup>755</sup> The prosecution submits that the testimony of D-0005 is not credible, as it is suggested that she should have known certain facts of which she was ignorant.<sup>756</sup> Although at one stage D-0005 gave an NGO an incorrect account as regards her service as a child soldier,<sup>757</sup> the Chamber was impressed by what was, overall, an internally

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<sup>748</sup> ICC-01/04-01/06-2744-Red-tENG, para. 46.

<sup>749</sup> ICC-01/04-01/06-2773-Red-tENG, paras 160 – 162.

<sup>750</sup> ICC-01/04-01/06-2773-Red-tENG, para. 167.

<sup>751</sup> T-144-Red2-ENG, page 13, lines 13-16 and page 18, lines 6 – 8.

<sup>752</sup> EVD-D01-00180; T-294-ENG, page 22, line 19 – page 23, line 13.

<sup>753</sup> ICC-01/04-01/06-2773-Conf, para. 157.

<sup>754</sup> EVD-D01-00082, which states that P-0010 was forcibly recruited by the APC in 1999 and remained with this group until her integration into the UPC in 2002); the testimony of D-0005 and D-0006.

<sup>755</sup> ICC-01/04-01/06-2744-Red-tENG, para. 36. The OPCV points out that the defence only questions the age of P-0010 when she was enrolled, and not the enrollment itself (footnote 117).

<sup>756</sup> ICC-01/04-01/06-2748-Conf, para. 403.

<sup>757</sup> T-261-Red2, page 26, lines 13 – 21 (D-0005).

consistent and persuasive account under oath, which the Chamber accepts.

268. Whilst the Chamber accepts that at some stage P-0010 may have served as a soldier within the UPC, it is not satisfied beyond reasonable doubt that this occurred when she was under 15 years of age. The internal contradictions in her accounts, as extensively canvassed herein, including the unexplained differences as to her date of birth in both her testimony and the documentary evidence, together with the strength of the conflicting external evidence, mean that she is not a witness that the Chamber is able to rely on as regards many aspects of the relevant detail of her account. However, the video material and her comments on it, as set out above, remain essentially unaffected by these criticisms.

*(3) The evidence of P-0011 and evidence relevant  
to his assessment*

**(a) P-0011**

269. P-0011 is an alleged former child soldier who was authorised to participate in the proceedings. P-0011 gave in evidence what he said was his name<sup>758</sup> and indicated he has not been known by any other names, including nicknames.<sup>759</sup> Substantial discrepancies and difficulties, however, emerged on this issue. First, he had not told the OTP prior to giving evidence about one of the names he supplied in his testimony (stating simply that he had not wanted to mention it),<sup>760</sup> and similarly, that name does not appear on his birth certificate.<sup>761</sup> At

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<sup>758</sup> T-138-CONF-ENG, page 52, lines 9 – 10.

<sup>759</sup> T-138-Red2-ENG, page 53, lines 4 – 12.

<sup>760</sup> T-139-CONF-ENG, page 48, lines 17 – 22.

<sup>761</sup> EVD-D01-00059.



page 21 of his application to participate in these proceedings as a victim (“Certification of a child after leaving an armed group”) the name provided also contains a material variation.<sup>762</sup> He testified that his sister or grandmother had suggested that latter name,<sup>763</sup> although it is to be noted that this variation also appears on an investigator’s note dated 27 March 2008 (albeit with a slightly different spelling).<sup>764</sup> He indicated that when he was younger he was called by another name that was not the one he was given at birth,<sup>765</sup> which he recalled having provided to a representative of the OTP.<sup>766</sup>

270. He stated that he was born in 1992,<sup>767</sup> a date indicated to him by members of his family,<sup>768</sup> and in particular his grandmother had suggested it to him prior to his first meeting with one of the representatives of the OTP.<sup>769</sup> However, this date differs from the date in his original witness statement (provided to the investigators in July 2005).<sup>770</sup> The witness stated this latter date was a mistake that he had made.<sup>771</sup>

271. The evidence he gave on where he attended school<sup>772</sup> is inconsistent and contradicts the information set out at paragraph 14 of his statement to OTP investigators.<sup>773</sup> When asked about these contradictions P-0011 stated that he was unaware of the truth, which

<sup>762</sup> T-139-CONF-ENG, page 49, lines 11 – 13.

<sup>763</sup> T-139-CONF-ENG, page 49 line 14 to page 50 line 6.

<sup>764</sup> EVD-D01-01087.

<sup>765</sup> T-139-CONF-ENG, page 51, lines 10 – 12.

<sup>766</sup> T-139-Red2-ENG, page 51, lines 14 – 22.

<sup>767</sup> T-138-CONF-ENG, page 53, line 24 to page 54 line 2.

<sup>768</sup> T-138-Red2-ENG, page 54, lines 3 – 5.

<sup>769</sup> T-139-Red2-ENG, page 2, lines 13 – 19 and page 57, line 17 to page 58, line 1.

<sup>770</sup> T-139-CONF-ENG, page 58, lines 2 – 7.

<sup>771</sup> T-139-Red2-ENG, page 58, lines 8 – 15.

<sup>772</sup> T-138-CONF-ENG, page 54, lines 10 – 16; T-139-CONF-ENG, page 67, line 20 to page 68, line 7, page 71, lines 5 – 6 (location of one of the schools), page 74, line 16 to page 75, line 8 and page 77, lines 2 – 7.

<sup>773</sup> T-139-CONF-ENG, page 71, line 7 to page 72, line 9.

he must have forgotten, but he thought the information given in the statement was correct.<sup>774</sup>

272. P-0011 initially suggested that he joined the UPC in July 2002 and he remained in military service with this group until July 2003.<sup>775</sup> However, in his application to participate as a victim, he indicated that he had been enlisted in January 2003<sup>776</sup> and had fought throughout the year 2003 and the first three months of 2004.<sup>777</sup> When the application was put to him during his examination, P-0011 gave evidence to the effect that he had been enlisted in July 2002 and left the military in March 2003.<sup>778</sup> The circumstances of his joining the UPC are equally uncertain. The witness suggested at paragraph 20 of his statement to the OTP that he "met a group of UPC soldiers who suddenly appealed to [him] to join them and to join their army and receive military training and to fight the Lendu enemies".<sup>779</sup> P-0011 said that the interpreter had made an error during the interview,<sup>780</sup> and that he had been enlisted by force.<sup>781</sup> However, the witness was notably inconsistent on this issue, in that he said during his evidence that when his studies were interrupted during the war, in addition to digging for gold, he voluntarily signed up for military service<sup>782</sup> with the UPC,<sup>783</sup> and that he was not enlisted by force but went voluntarily.<sup>784</sup>

273. A possible explanation for his willingness to join the UPC was given

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<sup>774</sup> T-139-Red2-ENG, page 72, lines 12 – 15 and page 74, lines 2 – 9.

<sup>775</sup> T-138-Red-ENG, page 57, line 24 to page 58, line 3 and page 58, lines 11 – 18.

<sup>776</sup> T-140-Red2-ENG, page 18, lines 3 – 5 and page 19, lines 1 – 2.

<sup>777</sup> T-140-Red2-ENG, page 19, lines 15 – 20.

<sup>778</sup> T-140-Red2-ENG, page 19, line 22 to page 20, line 5.

<sup>779</sup> T-139-Red2-ENG, page 82, lines 12 – 19 and page 83, lines 3 – 8.

<sup>780</sup> T-140-Red2-ENG, page 8, lines 10 – 22.

<sup>781</sup> T-140-Red2-ENG, page 8, lines 23 – 25.

<sup>782</sup> T-138-Red-ENG, page 57, lines 13 – 20.

<sup>783</sup> T-138-Red-ENG, page 57, line 24 to page 58, line 3.

<sup>784</sup> T-138-Red-ENG, page 58, lines 4 – 10; T-140-Red2-ENG, page 9, lines 1 – 5.

at paragraph 21 of his July statement to the OTP in which he had described how he had joined the organisation to avenge his mother's death.<sup>785</sup> However, when this was read out in Court, P-0011 stated that although the statement had been re-read to him and he had confirmed its accuracy, this first statement to the prosecution contained errors whilst his second statement was correct.<sup>786</sup> The witness testified that his mother had been alive when he entered military service, and accordingly he did not agree with the relevant part of the statement that was read to him.<sup>787</sup> The witness later testified that his mother died after he had left to join the military.<sup>788</sup> However, in a transcribed interview dated 8 January 2010, P-0011 suggested that his mother is aware of his testimony before the Court.<sup>789</sup> Further evidence indicating that P-0011's mother is alive was given by D-0024, which the Chamber has accepted.<sup>790</sup>

274. An additional element of confusion is provided by P-0011's application to participate in the proceedings before the Court, in which he indicated at page 11, in section D (entitled "Information Regarding the Alleged Crimes") that he had been forcibly enlisted by Bosco Ntaganda in 2003.<sup>791</sup> It was further indicated that "[a]fter two months of training in Bule, [he] was sent for combat throughout the year 2003 and even during the first few months of 2004."<sup>792</sup> The witness said in evidence that he did not remember very well, but that the reference to

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<sup>785</sup> T-140-Red2-ENG, page 11 line 9 to page 12, line 1.

<sup>786</sup> T-140-Red2-ENG, page 12, line 5 to page 14, line 13.

<sup>787</sup> T-140-Red2-ENG, page 15, line 15 to page 16, line 13.

<sup>788</sup> T-140-Red2-ENG, page 17, lines 10 – 17.

<sup>789</sup> EVD-D01-00745, page 0082 at lines 1173 – 1175.

<sup>790</sup> T-246-CONF-ENG, page 8, lines 1 – 9.

<sup>791</sup> T-140-Red2-ENG, page 18, lines 3 – 18.

<sup>792</sup> T-140-Red2-ENG, page 18 lines 16 – 18.

training and forceful enlistment by Bosco Ntaganda was not true.<sup>793</sup>

275. There was some minor difficulty in P-0011's evidence in relation to where he was enlisted, as he gave two different names.<sup>794</sup> At one stage the witness said that they are in the same place.<sup>795</sup> It became apparent that there is a relatively insubstantial distance between the two locations when they were shown to the witness on a map, although they are clearly not in the same place.<sup>796</sup>

276. During his evidence, P-0011 said he was in the fourth year when his studies were interrupted at the outbreak of war and he remained at home to help with farm work.<sup>797</sup> He completed that academic year when he left military service.<sup>798</sup> However, in an earlier account P-0011 had said that he had finished his fourth year before he enlisted.<sup>799</sup>

277. The witness's evidence was contradictory as regards certain events with a particular friend. In evidence, P-0011 said they enlisted in the army at the same time, travelling to Bule with soldiers.<sup>800</sup> However, in his July 2005 statement at paragraph 21, he stated they were not together when he joined the UPC militia.<sup>801</sup> When asked about this discrepancy, P-0011 insisted that he had told the investigators that he had been with his friend and that the UPC soldiers took them to Bule.<sup>802</sup>

278. His evidence was that soldiers took him to Lopa in a Toyota Stout

<sup>793</sup> T-140-Red2-ENG, page 18, lines 23 – 25.

<sup>794</sup> T-139-CONF-ENG, page 88, lines 7 – 12.

<sup>795</sup> T-139-CONF-ENG, page 88, lines 15 – 22.

<sup>796</sup> T-140-Red2-ENG, page 3, line 11 to page 5, line 21; EVD-D01-00060.

<sup>797</sup> T-138-Red2-ENG, page 56, lines 5 – 10.

<sup>798</sup> T-139-Red2-ENG, page 79, line 22 to page 80, line 1.

<sup>799</sup> T-139-Red2-ENG, page 68, lines 5 – 10.

<sup>800</sup> T-140-Red2-ENG, page 6, line 17 to page 7, line 7.

<sup>801</sup> T-140-Red2-ENG, page 7, lines 8 – 23.

<sup>802</sup> T-140-Red2-ENG, page 7, lines 13 – 23.

vehicle and from there by foot to a military camp at Bule.<sup>803</sup> There they started training after they had built their accommodation,<sup>804</sup> and that after four months he was given his equipment including uniforms and a weapon.<sup>805</sup> Later, he said he fought during battles at Barrière<sup>806</sup> and Lipri.<sup>807</sup> However, although he testified that Barrière was the first battle he took part in,<sup>808</sup> he failed to mention this to the OTP investigators in July 2005. His first statement to the OTP, under the heading “Active participation in UPC attacks on Lipri” includes the following: “I have a very clear and unforgettable memory of that day because there it was the first time I ever killed a person.”<sup>809</sup> The witness said that this description was incorrect, because he killed for the first time at Barrière.<sup>810</sup>

279. P-0031 confirmed that he remembered P-0011 from the context of his work.<sup>811</sup>

280. It was a highly unusual feature of this witness’s evidence that in advance of his meeting with representatives of the OTP in July 2005, he had written the names of some of the main localities he was to mention in his statement on his jeans.<sup>812</sup> When asked about this, the witness gave a distinctly confused explanation, including that he had done it for the “pleasure of it” before he had met the investigator.<sup>813</sup>

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<sup>803</sup> T-138-Red2-ENG, page 62, line 11 to page 63, line 19.

<sup>804</sup> T-140-Red2-ENG, page 29, line 24 to page 30, line 12.

<sup>805</sup> T-140-Red2-ENG, page 30, lines 13 – 21.

<sup>806</sup> T-140-Red2-ENG, page 41, lines 2 – 4.

<sup>807</sup> T-139-Red2-ENG, page 17, line 14 to page 19, line 1.

<sup>808</sup> T-140-Red2-ENG, page 41, lines 2 – 4.

<sup>809</sup> T-140-Red2-ENG, page 41, line 23 to page 42, line 1.

<sup>810</sup> T-140-Red2-ENG, page 42, lines 2 – 11.

<sup>811</sup> T-202-CONF-ENG, page 74, lines 1 – 3.

<sup>812</sup> EVD-D01-00062.

<sup>813</sup> T-140-Red2-ENG, page 62, line 1 to page 63, line 1.

**(b) D-0024**

281. D-0024, a member of P-0011's family,<sup>814</sup> said he was born in 1990, or between 1990 and 1991.<sup>815</sup> D-0024 gave evidence as to P-0011's schooling and the places where he lived that contradicts the evidence of P-0011.<sup>816</sup>

282. During the period of conflict between the Ngiti and the Lendu around 2002/2003, D-0024 sometimes met P-0011 and one of his close relatives in the market,<sup>817</sup> and she indicated that P-0011 never served as a soldier.<sup>818</sup> She was asked how she knew that P-0011 had never been a member of an armed group and she replied he was someone she saw because he was a very close family relative.<sup>819</sup>

283. The prosecution challenges the evidence of D-0024. It is suggested that her evidence on P-0011 not being in an armed group is vague and unsubstantiated, and that she was not in a position to know whether he was in the army.<sup>820</sup>

284. Although D-0024 was not in a position to be aware, at all relevant times, of the situation as regards P-0011 (she testified she fled the area for two weeks in 2002<sup>821</sup> and at one point during the war she feared that P-0011 and one of his close relatives were dead),<sup>822</sup> the Chamber found her evidence convincing, and – in the main – internally consistent. In all the circumstances, she provides some supporting

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<sup>814</sup> T-246-CONF-ENG, page 7, lines 13 – 16.

<sup>815</sup> T-246-Red2-ENG, page 10, lines 13 – 15.

<sup>816</sup> T-246-CONF-ENG, page 18, lines 12 to page 20, line 14 and page 26, lines 7 – 9 and 16 – 17; T-247-CONF-ENG, page 4, lines 5 – 8.

<sup>817</sup> T-247-CONF-ENG, page page 9, line 12 to page 12, line 16.

<sup>818</sup> T-246-CONF-ENG, page 28, lines 7 – 12.

<sup>819</sup> T-246-Red2-ENG, page 28, lines 19 – 21.

<sup>820</sup> ICC-01/04-01/06-2748-Red, paras 392 – 394. See also EVD-D01-00745, page 77, lines 1011-1012.

<sup>821</sup> ICC-01/04-01/06-T-247-CONF-ENG, page 10, line 19 to page 11, line 8.

<sup>822</sup> ICC-01/04-01/06-T-247-CONF-ENG, page 11, line 25 to page 12, line 6.

evidence for the suggestion that P-0011 did not serve as a child soldier within the UPC, although taken alone her account is inconclusive.

**(c) Conclusions as to P-0011**

285. The OPCV submits that the name and date of birth of P-0011 have been confirmed and the documents used by the defence to question his identity are unreliable, and it is suggested the allegations made by the accused in his abuse of process application as regards this witness are speculative.<sup>823</sup> The OPCV submits any contradictions that are apparent from these documents should be analysed taking into account the serious faults in the registration system in the DRC.<sup>824</sup> The OPCV further submits that P-0011 was recruited by the UPC military in July 2002 and remained within the group until July 2003,<sup>825</sup> and it suggests there is no reason why the subsequent out-of-court statements of other witnesses and the information they generally provided that tends to contradict this testimony should be given greater weight than his own account.<sup>826</sup> It is also argued that any contradictions and inconsistencies in P-0011's (and other victims') evidence can be explained by their concerns about security and the lapses of memory that are linked to trauma and stress.<sup>827</sup>

286. The prosecution submits that it is reasonable that the witness could not recall exactly what he told investigators 4 years earlier.<sup>828</sup>

287. The defence contends that it is inexplicable that the legal representative of P-0011 (the OPCV) contests the probative value of the

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<sup>823</sup> ICC-01/04-01/06-2744-Red-tENG, paras 31 and 32.

<sup>824</sup> ICC-01/04-01/06-2744-Red-tENG, para. 33.

<sup>825</sup> ICC-01/04-01/06-2744-Red-tENG, para. 37.

<sup>826</sup> ICC-01/04-01/06-2744-Red-tENG, para. 46.

<sup>827</sup> ICC-01/04-01/06-2744-Red-tENG, para. 46.

<sup>828</sup> ICC-01/04-01/06-2778-Red, para. 103.

witness's birth certificate, since this document purportedly established his identity and age for the purposes of his application to participate and for reparations (it was annexed thereto).<sup>829</sup>

288. Given the internal contradictions and the confusion within the evidence of P-0011 (as set out above), and taking into account the evidence of D-0024, the Chamber has real doubts as to the suggestion that P-0011 served as a child soldier within the UPC in the circumstances he described, namely when he was under 15 years of age and during the period covered by the charges. The internal contradictions in his accounts, as extensively canvassed hereinbefore, together with the conflicting external evidence, mean that he is not a witness that the Chamber is able to rely on as regards the detail of his account.

***(4) Other matters concerning the reliability and integrity of Intermediary 143***

289. In the course of 2007 and 2008, Intermediary 143 submitted some questionable financial requests,<sup>830</sup> several of which were considered excessive and unjustified by representatives of the OTP.<sup>831</sup>

290. An internal OTP report of 23 February 2006 which dealt with an incident in early January 2006 concerning three potential witnesses, called into question the credibility and reliability of Intermediary 143.<sup>832</sup>

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<sup>829</sup> ICC-01/04-01/06-2773-Red-tENG, para. 190.

<sup>830</sup> EVD-D01-01086.

<sup>831</sup> EVD-D01-01086, page 0170 to page 0174.

<sup>832</sup> EVD-OTP-00641, page 3/5.



*(5) Assessment of Intermediary 143*

291. Given the pattern of unreliability as regards the witnesses introduced by Intermediary 143 and called to give evidence during the trial (P-0007, P-0008, P-0010 and P-0011), the Chamber accepts that there is a real risk that he played a role in the markedly flawed evidence that these witnesses provided to the OTP and to the Court. Bearing in mind this consistent lack of credibility as regards the trial witnesses he introduced to the investigators, and particularly focussing on the cumulative effect of their individual accounts, it is likely that as the common point of contact he persuaded, encouraged or assisted some or all of them to give false testimony. The Chamber accepts that the accounts of P-0007, P-0008, P-0010 and P-0011 were or may have been truthful and accurate in part, but it has real doubts as to critical aspects of their evidence, in particular their age at the relevant time. Although other potential explanations exist, the real possibility that Intermediary 143 corrupted the evidence of these four witnesses cannot be safely discounted.

**2. Intermediary P-0316**

292. The Chamber first considers the evidence relating to the role and credibility of P-0316 before turning to the witnesses whose testimony may have been affected.

**a) Background**

293. In its Decision on Intermediaries, the Chamber described the evolution of the position of Intermediary P-0316, and including the evidence of P-0015 who revealed the identity of Intermediary P-0316 to

the defence on 16 June 2009.<sup>833</sup> The Chamber noted that several witnesses gave evidence to the effect that Intermediary P-0316 may have misused his position; this amounted to the allegation that he possibly “persuaded or invited witnesses to give false testimony to the Court.”<sup>834</sup> The Chamber instructed the prosecution to call Intermediary P-0316 as a witness in order to address the allegations levelled against him, the conflicts in the evidence and the contacts between the intermediaries.<sup>835</sup>

294. P-0316 fulfilled a support role<sup>836</sup> for the prosecution, on a contractual basis,<sup>837</sup> between 19 November 2005<sup>838</sup> and 31 March 2006.<sup>839</sup> However, his work for the OTP (for which he was paid) spanned a longer period, in that it had started at least by April 2005<sup>840</sup> and continued once his contract ended, extending through until 2008.<sup>841</sup> Although P-0316 stated that his functions did not involve contact with, or providing transportation for, the witnesses (or other individuals),<sup>842</sup> the defence confronted him with a receipt signed by him indicating that he had received \$30 for transport relating to, and his communication with, three witnesses.<sup>843</sup>

295. It is noteworthy that this intermediary had contact with the following lengthy list of potential witnesses: (first contact via P-0316)

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<sup>833</sup> ICC-01/04-01/06-2434-Red2, paras 21 – 23 and 38, 39.

<sup>834</sup> ICC-01/04-01/06-2434-Red2, para. 140.

<sup>835</sup> ICC-01/04-01/06-2434-Red2, para. 141.

<sup>836</sup> T-331-Red2-ENG, page 6, lines 3 – 18.

<sup>837</sup> T-328-Red2-ENG, page 11, line 4 to page 12, line 8.

<sup>838</sup> T-328-Red2-ENG, page 11, lines 15 – 19.

<sup>839</sup> T-331-Red2-ENG, page 7, lines 18 – 19.

<sup>840</sup> T-328-Red2-ENG, page 9, lines 1 – 7.

<sup>841</sup> T-328-Red2-ENG, page 12, lines 4 – 8; T-332-Red-ENG, page 37, lines 5 – 13 ; See also, by way of example, the receipts for expenses spanning the relevant years: EVD-D01-00411 (January 2008); EVD-D01-00355 (December 2005); EVD-D01-00308 (January 2008); EVD-D01-00364 (December 2007) and EVD-D01-00365 (February 2006).

<sup>842</sup> T-331-Red2-ENG, page 7, lines 9 – 15.

<sup>843</sup> T-331-Red2-ENG, page 7, line 20 to page 8, line 1; EVD-D01-00355.

DRC-OTP-WWWW-0020, DRC-OTP-WWWW-0021, DRC-OTP-WWWW-0035,<sup>844</sup> DRC-OTP-WWWW-0147, DRC-OTP-WWWW-0156, DRC-OTP-WWWW-0159, DRC-OTP-WWWW-0161, DRC-OTP-WWWW-0175, DRC-OTP-WWWW-0178, DRC-OTP-WWWW-0249, DRC-OTP-WWWW-0268, DRC-OTP-WWWW-0270 and DRC-OTP-WWWW-0314. He also had contact with DRC-OTP-WWWW-0250 (first contact via P-0316 and Individual 183), DRC-OTP-WWWW-0303 (first contact via P-0321),<sup>845</sup> trial witness P-0015 (potentially first contact via P-0316), trial witness P-0038 (potentially first contact via P-0316), DRC-OTP-WWWW-0028<sup>846</sup> (first contact via the associate of P-0316), DRC-OTP-WWWW-0183,<sup>847</sup> DRC-OTP-WWWW-0163 and DRC-OTP-WWWW-0166.

296. Witnesses P-0015, D-0016 (DRC-OTP-WWWW-0035) and P-0038 are relevant to this intermediary. Their particular evidence is addressed below.

**b) The evidence from P-0582 and P-0583**

297. P-0316 was introduced to P-0583 in April 2005.<sup>848</sup> P-0582 considered that P-0316 had good knowledge of the region and the various parties to the conflict, and he knew individuals who were involved in the events.<sup>849</sup> P-0583 began working with P-0316 in April 2005 and this continued, although with varying frequency, until his (P-0583's) departure from the Court in September 2007.<sup>850</sup> At the time when the

<sup>844</sup> DRC-OTP-WWWW-0035 was called by the defence as D-0016.

<sup>845</sup> EVD-D01-01039, No. 133.

<sup>846</sup> DRC-OTP-WWWW-0028 testified in the *Katanga and Ngudjolo* case, see ICC-01/04-01/06-2702-Red, paras 30 - 43.

<sup>847</sup> DRC-OTP-WWWW-0183 is referred to hereinafter as "Individual 183".

<sup>848</sup> T-334-Red2-ENG, page 55, lines 3 – 10. The person who introduced P-0316 to P-0582 is identified at T-334-CONF-ENG, page 53, line 24 to page 54, line 2.

<sup>849</sup> T-334-Red2-ENG, page 16, line 24 to page 17, line 16 and page 18, line 11.

<sup>850</sup> T-334-Red2-ENG, page 57, lines 7 – 11.

team began working with P-0316, P-0583 was the lead investigator and acted as the focal point for, and was most in contact with, P-0316.<sup>851</sup> The first requests made to P-0316 by the OTP were to identify potential witnesses, based on his knowledge of the Ituri situation.<sup>852</sup> This was at an early stage, a few months after the departure of the Operation Artemis contingent.<sup>853</sup>

298. P-0582 considered that all the intermediaries he knew behaved in a “sufficiently correct way” and did not ask anyone to tell lies,<sup>854</sup> but he suggested that P-0316 was not very comfortable with children and victims.<sup>855</sup> P-0583 similarly stated that while P-0316 was very successful in providing reliable information and that they trusted him, the role of an intermediary in the sense of taking care of children or witnesses, in contrast to merely putting them in contact with the prosecution, did not suit him very well.<sup>856</sup> It was suggested that P-0316 identified and provided reliable information about members of certain militias;<sup>857</sup> he was the main intermediary for the OTP as regards identifying militia members;<sup>858</sup> he travelled to locations which the investigators could not visit in order to contact witnesses;<sup>859</sup> he introduced witnesses to the OTP, some of whom were not known to the prosecution<sup>860</sup> (for instance P-0015<sup>861</sup> and D-0016<sup>862</sup>); he arranged

<sup>851</sup> T-334-Red2-ENG, page 18, line 24 to page 19, line 6.

<sup>852</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 61, lines 8 – 10.

<sup>853</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 61, lines 10 – 14. See Section IX on the nature of the armed conflict.

<sup>854</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 17, line 7 to page 18, line 2.

<sup>855</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-CONF-ENG, page 9, lines 1 – 3.

<sup>856</sup> T-334-Red2-ENG, page 17, lines 10 – 16; T-335-Red2-ENG, page 8, lines 10 to 25 and page 9, line 11.

<sup>857</sup> T-334-Red2-ENG, page 17, lines 6 – 9, page 55, lines 17 – 20, and page 57, lines 19 – 23 (P-0583).

<sup>858</sup> T-334-Red2-ENG, page 57, lines 16 – 23 (P-0583).

<sup>859</sup> T-334-Red2-ENG, page 18, lines 4 – 11 (P-0583).

<sup>860</sup> T-334-Red2-ENG, page 63, lines 21 – 24 and page 67, line 20 to page 68, line 5 (P-0583).

<sup>861</sup> T-264-Red2-ENG, page 22, lines 11 – 22 and T-264-CONF-ENG, page 61, lines 15 – 24 (P-0015).

their travel;<sup>863</sup> and he obtained identification papers.<sup>864</sup> P-0316 regularly provided information on the security situation in Bunia and in Ituri in general, and P-0583 was frequently in contact with him for information as to what was happening in the field.<sup>865</sup> As regards “unknown” individuals, P-0316 informed P-0583 about a number of “witnesses” who were officers of the UPC or other groups who could be contacted.<sup>866</sup> This was around the time of the first missions, at the end of 2004 or beginning of 2005.<sup>867</sup> During the more formal phase of P-0316’s work, it was one of his responsibilities to put the OTP in contact with individuals who had not yet been identified.<sup>868</sup>

299. P-0583 recalled that P-0316 was not asked to provide identity cards for those he introduced to the OTP, although when he told the OTP that someone of interest had been identified, the individual concerned would be asked to bring any relevant documents.<sup>869</sup>

300. P-0583 indicated that he found P-0316 to be intelligent and professional, and his reliability and credibility were demonstrated in the work he undertook and the way he responded to questions

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<sup>862</sup> T-256-CONF-ENG, page 8, line 24 to page 9, line 6 (D-0016).

<sup>863</sup> T-334-Red2-ENG, page 19, line 23 to page 20, line 1; T-335-Red2-ENG, page 33, lines 7 – 13; T-336-Red2-ENG, page 9, lines 14 – 19 (P-0583); See also, by way of example, expense receipts relating to travel arrangements for witnesses: EVD-D01-00684 (P-0583 testified that the code used for P-0316 was “DRC-SS05”, T-334-Red2-ENG, page 64, lines 17 – 20); EVD-D01-00357; EVD-D01-00758 and EVD-D01-00725.

<sup>864</sup> T-336-Red-ENG, page 10, lines 10 – 21 (P-0583) and page 58, line 11 to page 59, line 8 (P-0038); See also, by way of example, the expense receipts relating to documents prepared for witnesses: EVD-D01-00682 and EVD-D01-00382.

<sup>865</sup> T-334-Red2-ENG, page 66, lines 1 – 9 (P-0583); P-0582 also contacted P-0316 concerning security related questions, Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 8, lines 7 – 14 and Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-CONF-ENG, page 61, lines 21 – 24.

<sup>866</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 61, lines 15 – 20.

<sup>867</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 62, lines 4 – 12 (P-0583).

<sup>868</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-CONF-ENG, page 63, lines 5 – 12 (P-0583).

<sup>869</sup> T-334-Red2-ENG, page 67, line 20 to page 68, line 5.

addressed to him.<sup>870</sup> He usually found the contact details for those identified by the team.<sup>871</sup> P-0583 was asked if he had communicated any doubts or concerns regarding P-0316's work to his superiors, and although he indicated that there were the normal discussions that occurred when using an "intermediary informer", his view was P-0316 was better at providing information than taking care of witnesses.<sup>872</sup>

301. P-0583 did not raise any specific concerns about using P-0316 and he did not reassess the testimony of witnesses introduced by him, in addition to the usual, systematic verification process for the contents of witness statements.<sup>873</sup> There was a process of reassessment whenever new evidence came to light.<sup>874</sup>

302. Notwithstanding the favourable assessment set out above, evidence was given as to reservations concerning P-0316. P-0583 noted that he was not appointed to work as a liaison officer and explained that the relevant panel, which he had not been a part of, did not find P-0316 to be more capable than the other candidates.<sup>875</sup> Of considerably greater significance, when first asked to give details relating to his background and his then occupation, P-0316 provided information about his professional obligations towards the DRC government (*viz.* his work for the Congolese intelligence services, the *Agence Nationale de Renseignement*, "ANR") that were capable of undermining his impartiality.<sup>876</sup> P-0583 could not recall if he saw a copy of P-0316's *curriculum vitae* (dated 5 December 2004)<sup>877</sup> or whether he was aware of

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<sup>870</sup> T-334-Red2-ENG, page 25, lines 1 – 15.

<sup>871</sup> T-334-Red2-ENG, page 25, lines 15 – 18.

<sup>872</sup> T-335-Red2-ENG, page 8, lines 10 – 25 and page 9, line 11.

<sup>873</sup> T-335-Red2-ENG, page 13, lines 12 – 22.

<sup>874</sup> T-335-CONF-ENG, page 13, lines 22 – 25.

<sup>875</sup> T-334-Red2-ENG, page 69, line 16 to page 70, line 8.

<sup>876</sup> T-334-CONF-ENG, page 56, lines 3 – 11 (P-0583).

<sup>877</sup> EVD-OTP-00597.

it.<sup>878</sup> P-0583 recalled, however, that although P-0316 had introduced himself as a member of that body, he said it no longer paid him.<sup>879</sup>

303. At the beginning of 2006, this information was set out in his *curriculum vitae*.<sup>880</sup> P-0583 could not recall asking him whether he continued to work for the intelligence services after that time.<sup>881</sup> Instead, P-0583 believed that P-0316's background was a guarantee that he was capable of providing the team with the information necessary to locate individuals of interest, but it was also a reason to check thoroughly the material he provided.<sup>882</sup> P-0583 saw it as an advantage that P-0316 was familiar with issues such as confidentiality and security.<sup>883</sup> The fact that P-0316 might have been working for this national body therefore did not cause him any particular concerns.<sup>884</sup> The witness never came into contact with P-0316's superiors from within the intelligence services;<sup>885</sup> indeed, he was not aware of any contact between the OTP and this intermediary's managers.<sup>886</sup> However, although P-0583 said he generally appreciated P-0316's work, he could not entirely trust him because of his professional obligations towards the DRC government and because he started working for other investigators without informing P-0583.<sup>887</sup>

304. P-0582 indicated that in that part of the DRC it was difficult to say who was working for whom.<sup>888</sup> He gave evidence that it was possible

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<sup>878</sup> T-334-Red2-ENG, page 56, lines 18 – 24.

<sup>879</sup> T-335-CONF-ENG, page 14, line 24 to page 15, line 13.

<sup>880</sup> T-335-Red2-ENG, page 14, line 24 to page 15, line 6.

<sup>881</sup> T-335-Red2-ENG, page 15, lines 6 – 13.

<sup>882</sup> T-335-Red2-ENG, page 15, line 23 to page 16, line 8.

<sup>883</sup> T-334-CONF-ENG, page 17, line 17 to page 18, line 3.

<sup>884</sup> T-335-Red2-ENG, page 16, lines 9 – 13.

<sup>885</sup> T-335-CONF-ENG, page 19, lines 4 – 8.

<sup>886</sup> T-335-Red2-ENG, page 19, lines 9 – 13.

<sup>887</sup> T-334-Red2-ENG, page 25, line 19 to page 26, line 6.

<sup>888</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 65, lines 16 – 17.

to buy information or people who would provide information for a small amount of money.<sup>889</sup> P-0583 indicated that the OTP was aware of the nature of P-0316's relationship with the government and that the investigators talked about P-0316 probably having links to the President of the Republic.<sup>890</sup> However, P-0582 did not believe that the mandate of the Court was compromised on account of P-0316's work for the DRC intelligence services (in his view, he probably continues to work for them).<sup>891</sup> P-0582 was particularly concerned with P-0316's capacity to give information regarding security.<sup>892</sup> He investigated whether the material provided by P-0316 was reliable, although he said checks of this kind were also conducted for other individuals who assisted in a similar way.<sup>893</sup>

305. As regards payments to P-0316, he was reimbursed for his expenses, including transporting witnesses, and, additionally, he received a small amount of pay<sup>894</sup> (P-0583 thought this was calculated on the basis of the G3 post within the UN system).<sup>895</sup>

306. P-0583 gave evidence about a "Receipt for Reimbursement" to "DRC-SS05"<sup>896</sup> (the code used for P-0316)<sup>897</sup> and another similar receipt<sup>898</sup> (for travelling to locate a witness).<sup>899</sup> P-0583 agreed that

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<sup>889</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 65, lines 17 – 20.

<sup>890</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 66, lines 2 – 4.

<sup>891</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-CONF-ENG, page 66, lines 5 – 6.

<sup>892</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 66, line 25 to page 67, line 1.

<sup>893</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 67, lines 2 – 8.

<sup>894</sup> T-334-Red2-ENG, page 19, line 20 to page 20, line 1.

<sup>895</sup> T-334-Red2-ENG, page 23, lines 16 – 22.

<sup>896</sup> EVD-D01-00353.

<sup>897</sup> T-334-Red2-ENG, page 64, lines 12 – 20.

<sup>898</sup> T-334-Red2-ENG, page 64, line 24 to page 65, line 3; EVD-OTP-00611.

<sup>899</sup> T-334-Red2-ENG, page 65, lines 21 – 25.



\$44.56 appeared to be the daily salary paid to P-0316,<sup>900</sup> although he said the payment varied, depending on the work he undertook.<sup>901</sup>

307. P-0583 suggested that initially P-0316 did not work under a contract and he was simply remunerated for the work he undertook.<sup>902</sup> He signed a receipt for his pay at the end of a mission, which reflected the hours or days he had been engaged and he was reimbursed to the extent possible.<sup>903</sup> The money was advanced by the prosecution, with the agreement of the officials within the OTP.<sup>904</sup> P-0583 thought that P-0316 signed a contract with the OTP towards the end of 2005 or in 2006.<sup>905</sup> It was for a brief period of time (between one and three months) from the beginning of 2006.<sup>906</sup> P-0583 was in favour of this temporary contract, because it formalised the relationship with P-0316, so that he progressed from informant to intermediary, thereby enabling him to provide significantly more public work for the OTP.<sup>907</sup> As a result, P-0316 became an openly recognised member of the team.<sup>908</sup> He also provided assistance to the Registry.<sup>909</sup>

308. P-0583 was reminded of an email he wrote on 16 May 2006,<sup>910</sup> wherein he noted that a payment to P-0316 should be made as soon as possible; that it was becoming more and more difficult to justify paying certain expenses; and that some of the information provided by P-0316 seemed bizarre and required cross-checking. Although he could not recall this particular email exchange, P-0583 explained that it

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<sup>900</sup> T-334-Red2-ENG, page 65, lines 4 – 8.

<sup>901</sup> T-334-Red2-ENG, page 65, lines 9 – 14.

<sup>902</sup> T-334-Red2-ENG, page 23, line 23 to page 24, line 9.

<sup>903</sup> T-334-Red2-ENG, page 24, lines 9 – 13.

<sup>904</sup> T-334-Red2-ENG, page 24, lines 16 – 20.

<sup>905</sup> T-334-Red2-ENG, page 24, lines 21 – 25.

<sup>906</sup> T-334-Red2-ENG, page 68, lines 17 – 21.

<sup>907</sup> T-334-Red2-ENG, page 68, lines 22 to page 69, line 5.

<sup>908</sup> T-334-Red2-ENG, page 69, lines 11 – 15.

<sup>909</sup> T-334-Red2-ENG, page 69, lines 13 – 14 and page 70, lines 15 – 18.

<sup>910</sup> EVD-D01-00391.

must have been written after P-0316 had been turned down for a staff position and – at that time – there were no particular directives regarding payment for personnel in his position, raising the question of what payment procedures should be adopted.<sup>911</sup> He said that cross checking information was usual when working in these circumstances,<sup>912</sup> and the word “bizarre” simply meant the information was surprising.<sup>913</sup>

309. When asked to explain what he had said concerning the justification of expenses, P-0583 indicated that he had not meant that P-0316 was unable to justify his expenses or had acted excessively, but instead that it had become difficult to justify some of them to the finance section because he was not officially working for the Court, and it was necessary to explain why he should be paid or reimbursed.<sup>914</sup> A receipt for P-0316’s expenses was always filed with the finance office.<sup>915</sup> Over time the financial section raised additional questions about his expenditure, and in due course rules and regulations had to be established to govern the reimbursement of individuals of this kind.<sup>916</sup>

310. P-0582 did not favour formalising the work relationship with P-0316,<sup>917</sup> but the decision within the OTP was that either they had to end cooperation with him completely or (as the senior officials within the OTP proposed) he was to be given a contract, which recognised that he was to work “more in the light [...] and not so much in the

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<sup>911</sup> T-335-Red2-ENG, page 9, line 23 to page 10, line 9.

<sup>912</sup> T-335-Red2-ENG, page 10, lines 10 – 20.

<sup>913</sup> T-335-Red2-ENG, page 12, lines 8 – 23.

<sup>914</sup> T-335-Red2-ENG, page 11, lines 6 – 22.

<sup>915</sup> T-335-Red2-ENG, page 11, lines 17 – 22.

<sup>916</sup> T-335-Red2-ENG, page 11, line 24 to page 12, line 4.

<sup>917</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 67, line 21 to page 68, line 9.

dark".<sup>918</sup> Due to the contract, it was necessary to describe P-0316's work, including his relationship with the investigators.<sup>919</sup> In the event, this intermediary continued to provide the investigators with security information drawn from his networks that they otherwise would not have had access to.<sup>920</sup>

311. Although P-0316's contract ended on 31 March 2006, he still carried out the same functions as an intermediary.<sup>921</sup> He was responsible for a number of witnesses; he knew where to find them; and he was one of a small number of people in this position, because the investigators did not want to involve others in the management of witnesses.<sup>922</sup> Therefore, he continued to work with witnesses and he provided field information.<sup>923</sup>

*Incident with P-0316 and P-0143*

312. P-0582 was asked to consider two investigator's notes (EVD-D01-00383 and EVD-D01-00384),<sup>924</sup> and he indicated there were several levels of management that were engaged by an incident described therein, which generated a significant amount of discussion about their dealings with intermediaries.<sup>925</sup> In summary, two investigators

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<sup>918</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 68, lines 9 – 13.

<sup>919</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 68, lines 15 – 20.

<sup>920</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 68, lines 21 – 24.

<sup>921</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 68, line 25 to page 69, line 7 (P-0582).

<sup>922</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 69, lines 3 – 6 (P-0582).

<sup>923</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 69, lines 6 – 7 (P-0582).

<sup>924</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 2, lines 3 – 4.

<sup>925</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 2, lines 20 – 22.

had particular difficulties concerning P-0143 and P-0316.<sup>926</sup>

313. P-0582 gave evidence that P-0316 told the investigators that three children who were potential witnesses had been interviewed by the Congolese police services.<sup>927</sup> However, investigations carried out by the investigators revealed that this was inaccurate.<sup>928</sup> P-0582 understood that the UN had confirmed that harassment alleged by P-0316 was a falsehood.<sup>929</sup>

314. By way of detail, P-0316 had told the OTP that three children from the FNI/FRPI who were interviewed by “Office 2” (the intelligence service of the Congolese Ministry of the Interior)<sup>930</sup> had felt threatened as a result, causing at least two of them to leave Bunia.<sup>931</sup> The OTP asked P-0316 to locate these individuals.<sup>932</sup> However, the investigators discovered that they had not, in fact, left Bunia and they asked P-0143 to review the situation.<sup>933</sup> He indicated to the OTP that the children had not been interviewed at Office 2 and they had not been threatened. Furthermore, apart from one of them going home for Christmas, they had not left Bunia.<sup>934</sup> According to the Investigator’s Report on this incident, P-0143 stated “the whole incident would have been made up in order to gain attention and therefore some economic

<sup>926</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-CONF-ENG, page 2, line 23 to page 3, line 1 (P-0582).

<sup>927</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 3, lines 1 – 4.

<sup>928</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 3, lines 4 – 6.

<sup>929</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 75, lines 5 – 8.

<sup>930</sup> See EVD-D01-00383, footnote 1.

<sup>931</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 69, lines 21 – 23; EVD-D01-00383, para. 4.

<sup>932</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 69, lines 21 – 24; EVD-D01-00383, para. 6.

<sup>933</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 70, lines 2 – 5; EVD-D01-00383, para. 5.

<sup>934</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 70, lines 6 – 8; EVD-D01-00383, paras 8, 10, 13 and 14.

gain. In addition, he conceded that the lack of expertise in dealing with former child soldiers from the side of the original intermediary might have accentuated the incident.”<sup>935</sup>

315. P-0582 concluded that although the truth had not been told, it was difficult to determine who was responsible.<sup>936</sup> The main report on this incident was immediately transferred to the head of investigations because the issue was too important to remain at team level.<sup>937</sup> Therefore, the information was provided to those responsible for the situation in the DRC (including the relevant prosecuting counsel).<sup>938</sup> The incident was sufficiently serious that they required permission from Michel De Smedt and the Prosecutor of the Court before they could continue working with the witnesses affected by this incident.<sup>939</sup> Counsel with trial responsibility remained the direct supervisor for the investigators on all issues concerning the development of the investigation and any potential prosecution.<sup>940</sup> Michel De Smedt and Ekkehard Withopf (the latter was lead counsel in the case) were consulted, and Michel De Smedt said that both intermediaries had to be retained.<sup>941</sup>

316. Notwithstanding these issues, P-0582 (who was working on witness security as opposed to the investigation) considered the information

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<sup>935</sup> See EVD-D01-00383, para. 16.

<sup>936</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 70, lines 16 –20.

<sup>937</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 5, lines 12 – 15.

<sup>938</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 3, lines 11 – 16.

<sup>939</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 6, lines 4 – 6.

<sup>940</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 7, lines 2 – 9.

<sup>941</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 72, lines 9 – 18.

provided by P-0316 was useful and interesting;<sup>942</sup> it was of good quality; and, in comparison with other sources, entirely credible.<sup>943</sup> P-0582's view was that there were considerable interests at stake and that they did not want to lose a trusted source of information on the basis of a single incident.<sup>944</sup> He accepted that intermediaries could be manipulative and they had their own agendas.<sup>945</sup>

317. P-0582 was referred to the last paragraph of the investigator's note from 13 February 2006,<sup>946</sup> where it is set out that: "[t]he investigators have decided not to establish further initial contacts with former child soldiers through intermediary [P-0316], as he proved to be unreliable in his approach."<sup>947</sup> P-0582 suggested this was because the female investigators had taken sides, and had decided that P-0143 – unlike P-0316 – was somebody who could be trusted.<sup>948</sup>

318. P-0582 was referred to a note written on 23 February 2006.<sup>949</sup> The following is set out at the bottom of page 3:

Meeting with intermediaries [P-0143] and [P-0316] to clarify origin of false information on harassment by undetermined official authorities of three former child soldiers screened by investigators in December 2005: after talking to both intermediaries, it was made clear to investigators that the three children screened in December 2005 were never the object of harassment because of their contact with ICC investigators. However, each intermediary's version differed significantly, raising doubts about their

<sup>942</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 18, lines 17 – 21.

<sup>943</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 6, lines 12 – 14.

<sup>944</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 71, line 23 to page 72, line 1.

<sup>945</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 70, line 23 to page 71, line 1.

<sup>946</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 72, lines 21 – 23; EVD-D01-00384.

<sup>947</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 73, lines 1 – 3; EVD-D01-00384 at DRC-OTP-0232-0277.

<sup>948</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-CONF-ENG, page 73, lines 8 – 10.

<sup>949</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 74, lines 6 – 9; EVD-OTP-00641.

credibility and reliability. Relevant MONUC representatives that were alerted in December 2005, namely the Human Rights and the Child Protection section, were informed accordingly about the outcome of the falsehood of the harassment.<sup>950</sup>

319. P-0582 maintained that the female investigators believed that P-0316 had lied.<sup>951</sup>

320. This incident revealed, therefore, that one of these intermediaries had invented a story for the investigators on a potentially highly significant issue, and some of those working for the OTP considered it was likely to have been P-0316.<sup>952</sup>

321. Finally, before leaving this incident, an investigator noted within the relevant reports that it was the other intermediary's impression that one of the children involved in the incident and introduced to him by P-0316 appeared to have been "coached".<sup>953</sup> Furthermore, DRC-OTP-WWWW-0028 (one of the three children) gave evidence before Trial Chamber II (the transcripts of his testimony were admitted in the present proceedings)<sup>954</sup> that he had been encouraged to lie by Individual 183,<sup>955</sup> who was acting as P-0316's assistant in relation to his work as an intermediary.<sup>956</sup>

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<sup>950</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 74, lines 11 – 20.

<sup>951</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 74, line 21 to page 75, line 8.

<sup>952</sup> Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-CONF-ENG, page 71, lines 17 – 18.

<sup>953</sup> EVD-D01-00384 at page DRC-OTP-0232-0276.

<sup>954</sup> ICC-01/04-01/06-2702-Red, paras 30 - 43.

<sup>955</sup> *The Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-T-221-Red-ENG, page 24, line 16 to page 25, line 8, page 36, line 1 to page 37, line 4 and page 38, lines 6 – 9 (P-0316 is No. 12 and P-0183 is No. 14 in the list which is referred to).

<sup>956</sup> T-337-CONF-ENG, page 15, lines 10-24 (P-0038); T-335-CONF-ENG, page 16, line 20 to page 17, line 4 (P-0583) ; Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-CONF-ENG, page 63, line 18 to page 64, line 8 (P-0582).

### c) The Other Evidence

322. It is the defence submission that P-0015 and D-0016 demonstrated in evidence that P-0316 persuaded them to make false statements to the Prosecutor, which he helped prepare.<sup>957</sup>

323. P-0316, however, denied being aware that P-0015 and D-0016 were potential witnesses for the Court,<sup>958</sup> and he gave evidence to the Chamber that D-0016, P-0015 and P-0038 were not introduced to the OTP at his initiative.<sup>959</sup> Three witnesses<sup>960</sup> and P-0583 (as discussed below) contradicted this latter assertion.<sup>961</sup>

#### (1) P-0015

324. P-0583 indicated that P-0015 was introduced to the investigators by P-0316 in 2005,<sup>962</sup> whilst P-0316 appeared to maintain that the OTP told him to locate P-0015, having pointed him out in a photograph.<sup>963</sup>

325. P-0582 stated that P-0316 was present at the first relevant meeting in Kampala on 3 October 2005,<sup>964</sup> and he helped organise the interviews that were held in Bunia between P-0015 and the investigators in November 2005, although he did not participate when they took place.<sup>965</sup> P-0316, on the other hand, maintained that he had not

<sup>957</sup> ICC-01/04-01/06-2773-Red-tENG, paras 6 and 363, referring to ICC-01/04-01/06-2657-Conf-tENG, paras 35 to 68.

<sup>958</sup> EVD-D01-00372, page 0486, line 1157 to page 0487, line 1205; EVD-D01-00377, page 0489, line 14 to page 0499, line 349 and page 0499, line 354 to page 0512, line 806.

<sup>959</sup> T-332-Red2-ENG, page 30, line 8 to page 33, line 4; page 42, line 20 to page 47, line 2; T-333-Red2-ENG, page 16, line 19 to page 17, line 6.

<sup>960</sup> T-256-CONF-ENG, page 8, line 16 to page 9, line 6 (D-0016); T-264-Red2-ENG, page 64, line 4 to page 65, line 24 (P-0015); and T-337-CONF-ENG, page 19, line 18 to page 20, line 9 (P-0038).

<sup>961</sup> T-335-Red2-ENG, page 31, lines 4 - 10 (D-0016 is referred to as Witness 0035) and page 84, line 10 - 24 (P-0583).

<sup>962</sup> EVD-OTP-00629, paras 47 and 48 and T-335-CONF-ENG, page 84, lines 15- 24.

<sup>963</sup> T-332-Red2-ENG, page 45, line 10 to page 46 line 20.

<sup>964</sup> T-334-Red2-ENG, page 38, line 19 to page 39, line 2 and T-335-CONF-ENG, page 83, line 19 to page 84, line 6 and page 84, line 25 to page 85, line 7.

<sup>965</sup> T-336-Red2-ENG, page 9, lines 14 - 19; T-334-Red2-ENG, page 38, line 24 to page 39, line 2.



participated in, still less attended, the meeting between P-0015 and the investigators in October or November 2005.<sup>966</sup> Although he could not recall whether he had been in Kampala at the time of the first meeting,<sup>967</sup> a receipt indicates that he claimed expenses from the OTP to cover travel and accommodation costs in Kampala from 25 September to 5 October 2005.<sup>968</sup>

326. P-0583, at paragraph 48 of his written statement, indicated that P-0015 was unwilling to leave his militia, contrary to the evidence of P-0316.<sup>969</sup> P-0583 stated that he was surprised when P-0015 told him that he had come to give information and to cooperate, but that he did not want to leave his armed group.<sup>970</sup>

327. P-0583 failed to verify the identity of P-0015 by examining the team's archives, and later he unsuccessfully attempted to check his identity (along with others) in the Congolese voters' database.<sup>971</sup> He also enquired of the *Tribunal de Grande Instance* as to whether P-0015 was registered with the civil registry, but he was unable to recall the result.<sup>972</sup>

328. P-0583 gave evidence that although it was the general policy of the investigation team to ask witnesses if they knew the names of other individuals who were supposedly members of military or political units, he did not do this for P-0015.<sup>973</sup> However, the team moved rapidly from one investigation to another, and the resources available and other obstacles impeded the process of verifying the content of the

<sup>966</sup> T-332-Red2-ENG, page 48, line 20 to page 49, line 1 and page 49, lines 16 – 20.

<sup>967</sup> T-332-Red2-ENG, page 49, lines 2 – 5.

<sup>968</sup> EVD-OTP-00611.

<sup>969</sup> T-335-Red2-ENG, page 85, lines 8 – 21.

<sup>970</sup> T-335-Red2-ENG, page 85, lines 16 – 18.

<sup>971</sup> T-336-Red2-ENG, page 10, line 25 to page 11, line 10.

<sup>972</sup> T-336-Red2-ENG, page 11, lines 10 – 16.

<sup>973</sup> T-336-Red2-ENG, page 13, lines 6 – 16.

statements and determining the credibility of the witnesses.<sup>974</sup>

329. P-0583 noted that at paragraphs 151 and 152 of his statement, P-0015 gave details on how he joined the FNI when he left the UPC and on his position within the FNI.<sup>975</sup> P-0583 suggested that this information was effectively unverifiable.<sup>976</sup>

330. P-0015 stated at the beginning of his evidence on 16 June 2009, when called by the prosecution:

This is contrary to the statement given to the OTP and that's why I wanted to make the statement and explain why I came here. That's why I met the OTP's intermediary who told me the following. He said, you have to change your name, you have to change your identity. Don't give the true story that took place; in other words, there was a story that they were telling to the witnesses. And I say that they're crooks. Why is it that I say that they're crooks and swindlers? Well, instead of letting me tell the true story of what took place and instead of letting me describe all of the events that I lived through, they are inventing statements in order to manipulate the investigation.<sup>977</sup>

331. The witness stated that the intermediary in question was P-0316.<sup>978</sup>

332. When P-0015 later testified between 17 and 22 March 2010, he gave evidence that P-0316 had asked him to change his name and to provide a story from a newspaper or a journal about weapons and ammunition going to Bunia via Uganda.<sup>979</sup> He also gave him instructions on which name to use.<sup>980</sup> P-0015 produced a report card for the year 2002/2003 bearing what he said is his true name.<sup>981</sup>

333. P-0015 was told by P-0316 to provide particular information on

<sup>974</sup> T-336-Red2-ENG, page 13, lines 15 – 23.

<sup>975</sup> T-336-CONF-ENG, page 14, lines 12 – 17.

<sup>976</sup> T-336-CONF-ENG, page 16, lines 8 – 23.

<sup>977</sup> T-192-Red2-ENG, page 6, lines 8 – 18.

<sup>978</sup> T-192-CONF-ENG, page 5, line 18.

<sup>979</sup> T-264-Red2-ENG, page 64, lines 9 – 22; T-265-Red2-ENG, page 9, lines 9 – 14 and page 10, lines 2 – 6.

<sup>980</sup> T-264-CONF-ENG, page 64, line 19 – page 65, line 5.

<sup>981</sup> T-192-CONF-ENG, page 6, line 7; T-265-REd2-ENG, page 25, lines 15 – 19, EVD-D01-00123.

weapons to the OTP investigator, and the latter thereafter asked P-0015 to relay this material to another organisation, which in turn discovered that it was false<sup>982</sup> (P-0583 confirmed that he set up a relevant meeting which took place).<sup>983</sup> P-0015 stated that P-0316 had falsely told an investigator from the OTP that he (P-0015) lived in the countryside. P-0316 had bought him a ticket for a trip to Kampala even though P-0015 was living there at that time.<sup>984</sup> P-0015 confirmed that because he was living in Kampala he did not, in reality, have any transportation or accommodation costs.<sup>985</sup> D-0016 identified P-0015 on a photograph<sup>986</sup> and gave evidence as to where he lived.<sup>987</sup> On P-0316's direction he gave false details about his military training and his schooling.<sup>988</sup> The idea, he said, was to provide the investigator with P-0316's "story".<sup>989</sup> Each morning, in meetings at the hotel with the intermediary prior to the interview, he was given an outline of the account he was to provide to the investigators.<sup>990</sup> The witness said:

The intermediary gave me a briefing to use all possible means to hide the exact identity of my parents and my own identity and where I'd gone to school and where I had had military training.<sup>991</sup>

334. P-0015 indicated that P-0316 told him to hide his Hema ethnicity and his identity (he suggested that the name he was told to use was not a Hema or Iturian name), so that any investigation into his past

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<sup>982</sup> T-264-Red2-ENG, page 68, lines 5 – 24.

<sup>983</sup> T-335-Red2-ENG, page 88, line 17 to page 89, line 7.

<sup>984</sup> T-265-Red2-ENG, page 9, line 23 – page 10, line 13.

<sup>985</sup> T-265-Red2-ENG, page 10, lines 9 – 13.

<sup>986</sup> EVD-D01-00113; T-257-CONF-ENG, page 6, line 1 – 8. D-0016 used a name that closely resembles the name that P-0015 indicated in testimony was his real name (T-192-CONF-ENG, page 6, line 7).

<sup>987</sup> T-257-CONF-ENG, page 7, lines 19 – 25.

<sup>988</sup> T-264-Red2-ENG, page 70, lines 11 – 19.

<sup>989</sup> T-264-CONF-ENG, page 70, lines 11 – 19. P-0015 referred to the first name of P-0316.

<sup>990</sup> T-264-Red2-ENG, page 33, lines 4 – 8.

<sup>991</sup> T-265-Red2-ENG, page 21, lines 11 – 13.

would be very difficult for the prosecution.<sup>992</sup> He falsely told the investigators, at P-0316's instigation, that his parents were dead in order to stop the police from investigating them.<sup>993</sup>

335. P-0015 said that P-0316 invented a rank for him as a soldier and provided a matching identity document (although P-0316 apparently did not specify that he should say he had been part of the UPC).<sup>994</sup> In his account to the investigators, P-0015 claimed to have served in a position and at a rank that would have necessitated in-depth knowledge on his part of particular military issues.<sup>995</sup> However, he maintained he did not know a great deal about the structures and the organisation of the UPC, or who commanded the various brigades.<sup>996</sup> When audio extracts were played to him during his interview with the prosecution, P-0015 was unable to identify the commanders who were referred to by individual code names.<sup>997</sup> In addition, despite the position he had claimed to occupy in the FNI,<sup>998</sup> he was unable to describe its political or military structure and could not explain the meaning of this acronym.<sup>999</sup>

336. When P-0583 was informed that P-0015 had told the Court that he had lied about his identity, he expressed his surprise because during his interview P-0015 had provided a significant amount of detail about the events he had witnessed, and P-0583 formed the impression that he was credible.<sup>1000</sup> P-0583 was also surprised because through P-

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<sup>992</sup> T-265-Red2-ENG, page 22, lines 19 – 25; T-265-CONF-ENG, page 23, lines 10 – 13.

<sup>993</sup> T-265-CONF-ENG, page 20, line 21 – page 21, line 8; EVD-OTP-00729, para. 10.

<sup>994</sup> T-265-Red2-ENG, page 13, lines 10 – 14.

<sup>995</sup> EVD-OTP-00729, paras 41, 89-94 and 97.

<sup>996</sup> EVD-OTP-00729, para. 170.

<sup>997</sup> EVD-OTP-00738, paras 23, 35 – 37 and 43.

<sup>998</sup> T-336-CONF-ENG, page 16, lines 11 – 13 (excerpt of statement read out during the examination of P-0583).

<sup>999</sup> EVD-OTP-00729, paras 10 and 149-150; EVD-OTP-00738, para. 17.

<sup>1000</sup> T-334-Red2-ENG, page 37, lines 7 – 13.

0015's intermediary (namely P-0316) he made contact with someone in another city in the DRC who had information about a militia leader of interest.<sup>1001</sup> This individual referred to the name P-0015 later claimed was his false name, thereby at the time appearing to corroborate P-0015's identity.<sup>1002</sup>

337. The prosecution contends that the evidence of P-0015 is suspect for several reasons, including the length of time he waited before recanting his original testimony to the OTP, the fact that he refused to provide a photograph to prosecution investigators so that it could be shown to his grandparents, and by reference to particular factors relating to his family.<sup>1003</sup> It is emphasised that P-0015 testified that he was threatened at one point by four men, including a UPC soldier, an event which he reported to the prosecution at the time.<sup>1004</sup> The prosecution also refers to the testimony of P-0583 in relation to the fact that the prosecution's interview of P-0015 was carried out over several days, as according to P-0583 it is "difficult to imagine that you can learn a story and memorise it and repeat in the same way over several days".<sup>1005</sup>

338. As to the threats made to him, however, P-0015 explained that the soldier had been looking for him because they had "business" and their "own internal conflict", and he may have thought that P-0015 had money.<sup>1006</sup> In addition, when asked why he had not informed the prosecution earlier about the false nature of his statements, P-0015 referred to security concerns and said he had been threatened by P-

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<sup>1001</sup> T-334-Red2-ENG, page 37, lines 13 – 16.

<sup>1002</sup> T-334-Red2-ENG, page 37, lines 16 – 20 and page 38, lines 2 - 13.

<sup>1003</sup> ICC-01/04-01/06-2678-Red, para. 64.

<sup>1004</sup> ICC-01/04-01/06-2678-Red, para. 64.

<sup>1005</sup> ICC-01/04-01/06-2678-Red, para. 66, relying on T-334-Red2-ENG, page 39, lines 3 – 13.

<sup>1006</sup> T-264-Red2-ENG, page 35, lines 1 – 4.

0316 on numerous occasions.<sup>1007</sup> He also gave evidence to the effect that he had been subjected to pressure from his family and the Hema community due to his appearance in The Netherlands as a witness.<sup>1008</sup>

339. The Chamber's assessment of P-0015 is that the numerous weaknesses in the details of the account he provided the investigators in 2005 tend to indicate that he gave, at that stage, a significantly false story as to his identity and his alleged involvement with the UPC. Furthermore, when P-0015's testimony is coupled with the evidence of P-0583 concerning the circumstances in which he was introduced to the OTP and the October and November 2005 interviews, there is a persuasive basis for concluding that P-0316 lied to the Chamber as regards his dealings with P-0015. In all the circumstances, the Chamber finds that P-0015 has given a wholly credible account during his oral evidence (as opposed to what he said to the investigators in 2005) – which is supported by other evidence, as rehearsed above – that P-0316 went to significant lengths to persuade him to give a false account to the OTP, in part to secure financial benefits. In these circumstances, the Chamber has only relied on P-0015's evidence to the extent that it relates to P-0316.

## **(2) P-0038**

340. This witness is an alleged former UPC soldier. He joined Laurent Kabila's army in 1997 when he was 13 years old.<sup>1009</sup> He was disarmed later that year,<sup>1010</sup> and joined the UPC in 2001<sup>1011</sup> as a result of the

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<sup>1007</sup> T-264-Red2-ENG, page 51, lines 1 – 9 and lines 16 – 22 and page 71, lines 1 – 12.

<sup>1008</sup> T-264-Red2-ENG, page 54, line 23 to page 58, line 12.

<sup>1009</sup> T-113-Red-ENG, page 30, lines 3 – 9.

<sup>1010</sup> T-113-Red-ENG, page 30, lines 18 – 24.

<sup>1011</sup> T-113-Red-ENG, page 31, line 12. The English transcript refers to the year 2000. However, in light of the evidence given and the prosecution's question, the French transcript with its reference to the year 2001 is correct (T-113-Red-FRA, page 31, line 4).

latter's recruitment campaign. It follows he does not allege that he was a child soldier below the age of 15 within the UPC. The witness described the training camps of the UPC,<sup>1012</sup> and the extensive use that was made of child soldiers for various tasks including fighting,<sup>1013</sup> and acting as bodyguards and as 'wives' of commanders.<sup>1014</sup> The witness received extensive weapons training,<sup>1015</sup> including in Rwanda,<sup>1016</sup> and he was involved in battles at Mongbwalu,<sup>1017</sup> Komanda, Kobu and Bunia.<sup>1018</sup> The witness gave considerable evidence about the recruitment of children under the age of 15 by the UPC and their use to participate actively in hostilities (see below).<sup>1019</sup>

341. It is first to be noted that P-0038 contradicts the evidence of P-0316. The latter gave evidence to the effect that P-0038 had already been in contact with the investigators of the Court, and he was only asked to find his contact details after the OTP had supposedly lost track of P-0038.<sup>1020</sup> P-0316 stated he was able to find a telephone number for P-0038, which he provided to the investigators.<sup>1021</sup> P-0038 said a friend of his knew he had been involved in fighting and introduced him to P-0316, who put him in contact with an OTP investigator.<sup>1022</sup> Witness P-0038 indicated that when he met P-0316 they discussed his experience in the military, and P-0316 named individuals in the UPC and asked

<sup>1012</sup> T-113-Red-ENG, page 37, line 24 to page 38, line 5 and page 59, lines 21 – 22.

<sup>1013</sup> T-114-Red-ENG, page 82, lines 9 – 11.

<sup>1014</sup> T-114-Red-ENG, page 82, line 21 to page 83, line 3.

<sup>1015</sup> T-114-Red-ENG, page 7, lines 3 – 4 and page 7, line 16 to page 8, line 3.

<sup>1016</sup> T-113-Red-ENG, page 35, lines 5 – 8.

<sup>1017</sup> T-113-Red-ENG, page 48, line 24 to page 49, line 8.

<sup>1018</sup> T-113-Red-ENG, page 52, lines 6 – 9.

<sup>1019</sup> See paras 688, 801, 814, 821-824, 851-853, 915 and 1074.

<sup>1020</sup> T-333-Red2-ENG, page 16, line 19 to page 17, line 6.

<sup>1021</sup> T-333-Red2-ENG, page 17, lines 15 – 21.

<sup>1022</sup> T-337-CONF-ENG, page 45, lines 2 – 5 and T-336-Red2-ENG, page 43, line 4 to page 44, line 20 (P-0038's friend worked together with P-0316 in the same national institution, T-333-CONF-ENG, page 24, lines 16 – 21); P-0316 testified that P-0038 had already been in contact with the investigators and that he did not introduce him, T-333-Red2-ENG, page 16, line 21 to page 17, line 6.

him whether he knew them.<sup>1023</sup> Thereafter, P-0316 suggested he should see a representative of the OTP.<sup>1024</sup> P-0038 stated he was in contact with P-0316<sup>1025</sup> and described his relationship to P-0316's two colleagues, one of whom was a member of P-0038's extended family.<sup>1026</sup> P-0038 portrayed Individual 183 as P-0316's right-hand man, somebody who assisted him with his tasks for the Court.<sup>1027</sup> Also of note is that P-0038 stated he had prepared notes for use during his meetings with the investigators and he gave a convoluted explanation as to why he had suggested showing these notes to the investigators in a foreign country, due to security concerns.<sup>1028</sup>

342. As to his credibility, P-0038 claims that he was a member of the UPC between 2001 and 2005,<sup>1029</sup> and he maintained in evidence that he served as Chief Kahwa's bodyguard in April 2002.<sup>1030</sup> The defence submits that the witness's description of his military activities alongside Chief Kahwa are false, given the school records demonstrate that he was enrolled in school in Bunia until July 2002.<sup>1031</sup>

343. P-0038 stated he left school in November 2001 and returned to continue his studies in 2003.<sup>1032</sup> However, during the trial, he was shown records from the school he attended in 2001/2002. He identified himself among students listed in the school's records.<sup>1033</sup> P-0038's name

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<sup>1023</sup> T-336-Red2-ENG, page 45, line 23 – page 46, line 5 and T-337-CONF-ENG, page 8, line 9 to page 9, line 6.

<sup>1024</sup> T-336-Red2-ENG, page 46, lines 5 – 6.

<sup>1025</sup> T-337-Red2-ENG, page 34, lines 15 – 17.

<sup>1026</sup> T-336-Red2-ENG, page 77, line 14 to page 78, line 4; T-337-CONF-ENG, page 14, lines 9 – 16 (the two colleagues P-0038 refers to are the ones who worked with P-0316 in the Congolese intelligence services).

<sup>1027</sup> T-337-Red2-ENG, page 15, lines 10 - 24.

<sup>1028</sup> T-337-Red2-ENG, page 23, line 10 to page 29, line 20; EVD-D01-00395 (notes).

<sup>1029</sup> T-113-Red2-ENG, page 31, lines 13 – 15.

<sup>1030</sup> T-114-Red2-ENG, page 43, line 13 – 18; page 46, lines 9 – 12.

<sup>1031</sup> ICC-01/04-01/06-2773-Red-tENG, para. 457.

<sup>1032</sup> T-113-Red2-ENG, page 31, lines 12 – 18; T-114-Red2-ENG, page 48, lines 11 – 16.

<sup>1033</sup> T-114-Red2-ENG, page 50, line 24 to page 51, line 14.



was listed in the column entitled "Authorised to repeat",<sup>1034</sup> and the document does not explain why students in that column are entitled to repeat. The defence suggested the records indicate that P-0038 was at school during the 2001/2002 year (contrary to his evidence), rather than being in the UPC.<sup>1035</sup> The witness insisted he did not complete the school year.<sup>1036</sup> The defence argued the students who left the institution halfway through the school year were listed in Column E of the relevant document, under the heading "Left in the Course of the Year",<sup>1037</sup> and given his name is not in that column, he must have completed the year.<sup>1038</sup>

344. In the view of the Chamber, the witness gave a plausible explanation as to why his name did not appear in Column E, as follows:

A. I didn't complete the school year in this institution because I was allowed to repeat the year. It doesn't say why, but I know that I didn't take the exams. Because here I can't see where this has been said. Well, in fact, it says who repeated the year or went back to class, but it doesn't say why. It mentions those who left in the course of the year. It says, "Left in the course of the year," but there's no reference to those who repeated the year, and there's no reference to the reasons for which this was done.<sup>1039</sup>

The other evidence on this issue does not undermine this explanation.

345. The defence also challenges P-0038's evidence that he re-enrolled in school during the 2003/2004 year and was a student during the day and a soldier at night, on the basis that this suggestion is "implausible".<sup>1040</sup> The witness explained that, at the time he returned

<sup>1034</sup> T-114-Red2-ENG, page 51, lines 4 – 11.

<sup>1035</sup> T-114-CONF-ENG, page 51, line 12 – page 52, line 13.

<sup>1036</sup> T-114-Red2-ENG, page 52, lines 11 – 12.

<sup>1037</sup> T-114-Red2-ENG, page 51, line 25 to page 52, line 4.

<sup>1038</sup> ICC-01/04-01/06-2773-Red-tENG, para. 457, referring to EVD-D01-00172, page 4017.

<sup>1039</sup> T-114-Red2-ENG, page 52, lines 11 – 18.

<sup>1040</sup> ICC-01/04-01/06-2773-Red-tENG, para. 458.

to school in 2003, there was no UPC presence in Bunia during the day but there were patrols during the night. He stated that even though he was studying, he was under the orders of the UPC and in that sense he was a soldier. He stated he had been told “the army is not finished, it continues”.<sup>1041</sup> The Chamber is of the view that P-0038’s account is plausible and that he understood that he was a member of the UPC even if he also attended school.

346. The Chamber is unpersuaded by the defence arguments on the suggested weaknesses of this witness’s evidence, particularly concerning his military involvement and the fact that he described activities within the “UPC/RP”, along with a military structure and hierarchy, which it is alleged only existed from September 2002.<sup>1042</sup> Viewed globally, the witness gave detailed and credible evidence on his activities both before and after the establishment of the FPLC.

347. The other significant criticism of the witness by the defence is that the Court funded a significant element of his expenditure from May 2007 to February 2009, and his school fees for a complete academic year.<sup>1043</sup> P-0038 gave detailed evidence on the costs covered by the Court while he was under its protection leading up to his testimony between May 2007 and February 2009.<sup>1044</sup> P-0038 stated that when he was recalled as a witness he did not make any requests to the OTP, or any other organ of the Court, for compensation, care or relocation and he did not stipulate any conditions before giving evidence. The Chamber is of the view that the costs during this period were paid in the context of the protection programme provided by the Court. He

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<sup>1041</sup> T-114-Red2-ENG, page 55, lines 3 – 21.

<sup>1042</sup> ICC-01/04-01/06-2773-Red-tENG, para. 459.

<sup>1043</sup> ICC-01/04-01/06-2773-Red-tENG, para. 54.

<sup>1044</sup> T-337-Red2-ENG, page 37, line 1 to page 40, line 5.

received no more than the amount provided by the standard compensation and care scheme for witnesses. The evidence on this issue did not materially undermine the witness's account. The fact that a witness is in the ICC protection program does not, without more, undermine his or her credibility.

348. This was a measured witness, whose account was internally consistent and he gave a wholly credible account. Discrete aspects of his testimony where this was not the case will be addressed below. Notwithstanding his connection with P-0316, the Chamber has concluded he was a reliable witness whose evidence is truthful and accurate. Indeed, P-0038 stated he and P-0316 never talked about what he was supposed to say to the OTP and P-0316 did not tell him to provide false stories to the prosecution, nor did P-0316 promise the witness rewards for giving particular information to the investigators.<sup>1045</sup> P-0038 added that the investigator had told him not to talk to P-0316 about the contents of the meetings with the OTP.<sup>1046</sup> The Chamber accepts P-0038 may have prepared notes to assist during the meetings and it observes his explanation on providing the notes to the investigators is unclear, but in contrast to the situation regarding D-0016 described below, there is no evidence to support the assumption that he was prepared in order to give false testimony.

349. The defence challenges to the witness's evidence on his recruitment and Thomas Lubanga's visit to Mandro camp, as well as other identified areas of his evidence, will be addressed later in this Judgment.<sup>1047</sup> The impact of this witness's evidence is considered in the

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<sup>1045</sup> T-336-Red2-ENG, page 78, lines 11 - 25.

<sup>1046</sup> T-336-Red2-ENG, page 78, line 11 to page 78, line 25 to page 79, line 7; T-337-Red2-ENG, page 13, lines 4 – 9.

<sup>1047</sup> ICC-01/04-01/06-2773-Red-tENG, paras 461 – 475.

Chamber's overall conclusions, set out below.

**(3) D-0016**

350. P-0316 told P-0583 that D-0016 (known by the prosecution as DRC-OTP-WWWW-0035) was an officer in the UPC, a commander who had participated with his troops in a number of attacks,<sup>1048</sup> and as a result he asked P-0316 to arrange a meeting with this potential witness.<sup>1049</sup>

351. D-0016, however, maintained in his evidence before the Court that P-0316 persuaded him to lie to the OTP. The lies are said to have included the suggestion that D-0016 was one of the children who had been enrolled into the armed wing of the UPC by Thomas Lubanga,<sup>1050</sup> and that other children, including from his own family, had been enlisted into the army.<sup>1051</sup> D-0016 stated he and P-0316 agreed the witness was to allege falsely that young girls had given birth whilst in the army.<sup>1052</sup>

352. D-0016 met several times with P-0316, first in a café and thereafter in an office of one of his friends, and P-0316 indicated he was looking for "someone to say something about Mr Thomas Lubanga" to the OTP's investigators.<sup>1053</sup> D-0016 was introduced to the investigators at the Hellénique restaurant in Bunia,<sup>1054</sup> and later he met with them again in Kampala,<sup>1055</sup> between 30 September and 5 October 2005 and

<sup>1048</sup> T-335-Red2-ENG, page 31, lines 14 – 20 (P-0583).

<sup>1049</sup> T-335-Red2-ENG, page 31, lines 4 – 10 (P-0583).

<sup>1050</sup> T-257-Red-ENG, page 2, lines 15 – 21 and page 3, line 11 to page 4, line 3.

<sup>1051</sup> T-256-Red-ENG, page page 12, lines 2 – 8 and page 22, lines 1 – 4.

<sup>1052</sup> T-256-Red-ENG, page 12, lines 8 – 10 and page 21, line 20 to page 22, line 1.

<sup>1053</sup> T-256-Red2-ENG, page 9, lines 20 – 25 and page 11, lines 6-13.

<sup>1054</sup> T-257-Red-ENG, page 41, lines 19 – 23.

<sup>1055</sup> T-258-Red-ENG, page 10, lines 7 – 23.

then in Bunia on 12 November 2005.<sup>1056</sup>

353. D-0016 indicated he and P-0316 went over the subjects on which he was to lie whilst they were travelling over two days before the meetings in Kampala, as well as during the time he was in Kampala.<sup>1057</sup> They met prior to every interview with the investigators, in order to discuss the false evidence he was to give<sup>1058</sup> and they met again in the evening to prepare for the following day.<sup>1059</sup>

354. D-0016's evidence was that he had never served in the army, but he and P-0316 planned the lies that he was to repeat; and in the morning before he left for the interviews, he was given the answers to the questions.<sup>1060</sup>

355. D-0016 testified that during their preparatory meetings, they wrote down the names of people who were in the army as well as the names of villages where battles were fought, and he read these out.<sup>1061</sup> It is to be noted in relation to this issue that in one of the interviews between the prosecution and D-0016 there is mention of a notebook he compiled shortly before the interviews in which he had noted down the names of the places he had visited during the war.<sup>1062</sup> P-0583 testified that the interview with D-0016 was a difficult one – it was not easy to follow his account and P-0583 was not impressed by the

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<sup>1056</sup> T-258-Red-ENG, page 10, lines 7 – 11; See transcripts of interviews: EVD-OTP-00533 to EVD-OTP-00551.

<sup>1057</sup> T-256-Red-ENG, page 28, lines 8 – 16; T-258-Red-ENG, page 12, lines 11 – 19.

<sup>1058</sup> T-256-Red-ENG, page 28, lines 13 – 16.

<sup>1059</sup> T-258-Red-ENG, page 8, lines 9 – 13.

<sup>1060</sup> T-258-Red-ENG, page 15, line 19 to page 16, line 2.

<sup>1061</sup> T-256-Red-ENG, page 15, line 21 to page 16, line 8.

<sup>1062</sup> See extract of interview read out in court during the examination of P-0583, T-335-Red2-ENG, page 68, line 5 to page 69, line 25. T-335-Red2-ENG, page 68, line 5 to page 69, line 25 (P-0583); Notebook, pages: EVD-D01-00387, EVD-D01-00388, EVD-D01-00389 and EVD-D01-00390. This notebook is mentioned during the interview EVD-OTP-00546, page 1836, line 916 to page 1839, line 1009.

information he provided.<sup>1063</sup> However, P-0583 did not suspect that D-0016 had been rehearsed or prepared when he was interviewed.<sup>1064</sup>

356. D-0016's evidence was that P-0316 would buy him drinks and he gave him a small amount of money in return for these lies,<sup>1065</sup> and promised he would go to "the country of the white people".<sup>1066</sup> When D-0016 was subjected to pressure for allegedly having told lies about the accused, P-0316 wrote a fake threatening letter (which the witness suggested contains the latter's fingerprint),<sup>1067</sup> so as to help him leave Bunia.<sup>1068</sup> As instructed by P-0316, D-0016 gave this letter to a court official.<sup>1069</sup> The prosecution was unable to locate this document and it was uncertain whether the original had been in its possession.<sup>1070</sup> The original was unavailable to the Chamber as a result of this uncertainty or negligence, although a copy and a translation were discussed in the course of P-0316's testimony.<sup>1071</sup>

357. The defence argues that D-0016 provided material in accordance with the agreed plan.<sup>1072</sup> He said he had been a UPC soldier; he referred on several occasions to the presence of child soldiers under the age of fifteen; and he indicated that at least one young girl child

<sup>1063</sup> T-335-Red2-ENG, page 81, line 18 to page 82, line 5.

<sup>1064</sup> T-334-Red2-ENG, page 34, line 24 to page 35, line 4.

<sup>1065</sup> T-256-Red-ENG, page 16, lines 9 – 14.

<sup>1066</sup> T-256-Red-ENG, page 16, lines 17 – 21.

<sup>1067</sup> EVD-D01-00120, discussed at T-257-Red2-ENG, page 29, line 21 to page 30, line 5.

<sup>1068</sup> T-257-Red2-ENG, page 27, line 9 to page 28, line 8, page 30, lines 6 – 9 and page 32, lines 8 – 13.

<sup>1069</sup> T-257-Red2-ENG, page 28, lines 4 – 8 and page 33, lines 6 – 15.

<sup>1070</sup> The defence was never provided with the original of EVD-D01-00120, which the prosecution states cannot be located within its files. When questioned about this, the prosecution was also unable to say whether it had ever had possession of the original of this document. T-332-Red2-ENG, page 38, line 17 to page 39, line 25 and ICC-01/04-01/06-2678-Red, footnote 155. P-0316 denied ever having heard about such a letter (T-332-Red2-ENG, page 36, line 22 to page 37, line 1).

<sup>1071</sup> See, for example, T-329-Red-ENG, page 14, line 3 to page 15, line 10; EVD-D01-00120 and EVD-OTP-00612 (translation).

<sup>1072</sup> ICC-01/04-01/06-2657-tENG-Red, paras 35 – 40.

soldier had gone off to battle.<sup>1073</sup> The defence additionally suggests that substantial inconsistencies in the statements D-0016 gave to the OTP demonstrate they were false.<sup>1074</sup> The Chamber is of the view that the witness provided a confused account of the time when he purportedly joined the UPC<sup>1075</sup> and, although he described himself as a UPC officer, he was unaware of the name of the group's armed wing (the FPLC).<sup>1076</sup>

358. In all the circumstances, the defence invites the Chamber to conclude that the statements given to the investigators in October and November 2005 by D-0016 were the result of P-0316's invitation to him to lie.<sup>1077</sup>

359. As set out above, P-0583 gave evidence that D-0016 was identified and introduced by P-0316, and was described by him as a former UPC officer who had participated with his troops in a number of attacks.<sup>1078</sup> However, P-0316 denied having introduced potential witnesses to the OTP who were previously unknown to the prosecution,<sup>1079</sup> and he suggested that he was simply aware that D-0016 was among the demobilised children, and he looked for him on the basis of a photograph provided by the OTP.<sup>1080</sup> This conflicts directly with the evidence of P-0583.<sup>1081</sup>

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<sup>1073</sup> EVD-OTP-00535, page 1407, lines 43-49, page 1430, line 788 to page 1431, line 810, EVD-OTP-00540, page 1614, line 520 to page 1616, line 579 and EVD-OTP-00541, page 1645, line 52 to page 1647, line 93.

<sup>1074</sup> ICC-01/04-01/06-2657-tENG-Red, paras 43 – 45.

<sup>1075</sup> EVD-OTP-00535, page 1409, lines 104-121, page 1413, line 235 to page 1418, line 399, page 1421, line 500 to page 1422, line 518, page 1423, lines 566-573, page 1424, lines 575-592.

<sup>1076</sup> EVD-OTP-00537, page 1492, lines 686-694.

<sup>1077</sup> ICC-01/04-01/06-2657-Conf-tENG, paras 45 and 46.

<sup>1078</sup> T-335-Red2-ENG, page 31, line 4 –20 and EVD-OTP-00629, para. 41. As mentioned above, P-0582 testified that introducing potential witnesses who were unknown to the prosecution was one of P-0316's responsibilities, see Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 63, lines 6 – 12.

<sup>1079</sup> T-331-Red2-ENG, page 40, lines 9 – 11.

<sup>1080</sup> T-332-Red2-ENG, page 30, lines 8 – 11, page 31, line 3 and page 33, line 22 – page 34, line 3.

<sup>1081</sup> T-335-Red2-ENG, page 31, lines 4 – 10.

360. Moreover, P-0583 agreed that from 25 September onwards, D-0016 and P-0316 were in Kampala together for several days prior to a number of days of interviews<sup>1082</sup> (during which, as set out above, D-0016 used notes).<sup>1083</sup> P-0316 maintained that the interviews in Kampala marked the end of his contact with D-0016.<sup>1084</sup> This was contradicted by D-0016.<sup>1085</sup>

361. P-0316 gave evidence that he was unaware of any security problems relating to D-0016<sup>1086</sup> and he had not told the Office of the Prosecutor that a threatening letter had been found at Witness D-0016's home.<sup>1087</sup> By way of contradiction, in a telephone conversation with the investigators on 11 January 2008, P-0316 said D-0016 had found a letter containing death threats on his doorstep (this also contradicts the statement that P-0316 had no contact with D-0016 after the interviews).<sup>1088</sup> P-0316 explicitly denied having written the letter or having encouraged D-0016 to give false information about his security.<sup>1089</sup>

362. The prosecution argues that it has not been demonstrated that P-0316 solicited D-0016 to provide false incriminating evidence against the accused.<sup>1090</sup> The prosecution points to the statement by D-0016 that he did not personally receive money from the OTP whilst he was in Kampala for his interview in 2005,<sup>1091</sup> despite the fact that the

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<sup>1082</sup> T-335-CONF-ENG, page 53, line 24 to page 56, line 1; EVD-D01-00114; EVD-OTP-00629, para. 42.

<sup>1083</sup> EVD-OTP-00546, page 1836, line 916 to page 1839, line 1002.

<sup>1084</sup> T-332-Red2-ENG, page 35, lines 9 – 13; T-328-Red2-ENG, page 37, lines 15 – 17.

<sup>1085</sup> T-257-Red2-ENG, page 27, line 9.

<sup>1086</sup> T-329-Red2-ENG, page 16, lines 8 – 12 and T-332-Red2-ENG, page 35, line 24.

<sup>1087</sup> T-332-Red2-ENG, page 36, line 25 to page 37, line 1.

<sup>1088</sup> EVD-D01-01042, No. 31.

<sup>1089</sup> T-329-Red2-ENG, page 13, line 12 to page 14, line 21 and page 16, lines 8 – 11.

<sup>1090</sup> ICC-01/04-01/06-2678-Red, para. 52.

<sup>1091</sup> ICC-01/04-01/06-2678-Red, para. 53, discussing testimony from D-0016, see: ICC-01/04-01/06-T-257-Red2-ENG, page 20, lines 12 – 17 and T-258-Red-ENG, page 21, line 21 to page 22, line 15.



prosecution later showed D-0016 a video in which he received cash from P-0583.<sup>1092</sup>

363. At paragraph 43 of P-0583's statement, he stated D-0016 complained that P-0316 had taken part of the money he had been given to pay for the hotel and his food.<sup>1093</sup> P-0583 explained D-0016 had used the money for purposes other than paying for the hotel and therefore P-0316, on his own initiative, took this money to pay for the hotel and for food.<sup>1094</sup> P-0583 indicated P-0316 provided a consistent and believable explanation regarding this incident.<sup>1095</sup>

364. The Chamber has approached the evidence of D-0016 with a degree of caution, given he provided a detailed and untruthful account to the prosecution with a view to financial gain.<sup>1096</sup> Whilst the witness denies that he was subjected to threats from either Dieudonné Mbuna<sup>1097</sup> or the UPC,<sup>1098</sup> at several points in his evidence he indicated he felt pressure from members of the community and members of his family,<sup>1099</sup> because of the statement he had made to the OTP's investigators. However, it needs also to be observed that he gave a clear and broadly consistent account as to serious alleged wrongdoing on the part of P-0316.

365. When D-0016's account is coupled, first, with the evidence of P-0583 as regards the circumstances in which he was introduced to the OTP and, second, the involvement of P-0316 in the October and November 2005 interviews, there is a persuasive basis for concluding the latter

<sup>1092</sup> T-258-Red2-ENG page 28, lines 1 – 25; EVD-OTP-00532 at 01:10.

<sup>1093</sup> T-335-Red2-ENG, page 49, lines 21 – 24.

<sup>1094</sup> T-335-Red2-ENG, page 50, lines 7 – 11.

<sup>1095</sup> T-335-Red2-ENG, page 51, lines 9 – 18.

<sup>1096</sup> T-256-Red-ENG, page 16, lines 9 – 14.

<sup>1097</sup> T-257-Red2-ENG, page 31, lines 19 – 20.

<sup>1098</sup> T-257-Red2-ENG, page 31, lines 21 – 25.

<sup>1099</sup> T-257-Red-ENG, page 27, lines 11 – 13.

lied to the Chamber as regards his dealings with D-0016. For these reasons, the Chamber finds that D-0016 has given credible evidence – supported by other material, as rehearsed above – and in particular the Chamber accepts P-0316 went to significant lengths to persuade him to give a false account to the OTP, in part for financial gain.

***(4) P-0316's professional obligations towards the  
DRC government***

366. As set out earlier, at all material times, the Prosecutor was aware that P-0316 had held a position of responsibility linked to his national government through his work for the Congolese intelligence services<sup>1100</sup> and, moreover, at least one other member of staff from the same organisation assisted him with his work for the OTP.<sup>1101</sup>

367. P-0316 set out during his evidence the detail of the duties he performed within the intelligence services<sup>1102</sup> and his contacts with, and loyalty to, his government.<sup>1103</sup> The witness said:

From 2004 to date, there is one thing I would like to emphasise and it is this: I have always remained loyal to my government in my service. However, there were sometimes perhaps circumstances in which I might have worked outside of this capacity, but I always remained loyal to my government.<sup>1104</sup>

368. The Chamber is particularly concerned that the prosecution used an individual as an intermediary with such close ties to the government

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<sup>1100</sup> T-334-Red-ENG, page 17, line 17 to page 18, line 3 (P-0583); it was set out in his *curriculum vitae* (EVD-OTP-00597) and his personal history form (EVD-OTP-00598) when he applied.

<sup>1101</sup> T-331-CONF-ENG, page 78, line 23 to page 79, line 23 (P-0316 insisted that his colleague merely acted as a driver); T-337-CONF-ENG, page 15, lines 10-24 (P-0038); T-335-CONF-ENG, page 16, line 20 to page 17, line 4 (P-0583) ; Transcript of Deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-CONF-ENG, page 63, line 18 to page 64, line 8 (P-0582); EVD-D01-00371 (Receipt covering costs for both P-0316 and P-0183); EVD-D01-01043 (Excerpt from the prosecution's table of communication).

<sup>1102</sup> T-327-CONF ENG, page 12, line 7 to page 16, line 2; T-330-CONF ENG, page 21, lines 18 – 22; See also EVD-OTP-00597 and EVD-OTP-00598.

<sup>1103</sup> T-327-CONF ENG, page 14, lines 20 – 23; T-327-Red2-ENG, page 15, lines 1 – 7; T-332-Red2-ENG, page 49, lines 10 – 15.

<sup>1104</sup> T-327-Red2-ENG, page 14, lines 20 – 23.

that had originally referred the situation in the DRC to the Court. He not only introduced witnesses to the investigators, but he was also involved in the arrangements for their interviews. Given the likelihood of political tension, or even animosity, between the accused and the government, it was wholly undesirable for witnesses to be identified, introduced and handled by one or more individuals who, on account of their work or position, may not have had, to a sufficient degree or at all, the necessary qualities of independence and impartiality. Whilst it is acceptable for individuals in this category to provide information and intelligence on an independent basis, they should not become members of the prosecution team. Moreover, any information and intelligence they provide should be verified and scrutinised by the prosecution, in order to avoid any manipulation or distortion of the evidence.

*(5) False information and credibility issues*

369. In October 2008, P-0316 maintained to the prosecution that his assistant (Individual 183) and his family had been murdered, allegedly by a rebel movement. He suggested the dead man's fellow students had informed him of the death and that the killers were now pursuing him (P-0316).<sup>1105</sup> When questioned on this matter in October 2009 and again in November 2010, P-0316 reiterated this claim.<sup>1106</sup> However, these assertions are false, given the prosecution has asserted

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<sup>1105</sup> EVD-D01-01004 at DRC-OTP-0230-0460 and 0461. The account P-0316 gave to the prosecution at a later stage differs to the extent that he said his relatives informed him, and his parents had not been killed, EVD-D01-00372, page 0457, line 162 to page 0458, line 242.

<sup>1106</sup> EVD-D01-00372, page 0457, line 162 to page 0458, line 242; See also T-332-Red2-ENG, page 12, line 20 to page 17, line 10; T-331-Red2-ENG, page 81, line 24 to page 82, line 10.

“confidently” that Individual 183 is alive.<sup>1107</sup>

370. An investigator’s note dated 18 June 2010 concerning events that had taken place between 2006 and 2009 in relation to P-0316 indicates that members of the prosecution investigation team had serious doubts about his credibility.<sup>1108</sup> An entry for 16 May 2008 relates that a referral for protection for P-0316 was never submitted to the VWU because “the threats (SMS messages and visits to houses) claimed by Intermediary 316 could not be proven and he and his family gave different versions of these incidents.”<sup>1109</sup>

371. An entry from 30 May 2008 sets out that P-0316 “was told that the OTP had found out about some financial issues which do not correspond to what Intermediary 316 initially said. It was reiterated that Intermediary 316 must be truthful about everything”.<sup>1110</sup> The investigator’s note for 29 September 2008 indicates that OSU field officers “reported that [P-0316] continued to play games and provide false information on available houses. [...] The field staff reported being suspicious about [the intermediary’s] intentions.”<sup>1111</sup> On 14 April 2009, having received a set of invoices from P-0316 for medical expenses, “OSU field officers considered that the expenses seemed exaggerated and that the receipts should be confirmed with the relevant medical centres and pharmacy”.<sup>1112</sup>

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<sup>1107</sup> EVD-D01-01004 at DRC-OTP-0230-0461; EVD-D01-01043 (Excerpt from the prosecution’s table of contacts indicating that the OTP had been able to reach P-0183 by telephone); the prosecution confirmed in court that P-0183 is still alive: T-332-Red2-ENG, page 5, line 7 to page 6, line 12.

<sup>1108</sup> EVD-D01-01004.

<sup>1109</sup> EVD-D01-01004 at DRC-OTP-0230-0457.

<sup>1110</sup> EVD-D01-01004 at DRC-OTP-0230-0458.

<sup>1111</sup> EVD-D01-01004 at DRC-OTP-230-0460.

<sup>1112</sup> EVD-D01-01004 at DRC-OTP-230-0464.

**(6) Conclusions as to P-0316**

372. During his testimony before the Court between 9 and 12 November 2010, P-0316 repeatedly contradicted the information in the prosecution's records, the testimony of P-0582 and P-0583 and his own prior statements to the prosecution, most notably as regards his relationship with D-0016, P-0038 and P-0015, his knowledge of a threatening letter allegedly received by D-0016 and his activities on behalf of the investigative division.

373. Bearing in mind especially P-0316's lack of credibility, the Chamber is of the view that there are strong reasons to conclude he persuaded witnesses to lie as to their involvement as child soldiers within the UPC.

374. This conclusion potentially affects the Chamber's attitude to the witnesses called by the prosecution at trial with whom P-0316 had contact (P-0015 and P-0038). As set out above, the Chamber has concluded that the evidence of P-0015 cannot be relied on as to the substance of the charges. However, the Chamber has determined that the evidence of P-0038 is not affected in the same way, having scrutinised his evidence (see above).

**3. Intermediary P-0321**

375. In its Decision on Intermediaries, the Chamber observed that several witnesses had given evidence to the effect that intermediary 321 possibly misused his position and may have "persuaded or invited witnesses to give false testimony to the Court".<sup>1113</sup> The Chamber instructed the prosecution to call P-0321 as a witness in order to

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<sup>1113</sup> ICC-01/04-01/06-2434-Red2, para. 140.

resolve this criticism, the relevant discrepancies in the evidence and the issue of contact between the intermediaries.<sup>1114</sup>

376. The Chamber has considered below the evidence relating to the role and credibility of this intermediary, as well as the evidence of the other witnesses whose credibility may be affected.

#### a) Background

377. P-0321 carried out various tasks for the prosecution, which began when a representative of the Office of the Prosecutor contacted P-0321 in January 2007 and asked him to re-establish contact with P-0157<sup>1115</sup> and to set up a meeting with the investigators.<sup>1116</sup> P-0321 received direct telephone instructions from the OTP for this initial mission.<sup>1117</sup>

378. Thereafter, P-0031 contacted P-0321, and he was asked to organise a meeting between several children and the OTP representative P-0581 in Bunia.<sup>1118</sup> P-0321 was initially contacted by telephone,<sup>1119</sup> and subsequently P-0581<sup>1120</sup> gave him instructions in person.<sup>1121</sup>

379. The OTP then asked P-0321 to organise further meetings with various children in another town.<sup>1122</sup> P-0321 said that the investigators contacted him after each interview.<sup>1123</sup>

380. P-0321 was asked to give the children money once the interviews

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<sup>1114</sup> ICC-01/04-01/06-2434-Red2, para. 141.

<sup>1115</sup> T-308-CONF-ENG, page 47, lines 10 – 12 (P-0321); EVD-D01-01039, at DRC-D01-0003-5879; EVD-D01-01041, No 1.

<sup>1116</sup> T-308-CONF-ENG, page 46, line 1 to page 47, line 12 (P-0321).

<sup>1117</sup> T-308-Red2-ENG, page 46, line 11 to page 47, line 12 (P-321).

<sup>1118</sup> T-308-CONF-ENG, page 62, lines 9 – 25 (P-0321).

<sup>1119</sup> T-300-Red2-ENG, page 25, lines 6-16 (P-581).

<sup>1120</sup> T-308-CONF-ENG, page 52, line 23 – page 53 page 12.

<sup>1121</sup> T-300-Red2-ENG, page 25, lines 6 – 22 (P-0581).

<sup>1122</sup> T-309-CONF-ENG, page 2, lines 20 to page 3, line 6 (P-0321).

<sup>1123</sup> T-309-Red2-ENG, page 21, lines 14 -20.

were finished to enable them to return home.<sup>1124</sup> Following the interviews, the investigators instructed P-0321 to distribute mobile telephones to various witnesses.<sup>1125</sup>

381. In December 2007, at the request of the OTP, P-0321 talked to P-0297 about the arrangements for the latter's accommodation.<sup>1126</sup> Soon after, again on the instructions of the investigators, P-0321 accompanied P-0297 and another individual to an airport.<sup>1127</sup> In January 2008, the investigators contacted P-0321 about P-0213,<sup>1128</sup> whose position is considered in detail below.<sup>1129</sup>

382. Thereafter, P-0321 remained in touch with one of the OTP investigators.<sup>1130</sup> This continued once P-0321 was relocated in January 2008. P-0581 was in contact with P-0321 on at least two occasions in 2008<sup>1131</sup> and at least once in 2009.<sup>1132</sup> P-0581 gave evidence on how intermediaries working for the OTP were usually paid (but he could not recall if the relevant records were completed for P-0321).<sup>1133</sup>

383. On this basis, it is suggested by the defence that for more than a year, P-0321 acted on the instructions of the OTP and under the latter's supervision, as regards a number of potential witnesses in this case, and including trial witnesses P-0157, P-0213 (first contact via P-0321), P-0293 (first contact via P-0321), P-0294 (first contact via P-0321), P-

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<sup>1124</sup> T-309-Red2-ENG, page 21, lines 22 – 23.

<sup>1125</sup> T-309-Red2-ENG, page 2, line 20 to page 3, line 2 and page 21, line 24 to page 22, line 14; T-310-Red2-ENG, page 18, lines 14 – 24 (P-0321).

<sup>1126</sup> EVD-D01-01039, No 134.

<sup>1127</sup> EVD-D01-01039, No 134 and P-0321: T-310-CONF-ENG, page 35, line 13 to page 36, line 14.

<sup>1128</sup> T-322-CONF-ENG, page 23, lines 5-18 (P-0321).

<sup>1129</sup> See paras 394-406.

<sup>1130</sup> T-320-Red2-ENG, page 42, lines 6 – 8 (P-0321).

<sup>1131</sup> EVD-D01-01039, No 134. T-302-CONF-ENG, page 6, lines 9 - 18.

<sup>1132</sup> EVD-D01-01039, No 134.

<sup>1133</sup> T-302-Red2-ENG, page 11, line 23 to page 12, line 13 (P-0581).

0297 (first contact via P-0321) and P-0298 (first contact via P-0321).<sup>1134</sup>

**b) The relevant witnesses**

384. The Chamber has initially considered the evidence of the relevant defence witnesses before turning to the account of the prosecution witnesses whose reliability may be affected because they were first contacted by P-0321.

**(1) D-0003 and D-0004**

385. The defence relies on the evidence of two defence witnesses, D-0003 and D-0004, in support of a submission that P-0321 encouraged young boys (including P-0213, P-0294, P-0297 and P-0298) to claim falsely to the OTP that they had been enlisted into the armed wing of the UPC.<sup>1135</sup>

386. The prosecution suggests that D-0003 and D-0004 “succumbed to pressure” exerted on them by a person named Cordo, other UPC officials and village chiefs in order to persuade them to testify in favour of the accused.<sup>1136</sup> The prosecution submits that the substance of their evidence is flawed.<sup>1137</sup>

**(a) D-0003**

387. D-0003 maintained that P-0321 told children that an NGO would assist them to secure schooling and to learn a trade, and they would receive money.<sup>1138</sup> According to D-0003, P-0321 told him that in order to be paid, he must lie and say one of the individuals who was later

<sup>1134</sup> ICC-01/04-01/06-2657-tENG-Red, paras 75 – 80.

<sup>1135</sup> ICC-01/04-01/06-2657-tENG-Red, para. 81.

<sup>1136</sup> ICC-01/04-01/06-2748-Red, paras 454, 456, 459 – 461.

<sup>1137</sup> ICC-01/04-01/06-2748-Red, paras 462 – 469.

<sup>1138</sup> T-239-Red2-ENG, page 23, lines 6 – 13 and page 34, lines 5- 10.



called by the prosecution as a witness was a former child soldier whose mother had died.<sup>1139</sup> As part of this plan, D-0003 accompanied him to a meeting with the prosecution investigators.<sup>1140</sup> D-0003 testified that P-0321 asked him to pretend to be related to the individual just mentioned.<sup>1141</sup> The witness said he signed several documents for the OTP using different names.<sup>1142</sup>

388. D-0003 admitted lying to the OTP investigators for financial gain.<sup>1143</sup> He also admitted attempting to secure a financial reward in return for giving evidence in favour of Thomas Lubanga (although his evidence was that his offer to assist was turned down by members of the UPC who said they did not want to buy his testimony).<sup>1144</sup> It follows that D-0003's contact with individuals within the UPC hierarchy<sup>1145</sup> prior to testifying raises the risk that his testimony may be unreliable, given his desire to profit from any evidence he provided. Furthermore, the witness had come under pressure, including from his community<sup>1146</sup> and members of his own family,<sup>1147</sup> before he gave evidence. In the circumstances, the Chamber has focussed carefully on the risk that the evidence he gave may have been the result of his wish for personal financial gain (notwithstanding his account of the reaction of the UPC members) or following pressure or coercion.

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<sup>1139</sup> T-239-Red2-ENG, page 31, lines 17 – 20.

<sup>1140</sup> T-239-Red2-ENG, page 31, line 12 to page 32, line 12.

<sup>1141</sup> T-239-CONF-ENG, page 52, line 1 to page 54, line 4.

<sup>1142</sup> T-240-Red-ENG, page 4, line 12 to page 5, line 21.

<sup>1143</sup> T-240-Red-ENG, page 6, lines 24 – 25.

<sup>1144</sup> T-241-Red2-ENG, page 16, lines 10 – 15.

<sup>1145</sup> T-241-Red2-ENG, page 13, line 9 to page 14, line 6 and page 14, line 23 to page 15, line 4.

<sup>1146</sup> T-240-Red-ENG, page 13, line 23 to page 14, line 15.

<sup>1147</sup> T-239-Red2-ENG, page 46, lines 14 – 22.

**(b) D-0004**

389. D-0004 testified that P-0321 asked him and a number of others<sup>1148</sup> from his neighbourhood to maintain falsely to the OTP that they had been enlisted into the UPC's army,<sup>1149</sup> and to lie about issues such as their names,<sup>1150</sup> where they lived and their ages.<sup>1151</sup> D-0004 described the circumstances in which he suggested he met P-0321 in 2008.<sup>1152</sup> The witness claims P-0321 said to him and others that if they wished to earn money and to study, and if they desired a good life, then they should state falsely that they had been child soldiers,<sup>1153</sup> having been forcibly enlisted by the accused.<sup>1154</sup> D-0004 also testified that he travelled using different names, with a false student card provided to him by the OTP that gave incorrect information as to his name, age and village.<sup>1155</sup>

390. The prosecution highlights another witness's testimony that, contrary to D-0004's evidence about having made up stories at the instigation of P-0321, he underwent military training in the UPC and thereafter served in its army, at least for several weeks.<sup>1156</sup>

391. Questions as to the credibility of D-0004 are raised by a number of factors. First, he originally lied about having been a child soldier, given his later account was that he had never served in the military.<sup>1157</sup>

<sup>1148</sup> He stated they were four in total and he provided the names of the other three individuals, T-242-CONF-ENG, page 22, lines 6 – 7.

<sup>1149</sup> T-242-Red2-ENG, page 21, line 5 to page 23, line 8; T-245-Red2-ENG, page 11, line 25 to page 12, line 25. D-0004 stated that although P-0321 sent him away at the first meeting when D-0004 told him that he had not been a child soldier, P-0321 came back and told them to lie.

<sup>1150</sup> T-243-CONF-ENG, page 14, lines 1 – 7.

<sup>1151</sup> T-243-Red2-ENG, page 17, lines 8 – 13.

<sup>1152</sup> T-242-Red2-ENG, page 5, lines 23 – 24; T-245-CONF-ENG, page 5, lines 12 – 17.

<sup>1153</sup> T-245-Red2-ENG, page 12, lines 18 – 20.

<sup>1154</sup> T-242-Red2-ENG, page 7, lines 3 – 11.

<sup>1155</sup> T-243-Red2-ENG, page 14, lines 8 – 16, page 15, line 21 to page 16, line 3 and page 16, line 23 to page 17, line 7 and T-245-Red2-ENG, page 58, line 22 to page 59, line 24.

<sup>1156</sup> ICC-01/04-01/06-2678-Red, para. 97.

<sup>1157</sup> T-245-Red2-ENG, page 12, line 5; T-242-Red2-ENG, page 21, lines 13– 15.

Second, the witness stated he was put under pressure by his community and individuals affiliated with UPC when they suspected he had given evidence against the accused.<sup>1158</sup> This raises the possibility that his testimony was the result of coercion.

392. Finally, whilst the witness's evidence is generally internally consistent, there are particular issues which are relevant to his credibility. D-0004 gave evidence about having been subjected to pressure from particular villagers because it was assumed that he was testifying against Thomas Lubanga for money, which led D-0004 and another individual to make up a story for the prosecution in order to be relocated.<sup>1159</sup> At one stage the prosecution asked the witness if he was lying to the Court because of pressure from the villagers and members of the UPC. The witness replied "Yes, I accept", although he also challenged the suggestion that he was lying.<sup>1160</sup> He later denied he had been coerced into testifying.<sup>1161</sup>

393. The Chamber has treated the serious suggested improprieties that this witness has alleged against P-0321 with particular care.

## (2) *P-0213*

394. Witness P-0213 is an alleged former child soldier who gave evidence he was born in 1991<sup>1162</sup> and he provided his place of birth to the Chamber.<sup>1163</sup> He suggested soldiers from the UPC abducted him on three occasions,<sup>1164</sup> although he gave inconsistent testimony on the

<sup>1158</sup> T-242-Red2-ENG, page 13, lines 1 – 21; T-245-Red2-ENG, page 28, lines 11 – 23, page 32, line 2 to page 36, line 18, page 42, lines 16 – 21 and page 43, lines 13 – 17.

<sup>1159</sup> T-245-Red2-ENG, page 42, line 22 to page 43, line 2 and page 43, line 20 to page 44, line 4.

<sup>1160</sup> T-245-Red2-ENG, page 57, line 21 to page 58, line 8.

<sup>1161</sup> T-245-Red2-ENG, page 60, lines 7 – 10.

<sup>1162</sup> T-132-Red2-ENG, page 6, lines 12–13.

<sup>1163</sup> T-133-CONF-ENG, page 17, lines 14–19.

<sup>1164</sup> T-132-Red2-ENG, page 9, lines 18–19.

circumstances surrounding these incidents.<sup>1165</sup> Moreover, his interview with prosecution investigators in 2007 is inconsistent with his testimony before the Chamber on this issue.<sup>1166</sup>

395. He said that after his first abduction he was sent for training in the Lopa<sup>1167</sup> and Bule camps,<sup>1168</sup> and he took part in a battle against Ugandan troops in Bunia.<sup>1169</sup> Previously, he had been assigned to the accused's residence on security duty.<sup>1170</sup> With respect to his demobilisation, he gave evidence about having gone to different organisations where he received "kits" (including clothing and shoes), and he spoke of his wish to receive training.<sup>1171</sup> However, in an earlier statement to the prosecution the witness had stated he was never demobilised.<sup>1172</sup> He explained in Court that he said this because he was frightened,<sup>1173</sup> although the reasons for this alleged fear were never satisfactorily explained.

396. The defence suggests the testimony of P-0213 is false for a number of reasons.<sup>1174</sup> First, P-0213 gave his name to the Chamber and he indicated it was his only name and he did not use any other.<sup>1175</sup> When the defence suggested another name, he said it was a nickname used by the children when they were playing, but he insisted it was not his

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<sup>1165</sup> Concerning his first abduction, see: T-132-Red2-ENG, page 9, line 20 to page 11, line 10, but see T-134-Red2-ENG, page 2, line 25 to page 14, line 9. Concerning the second abduction: T-132-Red2-ENG, page 15, line 13 to page 16, line 4 and T-133-Red2-ENG, page 73, line 15 to page 76, line 24. Concerning the third abduction: T-134-Red2-ENG, page 43, line 21 to page 45, line 23.

<sup>1166</sup> T-134-Red2-ENG, page 3, line 17 to page 10, line 21.

<sup>1167</sup> T-132-Red2-ENG, page 11, lines 16 – 25.

<sup>1168</sup> T-132-Red2-ENG, page 24, line 20 to page 25, line 10.

<sup>1169</sup> T-132-Red2-ENG, page 47, lines 19 – 25.

<sup>1170</sup> T-132-Red2-ENG, page 45, lines 8 – 11.

<sup>1171</sup> T-133-Red2-ENG, page 30, line 24 to page 36, line 10.

<sup>1172</sup> T-133-Red2-ENG, page 30, lines 12–18.

<sup>1173</sup> T-133-Red2-ENG, page 30, lines 19–23.

<sup>1174</sup> ICC-01/04-01/06-2773-Red-tENG, paras 226 – 259.

<sup>1175</sup> T-133-CONF-ENG, page 15, line 25 to page 16, line 7.

name.<sup>1176</sup>

397. A school register indicates P-0213 was born in 1989 at a different location to the one he gave to the Chamber.<sup>1177</sup> However, it has been established by expert evidence that the entry for the year “1989” overwrites a previous entry which is partially visible underneath<sup>1178</sup> (the underlying reference cannot be made out). This entry is potentially unreliable in these circumstances, and the Chamber has placed little reliance on it.

398. Second, P-0213 gave evidence that he attended a particular school where he was born, between the first and the fourth year,<sup>1179</sup> although his schooling was interrupted at the end of third year when he was enlisted in the army.<sup>1180</sup> He also said he attended the same school (save for the interruption just referred to) until the “*sixième*,” the end of elementary school.<sup>1181</sup> He gave evidence that he began his fifth year at a school in Bunia, but he returned in the middle of the year to where he was born. He completed the fifth and sixth year at his former elementary school.<sup>1182</sup>

399. As mentioned above, D-0029, who has been a teacher for many years,<sup>1183</sup> and now works as a school inspector for the town of Bunia (following his work as a “school coordinator” in the schools of the Anglican community in the DRC),<sup>1184</sup> gave evidence on school records in the DRC. He indicated there was no primary school with the name

<sup>1176</sup> T-133-CONF-ENG, page 16, lines 8 – 15.

<sup>1177</sup> EVD-D01-00054, page 0140, No 2297.

<sup>1178</sup> EVD-OTP-00639, page 0324.

<sup>1179</sup> T-133-CONF-ENG, page 25, line 22 to page 26, line 20.

<sup>1180</sup> T-133-Red2-ENG, page 62, lines 2 – 21 and T-132-Red2-ENG, page 6, line 24 to page 7, line 9.

<sup>1181</sup> T-132-Red2-ENG, page 6, line 16 page 7, line 9.

<sup>1182</sup> T-133-CONF-ENG, page 26, line 21 to page 27, line 16.

<sup>1183</sup> T-293-Red-ENG, page 7, line 5 and page 8, lines 19 – 20.

<sup>1184</sup> T-293-Red-ENG, page 7, lines 8 – 10, page 8, lines 14 – 15 and lines 23 – 24 and page 10, lines 1 – 11.

referred to by P-0213 (where he claimed he attended during his first few years of schooling).<sup>1185</sup> His evidence was that the relevant school is in a different locality to the one referred to by P-0213.<sup>1186</sup>

400. In addition, D-0003 stated that of the nine children living in his immediate neighbourhood, including P-0297 and P-0213, none were child soldiers.<sup>1187</sup> He conceded “[i]t is true that we did make up stories for the money, but it is true that no child had been a child soldier.”<sup>1188</sup> D-0004 testified that P-0213 and P-0297 had agreed to give evidence in the Netherlands to the effect that Thomas Lubanga had enrolled them in the army, although neither of them had been soldiers.<sup>1189</sup> Moreover, D-0036 testified he had known P-0213 from at least 1998 onwards,<sup>1190</sup> and he never served as a soldier.<sup>1191</sup> Although the Chamber has approached D-0003 and D-0004’s testimony with caution, they clearly support the evidence of D-0036 and certain other material that the Chamber has considered. In light of this other evidence, the Chamber has concluded that D-0003’s and D-0004’s testimony raises serious doubts about the credibility and reliability of P-0213.

401. D-0002 <sup>1192</sup> also gave evidence that contradicted P-0213. He recognised the latter in a photograph<sup>1193</sup> and he indicated the name P-0213 provided as his nickname was in fact part of his real name,<sup>1194</sup> which he used to enrol in school.<sup>1195</sup>

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<sup>1185</sup> T-293-Red-ENG, page 21, lines 19 – 24.

<sup>1186</sup> T-293-Red-ENG, page 22, lines 2 – 5.

<sup>1187</sup> T-239-Red2, page 48, lines 1 – 5 and 10 – 20.

<sup>1188</sup> T-239-Red2, page 48, lines 3 – 5.

<sup>1189</sup> T-242-Red2, page 11, lines 19 – 23 and page 12, lines 7 – 13.

<sup>1190</sup> T-350-Red2, page 41, lines 15 – 20.

<sup>1191</sup> T-350-Red2, page 43, lines 5 – 11.

<sup>1192</sup> T-239-CONF-ENG, page 27, lines 14 – 19 and page 28, lines 15 – 23.

<sup>1193</sup> T-236-CONF-ENG, page 29, lines 1 – 12; EVD-D01-00106.

<sup>1194</sup> T-236-CONF-ENG, page 28, lines 19 – 23.

<sup>1195</sup> T-236-CONF-ENG, page 34, lines 5 – 9.

402. D-0002 gave evidence that P-0213 started primary school<sup>1196</sup> in a different location to the one the latter had indicated.<sup>1197</sup> He testified that P-0213 moved town and changed schools, although his education was interrupted because the new school was destroyed in fighting in the spring of 2003.<sup>1198</sup> The witness said that there is documentary evidence,<sup>1199</sup> which contradicts the evidence of P-0213, as to the schools he attended, although in the judgment of the Chamber this material has potentially been tampered with, rendering it unreliable.<sup>1200</sup> Otherwise, the Chamber has considered the detail of D-0002's evidence on the issue of P-0213's schooling<sup>1201</sup> and whereabouts.<sup>1202</sup>

403. The prosecution suggests that elements of the evidence from D-0002 were weak and that the witness was evasive and argumentative, and may have been influenced by the kind of pressure that it is alleged has been directed at many of the witnesses.<sup>1203</sup> However, the evidence does not support this suggestion, and the Chamber found him to be credible and reliable. No sustainable reason has been advanced as to why he would lie about P-0213.

404. This evidence, considered overall, raises serious questions as to the reliability of P-0213. The documentary and oral evidence strongly indicates he did not tell the truth about his age, his education and his military service. At the close of his evidence, the witness testified that

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<sup>1196</sup> T-236-CONF-ENG, page 32, line 4.

<sup>1197</sup> T-236-CONF-ENG, page 30, lines 8 – 20 (D-0002).

<sup>1198</sup> T-236-Red2-ENG, page 32, lines 6 – 8.

<sup>1199</sup> EVD-D01-00054, page 0140, No 2297; T-236-CONF-ENG, page 48, line 25 to page 49, line 2, page 49, line 22 to page 53, line 2 (D-0002).

<sup>1200</sup> EVD-OTP-00639, page 0324.

<sup>1201</sup> For the detail of this evidence see: T-236-CONF-ENG, page 32, lines 9 – 13. T-236-CONF-ENG, page 34, lines 5 – 8. T-236-CONF-ENG, page 34, lines 8 – 9. T-236-CONF-ENG, page 30, line 18 to page 31, line 18 and page 44, lines 20 – 22; T-237-CONF-ENG, page 8, line 11 to page 10, line 8. T-237-CONF-ENG, page 12, lines 10 – 16 and page 13, lines 3 – 4.

<sup>1202</sup> T-236-CONF-ENG, page 30, line 18 to page 31, line 18; T-237-CONF-ENG, page 12, lines 9 – 17. T-236-CONF-ENG, page 35, line 17 to page 36, line 22.

<sup>1203</sup> ICC-01/04-01/06-2748-Conf, paras 489 and 490.

he had not given the real name of his mother.<sup>1204</sup> According to the witness:

It's something which we planned. We didn't want to give my identity, my date of birth, the names of my parents, and the place where I studied. These are things which I discussed with – with my relatives. So what I said in Beni is the truth. And I told them that if they come here, that they need to know that the name that I gave is not my name. It's not my identity.<sup>1205</sup>

405. P-0213 explained that his uncle was a member of the UPC and that his testimony had caused considerable problems within his family.<sup>1206</sup> However, the witness also stated that he had given his mother's true name, and he said "[i]t's my name, which wasn't given, because she thought that I would be put to harm here, and she was afraid, and so she gave an identity".<sup>1207</sup> P-0213 stated he had told the truth during his testimony,<sup>1208</sup> although it is unclear whether P-0213 had, in fact, used his true name in evidence.

### **Conclusion as to P-0213**

406. The extent of the inconsistencies and the other problems with this witness's evidence supports the suggestion that he provided an account that was false, at least in part. Moreover, the fact he was introduced to the prosecution investigators by P-0321 raises additional concerns that the latter may have influenced his testimony. In light of all these circumstances, the Chamber concludes that P-0213 is not a witness who can safely be relied upon.

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<sup>1204</sup> T-134-Red2-ENG, page 76, lines 2 – 3.

<sup>1205</sup> T-134-Red2-ENG, page 76, lines 3 – 8.

<sup>1206</sup> T-134-CONF-ENG, page 77, lines 2 – 15.

<sup>1207</sup> T-134-Red2-ENG, page 76, line 15 to page 77, line 1.

<sup>1208</sup> T-134-Red2-ENG, page 77, lines 16 – 18.



**(3) P-0294**

407. P-0294 is an alleged former child soldier. He gave evidence as to his place and date of birth (the latter was in 1991).<sup>1209</sup> In court he testified his mother told him the location<sup>1210</sup> and the year of his birth, and his brother informed him of the precise date.<sup>1211</sup> In a written statement, the witness explained that one of his brothers saw his birth certificate in hospital (he gave conflicting accounts as to the brother he was referring to).<sup>1212</sup> P-0294 said he joined the APC in late 2000,<sup>1213</sup> and in due course he met Commander Pepe, who asked him to go to Uganda,<sup>1214</sup> where he was invited to train other recruits (although he said he had not undergone training himself because he had lied to the Commander about having already completed his training).<sup>1215</sup> Thereafter, he went to Mandro,<sup>1216</sup> for approximately a month<sup>1217</sup> for compulsory training.<sup>1218</sup> P-0294 testified that the group of Hema soldiers there later became known as the UPC.<sup>1219</sup> The witness succeeded in running away,<sup>1220</sup> but later he returned to the army of the UPC<sup>1221</sup> and became a guard for one of the commanders.<sup>1222</sup> This role ended when the commander in question went to Mandro.<sup>1223</sup> P-0294 said he took part in battles at Songolo,<sup>1224</sup> Bule and Kasenyi,<sup>1225</sup> and he

<sup>1209</sup> T-150-CONF-ENG, page 44, lines 13 – 14 and 23 – 25.

<sup>1210</sup> T-151-CONF-ENG, page 63, lines 14 – 17.

<sup>1211</sup> T-150-Red2-ENG, page 44, lines 13 – 19; T-151-Red2-ENG, page 53, line 21 to page 54, line 7.

<sup>1212</sup> T-151-CONF-ENG, page 54, line 8 to page 55, line 2.

<sup>1213</sup> T-150-Red2, page 46, line 9 to page 47, line 8, page 47, line 25 to page 48, line 8 and page 49, lines 24 – 25; T-151-Red2, page 88, lines 12 – 23 and page 92, lines 17 – 21 and page 93, lines 11 – 14.

<sup>1214</sup> T-150-Red2-ENG, page 61, lines 23 – 24.

<sup>1215</sup> T-150-Red2-ENG, page 63, lines 21 – 23 and page 66, lines 16 – 22.

<sup>1216</sup> T-150-Red2-ENG, page 70, lines 5 – 24.

<sup>1217</sup> T-152-Red2ENG, page 4, lines 12 – 18.

<sup>1218</sup> T-150-Red2ENG, page 71, lines 7 – 17 and page 74, line 14 to page 75, line 19.

<sup>1219</sup> T-150-Red2-ENG, page 71, lines 7 – 18.

<sup>1220</sup> T-150-Red2-ENG, page 81, lines 2 – 8; T-152-Red2-ENG, page 4, lines 19 – 22.

<sup>1221</sup> T-150-Red2-ENG, page 82, lines 4 – 6, page 83, lines 2 – 6 and lines 17 – 19; page 84, lines 3 – 10.

<sup>1222</sup> T-150-CONF-ENG, page 84, line 22 to page 85, line 22.

<sup>1223</sup> T-151-Red2-ENG, page 27, lines 11 – 9.

<sup>1224</sup> T-151-Red2-ENG, page 21, line 20 to page 22, line 2; T-152-Red2-ENG, page 14, lines 4 – 13.

served as one of the security guards at the residence of Thomas Lubanga.<sup>1226</sup> At the time of the battle of Bunia (2003)<sup>1227</sup> the witness suggested he was serving with a unit of the UPC.<sup>1228</sup> After the battle, he ran away,<sup>1229</sup> and joined PUSIC.<sup>1230</sup> He stayed with PUSIC for about a month and a half,<sup>1231</sup> and after having apparently rejoined the UPC for a short period (his testimony is unclear on this),<sup>1232</sup> he was demobilised.<sup>1233</sup>

408. There are significant grounds for suggesting that P-0294 provided an account that, in important respects, was untruthful. For instance, with respect to his age, the voter registration card bearing P-0294's name and photograph, along with the extract of the register of the independent electoral commission, give his date of birth as mid 1987.<sup>1234</sup> The certificate of family reunification indicates that in July 2004 P-0294 was 16 years old (meaning he was born in 1988).<sup>1235</sup> When asked about the age on the certificate, P-0294 said he had not given his correct age and he did not really know how old he is.<sup>1236</sup> He maintained he made an agreement with the child he was then with to change his own age so as to pass himself off as the other boy's little brother.<sup>1237</sup> P-0294 then insisted he was born in 1991 and knew this because his mother had shown him the relevant document,<sup>1238</sup> although earlier he had testified that he had never seen any

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<sup>1225</sup> T-151-Red2-ENG, page 26, lines 13 – 16.

<sup>1226</sup> T-151-Red2-ENG, page 33, lines 8 – 24; T-152-Red2-ENG, page 18, lines 19 – 25.

<sup>1227</sup> T-152-Red2-ENG, page 21, line 14.

<sup>1228</sup> T-152-Red2-ENG, page 21, lines 15 – 17.

<sup>1229</sup> T-151-Red2-ENG, page 38, lines 9 – 13; T-152-Red2-ENG, page 24, lines 6 – 9.

<sup>1230</sup> T-151-Red2-ENG, page 38, line 21 to page 39, line 12.

<sup>1231</sup> T-152-Red2-ENG, page 24, line 22 to page 25, line 3.

<sup>1232</sup> T-151-Red2-ENG, page 41, line 13 to page 42, line 9.

<sup>1233</sup> T-151-Red2-ENG, page 42, lines 10 – 13.

<sup>1234</sup> EVD-D01-00764 and EVD-D01-01006.

<sup>1235</sup> EVD-D01-00069 at page DRC-OTP-0160-0188.

<sup>1236</sup> T-151-Red2-ENG, page 62, lines 6 – 8.

<sup>1237</sup> T-151-Red2-ENG, page 62, lines 9 – 17.

<sup>1238</sup> T-151-Red2-ENG, page 62, line 22 to page 63, line 2.

documentation relating to his date of birth.<sup>1239</sup>

409. Another document shown to the witness (*viz.* the attestation *in lieu* of a primary school leaving certificate)<sup>1240</sup> indicates he was born in the place he claimed in mid 1988.<sup>1241</sup> The witness said he recognised the certificate and although some details were correct, the year of his birth (1988) was incorrect. This was because the individual who had registered him at school had entered an incorrect date, which was thereafter used on all of his school records.<sup>1242</sup> D-0029, a teacher who is currently a school inspector,<sup>1243</sup> suggested in his testimony that the individual with responsibility for issuing this certificate would have referred to a register when filling in the necessary information.<sup>1244</sup> As discussed above, D-0029 also indicated the school records were not always accurate.<sup>1245</sup> The register of a particular school for the year 2000 provides details of an individual with the same name and place of birth as indicated by P-0294, with a date of birth in early 1988.<sup>1246</sup> P-0294 said he was unaware of this document and he insisted he had completed the 6<sup>th</sup> year of primary school in a different institution, located in another town.<sup>1247</sup>

410. P-0293, who is P-0294's mother,<sup>1248</sup> gave evidence that P-0294 was born in 1991.<sup>1249</sup> She testified he began primary school in the town of his birth, although he moved to the home of another of his father's

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<sup>1239</sup> T-150-Red2-ENG, page 44, lines 20 – 22.

<sup>1240</sup> “*Attestation Tenant Lieu Du Certificat De Fin D’Etudes Primaires*”.

<sup>1241</sup> EVD-D01-00071.

<sup>1242</sup> T-151-Red2-ENG, page 85, lines 20 – 25 and page 86, lines 2 – 12.

<sup>1243</sup> T-293-Red-ENG, page 8, line 8 to page 10, line 11.

<sup>1244</sup> T-296-Red-ENG, page 44, line 10 to page 45, line 1 and page 46, lines 1 – 6.

<sup>1245</sup> T-296-Red-ENG, page 7, line 25 to page 8, line 20 and page 9, lines 4 – 17.

<sup>1246</sup> EVD-D01-00072, page 2, No. 3. There are two entries with the number 3. P-0294 is listed under the second entry.

<sup>1247</sup> T-151-CONF-ENG, page 86, line 19 to page 88, line 7.

<sup>1248</sup> T-153-CONF-ENG, page 17, line 24 to page 18, line 3 and page 18, lines 11 – 14.

<sup>1249</sup> T-153-Red2-ENG, page 34, lines 1 – 8.

wives. In due course he returned to his home town to continue his studies.<sup>1250</sup> She confirmed that he spent his sixth year at the primary school he had indicated.<sup>1251</sup>

411. The prosecution contends that the (inconsistent) school records and electoral documents are unreliable and that P-0294 and P-0293's evidence should be "preferred over these documents".<sup>1252</sup> It is suggested by the prosecution that this witness gave honest and sincere testimony and his mother (P-0293) and P-0031, along with the demobilisation and reunification certificates, corroborates his testimony.<sup>1253</sup> In all the circumstances, the Chamber has no doubt that the material rehearsed above, viewed cumulatively, casts considerable doubt over the witness's evidence, particularly as regards his assertion that he was born in 1991. No sufficient explanation has been provided as to why the majority of the documentary records suggest that the year of his birth was 1987 or 1988.

412. It is suggested by the defence that P-0294 "used" the military career of his brother to invent part or all of his account of his service as a soldier.<sup>1254</sup> The defence called a witness to support this contention.<sup>1255</sup> The prosecution argues that this evidence is flawed<sup>1256</sup> and it observes that the witness conceded at one stage that "[...] everyone said that he [P-0294] was a soldier. However, I really do not know, however, whether [P-0294] really was a member of any movement at all."<sup>1257</sup> The prosecution also relies on the witness's evidence that "in Ituri there

<sup>1250</sup> T-153-CONF-ENG, page 35, lines 14 – 19.

<sup>1251</sup> T-153-CONF-ENG, page 37, lines 1 – 11.

<sup>1252</sup> ICC-01/04-01/06-2748-Red, paras 366 – 368.

<sup>1253</sup> ICC-01/04-01/06-2748-Red, para. 369; ICC-01/04-01/06-2778-Red, para. 97.

<sup>1254</sup> ICC-01/04-01/06-2773-Red-tENG, paras 260-261; ICC-01/04-01/06-2657-tENG-Red, para. 133.

<sup>1255</sup> ICC-01/04-01/06-2773-Conf-tENG, para. 261.

<sup>1256</sup> ICC-01/04-01/06-2748-Conf, paras 371 and 372.

<sup>1257</sup> ICC-01/04-01/06-2748-Conf, paras 371 and 372. T-253-CONF-ENG, page 25, lines 12 – 15.

was fighting and everyone said that he was a soldier”.<sup>1258</sup> The Chamber understands this to mean “in Ituri there was fighting and everyone [claimed to be] a soldier”, which is consistent with the witness’s account when considered overall. Before he made this statement the witness explicitly indicated P-0294 had not been a soldier, and when questioned on these particular words, the witness stressed the prosecution had “not really understood”.<sup>1259</sup>

413. It is striking that much of the information provided by P-0294 on his personal and military activities is identical to that of his brother.<sup>1260</sup> At first he denied any knowledge of the armed group his brother belonged to.<sup>1261</sup> Later, P-0294 accepted he was aware of some of the details of his brother’s military activities but said he had not wanted to talk about him because he was afraid.<sup>1262</sup> In all the circumstances, the Chamber is persuaded that P-0294 used his brother’s circumstances to contribute to the account he provided the Chamber as to his own activities.

414. In addition, P-0294 accepted that the name he had provided as his mother’s name in order to obtain a reunification certificate was not her real name but was instead the mother of a companion.<sup>1263</sup> P-0293 testified that it was the name of a different relative of P-0294.<sup>1264</sup> P-0294 also admitted he lied to a centre that was involved with demobilisation, about his relationship to the person who had

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<sup>1258</sup> ICC-01/04-01/06-2748-Conf, para. 371.

<sup>1259</sup> See the transcript referenced in ICC-01/04-01/06-2748-Conf, footnotes 1026 and 1027.

<sup>1260</sup> See for a description of the relevant circumstances ICC-01/04-01/06-2773-Conf-tENG, paras 260 – 261 with the corresponding transcript references.

<sup>1261</sup> T-151-Red2-ENG, page 72, lines 8 – 11 and page 73, line 19 to page 74, line 6.

<sup>1262</sup> T-151-Red2-ENG, page 76, lines 11 – 19 and page 77, lines 11 – 23.

<sup>1263</sup> T-151-CONF-ENG, page 66, line 20 to page 67, line 10.

<sup>1264</sup> T-153-CONF-ENG, page 29, lines 4 – 13.

accompanied him<sup>1265</sup> and as regards his own age.<sup>1266</sup>

#### **Conclusion as to P-0294**

415. This evidence, considered cumulatively, raises serious questions as to the reliability of P-0294. The documentary and oral evidence establishes he did not tell the truth about his age, and there are real concerns he lied about his military service. Moreover, the fact that P-0294 was introduced to prosecution investigators by P-0321 raises additional concerns because of the real possibility that he may have influenced this witness's testimony. Given P-0294's credibility and the reliability of his evidence are seriously at issue, the Chamber is unable to rely on his account.

#### **(4) P-0297**

416. Witness P-0297 is an alleged former child soldier. He gave evidence he was 20 years old in May 2010,<sup>1267</sup> and he provided details of where he was born and lived, and the neighbourhood where his parents now reside in Bunia.<sup>1268</sup> He suggested that UPC soldiers enlisted him on two occasions.<sup>1269</sup>

417. The defence submits that the evidence provided by two witnesses, as well as certain documentary evidence demonstrates he lived in a particular neighbourhood of Bunia from birth<sup>1270</sup> and he had not been a

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<sup>1265</sup> T-151-Red2-ENG, page 43, lines 2 – 12.

<sup>1266</sup> T-151-Red2-ENG, page 62, lines 6 – 17.

<sup>1267</sup> T-285-Red2-ENG, page 7, lines 8 – 9.

<sup>1268</sup> T-285-CONF-ENG, page 7, line 18 to page 8, line 5.

<sup>1269</sup> T-285-Red2-ENG, page 44, lines 5 – 6 and page 44, line 18 to page 45, line 18 (first time); T-286-Red2-ENG, page 6, line 15 – page 7 line 14, page 8, line 16 to page 13, line 15 (second time).

<sup>1270</sup> T-242-Red3-ENG, page 6, lines 20 – 22 (D-0004 stated that P-0316 instructed them not to reveal that they lived in that particular neighbourhood); T-245-CONF-ENG, page 11, line 25 to page 12, line 1 (D-0004 stated that P-0297 was with him in Bunia when they met P-0321 for the first time). The defence suggests that the matriculation records of a primary school tend to indicate that in 1997 P-0297 was living in a particular neighbourhood of Bunia: EVD-D01-00145, page 3396, No 443/97.

soldier in the armed wing of the UPC.<sup>1271</sup>

418. The head of an avenue in the Simbilibo district,<sup>1272</sup> D-0036, testified he had known P-0297 since about 1996,<sup>1273</sup> and that P-0297 lived in the neighbourhood in 2002/2003 and did not leave until 2007 when “a young man came and misled a certain number of young persons”.<sup>1274</sup> D-0036 testified that P-0297 was never a soldier.<sup>1275</sup> D-0036 also gave evidence about a telephone conversation he had with P-0297 at the end of December 2010, during which the latter apparently asked him to refrain from saying that he had not been a soldier if he went to the Netherlands.<sup>1276</sup> D-0036 stated it was P-0321 “who had taken these children, and it’s because of him that they went and narrated all of what they said.”<sup>1277</sup> The prosecution suggests that D-0036’s lack of detailed knowledge of the family circumstances of some of the witnesses, and his evidence that he had not prepared a list of the other children in P-0297’s family because he had not realised that such a question would be asked, demonstrates he “came prepared to address certain issues but could not answer questions when taken outside his script”.<sup>1278</sup> The Chamber rejects this assessment. The Chamber found D-0036’s evidence to be detailed, generally consistent and persuasive. Given D-0036 admitted there were some errors as regards the notebook he introduced, it has disregarded this item,<sup>1279</sup> but otherwise, the Chamber has relied on his testimony.

<sup>1271</sup> ICC-01/04-01/06-2773-Red-tENG, paras 301 – 306.

<sup>1272</sup> T-350-Red2-ENG, page 39, lines 5 – 9.

<sup>1273</sup> T-350-Red2-ENG, page 46, lines 2 – 11.

<sup>1274</sup> T-350-Red2-ENG, page 46, line 12 to page 47, line 4.

<sup>1275</sup> T-350-Red2-ENG, page 47, lines 10 – 16.

<sup>1276</sup> T-350-Red2-ENG, page 47, line 25 to page 48, line 9.

<sup>1277</sup> T-350-Red2-ENG, page 49, lines 4 – 6.

<sup>1278</sup> ICC-01/04-01/06-2748-Red, paras 474 - 475.

<sup>1279</sup> EVD-D01-01099 (notebook); T-351-CONF-ENG, page 35, lines 18 – 21 and page 37, line 9 – page 39, line 3.

419. P-0297 gave evidence on the schools he attended between 2004 and 2006, following his studies and his recruitment as a soldier.<sup>1280</sup> However, the documentary evidence tends to indicate that someone with his identity attended one of those schools in October or November 1997<sup>1281</sup> (when he was allegedly living elsewhere). The prosecution argues document EVD-D01-00144 “proves nothing” because it is “nothing more than several pages stapled together” and because, in contrast to other pages, the school year is missing from the top of the page the defence contends is relevant for P-0297.<sup>1282</sup> The Chamber does not accept these submissions. The relevant document contains the school’s official stamp on each page and, although the school year does not appear on the material page, there is no credible evidence to support the contention that it is a forgery, and particularly that the relevant page (3315) was improperly inserted or that the relevant entry (number 24 on the list) is false. P-0297’s name appears on the school list of prize-winners in 1999-2000,<sup>1283</sup> and for the year 2000-2001 his name is entered under the heading “unclassified” on the same list.<sup>1284</sup> Furthermore, as observed by the defence,<sup>1285</sup> there was a possible contradiction between P-0297’s testimony that his last service in the military was for about three months under Mathieu Ngudjolo in 2004/2005<sup>1286</sup> and his suggestion he resumed his schooling in 2004,<sup>1287</sup>

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<sup>1280</sup> T-289-CONF-ENG, page 8, line 19 – 21, page 9, lines 1 – 9, page 18, lines 1 – 3 and 24, line 20 to page 25, line 24 and page 26, lines 13 – 18.

<sup>1281</sup> EVD-D01-00144, page 3315, No 24 and EVD-D01-00145, page 3935 and 3936, No 443/97. The documents contain the witness’s name as well as his father’s name, T-285-CONF-ENG, page 7, line 23.

<sup>1282</sup> ICC-01/04-01/06-2748-Red, para. 471.

<sup>1283</sup> EVD-D01-00146, No 28.

<sup>1284</sup> EVD-D01-00147, page 3255, No 20.

<sup>1285</sup> ICC-01/04-01/06-2773-Red-tENG, para. 305.

<sup>1286</sup> T-291-Red2-ENG, page 8, line 25 to page 9, line 8.

<sup>1287</sup> T-289-Red2-ENG, page 18, lines 1 – 3 and page 25, lines 6 – 7.



continuing until 2006.<sup>1288</sup>

420. Another witness gave evidence that undermined P-0297's account.

He stated that P-0297 was born in Bunia and had always lived in the Simbilibo neighbourhood, which contradicted P-0297's evidence as to the various places he had lived. This witness gave evidence that P-0297 attended three particular primary schools, whilst P-0297 testified he commenced his primary education at an institution not referred to by the witness. He also gave detailed evidence about the members of P-0297's family. He indicated P-0297 had not been a child soldier in the UPC.<sup>1289</sup>

421. It is of note that P-0297 suggested that two defence witnesses were sent to the Court by Cordo in order to state falsely that one of them and P-0297 had not served as child soldiers in the UPC.<sup>1290</sup>

422. Although the Chamber has approached the evidence on this issue with care, the school records, *prima facie*, tend to indicate that, contrary to P-0297's account, he was a student at a particular school between 1997 and 2001.<sup>1291</sup> P-0297 suggested the school records had been falsified at the behest of someone linked to the accused.<sup>1292</sup> D-0029 testified that during the war (as well as in other circumstances) school records were not always accurate.<sup>1293</sup> When shown document EVD-D01-00145, D-0029 agreed it contained mistakes (two students had

<sup>1288</sup> T-289-Red2-ENG, page 25, lines 6 – 24.

<sup>1289</sup> This witness is identified in ICC-01/04-01/06-2773-Conf-tENG, paras 294, 295, 298 and 301. The Chamber has considered the entirety of the witness's testimony.

<sup>1290</sup> T-285-CONF-ENG, page 15, line 16 to page 17, line 19.

<sup>1291</sup> EVD-D01-00144, EVD-D01-00145, pages 3935 – 3936, No. 443/97, EVD-D01-00146 and EVD-D01-00147, page 3255, No 20.

<sup>1292</sup> T-289-CONF-ENG, page 16, line 22 to page 17, line 21, page 24, line 2 to page 25, line 7, and page 27, line 17 to page 30, line 7. P-0297 also challenged the birth date included in these documents, which indicate that he would have been over 15 years of age in 2002.

<sup>1293</sup> T-296-Red-ENG, page 9, lines 4 – 17. The witness's evidence contained in this transcript demonstrates that many school records contained discrepancies and irregularities.

been assigned multiple registration numbers and there were discrepancies as regards dates of birth).<sup>1294</sup> The Chamber accepts this document should be treated with caution, but given the other relevant documents equally raise questions about P-0297's testimony, and bearing in mind the two witnesses (D-0036 and the other individual referred to above) whose testimony tends to undermine P-0297's truthfulness and accuracy, the Chamber is satisfied there are serious doubts about P-0297's account as to where he lived and his schooling.

423. Focussing particularly on his age, although the school documents suggest that P-0297 was significantly over 15 years of age in 2002,<sup>1295</sup> the prosecution strongly relies on the expert's examination of P-0297's hand and wrist bones along with the dental records in support of the contention that he was under the age of 15 within the timeframe of the charges<sup>1296</sup> (the experts concluded that P-0297 was between 16 and 17 years old in January 2008).<sup>1297</sup> However, as discussed above, these forensic assessments of age lack precision, and they provide an inadequate basis, taken alone, for determining an individual's age.

424. The account of P-0297 is also materially undermined by the contradictory statements he made concerning the death of his (biological) mother. He testified that she had been killed during the war in 2002 while fleeing a Lendu attack,<sup>1298</sup> and he gave her name to the Court.<sup>1299</sup> However, in his interview in December 2009 with members of the defence team he said that although she had been

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<sup>1294</sup> T-296-CONF-ENG, page 22, line 1 to page 24, line 25.

<sup>1295</sup> EVD-D01-00145, pages 3935 – 3936, No. 443/97.

<sup>1296</sup> ICC-01/04-01/06-2748-Red, paras 442 and 444.

<sup>1297</sup> EVD-OTP-00618, page 0435.

<sup>1298</sup> T-290-Red2-ENG, page 14, line 22 to page 15, line 3 and page 23, lines 13 – 19.

<sup>1299</sup> T-290-CONF-ENG, page 18, lines 21 – 24.

unwell, she recovered and returned home.<sup>1300</sup> His explanation in court for this contradiction was that he was afraid of the investigators.<sup>1301</sup>

425. In interview he further suggested he did not know anyone with the name of his stepmother,<sup>1302</sup> yet in court a prior statement was read to him in which he had referred to this person as someone he also calls his mother.<sup>1303</sup> The Chamber is unpersuaded by the prosecution's suggestion<sup>1304</sup> that these contradictions are satisfactorily explained by the fact that in the latter statement P-0297 may have been referring to his stepmother instead of his biological mother (his father married sisters and he referred to both of them as mother).<sup>1305</sup>

426. This witness was introduced to the OTP by P-0321<sup>1306</sup> and he denied the latter had encouraged him to lie.<sup>1307</sup> However, in statements taken by the defence, he indicated: "[P-0321] told me that if I go before the judges where Papa Thomas is in detention, I should say that I was forcibly recruited".<sup>1308</sup> When this statement was read out to P-0297 in court he said he had been afraid and denied that P-0321 told him what to say.<sup>1309</sup> He also told the defence team that P-0321 "said that were we to testify against Thomas and were he to be convicted, we would receive money".<sup>1310</sup> P-0297 suggested the investigators told him that if he was willing to testify before the Court, the judges "would be able to

<sup>1300</sup> T-290-Red2-ENG, page 19, line 23 to page 20, line 21.

<sup>1301</sup> T-290-Red2-ENG, page 20, lines 20 – 24.

<sup>1302</sup> EVD-D01-00150, pages 0064, lines 412 – 417; T-290-CONF-ENG, page 19, lines 12 – 13.

<sup>1303</sup> T-290-CONF-ENG, page 16, line 13 to page 17, line 11. There is also a screening note which indicates that he gave the name of his stepmother and said she had been killed during the war, EVD-D01-00296 at DRC-OTP-0190-0096.

<sup>1304</sup> ICC-01/04-01/06-2748-Red, para. 472.

<sup>1305</sup> T-290-Red2-ENG, page 17, line 12 to page 18, line 3 (P-0297).

<sup>1306</sup> T-287-CONF-ENG, page 35, lines 7 – 9 (P-0297).

<sup>1307</sup> T-288-Red2-ENG, page 21, lines 9 – 20.

<sup>1308</sup> EVD-D01-00190, page 0117, line 661 to page 0118, line 696.

<sup>1309</sup> T-288-Red2-ENG, page 23, line 10 – page 25, line 5; See also T-288-Red2-ENG, page 18 to page 27, line 4.

<sup>1310</sup> T-289-Red2-ENG, page 4, lines 14 – 21 (EVD-D01-00191, page 0126, line 133 to page 0127, line 152).

help” him.<sup>1311</sup>

427. P-0297 alleged that various individuals associated with the UPC and the accused were asking why he was testifying against Thomas Lubanga, and they were exerting pressure.<sup>1312</sup> He said that someone affiliated to the accused told him and others to give evidence that they had not been child soldiers in the UPC and “in that way Mr. Thomas Lubanga would be freed”.<sup>1313</sup> P-0297 indicated that some witnesses had come to the Court to deny they had been child soldiers.<sup>1314</sup> This was a clear acknowledgment by the witness that, to a great extent, external factors had influenced his testimony.

428. The witness suggested he met P-0321 in 2002 whilst he was still in the UPC, although P-0321’s evidence was that he met P-0297 for the first time at the Transit and Orientation Centre (“CTO”).<sup>1315</sup>

#### **Conclusion as to P-0297**

429. The Chamber recognises that this witness may have been confronted with difficult circumstances, but in light of the matters set out above, his account, overall, is unreliable. Notwithstanding the allegation made by P-0297 against some of the other witnesses in the case, it is likely that P-0321 persuaded or encouraged him to give false evidence. The Chamber is unable to rely on his account.

#### **(5) P-0298**

430. P-0298 is an alleged former child soldier who was authorised to

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<sup>1311</sup> T-289-Red2-ENG, page 4, line 24 to page 6, line 14.

<sup>1312</sup> T-285-Red2-ENG, page 9, lines 21 – 25; T-288-Red2-ENG, page 27, lines 5 – 25.

<sup>1313</sup> T-285-Red2-ENG, page 11, lines 2 – 14, page 12, lines 12 – 25 and page 15, lines 12 – 15.

<sup>1314</sup> T-285-CONF-ENG, page 15, line 16 to page 16, line 11.

<sup>1315</sup> T-322-CONF-ENG, page 26, lines 4 – 7; T-309-CONF-ENG, page 23, lines 21 – 23; T-308-CONF-ENG, page 9, lines 11 – 17.

participate in the proceedings (a/0002/06). He was the first witness called to give evidence on 28 January 2009, and when he reached the stage of describing his encounter with soldiers from the UPC, he said “[n]ow, as I swore before God that I would tell the truth, the whole truth, your question puts me in a difficult position with regards to my truth, because I said that I must tell the truth.”<sup>1316</sup> After a break, the witness was reminded he had given evidence about UPC soldiers taking his friends when he was with them en route home from school, to which the witness replied “[n]o, that’s not the case”<sup>1317</sup> and “[w]hat I said previously did not come from me. It came from someone else. They taught me that over three and a half years. I don’t like it. I would like to speak my mind as I swore before God and before everyone”.<sup>1318</sup> He said that together with his friends he had been promised clothes and many other things; he had never been to a training camp; he had been taught the details of his account; and although he had told himself that he would do what they had asked, when he came to court he decided to speak the truth.<sup>1319</sup> The judges then asked the witness the following question “[t]his morning you told the Court about a time when you were going home from school when some soldiers from the UPC came and took you and your friends away. Was that story from you true or false?” The witness replied “That’s not true”.<sup>1320</sup>

431. The legal representatives who represent the witness not only submit he is young, but it is also argued he was deeply perturbed when he testified during the first day of the trial, and his account was

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<sup>1316</sup> T-110-Red2-ENG, page 35, lines 21 – 23.

<sup>1317</sup> T-110-Red2-ENG, page 40, line 2.

<sup>1318</sup> T-110-Red2-ENG, page 40, lines 10 – 12.

<sup>1319</sup> T-110-Red2-ENG, page 40, lines 15 to 24.

<sup>1320</sup> T-110-Red2-ENG, page 41, lines 19 – 22.

influenced by the presence of the accused in the courtroom.<sup>1321</sup>

432. When the witness returned to give evidence two weeks later, his account was that he was enlisted by UPC soldiers as he was on his way home from school;<sup>1322</sup> he was taken first to Bule camp where he was trained,<sup>1323</sup> and then to Largu camp;<sup>1324</sup> he took part in fighting in Bule and Fataki;<sup>1325</sup> and he left the army in Largu with the help of his father, and thereafter he resumed his schooling in Bunia.<sup>1326</sup> Later, he was stopped by the UPC and taken to the camp at Centrale (where he was beaten and imprisoned in a “hole” for two days), and from there he was transferred to the camp at Mabanga,<sup>1327</sup> where his father found him (he arranged for his son to be collected and taken to Nizi). Finally, he returned to Bunia.<sup>1328</sup>

433. The legal representatives submit that on this second occasion, the witness testified without duress and he was able to give his account in considerable detail for an hour without any questions being put to him. It is argued that his testimony (as given at this stage) is credible and it is suggested it supplemented his previous statements (bearing in mind he was 11 at the time of the events and 18 at the time of his court appearance).<sup>1329</sup> It is contended that the “core” of his testimony was confirmed by his father (P-0299), and other witnesses.<sup>1330</sup>

434. The evidence on P-0298’s enlistment raises various difficult

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<sup>1321</sup> ICC-01/04-01/06-2746-Red-tENG, para. 53.

<sup>1322</sup> T-123-Red2-ENG, page 4, lines 15 – 25.

<sup>1323</sup> T-123-Red2-ENG, page 5, lines 1 – 6.

<sup>1324</sup> T-123-Red2-ENG, page 12, lines 17 – 22.

<sup>1325</sup> T-123-Red2-ENG, page 15, line 6 to page 16, line 10 and page 16, line 22 to page 17, line 5.

<sup>1326</sup> T-123-Red2-ENG, page 18, lines 6 – 22.

<sup>1327</sup> T-123-Red2-ENG, page 19, line 5 to page 20 line 17.

<sup>1328</sup> T-123-Red2-ENG, page 20, line 18 to page 21, line 9.

<sup>1329</sup> ICC-01/04-01/06-2746-Red-tENG, para. 53.

<sup>1330</sup> ICC-01/04-01/06-2746-Conf-tENG, para. 54.

questions. P-0298 said he spent about four months at the camp<sup>1331</sup> while P-0299, his father, gave evidence that he left school and went to a training camp for two months.<sup>1332</sup> Although this is only a two-month discrepancy, the evidence of D-0015 significantly contradicts the account of P-0298 on this issue. She said P-0298 fled from his school with other children,<sup>1333</sup> and returned about a week later, carrying a weapon.<sup>1334</sup> As opposed to suggesting that P-0298 obtained the weapon at a training camp, D-0015 gave evidence that P-0298 had stolen the weapon from a soldier<sup>1335</sup> and she had heard that he had been working in the market.<sup>1336</sup> She acknowledged that he had wanted to join the military and she accepted he may have spent a night at a camp, but she emphasised that he had not become a soldier.<sup>1337</sup> D-0015 gave evidence that P-0298 ran away once more, having spent two weeks at school,<sup>1338</sup> and she discovered he went to see members of his family.<sup>1339</sup> The prosecution has not advanced any submissions as to the credibility of witness D-0015.

435. The Chamber has considered the circumstances in which she was in a position to give evidence about P-0298,<sup>1340</sup> and it has reviewed a particular reason that arose during the evidence which may have led

<sup>1331</sup> T-124-Red2-ENG, page 25, lines 8 – 21.

<sup>1332</sup> EVD-D01-00769, page 0295, line 270 to page 0296, line 285.

<sup>1333</sup> T-279-Red2-ENG, page 7, lines 19 – 23 (D-0015).

<sup>1334</sup> T-279-Red2-ENG, page 7, lines 6 – 11 (D-0015).

<sup>1335</sup> T-279-Red2-ENG, page 8, lines 3 – 10.

<sup>1336</sup> T-279-Red2-ENG, page 7, line 4.

<sup>1337</sup> T-278-Red2-ENG, page 20, lines 2 – 6; T-279-Red2-ENG, page 19, line 8 to page 20, line 20.

<sup>1338</sup> T-279-Red2-ENG, page 8, lines 19 – 22.

<sup>1339</sup> T-279-Red2-ENG, page 8, line 22 to page 9, line 2.

<sup>1340</sup> T-278-CONF-ENG, page 12, lines 11 – 12, page 13, lines 11 – 15 and page 14, line 14 to page 15, line 24; T-124-CONF-ENG, page 21, lines 15 – 21 and page 22, lines 10 – 11; T-119-CONF-ENG, page 39, lines 1 – 11; EVD-D01-00768, page 0272, line 909 to page 0274, line 992; EVD-D01-00771, page 0337, lines 88-94; T-278-CONF-ENG, page 19, lines 14 – 15 and T-279-CONF-ENG, page 19, lines 10 – 15; EVD-D01-00769, page 0294, lines 222 – 233.

D-0015 to lie about P-0298.<sup>1341</sup> However, in all the circumstances, the Chamber found her evidence to be credible and reliable, and it casts significant doubt over the accuracy and reliability of the account of P-0298.

436. Nonetheless, there were other concerns as to the accuracy and reliability of P-0298, including the contradictions and inconsistencies between P-0298 and his father, P-0299, over the death of P-0298's mother. P-0298 testified that his mother was dead,<sup>1342</sup> but the Chamber heard evidence, which it accepted, that she is still alive and that P-0298 saw her after the war. P-0299 confirmed that P-0298's mother is alive although he said he had not told his son that this was the case.<sup>1343</sup>

437. Furthermore, D-0014 gave evidence which contradicts part of P-0299's testimony.<sup>1344</sup>

438. There is a difficulty over the age of P-0298. P-0299, his father, said in evidence that P-0298 was born in 1991 and he was in possession of his birth certificate.<sup>1345</sup> While P-0298 initially stated he could not remember his date of birth,<sup>1346</sup> he later indicated he was born in 1989.<sup>1347</sup> P-0299 confirmed this year (1989) in a re-interview<sup>1348</sup> and this is also corroborated by various school documents (allowing for a 2 day

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<sup>1341</sup> EVD-D01-00768, page 0275, line 1038 to page 0276, line 1068; EVD-D01-00768, page 0277, lines 1090 to 1105; EVD-D01-00768, page 0275, lines 1055 – 1077; EVD-D01-00771, page 0337, lines 104 – 106.

<sup>1342</sup> T-124-Red2-ENG, page 43, lines 17 – 21.

<sup>1343</sup> T-119-CONF-ENG, page 25, 16 to page 26, line 9 and T-119-Red2-ENG, page 30, lines 3 – 4; T-122-Red2-ENG, page 17, lines 3 – 24.

<sup>1344</sup> See, e.g. references as identified in ICC-01/04-01/06-2773-Conf-tENG, para. 343.

<sup>1345</sup> T-117-CONF-ENG, page 6, lines 4 – 8. The defence has not seen the birth certificate mentioned by the father, ICC-01/04-01/06-2657-tENG-Red, footnote 233.

<sup>1346</sup> T-110-Red2-ENG, page 32, lines 3 – 6.

<sup>1347</sup> T-123-Red2-ENG, page 53, lines 5 – 9.

<sup>1348</sup> EVD-D01-00768, page 0270, lines 847 and 849; in a handwritten statement relating to victim participation, P-0298 indicated that he was born in 1989, EVD-D01-00340. P-0321 gave evidence to the effect that P-0298 had given this date of birth, and that he had not personally checked its veracity, T-320-CONF-ENG, page 39, line 18 to page 40, line 1.



variation).<sup>1349</sup>

439. The defence submits certain documents contradict the information provided by P-0298.<sup>1350</sup> The school records indicate he completed his 5<sup>th</sup> year in primary school in the school year 2001/2002.<sup>1351</sup> Initially, P-0298 testified that he had finished the fifth year and had joined the sixth grade<sup>1352</sup> but later in evidence he suggested his schooling was interrupted while he was in the fifth rather than the sixth grade<sup>1353</sup> (he said that he was abducted in 2002 just before Christmas, during the 5<sup>th</sup> year).<sup>1354</sup> P-0298 said he meant that this occurred at the turn of the year (2002/2003).<sup>1355</sup> P-0299 gave evidence that P-0298 “went to school until the 5<sup>th</sup> grade” but could not complete his schooling because he was abducted before Christmas 2002”.<sup>1356</sup> He also testified that P-0298 resumed his studies, starting and completing his sixth year at primary school.<sup>1357</sup> Overall, the oral evidence accords with the available documentation save for the issue (just set out) that P-0298 was contradictory as to whether his schooling was interrupted in the fifth or sixth form. The school documents additionally indicate that P-0298 received a certificate of primary education in 2004 from a particular school.<sup>1358</sup> Although P-0298 denied the certificate that was produced during his evidence related to him or that he had received it, he accepted he had studied at that school.<sup>1359</sup> P-0299 confirmed he had

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<sup>1349</sup> EVD-D01-00155, page 3185, No 8; EVD-D01-00043, No. 0788; EVD-D01-00156, page 3806, line 6368 and EVD-D01-00042.

<sup>1350</sup> ICC-01/04-01/06-2773-Red-tENG, paras 346 and 347.

<sup>1351</sup> EVD-D01-00049, No. 15; EVD-D01-00162, page 4325, line 15.

<sup>1352</sup> T-123-Red2-ENG, page 46, lines 14 – 18.

<sup>1353</sup> T-123-Red2-ENG, page 48, lines 19 – 21.

<sup>1354</sup> T-123-Red2-ENG, page 4, lines 2 – 25 and page 48, lines 14 – 25.

<sup>1355</sup> T-123-Red2-ENG, page 49, lines 1 – 4.

<sup>1356</sup> T-117-Red2-ENG, page 6, lines 18 – 19 and page 9, line 20 to page 10, line 10.

<sup>1357</sup> T-117-Red2-ENG, page 35, lines 4 – 7.

<sup>1358</sup> Register of certificates of the school: EVD-D01-00155, page 3185, No 8; Results for the year 2004: EVD-D01-00043; certificate with the school stamp: EVD-D01-00042.

<sup>1359</sup> T-124-CONF-ENG, page 11, lines 9 – 14 and lines 18 – 25.

enrolled his son at the school in question for his sixth year of primary school, although he also noted “he had given up his studies because he didn’t do well” (rather than because he was abducted).<sup>1360</sup> In all the circumstances, the Chamber concludes that although there were some contradictions in the evidence concerning P-0298’s schooling, none were of real significance.

440. However, when P-0298’s lies as regards his recruitment by the UPC are added to the evidence of D-0015 – that he did not serve in the military or spend time at the training camps during the relevant period – the uncertainty as to the reliability of this witness becomes clear. Although there may have been a reason for D-0015 to lie, P-0298 never explained why he said on oath that he had received material rewards and had been instructed as to the evidence he was to give. Although the Chamber accepts P-0298 may have been a soldier, there is a real possibility he was encouraged and assisted to give false testimony, and P-0321 alone has been identified as the person who was likely to have acted in this way (not least, he introduced P-0298 to the investigators). It is to be noted that P-0321’s account of P-0298’s demobilisation is irreconcilable with the accounts of P-0298 and P-0299. P-0321 suggested P-0298 realised that he could not get anything further out of military service and in those circumstances he deserted and went to an organisation which delivered him to P-0321, who in turn persuaded P-0298’s family to take him back.<sup>1361</sup> However, P-0299 testified that P-0298 did not take the initiative and instead he was picked up in the street by members of an NGO.<sup>1362</sup> P-0298 suggested he heard an NGO was looking for child soldiers to demobilise, and he

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<sup>1360</sup> T-120-CONF-ENG, page 24, lines 7 – 12.

<sup>1361</sup> T-310-Red2-ENG, page 45, line 14 – page 46, line 20.

<sup>1362</sup> T-122-Red2-ENG, page 19, line 23 to page 20, line 3.

found a weapon to hand over before the NGO “took charge of me and of many other children”.<sup>1363</sup>

### **Conclusion as to P-0298**

441. Notwithstanding the prosecution’s suggestion that P-0298’s initial testimony was merely the result of his anger,<sup>1364</sup> the evidence overall before the Chamber creates a real doubt as to his honesty and reliability. Additionally, the real possibility exists that he was encouraged and assisted by P-0321 to give false evidence. P-0298 is not a witness on whom the Chamber is able to rely.

### **c) The lists of children**

442. A significant issue as regards this area of the case is how the various alleged former child soldiers were selected. P-0321 maintained he introduced P-0581 to all the children from a list provided to him by P-0031 over the telephone,<sup>1365</sup> and to those children alone. He testified that he did not have any difficulty in finding the children on P-0031’s list and he brought them all to Bunia.<sup>1366</sup> The only additions to the list were said to have been P-0157 and P-0298, who had previously been in contact with the ICC,<sup>1367</sup> but who (on his account) P-0581 did not meet.<sup>1368</sup> In due course, P-0321 changed his evidence, having considered a table comparing the list given to P-0581 by an investigator, the list provided to P-0581 by P-0321 and the list of the

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<sup>1363</sup> P-0299 confirmed that P-0298 was provided with “instruction” at the NGO, T-122-Red2-ENG, page 19, lines 16 – 21.

<sup>1364</sup> ICC-01/04-01/06-2678-Red, para. 91 citing T-123-Red2-ENG, page 30, lines 24 – 25.

<sup>1365</sup> T-308-CONF-ENG, page 53, lines 8 – 21 and T-308-Red2-ENG, page 61, lines 9 – 25 and page 63, lines 9 – 25; T-321-Red2-ENG, page 20, lines 1 – 23.

<sup>1366</sup> T-308-Red2-ENG, page 63, line 23 to page 64, line 7; T-320-Red2-ENG, page 55, lines 6 – 10.

<sup>1367</sup> T-308-CONF-ENG, page 64, lines 8 – 17; T-320-CONF-ENG, page 55, lines 11 – 18.

<sup>1368</sup> T-308-Red2-ENG, page 64, lines 12 – 17.

children ultimately introduced to P-0581 by P-0321.<sup>1369</sup> Confronted with this evidence, P-0321 said P-0581 did not meet five children from the initial list because they were working and did not want to meet with the OTP.<sup>1370</sup>

443. P-0581 gave evidence that he noticed discrepancies between the list given to him by P-0321 and the list provided by the investigators. He sent P-0321's list to his superiors and thereafter he was provided with a final list of names by the OTP via email. The screening was conducted on the basis of this final list.<sup>1371</sup> P-0581 had received instructions to contact P-0321 who was to send the children to him for screening (P-0321 was to contact those who were on the list).<sup>1372</sup>

444. Focussing on the discrepancies between the list sent to P-0581, the list given to P-0581 by P-0321 and the children introduced for screening by P-0321,<sup>1373</sup> eight of the eleven children who P-0581 met in November 2007 were not on the list he was sent by the OTP,<sup>1374</sup> and the answers given by P-0321 on this issue were markedly unclear and confused.<sup>1375</sup> He failed adequately to explain this anomalous evidence. The Chamber found P-0581 to be a generally reliable witness, and it is likely that P-0321 did not tell the truth when he said he simply introduced P-0581 to children from a list provided to him by P-0031.<sup>1376</sup>

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<sup>1369</sup> EVD-D01-00328.

<sup>1370</sup> T-321-CONF-ENG, page 25, lines 11 – 21 and page 26, lines 19 – 21.

<sup>1371</sup> EVD-D01-00314 and EVD-D01-00315 (email with a list of names sent to P-0581 by an OTP investigator); EVD-D01-00316 (list of names provided to P-0581 by P-0321); T-317-Red2-ENG, page 11, line 4 to page 12, line 7 (P-0581).

<sup>1372</sup> T-300-Red2-ENG, page 27, lines 4 - 11.

<sup>1373</sup> There are no overlaps on lists EVD-D01-00315 and EVD-D01-00316; T-317-Red2-ENG, page 12, lines 11 – 14.

<sup>1374</sup> EVD-D01-00328, comparative table based on EVD-D01-00315 and EVD-D01-00316.

<sup>1375</sup> T-321-Red2-ENG, page 25 line 11 to page 28, line 6 and T-323-CONF-ENG, page 4, line 6 to page 18, line 23 (P-0321).

<sup>1376</sup> This general issue has, in part, been addressed above in the context of the procedures adopted by the OTP for gathering evidence (see paras 143, 167-168, 190-192, and 197).

445. An additional troubling element is that P-0321 stated that the children who he introduced to P-0581 did not come from Bunia,<sup>1377</sup> and he gave extensive evidence of how, having paid for his own transport, he travelled by road from Bunia to other localities.<sup>1378</sup> However, three of the children (P-0213, P-0297 and D-0004) gave evidence that tends to indicate they were living in Bunia in November 2007.<sup>1379</sup> P-0321 also contradicted himself, testifying at one stage that in November 2007, P-0297 was living at home in Bunia.<sup>1380</sup>

#### **d) An organisation dealing with victims**

446. Before and during the time he worked for the OTP, P-0321 (along with P-0031) acted as an intermediary for a particular organisation,<sup>1381</sup> which helped victims to participate in these proceedings. P-0321 introduced P-0299 to this organisation following a request from P-0031.<sup>1382</sup> Furthermore, children had been put in touch with this organisation (with the assistance of P-0031) prior to being introduced to the prosecution.<sup>1383</sup>

447. The impact of this evidence is considered in the Chamber's overall conclusions, set out below.

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<sup>1377</sup> T-308-Red2-ENG, page 63, lines 1 - 5.

<sup>1378</sup> T-308-Red2-ENG, page 63, lines 9 – 22.

<sup>1379</sup> T-133-Red2-ENG, page 28, lines 3 – 13 and page 43, lines 2 – 17 (P-0213); T-287-CONF-ENG, page 33, line 22 to page 36 line 2 and page 37, lines 12 – 18 (P-0297); T-242-Red3-ENG, page 6, lines 3 – 6 (D-0004).

<sup>1380</sup> T-322-CONF-ENG, page 27, line 1 to page 28, line 22 (P-0321).

<sup>1381</sup> T-320-CONF-ENG, page 7, lines 5 – 8 (P-0321); T-308-CONF-ENG, page 34, lines 8 – 12 (P-0321).

<sup>1382</sup> T-320-CONF-ENG, page 33, line 22 to page 34, line 6 and page 34, lines 19 – 24 (P-0321).

<sup>1383</sup> T-320-CONF-ENG, page 11, lines 19 – 24 (P-0321).

**e) Assessment of Intermediary 321**

448. On the basis of the all the matters set above, the Chamber is satisfied that P-0321 acted on the instructions of the OTP and under the latter's supervision for more than a year. This is relevant to a number of witnesses who (save for the first) P-0321 was the original point of contact: P-0157, P-0213, P-0293, P-0294, P-0297 and P-0298. P-0321 was also in contact with P-0299.

449. D-0003 admitted he lied to the prosecution for financial gain at the invitation of P-0321 and he said the latter instructed him as to the account he was to provide. P-0213, P-0294, P-0297 and D-0004, according to the latter, were instructed by P-0321 to give false accounts about their names and ages, where they lived and their alleged enrolment in the UPC. Taking into account the questions raised about D-0003's and D-0004's evidence, the Chamber stresses that it has not relied on their testimony standing alone, but it has examined the available material in its entirety, and in particular the accounts of the individual prosecution witnesses who claimed to be former child soldiers, as well as the documentary evidence and the other relevant witnesses. P-0297's evidence was unreliable and the Chamber has concluded there is a material risk that P-0321 persuaded or encouraged him to give false evidence. Similarly, the accounts of P-0213 and P-0294 were generally unreliable. The Chamber does not accept the prosecution's argument that P-0298's initial testimony was merely the result of his anger, and it is of the view that the evidence relating to him, viewed overall, creates a real doubt as to his honesty and reliability. Additionally, the real possibility exists that he was encouraged and assisted by P-0321 to give false evidence.

450. Although the Chamber does not criticise the fact that P-0321 assisted the prosecution and a victims' organisation simultaneously, on the basis of the matters set out above the significant possibility has been established that P-0321 improperly influenced the testimony of a number of the witnesses called by the prosecution. Additionally, real doubt has been cast over the propriety of the way in which children were selected for introduction to the prosecution.

#### **4. Intermediary P-0031**

451. In the Decision on Intermediaries, the Chamber considered the evidence relevant to P-0031, who had also been called as a prosecution witness in June and July 2009.<sup>1384</sup> The Chamber decided that the evidence did not "meet the criteria for ordering him to be re-called in the context of the abuse of process application."<sup>1385</sup>

##### **a) Background**

452. P-0031 was located in Bunia during the period relevant to the charges, dealing with children in particularly difficult situations who included child soldiers.<sup>1386</sup>

453. P-0143 put P-0031 in contact with the OTP, and he was recruited as an intermediary by the prosecution in 2005 (he continued in this role at least until 2008).<sup>1387</sup> P-0031 was closely associated with P-0321, and he occasionally asked the latter to undertake work for the OTP.<sup>1388</sup> During the course of his involvement with the OTP, P-0031 had contact with

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<sup>1384</sup> ICC-01/04-01/06-2434-Red2, paras 13, 14, 17, 18, 20 and 24.

<sup>1385</sup> ICC-01/04-01/06-2434-Red2, para. 144.

<sup>1386</sup> T-198-Red2-ENG, page 86, line 5 to page 87, line 14 and page 91, lines 3 – 15.

<sup>1387</sup> Table of contacts, EVD-D01-01039, No. 23; EVD-D01-00401 and EVD-D01-00576.

<sup>1388</sup> T-308-CONF-ENG, page 62, lines 9 – 15.

the following witnesses: P-0007,<sup>1389</sup> P-0008,<sup>1390</sup> P-0011,<sup>1391</sup> P-0012,<sup>1392</sup> P-0046,<sup>1393</sup> P-0157 (first contact via P-0031),<sup>1394</sup> P-0293,<sup>1395</sup> P-0294<sup>1396</sup> P-0297,<sup>1397</sup> P-0298,<sup>1398</sup> and P-0299,<sup>1399</sup> and potential witness DRC-OTP-WWWW-0110 (first contact was via P-0031).<sup>1400</sup>

#### **b) The evidence from P-0582**

454. P-0582 gave evidence that he probably met P-0031 when he was accompanied by other investigators.<sup>1401</sup> He did not trust P-0031 or have confidence that he would be of use to their investigations.<sup>1402</sup>

455. Throughout 2005, P-0031 furnished the prosecution with videos, photographs and documents, and therefore he came to be viewed as a willing and cooperative witness who was able to provide relevant evidence. He supplied the prosecution with information concerning the demobilisation of child soldiers.<sup>1403</sup>

456. P-0582 was referred to page 3, paragraph 1, of an internal prosecution report dated 23 February 2006 which sets out that:

Investigators returned his original documents after registration of the copies.

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<sup>1389</sup> T-201-CONF-ENG, page 72, lines 11 – 13 and page 74, lines 9-12 (P-0031); EVD-D01-01039, No 23.

<sup>1390</sup> T-201-CONF-ENG, page 72, line 22 to page 73, line 2 and page 80, lines 17 – 20; T-202-CONF-ENG, page 70, lines 4 – 18 (P-0031); EVD-D01-01039, No 23.

<sup>1391</sup> T-201-CONF-ENG, page 73, lines 3 – 7 and page 77, lines 12 – 13 (P-0031); EVD-D01-01039, No 23.

<sup>1392</sup> EVD-D01-01039, No 11.

<sup>1393</sup> EVD-D01-01039, No 23.

<sup>1394</sup> T-202-CONF-ENG, page 79, lines 9 – 17 (P-0031); EVD-D01-01039, No 23.

<sup>1395</sup> T-153-CONF-ENG, page 53, line 21 – page 54, line 10; EVD-D01-01039, No 23.

<sup>1396</sup> T-202-CONF-ENG, page 78, lines 22-25; EVD-D01-01039, No 23.

<sup>1397</sup> EVD-D01-01039, No 23.

<sup>1398</sup> T-202-CONF-ENG, page 76, lines 14-22 (P-0031).

<sup>1399</sup> EVD-D01-01039, No 127.

<sup>1400</sup> EVD-D01-01039, No 60.

<sup>1401</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-CONF-ENG, page 10, lines 15 – 17.

<sup>1402</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 10, line 18 to page 11, line 3.

<sup>1403</sup> ICC-01/04-01/06-2656-Conf, para. 6.



However, [P-0031] failed to submit new additional documents that would allegedly be in his possession. After numerous occasions in which he failed to do so, major questions arose about his credibility and intentions to collaborate with the ICC. As a consequence investigators decided to suspend contacts for the time being.<sup>1404</sup>

457. P-0582 gave evidence that it was believed the documentary records referred to in the report would assist in shedding light on the potential problems with P-0031.<sup>1405</sup> The latter provided a few documents to the investigators (of doubtful relevance) and although he promised additional material, nothing was forthcoming.<sup>1406</sup>

458. P-0582 believed it had been decided, with the agreement of Michel De Smedt, to discontinue working with P-0031 because of a lack of trust<sup>1407</sup> following the February 2006 incident.

459. However, this decision was reversed once P-0031 provided certain relevant information, and thereafter he “was evaluated by the prosecution as being a credible trial witness”.<sup>1408</sup> The prosecution called P-0031 as a witness to give evidence about child soldiers and demobilisation.

460. It is accepted that during the relevant period the OTP paid P-0031 at least \$23,000.<sup>1409</sup> The prosecution suggests, with the exception of a single payment for travel, this money supported P-0031 within the OTP’s protection programme and it does not represent remuneration

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<sup>1404</sup> EVD-OTP-00641.

<sup>1405</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 11, lines 13 – 18.

<sup>1406</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 12, lines 3 – 5.

<sup>1407</sup> Transcript of Deposition on 18 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 12, lines 15 – 18.

<sup>1408</sup> ICC-01/04-01/06-2656-Red, paras 7 and 8.

<sup>1409</sup> This is based on documents disclosed on 3 March 2010, ICC-01/04-01/06-2657-Red-tENG, para. 186. It is suggested by the defence that this is an underestimate, ICC-01/04-01/06-2773-Red-tENG, footnote 1331.

for his services as an intermediary.<sup>1410</sup> The accounting documents disclosed by the prosecution demonstrate P-0031 received a monthly allowance from March 2007,<sup>1411</sup> and as of 12 March 2010 he continued to receive allowances from the OTP for accommodation and subsistence.<sup>1412</sup>

**c) The evidence of P-0157**

461. P-0157 is an alleged former child soldier who was introduced to the Office of the Prosecutor by P-0031. The accounting documents relating to P-0157 demonstrate he was also in contact with P-0143 between August and October 2006.<sup>1413</sup> Additionally, P-0321 indicated he had dealings with P-0157.<sup>1414</sup>

462. P-0157 said he was born in 1991.<sup>1415</sup> It is to be noted, however, the documentary evidence suggests that in 2002 and 2003, P-0157 was over 15 years of age. The IEC database demonstrates P-0157 had a voter's card, bearing his photograph and a date of birth (in 1986).<sup>1416</sup> Moreover, his name appears on the enrolment register for a particular school, and, at what is seemingly his entry, it is recorded P-0157 was born on an identified date in 1986.<sup>1417</sup> The 1991-2001 certificate award register for this school indicates that a certificate was awarded to P-0157 (born on the same date in 1986).<sup>1418</sup> The witness said he did not know his date of birth.<sup>1419</sup> He was shown a document that came from the general inspectorate for secondary and professional education,

<sup>1410</sup> ICC-01/04-01/06-2678-Red, para. 132.

<sup>1411</sup> EVD-D01-00547; EVD-D01-00529 and EVD-D01-00403.

<sup>1412</sup> EVD-D01-00988.

<sup>1413</sup> EVD-D01-00832 and EVD-D01-00833.

<sup>1414</sup> T-320-CONF-ENG, page 41, lines 14 – 25.

<sup>1415</sup> T-185-Red2-ENG, page 63, line 7.

<sup>1416</sup> EVD-D01-01031.

<sup>1417</sup> T-188-CONF-ENG, page 63, line 24 to page 65, line 14; EVD-D01-00170 and EVD-D01-00257.

<sup>1418</sup> EVD-D01-0169, page 0506, #42.

<sup>1419</sup> T-188-Red2-ENG, page 66, lines 1 – 6.

which comprises a list of students in the sixth grade in the same primary school for the year 1998.<sup>1420</sup> At line 9 it is recorded that he was born in 1986.<sup>1421</sup> When the witness was asked whether it was possible that in 1998 he was in the sixth grade at this primary school, he answered, "It could be true. It's a certified document, a document that states that."<sup>1422</sup>

463. The prosecution argues the school records are unreliable and they do not undermine P-0157's testimony as to his age,<sup>1423</sup> and in particular the prosecution suggests that the documents appear to have been altered. The prosecution relies on the expert's report, along with the evidence of D-0029, to the effect that different students were assigned the same matriculation number and the records contain errors as to numbering.<sup>1424</sup> It is argued by the prosecution that it is not necessary for the Chamber to conclude that P-0157 was under the age of 15 at the time he was conscripted.<sup>1425</sup> Rather, his evidence is of use as regards the recruitment and use of child soldiers by the UPC.<sup>1426</sup>

464. There are undoubted inaccuracies in the school records that have caused the Chamber to treat them with caution. As regards the present witness, however, all the relevant entries contradict the date of birth given by P-0157 during his evidence, and he accepted he may have been in the sixth grade of primary school in 1998. Although of limited value, the x-ray evidence tends to support the suggestion that P-0157

<sup>1420</sup> T-188-Red2-ENG, page 66, lines 7 – 14 and EVD-D01-00258.

<sup>1421</sup> T-188-Red2-ENG, page 66, lines 15-22 and EVD-D01-00258.

<sup>1422</sup> T-188-Red2-ENG, page 67, lines 7 – 11.

<sup>1423</sup> ICC-01/04-01/06-2748-Red, para. 514.

<sup>1424</sup> ICC-01/04-01/06-2748-Red, para. 514, referring to EVD-OTP-00639 and T-295-ENG, page 27, lines 3□7; T-296-CONF-ENG, page 10, line 17 to page 13, line 15 and page 16, line 18 to page 17, line 6.

<sup>1425</sup> ICC-01/04-01/06-2748-Red, para. 515.

<sup>1426</sup> ICC-01/04-01/06-2748-Red, paras 417 and 515.

was over the age of 15 at the time of his alleged conscription.<sup>1427</sup> In all the circumstances, the prosecution has not established that P-0157 was under the age of 15 at the time of his alleged recruitment and use in hostilities.

465. The prosecution argues P-0157 provided a significant and detailed account of the conscription, training and use of children by the UPC and it particularly relies on P-0157's evidence as to having been beaten, his description of daily life at Mandro and Thomas Lubanga's visit to the camp.<sup>1428</sup> The defence sought to undermine P-0157's credibility,<sup>1429</sup> and in response the prosecution highlighted his evidence that certain subjects remained painful for him, along with his frank acceptance that he was unable to remember every detail.<sup>1430</sup>

466. P-0157 gave potentially differing accounts about where he was enlisted by the UPC on his way home from school.<sup>1431</sup> However, he gave a credible explanation that the name of the location where he was abducted in his initial statement to the investigators was wrongly transcribed.<sup>1432</sup>

467. He gave contradictory evidence as to the stage during his school career when this occurred. At paragraph 16 of the witness's first statement to the investigators he indicated "[a]t the time [of the abduction] I went to [a particular] Institute [...] where I was in the sixth year of primary school".<sup>1433</sup> It is of note that EVD-D01-00258<sup>1434</sup> indicates he finished his sixth year of primary school in 1998 and the

<sup>1427</sup> ICC-01/04-01/06-2748-Red, para. 512.

<sup>1428</sup> ICC-01/04-01/06-2748-Red, paras 494 – 510.

<sup>1429</sup> See, e.g., ICC-01/04-01/06-2657-Red-tENG, paras 190 – 194.

<sup>1430</sup> ICC-01/04-01/06-2748-Red, paras 516 – 517.

<sup>1431</sup> T-187-Red2-ENG, page 66, line 15 to page 67, line 13.

<sup>1432</sup> T-187-CONF-ENG, page 29, line 8 to page 30, line 9.

<sup>1433</sup> T-187-CONF-ENG, page 28, line 9 to page 29, line 1.

<sup>1434</sup> EVD-D01-00258, page DRC-D01-0003-1749, No 49.

Certificate Issue Register for 1991-2001<sup>1435</sup> sets out that the witness sat his national exams in 1998. P-0157 said in evidence that at the time of his abduction he was in his first year of secondary school,<sup>1436</sup> having just finished his sixth year of primary school.<sup>1437</sup>

468. D-0025, who is now a teacher,<sup>1438</sup> knew P-0157 (he recognised him in a photograph).<sup>1439</sup> They went to school together<sup>1440</sup> in the academic year 2001/2002.<sup>1441</sup> D-0025 was born on 12 July 1989,<sup>1442</sup> and he said he was younger than P-0157<sup>1443</sup> although he conceded that he does not know P-0157's age.<sup>1444</sup> D-0025 gave consistent evidence, which was not materially contradicted or undermined. In all the circumstances the Chamber has accepted his account.

469. D-0025 indicated that when the population of Bunia fled in May 2003, P-0157 went to a village, close to Bunia and joined an armed group.<sup>1445</sup> He heard P-0157 had joined the FRPI.<sup>1446</sup> Although D-0025 was uncertain as to the exact date when he saw P-0157 dressed in a camouflage t-shirt, he was convinced this had happened.<sup>1447</sup>

470. P-0157 testified that he was taken in a Hilux vehicle to stadium in Bunia<sup>1448</sup> and from there he was transferred to Mandro<sup>1449</sup> for military

<sup>1435</sup> EVD-D01-00169, page DRC-OTP-0224-0506, No 42.

<sup>1436</sup> T-187-CONF-ENG, page 29, lines 20-23.

<sup>1437</sup> T-187-CONF-ENG, page 30, lines 2-9.

<sup>1438</sup> T-259-Red2-ENG, page 11, line 1.

<sup>1439</sup> T-259-Red2-ENG, page 11, line 17, page 12 lines 7 – 21 and page 15, lines 11 – 13, referring to EVD-D01-00121.

<sup>1440</sup> T-259-Red2-ENG, page 12, line 22 to page 13, line 16.

<sup>1441</sup> T-259-Red2-ENG, page 26, lines 15-17.

<sup>1442</sup> T-259-Red2-ENG, page 10, line 3.

<sup>1443</sup> T-259-Red2-ENG, page 13, line 23 to page 14, line 5.

<sup>1444</sup> T-259-Red2-ENG, page 14, lines 6 – 7.

<sup>1445</sup> T-259-Red2-ENG, page 19, lines 2 – 25.

<sup>1446</sup> T-259-Red2-ENG, page 20, lines 4 – 21. Witnesses have referred to the FNI and the FRPI interchangeably.

<sup>1447</sup> T-259-Red2-ENG, page 21, line 25 to page 22, line 9.

<sup>1448</sup> T-185-Red2-ENG, page 68, line 25 to page 69, line 1 and page 74, lines 14 – 21; T-187-Red2-ENG, page 36, line 14 to page 37, line 3.

<sup>1449</sup> T-185-Red2-ENG, page 79, lines 17-20.

training.<sup>1450</sup> However, in 2006 the witness told the investigators that he walked to the stadium.<sup>1451</sup> When questioned about this discrepancy, P-0157 accepted there were errors in his earlier statement.<sup>1452</sup> He said two particular commanders were with him throughout his time at Mandro.<sup>1453</sup> However, he failed to mention one of these commanders during his interview with the investigators over 4 days in October 2006.<sup>1454</sup> The witness said he was unable to recount all the details at that stage and instead he set out what he thought was important.<sup>1455</sup> The witness's evidence frequently lacked detail. For instance, he could not recall if he participated in combat during his training,<sup>1456</sup> although he later indicated this had happened.<sup>1457</sup> He suggested he spent time at Djugu,<sup>1458</sup> Bunia<sup>1459</sup> and Rwampara;<sup>1460</sup> he said he fought at Nyankunde;<sup>1461</sup> and he indicated he was part of a group that was selected to fight the Ugandans.<sup>1462</sup> However, he was unable to provide details of these events.

471. P-0157 testified that he deserted the UPC and joined the FNI,<sup>1463</sup> although during his first meeting with investigators from the OTP he failed to mention he had originally been in the UPC<sup>1464</sup> (he said in evidence this was because of the hurt caused by his membership of the

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<sup>1450</sup> T-186-Red2-ENG, page 18, lines 4-14.

<sup>1451</sup> T-187-Red2-ENG, page 37, lines 4-21.

<sup>1452</sup> T-187-Red2-ENG, page 37, lines 15-22.

<sup>1453</sup> T-188-CONF-ENG, page 5, lines 18 – 21.

<sup>1454</sup> T-188-Red2-ENG, page 4, line 24 to page 5, line 9.

<sup>1455</sup> T-188-Red2-ENG, page 4 line 20 to page 5, lines 9.

<sup>1456</sup> T-188-Red2-ENG, page 16, lines 2 – 7.

<sup>1457</sup> T-188-Red2-ENG, page 33, lines 13 – 23.

<sup>1458</sup> T-186-Red2-ENG, page 38, lines 15-16.

<sup>1459</sup> T-188-Red2-ENG, page 26, lines 12-16.

<sup>1460</sup> T-187-Red2-ENG, page 6, lines 8-12.

<sup>1461</sup> T-187-Red2-ENG, page 4, lines 15-17.

<sup>1462</sup> T-188-Red2-ENG, page 31, line 14 - 19.

<sup>1463</sup> T-187-Red2-ENG, page 10, line 25 to page 11, line 4 and page 11, line 25 to page 12, line 3; T-188-CONF-ENG, page 43, lines 6-7.

<sup>1464</sup> T-188-Red2-ENG, page 47, lines 19-22.

UPC).<sup>1465</sup>

472. P-0031, when asked about P-0157, simply described him as a child who had been a member of the FNI.<sup>1466</sup> The prosecution relies on P-0321's statement that P-0157 had been a UPC/FPLC child soldier,<sup>1467</sup> given he indicated that P-0157 told him about being a member of the UPC (however he failed to mention that he had also been a member of the FNI).<sup>1468</sup> As mentioned above, D-0025 said he heard about P-0157's membership in the FRPI, and P-0157 testified that he had been a soldier in the FNI (he said that he joined the group in March 2003).<sup>1469</sup>

473. The Chamber is of the view that P-0157 did not provide a credible explanation for his failure to mention that he had been a member of the UPC to the investigators and generally his account was notable for its lack of detail as regards certain significant events. In all the circumstances, the Chamber has not relied on his account.

#### **d) Assessment of P-0031**

474. The defence alleges that all of the witnesses with whom this intermediary had contact lied to the Court (P-0007, P-0008, P-0011, P-0157, P-0293, P-0294, P-0298 and P-0299), and it is noted he was in touch with intermediaries 143 and P-0321.<sup>1470</sup> The defence contends he is biased against Thomas Lubanga and tailored his account to match the charges against the accused.<sup>1471</sup> The defence relies on the regular and considerable payments he received, and it is suggested the OTP

<sup>1465</sup> T-188-Red2-ENG, page 48, lines 4-9.

<sup>1466</sup> T-202-Red2-ENG, page 79, lines 9 – 17.

<sup>1467</sup> ICC-01/04-01/06-2748-Red, para. 518.

<sup>1468</sup> T-320-Red2-ENG, page 41, lines 2 – 13.

<sup>1469</sup> T-188-Red2-ENG, page 42, line 24 to page 43, line 20.

<sup>1470</sup> ICC-01/04-01/06-2773-Red-tENG, paras 618 and 623 – 624.

<sup>1471</sup> ICC-01/04-01/06-2773-Red-tENG, paras 619 – 622 and 629.

failed to act on information that had been in its possession since February 2006 which raised doubts as to his integrity (it is suggested these concerns were corroborated by P-0582).<sup>1472</sup> It is argued the logbooks and other documents he produced are unreliable,<sup>1473</sup> and the defence submits he accepted in evidence that children sometimes lied in order to benefit from the process of demobilisation. Furthermore, neither the intermediary nor the NGO attempted to corroborate their accounts.<sup>1474</sup>

475. The prosecution submits “[n]o witness testified that P-0031 manipulated, coached or encouraged witnesses to lie to the Prosecution or to the Court.”<sup>1475</sup> It further suggests the defence has misrepresented the evidence and it has failed to establish that P-0031 was biased in his testimony.<sup>1476</sup>

476. There is insufficient evidence to support the suggestion that P-0031 persuaded, encouraged or assisted witnesses to give false testimony. Although P-0031 had contact with numerous witnesses whose evidence the Chamber has not accepted, this is insufficient, even on a *prima facie* basis, to lead to the conclusion that P-0031 encouraged any of them to lie. None of the alleged former child soldiers who P-0031 dealt with suggested he influenced their evidence and the Chamber does not accept the defence assertions that P-0031 was biased against Thomas Lubanga.<sup>1477</sup>

477. However, given his close cooperation with P-0321 and the doubts as to his reliability analysed above, the Chamber has treated P-0031’s

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<sup>1472</sup> ICC-01/04-01/06-2773-Red-tENG, paras 625 – 628.

<sup>1473</sup> ICC-01/04-01/06-2773-Red-tENG, para. 633.

<sup>1474</sup> ICC-01/04-01/06-2773-Red-tENG, paras 630 – 632.

<sup>1475</sup> ICC-01/04-01/06-2778-Red, para. 119.

<sup>1476</sup> ICC-01/04-01/06-2778-Red, paras 120 and 121.

<sup>1477</sup> ICC-01/04-01/06-2773-Red-tENG, para. 629.



evidence with particular care.

## F. CONCLUSIONS ON THE CHILD SOLDIERS CALLED BY THE PROSECUTION

478. The prosecution submits that the inconsistencies within and between the accounts of the alleged former child soldiers do not necessarily mean their testimony is unreliable, and in this regard the Chamber is invited to focus on the evidence of the expert witness Ms Schauer (CHM-0001).<sup>1478</sup> The OPCV submits any contradictions and difficulties in the testimony of P-0007, P-0008, P-0010 and P-0011 should be viewed in the context of the trauma they may have experienced, including the stress of giving evidence.<sup>1479</sup> The defence also relies on part of Ms Schauer's (CHM-0001) evidence, namely that Post Traumatic Stress Disorder can only be identified by way of a medical examination, and accordingly it is suggested it has not been demonstrated that any of these witnesses suffered from this disorder. The defence suggests Ms Schauer (CHM-0001) further testified that trauma does not affect an individual's memory, including his or her ability to tell the truth, but instead it may make it difficult for them to speak about relevant events (as opposed to other, non-traumatic matters), and therefore the potential impact of trauma should not be considered when assessing the credibility of the witnesses.<sup>1480</sup>

479. The Chamber has taken into account the psychological impact of the events that have been described in evidence, and the trauma the children called by the prosecution are likely to have suffered. The Chamber accepts that some or all of them may have been exposed to violence in the context of war, and this may have had an effect on their

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<sup>1478</sup> ICC-01/04-01/06-2748-Red, paras 523 – 524.

<sup>1479</sup> ICC-01/04-01/06-2744-Red-tENG, para. 46.

<sup>1480</sup> ICC-01/04-01/06-2773-Red-tENG, paras 367 – 368.

testimony. Additionally, they were often interviewed on multiple occasions following these events. Nonetheless, for the reasons identified in the relevant analysis for each witness, the inconsistencies or other problems with their evidence has led to a finding that they are unreliable as regards the matters that are relevant to the charges in this case.

480. On the basis of the entirety of the analysis set out above, the Chamber has not accepted the prosecution's submission that it has established beyond reasonable doubt that P-0007, P-0008, P-0010, P-0011, P-0157, P-0213, P-0294,<sup>1481</sup> P-0297 and P-0298<sup>1482</sup> were conscripted or enlisted into the UPC/FPLC when under the age of 15 years, or that they were used to participate actively in hostilities, between 1 September 2002 and 13 August 2003. It is relevant to note that these nine individuals were identified by the prosecution at an early stage in these proceedings<sup>1483</sup> as demonstrating the way in which children were enlisted, conscripted and used by the FPLC.<sup>1484</sup>

481. The Chamber has concluded that P-0038 who was over 15 when he joined the UPC gave accurate and reliable testimony. Similarly, the Chamber has acted on the evidence relating to the videos addressed by P-0010 in her evidence. The effect of this evidence is considered in the Chamber's overall conclusions.

482. The Chamber is of the view that the prosecution should not have delegated its investigative responsibilities to the intermediaries in the

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<sup>1481</sup> Given the mother of P-0294 (P-0293) was called to give evidence on the personal history of her son, which the Chamber is not relying on, the Chamber has not considered her evidence further.

<sup>1482</sup> Given the father of P-0298 (P-0299) was called to give evidence on the personal history of his son, which the Chamber is not relying on, the Chamber has not considered his evidence further.

<sup>1483</sup> Amended Document Containing the Charges, Article 61(3)(a), 22 December 2008, ICC-01/04-01/06-1571-Conf-Anx, paras 41 – 98. A public redacted version was filed on 23 December 2008, ICC-01/04-01/06-1573-Anx1.

<sup>1484</sup> ICC-01/04-01/06-1573-Anx1, para. 101.

way set out above, notwithstanding the extensive security difficulties it faced. A series of witnesses have been called during this trial whose evidence, as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot safely be relied on. The Chamber spent a considerable period of time investigating the circumstances of a substantial number of individuals whose evidence was, at least in part, inaccurate or dishonest. The prosecution's negligence in failing to verify and scrutinise this material sufficiently before it was introduced led to significant expenditure on the part of the Court. An additional consequence of the lack of proper oversight of the intermediaries is that they were potentially able to take advantage of the witnesses they contacted. Irrespective of the Chamber's conclusions regarding the credibility and reliability of these alleged former child soldiers, given their youth and likely exposure to conflict, they were vulnerable to manipulation.

483. As set out above, there is a risk that P-0143 persuaded, encouraged, or assisted witnesses to give false evidence; there are strong reasons to believe that P-0316 persuaded witnesses to lie as to their involvement as child soldiers within the UPC; and a real possibility exists that P-0321 encouraged and assisted witnesses to give false evidence. These individuals may have committed crimes under Article 70 of the Statute. Pursuant to Rule 165 of the Rules, the responsibility to initiate and conduct investigations in these circumstances lies with the prosecution. Investigations can be initiated on the basis of information communicated by a Chamber or any reliable source. The Chamber hereby communicates the information set out above to the OTP, and the Prosecutor should ensure that the risk of conflict is avoided for the

purposes of any investigation.<sup>1485</sup>

484. Witnesses P-0007, P-0008, P-0010, P-0011, and P-0298 were granted permission to participate in the proceedings as victims (see the Chamber's Decision of 15 December 2008), as the information submitted was sufficient to establish, on a *prima facie* basis, that they were victims under Rule 85 of the Rules.<sup>1486</sup> In the view of the Majority, given the Chamber's present conclusions as to the reliability and accuracy of these witnesses, it is necessary to withdraw their right to participate. Similarly, the father of P-0298, P-0299, was granted permission to participate on account of his son's role as a child soldier.<sup>1487</sup> The Chamber's conclusions as to the evidence of P-0298 render it equally necessary to withdraw his right to participate in his case. In general terms, if the Chamber, on investigation, concludes that its original *prima facie* evaluation was incorrect, it should amend any earlier order as to participation, to the extent necessary. It would be unsustainable to allow victims to continue participating if a more detailed understanding of the evidence has demonstrated they no longer meet the relevant criteria.

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<sup>1485</sup> T-350-Red2-ENG, page 17, lines 14 – 19; see also Prosecution's Observations on Article 70 of the Rome Statute, 1 April 2011, ICC-01/04-01/06-2716, para 11; see also, *The Prosecutor v. Katanga and Ngudjolo*, Decision on the Prosecution's renunciation of the testimony of witness P-159, 24 February 2011, ICC-01/04-01/07-2731, para. 18.

<sup>1486</sup> Decision on the applications of victims to participate in the proceedings, 15 December 2008, ICC-01/04-01/06-1556. A corrigendum was issued on 13 January 2009, ICC-01/04-01/06-1556-Corr-Anx1.

<sup>1487</sup> Decision on the supplementary information relevant to the applications of 21 victims, 21 July 2009, ICC-01/04-01/06-2063, paragraph 39 (c).

## VIII. THE THREE VICTIMS WHO GAVE EVIDENCE

485. On 2 April 2009, one of the legal representatives for victims submitted an application for three victims, a/0229/06, a/0225/06, and a/0270/07, to participate in person in the proceedings against Thomas Lubanga.<sup>1488</sup> The Chamber requested additional information,<sup>1489</sup> and a further filing was submitted on 18 May 2009.<sup>1490</sup> Mr Keta filed written submissions on 22 June 2009, following discussions with the VWU concerning questions of security.<sup>1491</sup> On 26 June 2009, the Chamber adjourned the applications on behalf of the victims to present their views and concerns in person (these applications have not been renewed) and granted their applications to give evidence.<sup>1492</sup> The defence refers to their submissions made in the context of the abuse of process application.<sup>1493</sup> In essence, it is alleged by the defence that victim a/0270/07 instigated victims a/0229/06 and a/0225/06 to steal the identities of Thonifwa Uroci Dieudonné (D-0032) and Jean-Paul Bedijo Tchonga (D-0033) in order to claim falsely that they had been abducted by the UPC and used as child soldiers.

486. The Chamber has considered the evidence of these three victims before discussing the contradictory evidence of the relevant defence

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<sup>1488</sup> Requête soumise par le représentant légal des victimes représentées, sur le désir des victimes A/0225/06, A/0229/06 et A/210/01 de participer en personne à la procédure, 2 April 2009 (notified on 3 April 2009), ICC- 01/04-01/06-1812-Conf.

<sup>1489</sup> T-171-Red2-ENG, page 37, lines 4-25 and page 38, lines 1-6.

<sup>1490</sup> Informations complémentaires concernant la «Requête soumise par le représentant légal des victimes représentées, sur le désir des victimes A/0225/06, A/0229/06 et A/270/07 de participer en personne à la procédure » déposée le 2 avril 2009, 18 May 2009, ICC-01/04-01/06-1883-Conf.

<sup>1491</sup> Soumission, 19 juin 2009, ICC-01/04-01/06-1977-Conf.

<sup>1492</sup> Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, 26 June 2009, ICC-01/04-01/06-2002-Conf, para. 45. A public redacted version was issued on 9 July 2009 (ICC-01/04-01/06-2032-Anx).

<sup>1493</sup> ICC-01/04-01/06-2773-Red-tENG, para. 679, referring to ICC-01/04-01/06-2657-Conf-tENG, paras 200 – 228 and ICC-01/04-01/06-2686-Conf.

witnesses.

**A. Victims a/0270/07 (V02-0001), a/0229/06 (V02-0003) and a/0225/06 (V02-0002)**

487. Two individuals who claimed to be victims a/0229/06 (V02-0003) and a/0225/06 (V02-0002) testified as to their alleged recruitment by the UPC in the region of Mahagi, Ituri-Oriental province, DRC. Their evidence covered their alleged training and their active participation in hostilities.

488. The witness who identified himself as victim a/0229/06 (V02-0003)<sup>1494</sup> stated that he was abducted on his way home from school<sup>1495</sup> in April 2003.<sup>1496</sup> According to the date of birth he provided during his evidence, he was over the age of 15 at the time he claimed to have been abducted (April 2003).<sup>1497</sup> He stated that he underwent training at Bule camp<sup>1498</sup> and that he participated in the battle in Bunia,<sup>1499</sup> when he was shot.<sup>1500</sup>

489. The witness who identified himself as victim a/0225/06 (V02-0002)<sup>1501</sup> said that UPC soldiers abducted him<sup>1502</sup> whilst he was playing in a Mahagi village in 2003,<sup>1503</sup> and that he was taken to a transit camp.<sup>1504</sup> According to the date of birth he provided during his evidence, he was under the age of 15 at the time he claimed to have

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<sup>1494</sup> T-230-Red2-ENG, page 34, line 15.

<sup>1495</sup> T-230-Red2-ENG, page 35, line 12 to page 39 line 19.

<sup>1496</sup> T-230-Red2-ENG, page 35, line 12.

<sup>1497</sup> T-230-Red2-ENG, page 34, lines 17-19.

<sup>1498</sup> T-230-Red2-ENG, page 36, line 22 to page 37, line 4.

<sup>1499</sup> T-231-Red2-ENG, page 28, lines 10-11.

<sup>1500</sup> T-230-Red2-ENG, page 37, lines 24-25 and page 45, lines 18-22; T-231-Red2-ENG, page 35, lines 11-17.

<sup>1501</sup> T-227-Red2-ENG, page 50, line 23.

<sup>1502</sup> T-227-Red2-ENG, page 51, lines 13 – 17; T-227-Red2-ENG, page 73, lines 16 – 19; T-227-Red2-ENG, page 72, lines 11 – 16.

<sup>1503</sup> T-227-Red2-ENG, page 52, lines 10 – 20.

<sup>1504</sup> T-227-Red2-ENG, page 59, lines 15 – 16.

been abducted.<sup>1505</sup> The commanders used him for looting,<sup>1506</sup> finding rich people and obtaining hashish.<sup>1507</sup> He subsequently underwent military training at a UPC camp.<sup>1508</sup> He was involved in fighting<sup>1509</sup> and he was injured in his right calf by a bullet at Bunia.<sup>1510</sup>

490. Victim a/0270/07 (V02-0001) testified as to the alleged recruitment of children from a school in Mahagi, Ituri-Orientale Province, DRC and his efforts to prevent this from happening,<sup>1511</sup> and his relationship with certain child soldiers when they returned home. He said he witnessed UPC soldiers enlisting students on 5 February 2003,<sup>1512</sup> (four pupils were abducted).<sup>1513</sup> He claimed he is the guardian of victims a/0229/06 (V02-0003) and a/0225/06 (V02-0002) and he explained his relationship with each child and how he came to take on the role of guardian.<sup>1514</sup>

#### **B. Defence witnesses D-0032 and D-0033**

491. The defence relied on evidence that seriously undermined the suggested truthfulness and reliability of a/0225/06 (V02-0002), a/0229/06 (V02-0003) and a/0270/07 (V02-0001). The defence submitted that a/0225/06 and a/0229/06 gave false testimony at the instigation of a/0270/07, and that a/0270/07 was actively involved in encouraging pupils at the Institute where he worked to claim falsely that they had been child soldiers in order to participate in proceedings before the

<sup>1505</sup> T-227-Red2-ENG, page 50, line 25 to page 51, line 2.

<sup>1506</sup> T-228-Red2-ENG, page 5, lines 20 – 23.

<sup>1507</sup> T-228-Red2-ENG, page 7, lines 1 – 3.

<sup>1508</sup> T-227-Red2-ENG, page 57, lines 12 – 14.

<sup>1509</sup> T-228-Red2-ENG, page 53, line 24 to page 54, line 17 and page 54, line 25 to page 55, line 6; T-227-Red2-ENG, page 62, line 25 to page 63, line 2.

<sup>1510</sup> T-229-Red2-ENG, page 15, lines 7 – 8.

<sup>1511</sup> T-225-Red2-ENG, page 23, lines 2 – 25.

<sup>1512</sup> T-225-Red2-ENG, page 22, lines 23 – 25.

<sup>1513</sup> T-225-Red2-ENG, page 24, lines 6 – 8.

<sup>1514</sup> T-226-Red2-ENG, page 48, line 11 to page 50, line 20.

Court.<sup>1515</sup>

492. D-0032 testified that he (not a/0225/06) was Thonifwa Uroci Dieudonné.<sup>1516</sup> D-0032 said that together with the others in his class who had been in military service, he was told by a/0270/07 to pay a fee in order to “register” in Ndrele because those who were child soldiers would receive certain benefits and their studies would be paid for.<sup>1517</sup> According to D-0032, a/0270/07 told them to claim that their parents had died in order to receive the benefits quickly.<sup>1518</sup> D-0032 did not know the “white people” who conducted the registration process, although during his testimony he recognised an ICC victim participation form bearing his name along with (as he believed) his fingerprint. He had not filled it in and the signature was not his.<sup>1519</sup> He said one of those accompanying him during the registration process was Jean-Paul Bedijo Tchonga.<sup>1520</sup> D-0032 testified that following registration they did not receive any of the benefits promised to them and while they were in Ndrele, a/0270/07 told him and Jean-Paul Bedijo that the white people had not come and they could go home.<sup>1521</sup> The witness later learned that a/0270/07 was going to “replace” them (he was told this by one of those who had been brought by a/0270/07 to take their place).<sup>1522</sup>

493. D-0032 said he was born in 1988<sup>1523</sup> and his parents are Ukunya

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<sup>1515</sup> Defence Application Seeking a Permanent Stay of the Proceedings ICC-01/04-01/06-2657-Conf-tENG, 4 February 2001, paras 200-228. A public redacted version was issued on 30 March 2011.

<sup>1516</sup> T-275-Red2-ENG, page 5, line 10.

<sup>1517</sup> T-275-Red2-ENG, page 12, line 21 to page 13, line 18.

<sup>1518</sup> T-275-Red2-ENG, page 13, lines 9 – 11.

<sup>1519</sup> T-275-Red2-ENG, page 15, line 11 to page 17, line 13.

<sup>1520</sup> T-275-Red2-ENG, page 17, line 20 to page 18, line 1.

<sup>1521</sup> T-275-Red2-ENG, page 13, line 19 to page 14, line 4.

<sup>1522</sup> T-275-Red2-ENG, page 14, lines 4 – 11.

<sup>1523</sup> T-275-Red2-ENG, page 5, lines 11 – 16.



Nyona Bertin<sup>1524</sup> and Generose Francoise.<sup>1525</sup> a/0225/06 was unable to identify the individuals in photographs EVD-D01-00101<sup>1526</sup> and EVD-D01-00102,<sup>1527</sup> whilst D-0032 identified them as his father<sup>1528</sup> and mother<sup>1529</sup> respectively. It is unnecessary to go into the details of the evidence, but the accounts of D-0032 and a/0225/06 differ significantly regarding their family histories<sup>1530</sup> and their schooling.<sup>1531</sup>

494. Critically, the testimony of D-0032 is supported by that of D-0034, who testified that he is the father of Thonifwa Uroci.<sup>1532</sup> D-0034, who is also the father of D-0033, corroborated the evidence from D-0032 about his family,<sup>1533</sup> and he confirmed D-0032's account as to his primary and secondary education.<sup>1534</sup> Moreover, D-0034 asserted that whilst Thonifwa Uroci was forcibly<sup>1535</sup> involved with the UPC as an errand boy, he never bore arms,<sup>1536</sup> or underwent military training.<sup>1537</sup> D-0034 was unable to identify the person shown in photograph EVD-D01-00130<sup>1538</sup> (a/0225/06).<sup>1539</sup>

495. The Chamber ordered a forensic test following D-0032's evidence

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<sup>1524</sup> T-275-Red2-ENG, page 5, lines 17 – 23.

<sup>1525</sup> T-275-Red2-ENG, page 5, line 24 to page 6, line 2.

<sup>1526</sup> T-235-Red2-ENG, page 46, lines 21 – 24.

<sup>1527</sup> T-235-Red2-ENG, page 46, lines 17 – 20.

<sup>1528</sup> T-275-Red2-ENG, page 8, lines 1 – 11.

<sup>1529</sup> T-275-Red2-ENG, page 8, line 13 to page 9, line 5.

<sup>1530</sup> a/0225/06: T-227-CONF-ENG, page 41, lines 5 – 10, page 42, lines 4 – 12, and page 51, lines 3 – 12; T-230-CONF-ENG, page 10, lines 3 – 4; and T-235- CONF-ENG, page 41, lines 1 - 20, page 42, lines 16 – 25, and page 43, lines 1 – 7; D-0032: T-275- Red2-ENG, page 6, lines 3 – 7, page 9, lines 6 – 20, page 9, line 23, to page 10, line 1, page 53, lines 2 – 20, and page 56, lines 3 – 12.

<sup>1531</sup> a/0225/06: T-228-CONF-ENG, page 29, line 19, and page 32, lines 1 – 9; and T-228-Red2-ENG, page 33, lines 5 – 6; D-0032: T-275- Red2-ENG, page 6, lines 17 – 19, page 7, lines 6 – 15, and page 48, lines 3 – 5.

<sup>1532</sup> T-280-Red2-ENG, page 15, line 25 and page 18, lines 20 – 23.

<sup>1533</sup> T-280-Red2-ENG, page 21, lines 4 – 22; page 18, lines 4 – 5 and page 22, lines 12 – 16.

<sup>1534</sup> T-280-Red2-ENG, page 22, lines 20 to page 23, line 4.

<sup>1535</sup> T-280-Red2-ENG, page 52, lines 14 to page 53, line 4.

<sup>1536</sup> T-280-Red2-ENG, page 28, lines 7 – 13.

<sup>1537</sup> T-280-Red2-ENG, page 28, lines 4 – 6.

<sup>1538</sup> T-280-Red2-ENG, page 43, lines 3 – 6.

<sup>1539</sup> T-280-Red2-ENG, page 43, lines 7 – 9.

that his fingerprint was on the victim application form.<sup>1540</sup> The results are that one of the fingerprints does not match the witness, while the other fingerprints were inconclusive.<sup>1541</sup> This evidence is therefore essentially equivocal.

496. D-0033 testified that he (not a/0229/06) was Jean-Paul Bedijo Tchonga.<sup>1542</sup> He stated a/0270/07 worked for an Institute in Mahagi. The latter “registered” the children who were child soldiers “because the white people were coming”.<sup>1543</sup> D-0033 also testified that a/0270/07 promised them that their studies would be paid for.<sup>1544</sup> He did not recognise an application to participate carrying his name (along with related material) and he said the signatures were not his.<sup>1545</sup> Similarly, he did not recognize a witness statement bearing his name dated 7 August 2009 or the signature on the last page.<sup>1546</sup> He suggested the person who had signed the documents might have been an individual in photographs that were put to him during his examination.<sup>1547</sup> D-0033 stated that he could not precisely say who this person was, but he had been told that they had been “replaced by other people” at the instigation of a/0270/07.<sup>1548</sup> D-0032 went on to identify the two people he had seen in the photographs and he said a/0270/07 had taken these two individuals in order to register them in their place.<sup>1549</sup> He supported D-0032’s evidence that a/0270/07 took money in exchange for registration; that he told them they would receive material

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<sup>1540</sup> T-280-Red2-ENG, page 5, lines 8 – 25.

<sup>1541</sup> Submission of the Registrar of the results of the forensic analysis in relation to the fingerprints of Defence witness 32, 11 June 2010, ICC-01/04-01/06-2477-Conf, para. 9.

<sup>1542</sup> T-276-Red2-ENG, page 25, line 24.

<sup>1543</sup> T-276-CONF-ENG, page 29, line 19 to page 30, line 10.

<sup>1544</sup> T-276-CONF-ENG, page 48, lines 17 – 23.

<sup>1545</sup> T-276-Red2-ENG, page 39, line 6 to page 40, line 14 and page 41, line 24 to page 43, line 17.

<sup>1546</sup> T-276-Red2-ENG, page 41, lines 1 – 23.

<sup>1547</sup> T-276-Red2-ENG, page 45, lines 14 – 21.

<sup>1548</sup> T-276-Red2-ENG, page 46, lines 15 – 22.

<sup>1549</sup> T-276-CONF-ENG, page 47, lines 8 – 23.

assistance and school fees; and he instructed them to say their parents had died.<sup>1550</sup> D-0033 had gone with others to a/270/07's house within the preceding year and he had discussed with him the assistance they would receive and their service in the armed group.<sup>1551</sup> The evidence of D-0034 supports this assertion, in that he stated that his son, D-0032, told him a/0270/07 invited D-0032 to his home.<sup>1552</sup> Furthermore, D-0034 denies there is any family relationship between a/0270/07 and his son<sup>1553</sup> and he asserted a/0270/07 was aware that D-0034 was the father of the real Thonifwa Uroci, namely D-0032.<sup>1554</sup>

497. D-0033 testified he was born 17 May 1987<sup>1555</sup> and his parents are Thomas Ugeno<sup>1556</sup> and Georgette Urymen.<sup>1557</sup> A/0229/06 was unable to identify the individuals in photographs<sup>1558</sup> who D-0033 said were Thonifwa Uroci<sup>1559</sup> and Thomas Ugeno (Jean-Paul Bedijo's father).<sup>1560</sup> D-0032 gave a significantly different account to that of a/0229/06 with respect to the family history.<sup>1561</sup> Additionally, a/0229/06 stated he undertook military training at an UPC camp,<sup>1562</sup> whilst, D-0033 indicated that although he received military training, it was a/0270/07 who suggested the name of Bule camp.<sup>1563</sup>

498. a/0270/07 was unable to identify the individual in photograph EVD-

<sup>1550</sup> T-276-CONF-ENG, page 48, line 12 to page 49, line 8 and page 49, lines 15 – 19.

<sup>1551</sup> T-276-CONF-ENG, page 49, line 20 to page 50, line 11.

<sup>1552</sup> T-280-CONF-ENG, page 23, line 24 to page 24, line 2.

<sup>1553</sup> T-280-CONF-ENG, page 32, lines 7 – 8.

<sup>1554</sup> T-280-CONF-ENG, page 27, lines 19 – 21.

<sup>1555</sup> T-276-Red2-ENG, page 26, line 1.

<sup>1556</sup> T-277-Red2-ENG, page 40, lines 3 – 7; T276-Red2-ENG, page 26, lines 4 - 5.

<sup>1557</sup> T-276-Red2-ENG, page 26, lines 6 – 7.

<sup>1558</sup> T-234-CONF-ENG, page 2, lines 1-6, see EVD-D01-00096; T-234-CONF-ENG, page 7, lines 21 – 25, see EVD-D01-00097.

<sup>1559</sup> T-276-Red2-ENG, page 29, lines 2 – 9.

<sup>1560</sup> T-276-Red2-ENG, page 28, lines 19 – 24 to page 29, line 9.

<sup>1561</sup> a/0229/06: T-231-CONF-ENG, page 12, line 22 and page, 13, lines 8-15; T-230-Red2-ENG, page 39, lines 14-19; D-0033: T-277-CONF-ENG, page 41, lines 5 – 6; T-276-Red2-ENG, page 26, lines 8 – 12.

<sup>1562</sup> T-230-Red2-ENG, page 36, line 22 to page 37, line 4.

<sup>1563</sup> T-276-Red2-ENG, page 75, lines 20 – 25.

D01-00096<sup>1564</sup> which D-0033 subsequently identified as Thonifwa Uroci.<sup>1565</sup> a/0270/07 was also unable to identify the individuals in photographs EVD-D01-00101<sup>1566</sup> and EVD-D01-00102,<sup>1567</sup> who D-0032 later identified as his mother<sup>1568</sup> and father<sup>1569</sup> respectively.

### C. Conclusions on the three victims who gave evidence

499. The evidence of a/0225/06, a/0229/06, and a/0270/07 contains internal inconsistencies which undermine their credibility. a/0225/06's recollection of his abduction and military service lacked clarity, and he demonstrated uncertainty when questioned about the details of those events. The witness said he was abducted in both February 2002 and March 2003,<sup>1570</sup> although he said he was confused and had problems with dates.<sup>1571</sup> a/0225/06 gave significantly unhelpful answers on occasion when questioned about the gaps and inconsistencies in his testimony;<sup>1572</sup> for example, he claimed to have received a bullet wound at Bogoro, and when asked why this was not mentioned in his August 2009 statement, he simply replied 'with the intelligence I have, I can't, I forget'.<sup>1573</sup>

500. a/0229/06 was inconsistent in his account of his abduction and military service. For instance, it was unclear whether his abduction occurred when he was in the first or second year of his secondary education.<sup>1574</sup> He was often vague in his answers and he tended to

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<sup>1564</sup> T-235-CONF-ENG, page 20, line 25 to page 21, line 6.

<sup>1565</sup> T-276-Red2-ENG, page 29, lines 2 – 9.

<sup>1566</sup> T-235-CONF-ENG, page 13, lines 3 – 4 and 19 – 20.

<sup>1567</sup> T-235-CONF-ENG, page 15, lines 13 – 21.

<sup>1568</sup> T-275-Red2-ENG, page 8, line 13 to page 9, line 5.

<sup>1569</sup> T-275-Red2-ENG, page 8, lines 1 – 11.

<sup>1570</sup> T-227-Red2-ENG, page 53, lines 18-22 and page 74, lines 19 – 23; T-228-Red2-ENG, page 2, lines 7 – 20.

<sup>1571</sup> T-227-Red2-page 74, lines 19 – 23.

<sup>1572</sup> T-229-CONF-ENG, page 32, line 23 to page 33, line 22.

<sup>1573</sup> T-229-CONF-ENG, page 33, line 11.

<sup>1574</sup> T-231-CONF-ENG, page 17, line 19 to page 18, line 10.

respond by stating that he was unable to answer the questions.<sup>1575</sup>

501. a/0270/07 was an evasive witness who, on occasion, was reluctant to respond when questioned or he provided inadequate answers. For example, he testified that the Institute had been subjected to a number of attacks, but when asked why the school archives did not contain a report of this event, the witness simply responded that this information might be biased.<sup>1576</sup>

502. In all the circumstances, the Chamber has concluded that D-0033 and D-0034 were consistent, credible and reliable witnesses and it accepts that there is a real possibility that victims a/0229/06 and a/0225/06 (at the instigation or with the encouragement of a/0270/07) stole the identities of Thonifwa Uroci Dieudonné (D-0032) and Jean-Paul Bedijo Tchonga (D-0033) in order to obtain the benefits they expected to receive as victims participating in these proceedings. The Chamber is persuaded there are significant weaknesses as regards the evidence of a/0225/06, a/0229/06, and a/0270/07, to the extent that their accounts are unreliable. Given the material doubts that exist as to the identities of a/0229/06 and a/0225/06, which inevitably affect the evidence of a/0270/07, the permission originally granted to a/0229/06, a/0225/06, and a/0270/07 to participate as victims is withdrawn. In general terms, if the Chamber, on investigation, concludes that its original *prima facie* evaluation was incorrect, it should amend any earlier order as to participation, to the extent necessary. It would be unsustainable to allow victims to continue participating if a more detailed understanding of the evidence has demonstrated they no

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<sup>1575</sup> T-231-CONF-ENG, page 47, lines 13-24; T-231-CONF-ENG, page 48, lines 9-12; T-231-CONF-ENG, page 45, lines 2-4; T-231-CONF-ENG, page 41, lines 16-18.

<sup>1576</sup> T-226-Red-ENG, page 17, lines 5 – 14 and line 20 to page 18, line 14.

longer meet the relevant criteria.

## IX. THE ARMED CONFLICT AND ITS NATURE

### A. INTRODUCTION

503. It is necessary to determine whether there was a relevant armed conflict, and if so, whether it was international or non-international in character.

504. The existence of an armed conflict, be it international or non-international, is a fundamental requirement of the charges under Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute, which provide, *inter alia*:

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

[...]

b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law [...]

c) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, [...]

It follows that if the prosecution has failed to prove the existence of a relevant armed conflict in Ituri from early September 2002 until 13 August 2003, it will have failed to prove the charges against the accused.

### B. SUBMISSIONS

#### 1. Prosecution submissions

505. The prosecution submits it is undisputed that a significant and protracted armed conflict occurred in Ituri during the relevant

period.<sup>1577</sup>

506. Relying on jurisprudence from the Pre-Trial Chambers and the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the prosecution suggests an international armed conflict exists “whenever there is resort to armed force between States.”<sup>1578</sup> It is argued a non-international armed conflict is established when States have not resorted to armed force and i) the violence is sustained and has reached a certain degree of intensity, and ii) armed groups with some degree of organisation, including the capability of imposing discipline and the ability to plan and carry out sustained military operations, are involved. Additionally, Article 8(2)(f) of the Statute stipulates that the conflict must be “protracted” for these purposes.<sup>1579</sup>

507. It is argued non-international conflicts only cease with a “peaceful settlement” and that a mere reduction in the extent of the hostilities is insufficient.<sup>1580</sup> The prosecution submits the evidence demonstrates that a settlement of this kind did not exist prior to 13 August 2003<sup>1581</sup> because many organised armed groups continued to operate in Ituri during this period, including the FNI, which allegedly perpetrated massacres in June and July 2003; PUSIC, in its opposition to the UPC/FPLC in Tchomia in November 2003; and the *Forces Armées du Peuple Congolais* (“FAPC”), as regards its fight with the FNI and *Forces Populaires pour la Démocratie au Congo* (“FPDC”) in order to take control

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<sup>1577</sup> ICC-01/04-01/06-2748-Red, paras 21 – 24, relying on the jurisprudence of the Pre-Trial Chambers and the ICTY (see below).

<sup>1578</sup> ICC-01/04-01/06-2748-Red, para. 21.

<sup>1579</sup> ICC-01/04-01/06-2748-Red, para. 21. The ICTY jurisprudence relied upon is: *Prosecutor v. Tadić, Case No. IT-94-1-T* (trial judgment), *Prosecutor v. Đorđević, Case No. IT-05-87/1-T* (trial judgment), *Prosecutor v. Limaj et al., Case No. IT-03-66-T* (trial judgment), *Prosecutor v. Haradinaj et al., Case No. IT-04-84-T* (trial judgment), and *Prosecutor v. Mrkšić et al., Case No. IT-95-13/1-T* (trial judgment).

<sup>1580</sup> ICC-01/04-01/06-2778-Red, para. 125.

<sup>1581</sup> T-356-ENG, page 49, line 10 to page 50, line 9 (prosecution oral closing submissions).



of Mahagi in June 2003.<sup>1582</sup> It is the prosecution's contention that members of the UPC/FPLC attacked MONUC several times.<sup>1583</sup>

508. The prosecution alleges the UPC/FPLC fought the RCD-ML, the FNI and the FRPI, and that each of these groups was armed and had a sufficient degree of organisation (demonstrated by their leadership structure and participation in the political process). Furthermore, it is suggested these armed groups had the ability to undertake sustained operations, as revealed by their ability to train troops and participate in numerous battles.<sup>1584</sup>

509. The prosecution submits the conflict was non-international in character, notwithstanding the conclusion of the Pre-Trial Chamber that it was international until Uganda withdrew from Ituri on 2 June 2003.<sup>1585</sup>

510. It is the prosecution submission that there can be simultaneous conflicts within a particular territory that involve different forces, and that Uganda's involvement (even if it is found to have constituted occupation), would not automatically mean the armed conflict relevant to the charges was international in character.<sup>1586</sup> The prosecution submits the key issue is the nature of the conflict to which the particular army or militia is a party (*viz.* the conflict "to which Lubanga's militia was a party during the relevant times").<sup>1587</sup>

511. The prosecution suggests that even if Uganda can be said to have

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<sup>1582</sup> ICC-01/04-01/06-2778-Red, para. 126.

<sup>1583</sup> ICC-01/04-01/06-2778-Red, para. 126.

<sup>1584</sup> ICC-01/04-01/06-2748-Red, paras 22 – 24.

<sup>1585</sup> ICC-01/04-01/06-2748-Red, para. 30 and T-356-ENG, page 43, line 20 to page 45, line 1 (prosecution oral closing submissions).

<sup>1586</sup> ICC-01/04-01/06-2748-Red, paras 48-54 and T-356-ENG, page 45, line 12 to page 46, line 19 (prosecution oral closing submissions).

<sup>1587</sup> ICC-01/04-01/06-2748-Red, para. 31.

been occupying certain areas of Ituri, such as Bunia airport, there is insufficient evidence that it occupied Bunia as a whole during the relevant timeframe.<sup>1588</sup> In addition, the prosecution submits that although there is some evidence of assistance provided by Rwanda and Uganda, applying the overall control test, as adopted by the ICC and ICTY (see below), it falls short of the threshold for indirect intervention.<sup>1589</sup> Equally, it is submitted that neither the presence of multi-national forces nor the direct intervention by Ugandan military forces were sufficient to constitute an international conflict, as the part played by these forces did not result in two states opposing each other.<sup>1590</sup> Finally, the prosecution argues that even if Ugandan involvement did create an international armed conflict, the UPC/FPLC was involved in a distinct, simultaneous non-international armed conflict.<sup>1591</sup>

## 2. Defence submissions

512. The defence, as part of its analysis of armed conflicts that are non-international in character, relies on the approach adopted by Pre-Trial Chamber I.<sup>1592</sup> Referring to the provisions of Article 8(2)(f) of the Statute, it submits the violence must reach a particular level of intensity. Armed conflicts not of an international character are conflicts that take place in the territory of a State when there is a protracted conflict between the government and organised armed groups, or

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<sup>1588</sup> ICC-01/04-01/06-2748-Red, paras 44 – 47 and T-356-ENG, page 46, line 20 to page 49, line 9 (prosecution oral closing submissions).

<sup>1589</sup> ICC-01/04-01/06-2748-Red, paras 38 – 43.

<sup>1590</sup> ICC-01/04-01/06-2748-Red, paras 36 – 37.

<sup>1591</sup> ICC-01/04-01/06-2748-Red, paras 56 – 58.

<sup>1592</sup> ICC-01/04-01/06-2773-Red-tENG, para. 27, referring to ICC-01/04-01/06-803-tEN, paras 227 – 234.

between armed groups.<sup>1593</sup>

513. It is suggested by the defence that Additional Protocol II to the Geneva Conventions of 8 June 1977 operates to restrict this definition by stipulating that armed conflicts in this category “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this protocol.”<sup>1594</sup>

514. The defence argues the prosecution has failed to demonstrate that the FNI, the FRPI, PUSIC, and the FAPC were “organized armed groups” under international humanitarian law.<sup>1595</sup> It is submitted it has not been proven that these organisations were under responsible command or exercised sufficient control over a part of the relevant territory, thereby enabling them to carry out sustained and concerted military operations and to implement the provisions of international humanitarian law.<sup>1596</sup>

515. The approach of the Pre-Trial Chamber is referred to by the defence in this regard:

Thus, in addition to the requirement that the violence must be sustained and have reached a certain degree of intensity, Article I.I of Protocol Additional II provides that armed groups must: i) be under responsible command implying some degree of organisation of the armed groups, capable of planning and carrying out sustained and concerted military operations and imposing discipline in the name of a *de facto* authority, including the

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<sup>1593</sup> ICC-01/04-01/06-2773-Red-tENG, paras 28 – 29.

<sup>1594</sup> ICC-01/04-01/06-2773-Red-tENG, para. 30; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 1(1) (“Additional Protocol II”).

<sup>1595</sup> ICC-01/04-01/06-2786-Red-tENG, para. 105.

<sup>1596</sup> ICC-01/04-01/06-2786-Red-tENG, para. 105.

implementation of the Protocol; and ii) exercise such control over territory as to enable them to carry out sustained and concerted military operations.<sup>1597</sup>

516. The defence supports the conclusion of the Pre-Trial Chamber that the conflict in Ituri in the period between September 2002 and June 2003 was an armed conflict of an international character (it is suggested that the conflict only extended until late May 2003).<sup>1598</sup> The defence argues that whilst sporadic acts of violence occurred in Ituri after May 2003, these did not involve organised armed groups exercising territorial control and they should be treated as instances of internal disturbance and tension. It is suggested there was no conflict of any kind in Ituri between the end of May 2003 and August 2003.<sup>1599</sup>

517. The defence emphasises the evidence of P-0041, who testified as to arms being provided to the FPLC by Rwanda, the involvement of Mr Mbusa Nyamwisi in the conflict in Ituri and the decision of the United Nations to maintain Ugandan troops in the DRC.<sup>1600</sup> The defence also highlights the testimony of a number of other witnesses: P-0017, concerning alleged training given by Rwanda to the FPLC and his reference to the Ugandan army as an occupying force;<sup>1601</sup> P-0055, as to the presence of the Ugandan army as an occupying force in Bunia and the provision of weapons and uniforms by Rwanda;<sup>1602</sup> P-0012, relating to Ugandan arms deliveries to PUSIC;<sup>1603</sup> and the expert Gérard Prunier (P-0360), on Uganda's role as an occupying force in Ituri, the involvement of the Kinshasa government in the conflict either directly or through the RCD-ML, and what he described as a "war by proxy

<sup>1597</sup> ICC-01/04-01/06-2773-Red-tENG, para. 31, referring to ICC-01/04-01/06-803-tEN, para. 232.

<sup>1598</sup> ICC-01/04-01/06-2773-Red-tENG, paras 689 - 693; ICC-01/04-01/06-2786-Red-tENG, para. 108.

<sup>1599</sup> ICC-01/04-01/06-2773-Red-tENG, paras 694 - 699.

<sup>1600</sup> ICC-01/04-01/06-2773-Red-tENG, paras 396 - 398.

<sup>1601</sup> ICC-01/04-01/06-2773-Red-tENG, para. 440.

<sup>1602</sup> ICC-01/04-01/06-2773-Red-tENG, paras 482 - 483.

<sup>1603</sup> ICC-01/04-01/06-2773-Red-tENG, para. 559.

between the states of the DRC, Uganda, and Rwanda".<sup>1604</sup> However, the defence observes that Mr Prunier (P-0360) stressed that the available information on the events in Ituri in 2002-2003 is not particularly reliable. In addition, the defence submits that some of the views expressed in this witness's report are partial, although it accepts he is reliable on certain identified subjects.<sup>1605</sup>

### 3. Victims submissions

518. The V01 group of legal representatives of victims contends it is undisputed that one or more armed conflicts occurred in Ituri between 1 September 2002 and 13 August 2003.<sup>1606</sup> The V01 group submits that the conflict cannot properly be considered as a situation of internal disturbance or tension, given the duration and intensity of the hostilities, the number of victims and the manner in which the forces were organised and armed.<sup>1607</sup>

519. The V01 team argues that during the period between September 2002 and June 2003, an international armed conflict and a non-international armed conflict existed simultaneously in the territory of Ituri.<sup>1608</sup>

520. The V02 group of legal representatives of victims contends that an armed conflict, with a degree of intensity and involving the UPC, PUSIC and the FNI (among others), occurred in Ituri from September 2002 to August 2003.<sup>1609</sup> It argues the fight between the UPC and the

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<sup>1604</sup> ICC-01/04-01/06-2773-Red-tENG, paras 668 – 673.

<sup>1605</sup> ICC-01/04-01/06-2773-Red-tENG, paras 664 – 667.

<sup>1606</sup> ICC-01/04-01/06-2746-Red-tENG, para. 4.

<sup>1607</sup> ICC-01/04-01/06-2746-Red-tENG, para. 4.

<sup>1608</sup> ICC-01/04-01/06-2746-Red-tENG, para. 14, referring to ICC-01/04-01/06-803-tEN, para. 209.

<sup>1609</sup> ICC-01/04-01/06-2747-Red-tENG, para. 75.

FNI over control of the gold-mining town of Mongbwalu,<sup>1610</sup> the UPC/FPLC military operations against the towns of Tchomia and Nizi and the village of Iga Barrière, as well as numerous other armed attacks, demonstrate the existence of an armed conflict. It advances by way of further evidence in this regard the Security Council's Resolution 1493<sup>1611</sup> (pursuant to Chapter VII of the United Nations Charter), and the latter's decision to remain actively seized of the Ituri situation throughout the period of the charges.

521. The V02 team maintains that the armed conflict can be classified as international due to its intensity, duration and character.<sup>1612</sup> It is suggested the UPC/FPLC was an organised armed group within the meaning of Article 8(2)(f) of the Statute, as it was capable of carrying out large-scale military operations for a protracted period of time.<sup>1613</sup> It also relies on the testimony of several witnesses as to the highly structured nature of the UPC and its chain of command.<sup>1614</sup>

522. The OPCV has not advanced submissions as to whether there was an armed conflict, arguing that the prosecution is better placed to address this issue.<sup>1615</sup> Similarly, it has not presented arguments as to the appropriate characterisation of the conflict. Instead, the OPCV stresses that Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute criminalise the same conduct regardless of the characterisation of the armed conflict.<sup>1616</sup> The V02 team advanced a similar submission.<sup>1617</sup>

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<sup>1610</sup> ICC-01/04-01/06-2747-Red-tENG, para. 75.

<sup>1611</sup> United Nations Security Council Resolution 1493, UN Doc. S/RES/1493, 28 July 2003, paras 26 – 27.

<sup>1612</sup> ICC-01/04-01/06-2747-Red-tENG, para. 74.

<sup>1613</sup> ICC-01/04-01/06-2747-Red-tENG, para. 78.

<sup>1614</sup> ICC-01/04-01/06-2747-Red-tENG, paras 79 – 82.

<sup>1615</sup> ICC-01/04-01/06-2744-Red-tENG, para. 15.

<sup>1616</sup> ICC-01/04-01/06-2744-Red-tENG, para. 15.

<sup>1617</sup> ICC-01/04-01/06-2747-Red-tENG, para. 72.

## C. THE CHAMBERS'S CONCLUSIONS

### 1. The law

*Characterisation of the armed conflict (international armed conflict vs. non-international armed conflict)*

523. In the Decision on the confirmation of charges, the Pre-Trial Chamber, having considered the evidence as to Rwanda's involvement in the armed conflict, concluded there was insufficient evidence to establish substantial grounds to believe that Rwanda played a role that could be described as direct or indirect intervention in the armed conflict in Ituri.<sup>1618</sup>

524. In its final analysis, the Pre-Trial Chamber held:

On the evidence admitted for the purpose of the confirmation hearing, the Chamber considers that there is sufficient evidence to establish substantial grounds to believe that, as a result of the presence of the Republic of Uganda as an occupying Power, the armed conflict which occurred in Ituri can be characterised as an armed conflict of an international character from July 2002 to 2 June 2003, the date of the effective withdrawal of the Ugandan army.<sup>1619</sup>

[...] there are substantial grounds to believe that between 2 June and late December 2003, the armed conflict in Ituri involved, inter alia, the UPC/FPLC, PUSIC and the FNI; that the UPC and FNI fought over control of the gold-mining town of Mongbwalu; that various attacks were carried out by the FNI in Ituri during this period; that a political statement was signed in mid-August 2003 in Kinshasa by the main armed groups operating in Ituri calling on the transitional government to organise "[TRANSLATION] a meeting with us, current political and military actors on the ground, so as to nominate by consensus, new administrative officials for appointment;" that at the very beginning of November 2003, the UPC carried out a military operation against the town of Tchomia, which was then under PUSIC control; and, finally, that the UPC/FPLC armed forces controlled the towns of Iga Barrière and Nizi at the very least in December 2003.<sup>1620</sup>

<sup>1618</sup> ICC-01/04-01/06-803-tEN, paras 221 – 226.

<sup>1619</sup> ICC-01/04-01/06-803-tEN, para. 220.

<sup>1620</sup> ICC-01/04-01/06-803-tEN, para. 236 (footnotes omitted).

525. In determining that the relevant conflict was international between September 2002 and 2 June 2003 and non-international between 2 June 2003 and 13 August 2003, the Pre-Trial Chamber confirmed the charges against the accused on the basis of Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute, although the prosecution had only charged the accused with the conscription and enlistment of children under the age of fifteen years, and their use to participate actively in hostilities, within the context of a non-international armed conflict under Article 8(2)(e)(vii) of the Statute.

526. The prosecution<sup>1621</sup> and the defence<sup>1622</sup> applications for leave to appeal were refused by the Pre-Trial Chamber, which observed:

[P]ursuant to Regulation 55 of the Regulations of the Court, the Trial Chamber may "change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused." Indeed, there is nothing to prevent the Prosecution or the Defence from requesting that the Trial Chamber reconsider the legal characterisation of the facts described in the charges against Thomas Lubanga Dyilo and as confirmed by the Chamber.<sup>1623</sup>

527. Following submissions from the parties after the transfer of the case to the Trial Chamber, the latter gave notice, in accordance with Regulation 55 of the Regulations of the Court, that the legal characterisation of the facts may be subject to change. The Chamber instructed the parties and participants to:

[...] prepare their cases on the basis that the Bench may decide that the first group of three charges encompass both international and internal armed conflicts.<sup>1624</sup>

528. Accordingly, the prosecution submitted as follows:

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<sup>1621</sup> ICC-01/04-01/06-806.

<sup>1622</sup> ICC-01/04-01/06-807-Conf.

<sup>1623</sup> ICC-01/04-01/06-915, para. 44.

<sup>1624</sup> Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 49.



Consistent with the Trial Chamber's decision of 13 December 2007 and the amended document containing the charges, the Prosecution will present the totality of its evidence relating to both international and non-international aspects of the conflict. The evidence will enable the Chamber to determine whether the Ugandan occupation of Ituri between the 1<sup>st</sup> of September 2002 and early June 2003 transformed the character of the conflict into an international armed conflict.<sup>1625</sup>

529. In its 'Order on the timetable for closing submissions', the Chamber invited submissions on the nature of the armed conflict and the factors that should be borne in mind if the Chamber were to modify the legal characterisation of the charges for the period from early September 2002 to 2 June 2003.<sup>1626</sup>

530. The parties and the participants have not challenged the procedure followed by the Chamber as regards a possible legal re-characterisation of the facts under Regulation 55 of the Regulations of the Court, although they addressed in their submissions whether it would be appropriate for any modification to occur.

*Definition of armed conflict*

531. The relevant Elements of Crimes require that the alleged criminal conduct "took place in the context of and was associated with an [...] armed conflict".<sup>1627</sup> There is no definition of armed conflict in the Statute or in the Elements of Crimes. The introduction to the Elements of Crimes sets out that:

The elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict [...]

532. As with the Rome Statute, neither the Geneva Conventions nor their

<sup>1625</sup> T-107-ENG, page 22, lines 1-7; T-107-FRA, page 20, lines 16 – 19.

<sup>1626</sup> ICC-01/04-01/06-2722, para. 4 (iii) and (iv).

<sup>1627</sup> See Elements of Crimes, Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii), para. 4.

Additional Protocols explicitly define ‘armed conflict.’<sup>1628</sup>

533. The definition of this concept has been considered by other international tribunals and the Chamber has derived assistance from the jurisprudence of the ICTY:

70. [...] an armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.<sup>1629</sup>

*Armed conflict not of an international character*

534. As to the definition of an armed conflict not of an international character, Article 8(2)(f) of the Statute provides:

Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.<sup>1630</sup>

<sup>1628</sup> Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes* (2008), page 291; Héctor Olásolo, *Ensayos sobre la Corte Penal Internacional* (2009), pages 357 *et seq.*

<sup>1629</sup> ICTY, *Prosecutor v. Tadić, Case No. IT-94-1-AR72*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (“*Tadić* Interlocutory Appeal Decision”).

<sup>1630</sup> Common Article 3 to the Geneva Conventions of 12 August 1949 provides: “In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting parties, [...]”; Article 1(1) of Additional Protocol II reads: “This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” Article 1(2) of Additional Protocol II provides as follows: “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of

535. Relying on Additional Protocol II to the Geneva Conventions and the ICTY *Tadić* Interlocutory Appeal Decision cited above, Pre-Trial Chamber I determined that “the involvement of armed groups with some degree of organisation and the ability to plan and carry out sustained military operations would allow for the conflict to be characterised as an armed conflict not of an international character.”<sup>1631</sup>

536. The Trial Chamber agrees with this approach, and notes that Article 8(2)(f) of the Statute only requires the existence of a “protracted” conflict between “organised armed groups”. It does not include the requirement in Additional Protocol II that the armed groups need to “exercise such control over a part of [the] territory as to enable them to carry out sustained and concerted military operations”.<sup>1632</sup> It is therefore unnecessary for the prosecution to establish that the relevant armed groups exercised control over part of the territory of the State.<sup>1633</sup> Furthermore, Article 8(2)(f) does not incorporate the requirement that the organised armed groups were “under responsible command”, as set out in Article 1(1) of Additional Protocol II.<sup>1634</sup> Instead, the “organized armed groups” must have a sufficient degree of organisation, in order to enable them to carry out protracted armed

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a similar nature, as not being armed conflicts.” Whereas Common Article 2 is limited to international armed conflicts between signatories, Common Article 3 affords minimal protection to organised armed groups involved in any conflict not of an international character. See Gerhard Werle, *Principles of International Criminal Law* (2009), page 366 at marginal note 981; Andrew J. Carswell, “Classifying the conflict: a soldier’s dilemma”, 91 *International Review of the Red Cross* (2009), page 150; Gary D. Solis, *The Law of Armed Conflict*, (2010), page 157.

<sup>1631</sup> ICC-01/04-01/06-803-tEN, para. 233. It is to be noted that the extract of the Pre-Trial Chamber’s reasoning relied upon by the defence in its submissions (see para. 515) does not appear to reflect the ultimate conclusion of the Pre-Trial Chamber, set out in para. 233 of the Decision on the confirmation of charges.

<sup>1632</sup> Additional Protocol II, Article 1(1).

<sup>1633</sup> Pre-Trial Chamber II came to the same conclusion in ICC-01/05-01/08-424, para. 236.

<sup>1634</sup> This appears to be the approach adopted by Pre-Trial Chamber I, ICC-01/04-01/06-803-tEN, paras 232 - 233; Pre-Trial Chamber II adopted a different interpretation, ICC-01/05-01/08-424, para. 234.

violence.<sup>1635</sup>

537. When deciding if a body was an organised armed group (for the purpose of determining whether an armed conflict was not of an international character), the following non-exhaustive list of factors is potentially relevant: the force or group's internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, are available; the force or group's ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement.<sup>1636</sup> None of these factors are individually determinative. The test, along with these criteria, should be applied flexibly when the Chamber is deciding whether a body was an organised armed group, given the limited requirement in Article 8(2)(f) of the Statute that the armed group was "organized".

538. The intensity of the conflict is relevant for the purpose of determining whether an armed conflict that is not of an international character existed,<sup>1637</sup> because under Article 8(2)(f) the violence must be more than sporadic or isolated. The ICTY has held that the intensity of the conflict should be "used solely as a way to distinguish an armed

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<sup>1635</sup> ICC-01/04-01/06-803-tEN, para. 234. The inclusion of the additional requirements set out in Additional Protocol II that the armed groups are under responsible command and exercise control over a part of the territory appears to have been deliberately rejected by the drafters of the Rome Statute. See Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes* (2008), page 502 at marginal note 351; William A. Schabas, *The International Criminal Court – A Commentary on the Rome Statute* (2010), pages 204-205; Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999), pages 120 – 121; International Committee of the Red Cross ("ICRC"), *Concerns on Threshold for War Crimes Committed in Non-international Armed Conflicts as Contained in the Bureau Proposal in Document A/CONF.183/C.1/L.59 and Corr. 1*, UN Doc. A/CONF.183/INF/11.

<sup>1636</sup> ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgment, 30 November 2005, para 90; ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Trial Chamber, Judgment, 3 April 2008, para. 60 ; ICTY, *Prosecutor v. Bošković*, Case No. IT-04-82-T, Trial Chamber, Judgment, 10 July 2008, paras 199 – 203.

<sup>1637</sup> The requirement set out in Article 8(2)(f) is also a jurisdictional requirement because if the necessary level of intensity is not reached, the alleged crimes do not fall within the jurisdiction of the Court; see ICC-01/05-01/08-424, para. 225.

conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.”<sup>1638</sup> In order to assess the intensity of a potential conflict, the ICTY has indicated a Chamber should take into account, *inter alia*, “the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, if so, whether any resolutions on the matter have been passed.”<sup>1639</sup> The Chamber is of the view that this is an appropriate approach.

*The distinction between international and non-international armed conflicts*

539. It is to be observed at the outset that some academics,<sup>1640</sup> practitioners,<sup>1641</sup> and a line of jurisprudence from the *ad hoc* tribunals<sup>1642</sup>

<sup>1638</sup> ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Trial Chamber, Public Judgment with Confidential Annex – Volume I of II, 23 February 2011, para. 1522.

<sup>1639</sup> ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Trial Chamber, Judgment, 27 September 2007, para. 407.

<sup>1640</sup> James Stewart, “Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict”, 85 *International Review of the Red Cross* (2003); Dietrich Schindler, “The Different Types of Armed conflicts according to the Geneva Conventions and Protocols”, 163 *Collected Courses of the Hague Academy of International Law* (1979-II); W. Michael Reisman and James Silk, “Which Law Applies to the Afghan Conflict?”, 82(3) *American Journal of International Law* (1988); Hans Pieter Gasser, “Internationalized Non-international armed conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon”, 33 *Auckland University Law Review* (1983), page 479; W. Michael Reisman, “Application of Humanitarian Law in non-international armed conflicts: Remarks by W. Michael Reisman”, 85 *Proceedings of the Annual Meeting (American Society of International Law)* (1991); Robert Cryer, *An Introduction to International Criminal Law and Procedure* (2010), page 586.

<sup>1641</sup> In 1947, the ICRC proposed that a paragraph be added to Article 2 of the draft Geneva Conventions. This paragraph stated that “[i]n all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries.” Although this provision was not adopted, it demonstrates that concerns about the distinction between international and non-international armed conflicts existed early on: see Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary - Volume III: Geneva Convention relative to the Treatment of Prisoners of War* (2002), page 31. More recently, a study undertaken under the auspices of the ICRC makes reference to a large body of customary rules, the majority of which are equally applicable

have questioned the usefulness of the distinction between international and non-international armed conflicts, particularly in light of their changing nature. In the view of the Chamber, for the purposes of the present trial the international/non-international distinction is not only an established part of the international law of armed conflict, but more importantly it is enshrined in the relevant statutory provisions of the Rome Statute framework, which under Article 21 must be applied. The Chamber does not have the power to reformulate the Court's statutory framework.

540. The Appeals Chamber of the ICTY has recognised that, depending on the particular actors involved, conflicts taking place on a single territory at the same time may be of a different nature.<sup>1643</sup> The Chamber endorses this view and accepts that international and non-international conflicts may coexist.<sup>1644</sup>

#### *International armed conflict*

541. The Rome Statute framework does not define an "international

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regardless of the classification of the relevant armed conflict: see Jean-Marie Henckaerts, "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict", 87 *International Review of the Red Cross* (2005), pages 198 – 212.

<sup>1642</sup> *Tadić* Interlocutory Appeal Decision, paras 96 – 98 and para. 119. The Chamber addressed the emerging issue of a blurred legal differentiation between international and non-international armed conflicts. The Chamber indicated that "it is only natural that the aforementioned dichotomy should gradually lose its weight."

<sup>1643</sup> *Tadić* Interlocutory Appeal Decision, paras 72-77; Otto Kimminich, *Schutz der Menschen in bewaffneten Konflikten, Zur Fortentwicklung des humanitären Völkerrechts* (1979), page 126 *et seq*; Gerhard Werle, *Principles of International Criminal Law* (2009), page 372 at marginal note 997.

<sup>1644</sup> ICTY, *Prosecutor v. Tadić, Case No. IT-94-I-A*, Appeals Chamber, Appeals Judgment, 15 July 1999 ("*Tadić* Appeal Judgment"), para. 84. The International Court of Justice ("ICJ") also acknowledged the principle of coexistence in the *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, Judgment of 27 June 1986, para. 219: "The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts. Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict".

armed conflict". Relying on Common Article 2 of the Geneva Conventions, the International Committee of the Red Cross ("ICRC") Commentary thereto, and the ICTY *Tadić* Appeals Judgment, Pre-Trial Chamber I determined that an armed conflict is international:

if it takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance. In addition an internal armed conflict that breaks out on the territory of a State may become international – or depending upon the circumstances, be international in character alongside an internal armed conflict – if (i) another State intervenes in that conflict through its troops (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).<sup>1645</sup>

It is widely accepted that when a State enters into conflict with a non-governmental armed group located in the territory of a neighbouring State and the armed group is acting under the control of its own State, "the fighting falls within the definition of an international armed conflict between the two States".<sup>1646</sup> However, if the armed group is not acting on behalf of a government, in the absence of two States opposing each other, there is no international armed conflict.<sup>1647</sup> Pre-Trial Chamber II, when considering this issue, concluded that "an international armed conflict exists in case of armed hostilities between States through their respective armed forces or other actors acting on

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<sup>1645</sup> ICC-01/04-01/06-803-tEN, para. 209. See also ICC-01/05-01/08-424, paras 220-223. See *Tadić* Interlocutory Appeal Decision, para. 70 (cited above). See also ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, para. 183 and ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 122.

<sup>1646</sup> Sylvain Vité, "Typology of armed conflicts in international humanitarian law : legal concepts and actual situations", 91 International Review of the Red Cross (2009), pages 70 – 71 and 90; see also *Tadić* Appeal Judgment, paras 84, 90, 131, and 137 – 145; Gary D. Solis, *The Law of Armed Conflict* (2010), pages 154 – 155; Jelena Pejić, "Status of Armed Conflicts" in Elizabeth Wilmshurst (ed.) *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007), pages 92 – 93.

<sup>1647</sup> Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary – Volume I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2002), page 32 ("Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2 [...]"); Sylvain Vité, "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations", 91 International Review of the Red Cross (2009), pages 70 – 71; Jelena Pejić, "Status of Armed Conflicts", in Elizabeth Wilmshurst (ed.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007), pages 92 – 93.

behalf of the State.”<sup>1648</sup> As regards the necessary degree of control of another State over an armed group acting on its behalf, the Trial Chamber has concluded that the “overall control” test is the correct approach. This will determine whether an armed conflict not of an international character may have become internationalised due to the involvement of armed forces acting on behalf of another State. A State may exercise the required degree of control when it “*has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.*”<sup>1649</sup> Pre-Trial Chamber I adopted this approach.<sup>1650</sup>

542. Moreover, footnote 34 of the Elements of Crimes stipulates that the term “international armed conflict” includes a “military occupation”, for all of the crimes coming within Article 8(2)(a) of the Statute. Pre-Trial Chamber I held that a “territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.”<sup>1651</sup> The Chamber agrees with

<sup>1648</sup> ICC-01/05-01/08-424, para. 223.

<sup>1649</sup> *Tadić* Appeal Judgment, para. 137 (emphasis in the original); see also: “[C]ontrol by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training).” (*ibid.*, para. 137, emphasis in the original). See also, ICTY, *Prosecutor v. Aleksovski, Case No. IT-95-14/1-A*, Appeals Chamber, Appeals Judgment, 24 March 2000, paras 131 - 134; ICTY, *Prosecutor v. Delalić et al., Case No. IT-96-21-A*, Appeals Chamber, Appeals Judgment, 20 February 2001, para. 26; ICTY, *Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-A*, Appeals Chamber, Appeals Judgment, 17 December 2004, paras 306 – 307.

<sup>1650</sup> ICC-01/04-01/06-803-tEN, para. 211.

<sup>1651</sup> ICC-01/04-01/06-803-tEN, para. 212, relying on ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgement, 19 December 2005, I.C.J. Reports 2005 and Articles 42 and 43 of Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on land, 18 October 1907. Article 42 reads: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” Article 43 reads: “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” See also ICC-01/04-01/06-803-tEN, para. 205.



this definition. The Chamber notes the reference in Article 8(2)(b) to “the established framework of international law”, which applies equally to the crimes set out in Article 8(2)(b). The crime of “conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities” as set out in Article 8(2)(b)(xxvi) of the Statute falls within “the established framework of international law” as one of the “other serious violations of the laws and customs applicable in international armed conflict”. The prohibition is based on Article 77(2) of Additional Protocol I to the Geneva Conventions of 12 August 1949.<sup>1652</sup> This Protocol applies to armed conflicts between States, as indicated by Common Article 2 of the Geneva Conventions.<sup>1653</sup> It follows that for the purposes of Article 8(2)(b)(xxvi) of the Statute, “international armed conflict” includes a military occupation.

## 2. The facts

543. The evidence in the case demonstrates beyond reasonable doubt that during the entirety of the period covered by the charges there were a number of simultaneous armed conflicts in Ituri and in surrounding areas within the DRC, involving various different groups. Some of these armed conflicts, which included the UPC, involved protracted violence. The military wing of the UPC, known as the

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<sup>1652</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (“Additional Protocol I”); see also Articles 38(2) and (3) of the UN Convention on the Rights of the Child; Knut Dörmann, *Elements of War crimes under the Rome Statute of the International Criminal Court, Sources and Commentary* (2003), pages 376-377; Roy S. Lee (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), page 205; William A. Schabas, *The International Criminal Court – A Commentary on the Rome Statute* (2010), page 252; Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes* (2008), pages 467-468. See paras 600-628 of this Judgment.

<sup>1653</sup> Article 1(3) of Additional Protocol I reads: “This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.”

FPLC, was established by September 2002.<sup>1654</sup> As already highlighted in the Chapter on the Background to the Conflict in Ituri (see above), from the beginning of September 2002 at the latest, the UPC/FPLC as a political and military organisation was in control of Bunia.<sup>1655</sup> The takeover of Bunia by the UPC/FPLC marked the turning point in the Ituri conflict.<sup>1656</sup> From then onwards, the “rapidity of the alliance switches”, the “multi-directionality” of the fighting and the nature of the violence against the civilian population reached unprecedented extremes.<sup>1657</sup> The UPC/FPLC was organised with a leadership structure<sup>1658</sup> that was capable of training troops<sup>1659</sup> as well as imposing discipline,<sup>1660</sup> and it carried out sustained military operations in Ituri during the relevant timeframe.<sup>1661</sup>

544. In addition to the FPLC, there were a number of significant political and military groups in operation in Ituri in 2002. The RCD-ML, whose army was the APC, was defeated in August 2002 in Bunia and thereafter it supported the Lendu militias and engaged in fighting against the UPC/FPLC.<sup>1662</sup> As set out above, the Lendu formed a group called the FNI and the Ngiti created the FRPI. Other significant militias

<sup>1654</sup> See T-188-CONF-ENG, page 91, lines 20 – 21, page 94, lines 3 – 11 and T-189-CONF-ENG, page 4, line 10 to page 5, line 16 (P-0016). See discussion of the credibility of P-0016 in Section X(B)(2).

<sup>1655</sup> T-179-Red-ENG, page 76, lines 5 – 17 (P-0014); T-342-ENG, page 5, line 22 to page 6, line 1 and page 9, lines 3 – 5 and T-343-Red-ENG, page 3, lines 16 – 24 (D-0019); T-348-ENG, page 44, lines 10 – 13 (D-0007); T-346-ENG, page 74, lines 6 – 12 (D-0011). See discussion of the credibility of D-0011 and D-0019 in Section X(B)(2).

<sup>1656</sup> The Ituri Conflict: A background study, prepared for the ICC by P-0360, EVD-OTP-00403 at DRC-OTP-0203-0106. Overall, the Chamber has relied on parts of the evidence of Mr Prunier which are not challenged by the defence (see para. 517). Where the Chamber relied on other parts of his evidence, it is satisfied that they are reliable or consistent with other evidence in the case. See also discussion of Mr Prunier’s credibility in the “Factual overview” section above, paras 68-69.

<sup>1657</sup> EVD-OTP-00403 at DRC-OTP-0203-0106 – DRC-OTP-0203-0108.

<sup>1658</sup> T-154-Red-ENG, page 21, lines 7 – 20 and page 23, line 24 to page 24, line 19 (P-0017). See discussion of the credibility of P-0017 in Section X(B)(2).

<sup>1659</sup> See Section X(B) containing factual findings on conscription, enlistment and use.

<sup>1660</sup> See Section X(B) containing factual findings on conscription, enlistment and use.

<sup>1661</sup> See paras 547 and 550.

<sup>1662</sup> Special Report on the events in Ituri, January 2002 – December 2003, S/2004/573, EVD-OTP-00623 at DRC-0074-0470.

at the time included, *inter alia*, PUSIC, headed by Chief Kahwa Panga Mandro after his departure from the UPC/FPLC near the end of 2002, and Jérôme Kakwavu's FAPC.<sup>1663</sup>

545. On the basis of the evidence presented in this case, it has been established that the APC, the armed wing of the RCD-ML,<sup>1664</sup> was an organised armed group capable of carrying out prolonged hostilities within the period of the charges.<sup>1665</sup> During this time, the RCD-ML/APC also supported various Lendu armed militias, including the FRPI, in combat against the UPC/FPLC.<sup>1666</sup>

546. From March 2003, at the latest, the FRPI was an organised armed group as it had a sufficient leadership and command structure, participated in the Ituri Pacification Commission, carried out basic training of soldiers and engaged in prolonged hostilities, including the battles in Bogoro and Bunia (between March and May 2003).<sup>1667</sup>

547. Extensive evidence has been given during the trial concerning the UPC/FPLC's involvement in the fighting involving rebel militias (namely the RCD-ML and Lendu militias, including the FRPI) that took place in Ituri between September 2002 and August 2003.<sup>1668</sup> The

<sup>1663</sup> EVD-OTP-00623 at DRC-OTP-0074-0468 – 0469 (D-0019); T-340-ENG, page 48, line 21 to page 51, line 15 (D-0037); T-347-Red-ENG, page 16, lines 16 – 20 (D-0011) and T-162-Red-ENG, page 61, lines 9 – 11 (P-0002). See discussion of the credibility of P-0002 and D-0037 in Section X(B)(2).

<sup>1664</sup> EVD-OTP-00405, page 16 and T-168-Red-ENG, page 34, line 2 to page 35, line 2 (P-0012). "RCD-ML/APC" is used herein when referring to both the APC and the RCD-ML. See discussion of the credibility of P-0012 in Section X(B)(2).

<sup>1665</sup> The RCD-ML and the APC had an organised leadership and command structure and participated in the Inter-Congolese negotiations, see EVD-OTP-00623 at DRC-OTP-0074-0429 to DRC-OTP-0074-0430, DRC-OTP-0074-0451 and DRC-OTP-0074-0470; T-188-Red2-ENG, page 91, line 22 to page 92, line 11 (P-0016).

<sup>1666</sup> EVD-OTP-00623 at DRC-OTP-0074-070 and DRC-OTP-0074-0480 - 0482; T-348-ENG, page 42, lines 4 – 13 (D-0007); T-125-Red-ENG, page 81, lines 12 – 14 and T-126-Red-ENG, page 16, lines 14 – 23 (P-0041). See discussion of the credibility of P-0041 in Section X(B)(2).

<sup>1667</sup> EVD-OTP-00623 at DRC-OTP-0074-0434 and DRC-OTP-0074-0470; T-162-Red-ENG, page 78, lines 7 – 22 and T-164-Red-ENG, page 13, lines 6 – 16 (P-0002); EVD-OTP-0737 at DRC-OTP-0152-0263; T-156-ENG, page 74, lines 16 – 22 (P-0360).

<sup>1668</sup> EVD-OTP-00623 at DRC-OTP-0074-0436 to DRC-OTP-0074-0437; T-182-CONF-ENG, page 8, line 15 to page 9, line 11 (P-0014). See discussion of the credibility of P-0014 in Section X(B)(2).

Chamber heard evidence that the UPC/FPLC, assisted by the UPDF, fought the RCD-ML in Bunia in August 2002.<sup>1669</sup> In November 2002, the UPC/FPLC fought Lendu combatants and the APC in Mongbwalu.<sup>1670</sup> The UPC/FPLC fought the APC and Lendu militias in Bogoro (March 2003),<sup>1671</sup> and it was in conflict with Lendu militias in Lipri, Bambu and Kobu (in February and March 2003),<sup>1672</sup> Mandro (March 2003),<sup>1673</sup> and Mahagi,<sup>1674</sup> among other areas. In early March 2003, fighting between the UPC/FPLC and the UPDF and several Lendu militias, including the FRPI, ended in the withdrawal of the UPC/FPLC from Bunia.<sup>1675</sup> However, in May 2003 the UPC/FPLC army returned to Bunia where it clashed with Lendu militias, again including the FRPI, resulting in a number of casualties.<sup>1676</sup>

548. Although Ugandan forces withdrew from Bunia in May 2003, the evidence indicates that there was no “peaceful settlement” prior to 13 August 2003. Documentary evidence establishes that in June 2003, the Hema village of Katoto was attacked twice by Lendu militia members,

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<sup>1669</sup> See paras 90 and 1084-1114. However, several defence witnesses denied that UPC/FPLC soldiers were responsible for “chasing” the RCD-ML out of Bunia.

<sup>1670</sup> EVD-OTP-00623 at DRC-OTP-0074-0451 to DRC-OTP-0074-0452; T-154-Red2-ENG, page 22, line 15 to page 23, line 14, page 25, lines 15 – 16 and page 79, lines 19 – 25; T-157-Red-ENG, page 71, lines 14 to page 73, line 20 (P-0017); T-174-Red2-ENG, page 50, line 9 to page 51, line 24 (P-0055); EVD-OTP-00623 at DRC-OTP-0074-0451 to DRC-OTP-0074-0452. See discussion of the credibility of P-0055 in Section X(B)(2).

<sup>1671</sup> EVD-OTP-00623 at DRC-OTP-0074-0443 to DRC-OTP-0074-0444.

<sup>1672</sup> EVD-OTP-00623 at DRC-OTP-0074-0444 and DRC-OTP-0074-00445; T-157-Red-ENG, page 90, lines 5 – 11 and page 96, lines 3 to page 97, line 22 (P-0017); EVD-OTP-00491, page 25, line 12 to page 27, lines 10 – 25 (transcript of testimony of P-0046 during the hearing on the Confirmation of the Charges). See discussion of the credibility of P-0046 in Section X(B)(2).

<sup>1673</sup> EVD-OTP-00623 at DRC-OTP-0074-0445; T-190-Red-ENG, page 58, line 25 to page 59, line 6 (P-0016).

<sup>1674</sup> T-348-ENG, page 42, lines 2 – 13 (D-0007) and EVD-OTP-00623 at DRC-OTP-0074-0433, DRC-OTP-0074-0437, and DRC-OTP-0074-0479 – 0480. See discussion of the credibility of D-0007 in Section X(B)(2).

<sup>1675</sup> EVD-OTP-00623 at DRC-0074-0445 to DRC-0074-0446; T-348-ENG, page 41, lines 14 - 18 and EVD-OTP-00403 at DRC-OTP-0203-0109 to DRC-OTP-0203-0110; T-178-Red2-ENG, page 18, line 13 to page 19, line 1 (P-0055) and T-160-Red2-ENG, page 70, lines 17 - 21 (testimony of P-0002).

<sup>1676</sup> EVD-OTP-00623 at DRC-OTP-0074-0446 to DRC-OTP-0074-0447; T-164-Red2-ENG, page 12 lines 3 – 20 and T-164-Red2-FRA, page 12, lines 12 – 15 (testimony of P-0002); T-168-CONF-ENG, page 74, line 25 to page 75, line 8 and page 76, lines 23 – 25 (P-0012).

resulting in many casualties.<sup>1677</sup> In addition, Lendu militia and APC soldiers attacked Tchomia in July 2003, killing up to eleven civilians.<sup>1678</sup> Scores more civilians were killed in July 2003, when Lendu combatants carried out attacks on Fataki.<sup>1679</sup> During the summer of 2003, the UN Security Council authorised the deployment to Ituri of a European Union led Interim Emergency Multinational Force (Operation Artemis) in order to restore security in the area, and on 28 July 2003 MONUC was given a Chapter VII mandate authorising it to take the necessary measures to protect civilians.<sup>1680</sup> Despite these and other efforts, the evidence clearly indicates that during the period between the end of May 2003 and 13 August 2003, a peaceful settlement had not been reached in Ituri.

549. Although the defence submits that between September 2002 and late May 2003 there was an international armed conflict taking place in Ituri, it is argued that there is insufficient evidence to establish the existence of any armed conflict between late May 2003 and 13 August 2003.<sup>1681</sup>

550. However, the Chamber finds that the evidence on this issue leaves no reasonable doubt that the UPC/FPLC, as an armed force or group, participated in protracted hostilities and was associated with an armed conflict throughout the relevant timeframe of the charges.

551. In situations where conflicts of a different nature take place on a

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<sup>1677</sup> EVD-OTP-00623 at DRC-OTP-0074-0449.

<sup>1678</sup> EVD-OTP-00623 at DRC-OTP-0074-0448 – 0449 and DRC-OTP-00482.

<sup>1679</sup> The FAPC were also reportedly involved in one of the attacks. EVD-OTP-00623 at DRC-OTP-0074-0449 - DRC-OTP-0074-0450 and Fourteenth report of the Secretary General on the United Nations Organization Mission in the Democratic Republic of the Congo, EVD-OTP-00625 at DRC-OTP-0074-0215 to DRC-OTP-0074-0216.

<sup>1680</sup> EVD-OTP-00623 at DRC-OTP-0074-0482 and EVD-OTP-00625 at DRC-OTP-0074-0215 to DRC-OTP-0074-0217.

<sup>1681</sup> ICC-01/04-01/06-2773-Red-tENG, paras 668-674 and 681-699.

single territory, it is necessary to consider whether the criminal acts under consideration were committed as part of an international or a non-international conflict.<sup>1682</sup> In these circumstances, the question arises as to whether the military involvement by one or more of the DRC's neighbours on its territory internationalised the relevant conflict or conflicts.

552. In accordance with the test set out above, to determine whether the UPC/FPLC was a party to an international armed conflict in Ituri, the relevant inquiry is whether between September 2002 and 13 August 2003, the UPC/FPLC, the APC and the FRPI were used as agents or "proxies" for fighting between two or more states (namely Uganda, Rwanda, or the DRC).

553. As to the role of the DRC, there is some evidence that Kinshasa sent trainers and weapons to the APC.<sup>1683</sup> The UN Special Report on the events in Ituri contains allegations that in the last three months of 2002, "some military supplies may have also been sent directly to the Lendu militia" in Rethy, within the Djugu territory.<sup>1684</sup> However, the limited support provided by the Congolese government to the RCD-ML and potentially to Lendu militias during this time is insufficient to establish the DRC government's overall control over these armed groups. Critically, there is no sustainable suggestion that the DRC had a role in organising, coordinating or planning the military actions of the UPC/FPLC during the period relevant to the charges.

554. Regarding the role of Rwanda, there is ample evidence it provided

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<sup>1682</sup> See Gerhard Werle, *Principles of International Criminal Law* (2009), page 372 at marginal note 998.

<sup>1683</sup> T-156-ENG, page 67, line 6 to page 68, line 14 and T-156-FRA page 64, lines 21 – 25 (P-0360) and EVD-OTP-00623 at DRC-OTP-0074-00435.

<sup>1684</sup> EVD-OTP-00623 at DRC-OTP-0074-00435.

support to the UPC/FPLC. There is evidence that Rwanda supplied uniforms<sup>1685</sup> and weapons<sup>1686</sup> to the UPC/FPLC, including dropping weapons by air to Mandro,<sup>1687</sup> and it provided training to UPC/FPLC soldiers, in the DRC and in Rwanda.<sup>1688</sup> P-0017, a former UPC/FPLC member,<sup>1689</sup> testified that he went to Rwanda with a group of soldiers to receive heavy-weapons training in late 2002.<sup>1690</sup> Around January 2003, the UPC/FPLC reportedly signed an agreement with the RCD-G, which was supported by Kigali.<sup>1691</sup> Documentary evidence establishes that after the UPDF expelled the UPC/FPLC from Bunia in March 2003, Thomas Lubanga and others were evacuated to Rwanda.<sup>1692</sup>

555. P-0055 testified that he had been told, with regard to the UPC/FPLC's objective of taking military control of the town of Mongbwalu, "they had received orders from Rwanda" and Rwanda had indicated "if they took the town of Mongbwalu it would be a good thing and they were going to receive everything they needed. And so the objective of taking Mongbwalu was to obey an order issued by Rwanda, and in order to receive assistance from Rwanda as a

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<sup>1685</sup> T-181-Red2-ENG, page 88, line 21 to page 89, line 2 (P-0014). P-0055 testified that Rwanda supplied uniforms to the UPC/FPLC whilst Uganda supplied boots: T-175-Red2-ENG, page 64, line 25 to page 65, line 15 (testimony of P-0055).

<sup>1686</sup> T-175-Red2-ENG, page 66, lines 6 – 19 (P-0055) and T-181-Red2-ENG, page 88, line 21 to page 89, line 4 (P-0014).

<sup>1687</sup> EVD-OTP-00623 at DRC-OTP-0074-0435; T-181-Red2-ENG, page 90, lines 3 – 19 (P-0014). P-0012 testified that Rwanda supplied Mr Lubanga with weapons and Mr Lubanga then passed some weapons to the Lendu: T-168-Red2-ENG, page 60, line 10 to page 61, line 11 and page 64, line 7 to page 65, line 15.

<sup>1688</sup> Thirteenth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, EVD-OTP-00624 at DRC-OTP-0131-0047; EVD-OTP-00623 at DRC-OTP-0074-0434; T-181-Red2-ENG, page 90, lines 16– 23; T-182-CONF-ENG, page 13, lines 11 – 16; T-184-Red-ENG, page 26, lines 1 – 5 (P-0014) and T-209-ENG, page 77, line 4 to page 78, line 17 (P-0116). See discussion of the credibility of P-0116 in paras 1031 and 1036.

<sup>1689</sup> T-154-Red-ENG, page 17, line 11 to page 18, line 9.

<sup>1690</sup> T-154-Red-ENG, page 40, lines 4 – 12 and page 60, line 7 to page 67, line 2.

<sup>1691</sup> T-168-Red-ENG, page 64, lines 13 – 18 (P-0002). See also interview with Chief Kahwa Panga Mandro, video EVD-OTP-00412 at 00:12:45 ("Everyone is aware of this. This is why Mr. Lubanga, when he realised that he was losing, created alliances with RCD-Goma. And you know that RCD-Goma is Rwanda") introduced during testimony of P-0002, T-162-Red-ENG, page 55, lines 14 – 16.

<sup>1692</sup> EVD-OTP-00623 at DRC-OTP-0074-0434 – DRC-OTP-0074-0435.

result.”<sup>1693</sup> As discussed below, there is no corroboration of this statement.

556. Furthermore, there is no evidence that Rwanda supported either the APC or the FRPI. Therefore, it is unnecessary for the Chamber to consider this issue further.

557. There is considerable material regarding the presence of Ugandan troops in Ituri between September 2002 and 13 August 2003, although the overall number involved was decreasing during the period covered by the charges. For instance, Gérard Prunier (P-0360) indicated that although the UPDF once deployed 13,000 troops in the DRC, at the time the all-inclusive peace agreement was signed on 17 December 2002, 10,000 had been withdrawn.<sup>1694</sup> Similarly, reports from the UN set out that between 10 September 2002 and 18 October 2002, 2,287 UPDF troops withdrew from Ituri, leaving a reinforced battalion in Bunia and troops patrolling the Ruwenzori Mountains.<sup>1695</sup> Notwithstanding that reduction, there was, on occasion, substantial activity on the part of Ugandan forces: for instance, the UPDF was in occupation of areas in Bunia, such as the airport, for considerable periods of time (in the latter case, from 1 September 2002 until 6 May 2003).<sup>1696</sup>

558. Additionally, there is evidence of Ugandan support for UPC/FPLC

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<sup>1693</sup> T-178-CONF-ENG, page 10, lines 8 – 18. See discussion of the credibility of P-0055 in Section X(B)(2).

<sup>1694</sup> The influence of Rwanda and Uganda inside the DRC in general and the Ituri in particular during the “semi post war period”, EVD-OTP-00405 at DRC-OTP-0203-0017- 0018.

<sup>1695</sup> Twelfth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, EVD-OTP-00620 at DRC-OTP-0131-0390.

<sup>1696</sup> T-162-Red-ENG, page 53, lines 11 – 15; T-164-Red2, page 12, lines 3 – 20 (P-0002); T-154-Red-ENG, page 67, line 23 to page 68, line 13 (P-0017); T-174-Red2, page 25, lines 17 – 19 (P-0055).



troops in the form of training and providing weapons.<sup>1697</sup>

559. Documentary evidence demonstrates the FRPI was supported by individual UPDF commanders, and the FRPI (and other militias) assisted in removing the UPC/FPLC from Bunia in March 2003.<sup>1698</sup>

560. Gérard Prunier (P-360) testified that the DRC, Uganda, and Rwanda fought through “proxies,”<sup>1699</sup> and at one point in his evidence, he asserted that a proxy war between Kinshasa and Uganda continued until the final departure of Ugandan troops (which he suggested was in 2004).<sup>1700</sup> However, as discussed above, the evidence in this case concerning the DRC’s role in the relevant conflict has essentially been limited to the way it provided support to the APC.<sup>1701</sup> As to Uganda’s involvement, according to Gérard Prunier (P-0360), the UPDF initially had supported “the Hemas against the Lendu” before switching sides and lending assistance to the Lendu.<sup>1702</sup> As to Uganda’s control over the FRPI and other militias, Mr Prunier (P-0360) testified that the Ugandans were “unable to control their agents on the ground”.<sup>1703</sup> In his report to the Chamber, Mr Prunier (P-0360) asserted “[a]fter August 2002 the UPDF obviously lost control of its proxies”.<sup>1704</sup> He also suggested that at some point Kampala may not even have had control of its own forces in the DRC.<sup>1705</sup>

561. During the period relevant to the charges (September 2002 to 13

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<sup>1697</sup> EVD-OTP-00623 at DRC-OTP-0074-0433 – DRC-OTP-0074-0434 (stating that Uganda was involved in the creation of the UPC/FPLC and helped to train and arm UPC/FPLC rebels but later turned against the UPC/FPLC and instead provided support to the FNI/FRPI).

<sup>1698</sup> EVD-OTP-00623 at DRC-0074-0434 and EVD-OTP-00403 at DRC-OTP-0203-0109 to DRC-OTP-0203-0110.

<sup>1699</sup> T-156-ENG, page 52, lines 11 – 16.

<sup>1700</sup> T-156-ENG, page 67, line 6 to page 68, line 21.

<sup>1701</sup> T-156-ENG, page 67, line 6 to page 68, line 14.

<sup>1702</sup> T-156-ENG, page 74, lines 2 – 9.

<sup>1703</sup> T-156-ENG, page 75, line 17.

<sup>1704</sup> EVD-OTP-00403 at DRC-OTP-0203-0115.

<sup>1705</sup> T-157-Red-ENG, page 42, line 11 to page 43, line 7.

August 2003), the UPC/FPLC was primarily engaged in conflict with the RCD-ML/APC (which received support from the DRC) and Lendu militias, including the FRPI (which were sometimes assisted by individual UPDF commanders),<sup>1706</sup> though the UPC/FPLC also fought against Ugandan forces, in particular in Bunia in March 2003. The Chamber has not heard any evidence that Uganda had a role in organising, coordinating or planning UPC/FPLC military operations. With regard to Rwanda, although P-0055 gave evidence that the UPC/FPLC wanted to take the town of Mongbwalu because it had been directed to do so by Rwanda,<sup>1707</sup> this statement has not been corroborated by other evidence and it is insufficient, taken alone or together with the other evidence above, to prove that Rwanda had overall control of the UPC/FPLC and the latter acted as its agent or proxy. Thus, there is insufficient evidence to establish (even on a *prima facie* basis) that either Rwanda or Uganda exercised overall control over the UPC/FPLC.

562. There is no evidence of direct intervention by Rwanda in Ituri during this time. Therefore, it is unnecessary for the Chamber to consider this issue further.

563. Similarly, although there is evidence of direct intervention on the part of Uganda, this intervention would only have internationalised the conflict between the two states concerned (*viz.* the DRC and Uganda). Since the conflict to which the UPC/FPLC was a party was not “a difference arising between two states”<sup>1708</sup> but rather protracted violence carried out by multiple non-state armed groups, it remained a

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<sup>1706</sup> EVD-OTP-00623 at DRC-OTP-0074-0434.

<sup>1707</sup> T-178-Red2-ENG, page 10, lines 8 – 18.

<sup>1708</sup> See para.541.

non-international conflict notwithstanding any concurrent international armed conflict between Uganda and the DRC.

564. As discussed above, there is evidence that during the relevant timeframe the UPDF occupied certain areas of Bunia, such as the airport. However, it is unnecessary to analyse whether territory came under the authority of the Ugandan forces, thereby amounting to a military occupation, because the relevant conflict or conflicts concern the UPC and other armed groups.<sup>1709</sup>

565. Focussing solely on the parties and the conflict relevant to the charges in this case, the Ugandan military occupation of Bunia airport does not change the legal nature of the conflict between the UPC/FPLC, RCD-ML/APC and FRPI rebel groups since this conflict, as analysed above, did not result in two states opposing each other, whether directly or indirectly, during the time period relevant to the charges. In any event, the existence of a possible conflict that was “international in character” between the DRC and Uganda does not affect the legal characterisation of the UPC/FPLC’s concurrent non-international armed conflict with the APC and FRPI militias, which formed part of the internal armed conflict between the rebel groups.

566. For these reasons and applying Regulation 55 of the Regulations of the Court, the Chamber changes the legal characterisation of the facts to the extent that the armed conflict relevant to the charges was non-international in character.

567. The Trial Chamber therefore finds that the armed conflict between the UPC/FPLC and other armed groups between September 2002 and

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<sup>1709</sup> See paras 543-544.

13 August 2003 was non-international in nature.

## X. CONSCRIPTION AND ENLISTMENT OF CHILDREN UNDER THE AGE OF 15 OR USING THEM TO PARTICIPATE ACTIVELY IN HOSTILITIES (ARTICLE 8(2)(e)(vii) OF THE STATUTE)

### A. THE LAW

568. Given the Chamber's conclusion that the UPC was engaged in a non-international armed conflict throughout the period of the charges,<sup>1710</sup> it is unnecessary to interpret or discuss Article 8(2)(b)(xxvi). Subject to one significant difference in wording (conscription or enlistment of children into "national armed forces" (Article 8(2)(b)(xxvi) of the Statute) as opposed to "armed forces or groups" (Article 8(2)(e)(vii) of the Statute), the elements of these two crimes are similar.<sup>1711</sup> Therefore, the extent to which the crimes of conscription, enlistment and use of children below the age of 15 under Article 8(2)(b)(xxvi) have previously been the subject of interpretation and consideration will be relevant to the Chamber's analysis of Article 8(2)(e)(vii).

569. Article 8(2)(e)(vii) of the Statute, the first treaty to include these offences as war crimes,<sup>1712</sup> provides:

2. [...]

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<sup>1710</sup> See paras 543-567.

<sup>1711</sup> See wording of the respective elements of crime for Article 8(2)(b)(xxvi) and 8(2)(e)(vii). See also Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary* (2003), page 471; Roy S. Lee (eds.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (2001), page 206; William Schabas, *The International Criminal Court - A Commentary on the Rome Statute* (2010), page 252.

<sup>1712</sup> See also Statute of the Special Court for Sierra Leone, Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, article 4(c), which reads identically.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

[...]

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

[...]

The corresponding Elements of Crimes read as follows:

The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities.

Such person or persons were under the age of 15 years.

The perpetrator knew or should have known that such person or persons were under the age of 15 years.

The conduct took place in the context of and was associated with an armed conflict not of an international character.

The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

570. The Chamber's conclusions on Elements 3 and 5 are addressed separately in the context of Section XI(A)(5).<sup>1713</sup> The Chamber has also discussed the definition of an "[organised] armed group" elsewhere in this judgment.<sup>1714</sup>

571. The Elements of Crimes require that the relevant "conduct took place in the context of and was associated with an armed conflict not of an international character".<sup>1715</sup> Given the plain and ordinary meaning of this provision, it is unnecessary to discuss its interpretation in detail: it is sufficient to show that there was a

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<sup>1713</sup> See paras 1014-1016.

<sup>1714</sup> See paras 536-537.

<sup>1715</sup> Elements of Crimes, Article 8(2)(b)(xxvi), para. 4.

connection between the conscription, enlistment or use of children under 15 and an armed conflict that was not international in character. The remaining Elements and the relevant applicable law are analysed below.

## 1. Submissions

### a) Prosecution submissions

#### *Enlistment and conscription*

572. The prosecution adopts the approach of the Pre-Trial Chamber, in defining conscription as forcible recruitment and enlistment as voluntary recruitment.<sup>1716</sup> It is argued that the prohibition against both forms of recruitment of children is “well established in customary international law”, and that a child’s consent does not constitute a valid defence.<sup>1717</sup> The prosecution refers to the Pre-Trial Chamber’s conclusion that these crimes are of a continuing nature, and only end when the children leave the relevant group or reach 15 years of age.<sup>1718</sup>

573. The prosecution notes the interpretation of the Appeals Chamber of the Special Court for Sierra Leone (“SCSL”) that enlistment (meaning in this context recruitment of a voluntary or compulsory nature) “[...] include[s] any conduct accepting the child as a part of the militia. Such conduct would include making him participate in military operations”.<sup>1719</sup>

<sup>1716</sup> ICC-01/04-01/06-2748-Red, para. 138, referring to ICC-01/04-01/06-803-tEN.

<sup>1717</sup> ICC-01/04-01/06-2748-Red, para. 138, referring to ICC-01/04-01/06-803-tEN, paras 242 – 248.

<sup>1718</sup> ICC-01/04-01/06-2748-Red, para. 138, referring to ICC-01/04-01/06-803-tEN, para. 248.

<sup>1719</sup> ICC-01/04-01/06-2748-Red, footnote 267; SCSL, *Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-A*, Appeals Chamber, Judgement, 28 May 2008 (“*CDF Appeal Judgment*”), para. 144.

*Use of children to participate actively in hostilities*

574. It is submitted by the prosecution that the term “child soldiers” includes all children under the age of 18 who participate in any circumstances in an armed group or force. Therefore, it is argued that this protection is not restricted to those children who actively fight, but rather it includes any child whose role is essential to the functioning of the armed group, for instance by working as a cook, porter, messenger or when individuals are used for sexual purposes, including by way of forced marriage.<sup>1720</sup>

575. The prosecution supports the Pre-Trial Chamber’s approach that “active participation in hostilities” includes direct participation in combat, as well as combat-related activities such as scouting, spying, sabotage and the use of children at military checkpoints or as decoys and couriers. In addition, it is argued the term includes the use of children to guard military objectives or to act as the bodyguards of military commanders.<sup>1721</sup> The prosecution accepts the Pre-Trial Chamber’s ruling that activities that are clearly unrelated to hostilities, such as delivering food to an airbase and working as domestic staff in the officers’ quarters, are excluded.<sup>1722</sup>

576. The prosecution, as part of its submissions, focussed on the approach of the SCSL when it decided that using children as bodyguards, allowing children (armed with cutlasses, knives and guns) to be present in active combat zones, using children to monitor checkpoints and leading “Kamajors”, or dancing in front of them as

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<sup>1720</sup> ICC-01/04-01/06-2748-Red, para. 139; referring to *inter alia*, UNICEF, *Cape Town Principles and Best Practices*, 27 - 30 April 1997 (“Cape Town Principles”) pages 2 – 3; UN, *Integrated Disarmament, Demobilization and Reintegration Standards*, 1 August 2006, pages 3 and 19.

<sup>1721</sup> ICC-01/04-01/06-2748-Red, para. 140; ICC-01/04-01/06-803-tEN, paras 261 and 263.

<sup>1722</sup> ICC-01/04-01/06-2748-Red, para. 140; ICC-01/04-01/06-803-tEN, para. 262.



they go into battle, constitute the use of children to participate actively in hostilities.<sup>1723</sup> The prosecution notes that the SCSL has decided that the “use” of children to participate actively in hostilities occurs when their lives are put at risk in combat and if they are present when crimes are committed, irrespective of their particular duties.<sup>1724</sup> The SCSL concluded that participation in hostilities includes any work or support that gives effect to, or helps maintain, the conflict, and the interpretation note added to the draft ICC Statute by the ICC Preparatory Commission in 2002 contributed, at least to an extent, to that interpretation.<sup>1725</sup>

577. The prosecution also rehearses the broad approach taken by the UN Special Representative of the Secretary General on Children and Armed Conflict, Ms Radhika Coomaraswamy (CHM-0003, “Ms Coomaraswamy” or “Special Representative”) on this issue, who suggested that children who were given roles as cooks, porters, nurses and translators, together with those who were sexually exploited, should be viewed as providing essential support and that the Court should ensure that girls are not excluded in this context.<sup>1726</sup>

578. In summary, the prosecution submits that the Chamber ought to adopt a broad interpretation of the expression “direct support function”, “in order to afford wider protection to child soldiers and to prevent any use of children in activities closely related to

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<sup>1723</sup> ICC-01/04-01/06-2748-Red, para. 141; referring to SCSL, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, Trial Chamber, Judgment, 2 August 2007 (“CDF Trial Judgment”), para. 688.

<sup>1724</sup> ICC-01/04-01/06-2748-Red, para. 141; referring to SCSL, *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Trial Chamber, Judgment, 20 June 2007 (“AFRC Trial Judgment”), para. 1267.

<sup>1725</sup> ICC-01/04-01/06-2748-Red, para. 141; referring to SCSL, *CDF Trial Judgment*, para. 193; SCSL, *AFRC Trial Judgment*, para. 736.

<sup>1726</sup> ICC-01/04-01/06-2748-Red, para. 142; referring to Written submissions of Ms Coomaraswamy, ICC-01/04-01/06-1229-AnxA (EVD-CHM-00007), paras 17 – 26.

hostilities".<sup>1727</sup>

## **b) Defence submissions**

### *Enlistment and conscription*

579. The defence observes that the Pre-Trial Chamber and the Rome Statute framework have left the concept of enlistment undefined.<sup>1728</sup> It is suggested that the broad approach taken in various international instruments, which were designed to afford children the widest possible protection, should not be imported into criminal proceedings before the ICC because tightly-defined criteria are to be applied.<sup>1729</sup> In this regard, the defence relies on Articles 22(1) and (2) of the Statute.<sup>1730</sup>

580. It is, therefore, argued that the various international instruments governing the protection of children in this area, particularly when terms such as “children associated with armed forces and groups” are used, include children who, on account of their role, should not be treated as soldiers for the purposes of the criminal law.<sup>1731</sup> The defence refers in this context to the Paris Principles.<sup>1732</sup>

581. Additionally, the defence relies on jurisprudence from the European Court of Human Rights to the effect that a criminal offence must be clearly defined in the relevant laws, and the criminal law should not be broadly interpreted to an accused’s detriment.<sup>1733</sup> Against this

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<sup>1727</sup> ICC-01/04-01/06-2748-Red, para. 143.

<sup>1728</sup> ICC-01/04-01/06-2773-Red-tENG, para. 32.

<sup>1729</sup> ICC-01/04-01/06-2773-Red-tENG, para. 33.

<sup>1730</sup> ICC-01/04-01/06-2773-Red-tENG, footnote 29.

<sup>1731</sup> ICC-01/04-01/06-2773-Red-tENG, para. 33.

<sup>1732</sup> The Paris Principles, The Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007 (“Paris Principles”) Principle 2.1; ICC-01/04-01/06-2773-Red-tENG, footnote 28.

<sup>1733</sup> ICC-01/04-01/06-2773-Red-tENG, footnote 29; European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Article 7(1); European Court of Human Rights (“ECHR”), *Veeber v. Estonia (No. 2)*, Application No. 45771/99, Judgment (Merits and Just Satisfaction) 21

background and in light of a possible lengthy sentence under Article 77 of the Statute, it is suggested that a stricter definition of the concept of military enlistment is necessary. The defence supports the following approach, namely the “[...] integration of a person as a soldier, within the context of an armed conflict, for the purposes of participating actively in the hostilities on behalf of the group”,<sup>1734</sup> and it relies on commentary from the ICRC for this suggested approach.<sup>1735</sup>

582. The critical distinction suggested by the defence is between those children who are integrated into an armed group as soldiers and who undertake military functions, and those who do not perform a military role and are not assigned any functions connected with the hostilities (although they are within the armed group).<sup>1736</sup> The latter, it is submitted, should not be treated as having been enlisted. The defence relies on the Dissenting Opinion of Justice Robertson at the SCSL:

[...] forcible recruitment is always wrong, but enlistment of child volunteers might be excused if they are accepted into the force only for non-combatant tasks, behind the front lines.<sup>1737</sup>

*Use of children to participate actively in hostilities*

583. The defence criticises the Pre-Trial Chamber’s interpretation of the concept of “actively participating in hostilities” because it only excludes those activities that are “clearly unrelated to hostilities”,

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January 2003, para. 31; ECHR, *Pessino v. France*, Application No. 40403/02, Judgment (Merits and Just Satisfaction), 10 October 2006, para. 35.

<sup>1734</sup> ICC-01/04-01/06-2773-Red-tENG, para. 34.

<sup>1735</sup> ICC-01/04-01/06-2773-Red-tENG, footnote 30; ICRC, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’, 90 International Review of the Red Cross (2008), page 1007.

<sup>1736</sup> ICC-01/04-01/06-2773-Red-tENG, paras 35 and 36; ICRC, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’ 90 International Review of the Red Cross (2008), pages 1007-1008.

<sup>1737</sup> ICC-01/04-01/06-2773-Red-tENG, para. 36 and footnote 32; SCSL, *The Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Dissenting Opinion of Justice Robertson, 31 May 2004 (“Dissenting Opinion of Justice Robertson”), para. 9.

whilst including couriers, guards at military sites and the bodyguards of military commanders.<sup>1738</sup> It is argued that this interpretation is excessively broad and violates Article 22(2) of the Statute.<sup>1739</sup>

584. The defence suggests, particularly by reference to the jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (“ICTR”), that the concept of “actively participating in hostilities” should be interpreted as being synonymous with “direct participation” which, it is argued, equates to “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”<sup>1740</sup>

585. The defence relies on the three cumulative criteria<sup>1741</sup> for defining direct participation in hostilities as identified by the ICRC, and it argues that those who act as bodyguards or guard military installations (or similar), do not fulfil these criteria and should not be treated as having participated actively in the hostilities.<sup>1742</sup>

586. The defence submits that the broad interpretation applied by the Pre-Trial Chamber diminishes the meaning of the adjective “active” and its utility for distinguishing between direct and indirect forms of participation in hostilities (the latter, it is suggested, is not proscribed

<sup>1738</sup> ICC-01/04-01/06-2773-Red-tENG, para. 38; see ICC-01/04-01/06-803-tEN, paras 261 – 263.

<sup>1739</sup> ICC-01/04-01/06-2773-Red-tENG, para. 39.

<sup>1740</sup> ICC-01/04-01/06-2773-Red-tENG, para 40; citing ICTR, *Prosecutor v. Rutaganda, Case No. ICTR-96-3-T*, Trial Chamber, Judgment, 6 December 1999, para. 99; reference is also made to ICTR, *Prosecutor v. Akayesu, Case No. ICTR-96-4-T*, Trial Chamber, Judgment, 2 September 1998, para. 629.

<sup>1741</sup> ICRC, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’, 90 *International Review of the Red Cross* (2008), pages 995 – 996: “1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)”; cited in ICC-01/04-01/06-2773-Red-tENG, para. 41.

<sup>1742</sup> ICC-01/04-01/06-2773-Red-tENG, paras 41 and 42.

by the Statute).<sup>1743</sup> In addition, it is argued that the Pre-Trial Chamber's interpretation does not allow for a distinction between child soldiers based on whether they participated in the hostilities.<sup>1744</sup> It is contended this is objectionable because the intention was to focus on children below the age of 15 who "actively participate in hostilities", so as to punish those who endanger them.<sup>1745</sup>

587. The defence suggests that a footnote to the draft Statute of the Court provides a wholly insufficient basis for extending the concept of "actively participating" to cover all activities other than fighting with an indirect link to the hostilities.<sup>1746</sup> By reference to the principle of legality, the defence argues that the decisions of the SCSL, delivered after the relevant events, should not be used in support of a broad interpretation and it suggests that at the time of the events which are the subject of the present charges, international criminal law only addressed the use of children to participate in military operations within fighting units.<sup>1747</sup>

### **c) Victims Submissions**

588. The legal representatives of the V01 group of victims support the approach of Pre-Trial Chamber I in the Confirmation Decision, namely that enlistment refers to voluntary recruitment and conscription relates to forcible recruitment. However, it is argued this distinction has no bearing as regards "minors", although it may be a factor in sentencing.<sup>1748</sup>

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<sup>1743</sup> ICC-01/04-01/06-2773-Red-tENG, para. 43.

<sup>1744</sup> ICC-01/04-01/06-2773-Red-tENG, para. 44.

<sup>1745</sup> ICC-01/04-01/06-2773-Red-tENG, para. 44.

<sup>1746</sup> ICC-01/04-01/06-2773-Red-tENG, para 45, referring to ICC-01/04-01/06-803-tEN, para. 261, footnote 339.

<sup>1747</sup> ICC-01/04-01/06-2773-Red-tENG, paras 46 and 47.

<sup>1748</sup> ICC-01/04-01/06-2746-Conf-Corr-tENG, para. 24.

589. It is submitted the term “child soldiers” is increasingly being replaced by the expression “children associated with armed forces or groups”<sup>1749</sup> and the prohibition against the recruitment of children under the age of fifteen years includes any participation by a child in a military organisation. Accordingly, the argument is advanced that the protection afforded by the Statute extends to young girls who are recruited by armed forces and are then used primarily as servants or sexual slaves. The legal representatives note, however, that these girls also often participate directly in military activities.<sup>1750</sup>

590. The V01 group highlights the difference between the concepts of “taking a direct part,” as used in Additional Protocol I to the Geneva Conventions, and “participating actively in hostilities”. The legal representatives argue that those who drafted the Statute deliberately chose the latter formulation so as to encompass a wider range of activities.<sup>1751</sup>

591. The legal representatives refer to the approach adopted by Pre-Trial Chamber I in the Decision on the confirmation of charges on the definition of “active participation”.<sup>1752</sup>

592. The victim group V02 endorses the approach of Pre-Trial Chamber I and the expert witness Ms Coomaraswamy (CHM-0003), to the effect that conscription is to be defined as forcible recruitment, whereas enlistment covers voluntary recruitment (although the child’s consent is not a valid defence).<sup>1753</sup> Furthermore, the legal representatives

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<sup>1749</sup> ICC-01/04-01/06-2746-Conf-Corr-tENG, para. 26; referring to EVD-CHM-00007, footnote 8.

<sup>1750</sup> ICC-01/04-01/06-2746-Conf-Corr-tENG, para. 26.

<sup>1751</sup> ICC-01/04-01/06-2746-Conf-Corr-tENG, para. 27; see Roy S. Lee (eds.), *The International Criminal Court: Elements of Crimes and Rules Of Procedure and Evidence* (2001), pages 205-207.

<sup>1752</sup> ICC-01/04-01/06-2746-Conf-Corr-tENG, para. 28, referring to ICC-01/04-01/06-803-tEN, paras 261 – 263.

<sup>1753</sup> ICC-01/04-01/06-2747-Red-tENG, paras 34 – 36.

support the approach of the expert witness that the Court must approach this distinction on a case-by-case basis, focussing on what was required of the children, together with the circumstances of their enrolment and the manner in which they were separated from their families and communities.<sup>1754</sup>

593. The legal representatives of the V02 group of victims submit that in order to establish active participation in hostilities, it is unnecessary to prove that the children were directly involved in combat, and that active participation in related activities (such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints, or to transport ammunition) is included.<sup>1755</sup>

594. The legal representatives rely on the SCSL's judgment in the case of the case of *The Prosecutor v. Brima, Kamara and Kanu* ("AFRC" case), in which the Court highlighted:

Using children to 'participate actively in the hostilities' encompasses putting their lives directly at risk in combat [...] [A]ny labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation.<sup>1756</sup>

595. The legal representatives note the approach of Pre-Trial Chamber I that using children to guard military sites, such as the quarters of the commanders, comes within these offences.<sup>1757</sup> However, it is also observed that Pre-Trial Chamber I excluded activities which are "manifestly without connection to the hostilities", for instance by making deliveries or providing domestic help at the married officers'

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<sup>1754</sup> ICC-01/04-01/06-2747-Red-tENG, paras 38 – 39.

<sup>1755</sup> ICC-01/04-01/06-2747-Red-tENG, para. 53.

<sup>1756</sup> ICC-01/04-01/06-2747-Red-tENG, para. 57; SCSL, *AFRC Trial Judgment*, paras 736 and 737.

<sup>1757</sup> ICC-01/04-01/06-2747-Red, para. 54.

quarters.<sup>1758</sup>

596. The OPCV adopts the position of Pre-Trial Chamber I that “conscripting” and “enlisting” are both forms of “recruitment”, and that the former is forcible whilst the latter is voluntary (albeit the child’s consent is not a valid defence). The legal representative suggests that the principle that children should not be recruited into the armed forces includes an absolute prohibition against the voluntary enlistment of minors.<sup>1759</sup>

597. It is contended by the OPCV that the offences of conscripting and enlisting are of a continuing nature, in that they are committed for as long as the children are under fifteen years of age and remain in the armed force or group.<sup>1760</sup>

598. It is submitted that active participation in hostilities covers both direct and indirect participation and there should be no distinction “between the participation of child combatants and that of child non combatants in hostilities.”<sup>1761</sup> The OPCV relies on the submissions of Ms Coomaraswamy (CHM-0003), the Cape Town Principles, the Paris Principles and the African Union’s Solemn Declaration on Gender Equality in Africa as support for the proposition that the expression to “participate actively” should be interpreted so as to protect girls recruited into the armed forces for sexual purposes. It is submitted this is usually the primary reason for their recruitment.<sup>1762</sup> Moreover, the

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<sup>1758</sup> ICC-01/04-01/06-2747-Red, para. 56, referring to EVD-CHM-00007, para. 19.

<sup>1759</sup> ICC-01/04-01/06-2744-Red-tENG, para. 6, referring *inter alia* to ICC-01/04-01/06-803-tENG, paras 246-247, ICRC Commentary to the Additional Protocols to the Geneva Conventions, and EVD-CHM-00007, para. 10.

<sup>1760</sup> ICC-01/04-01/06-2744-Red-tENG, para. 7, referring *inter alia* to ICC-01/04-01/06-803-tENG, para. 248.

<sup>1761</sup> ICC-01/04-01/06-2744-Red-tENG, para. 9.

<sup>1762</sup> ICC-01/04-01/06-2744-Red-tENG, paras 10-11; EVD-CHM-00007, paras 19, 21 and 26.



legal representative suggests this interpretation is fully supported by Ms Coomaraswamy (CHM-0003) in her criticism of Pre-Trial Chamber I's ruling excluding activities that were manifestly unrelated to hostilities:

[t]he Court should deliberately include any sexual acts perpetrated, in particular against girls, within its understanding of the "using" [children in hostilities] crime [and] that during war, the use of girl children in particular includes sexual violence.<sup>1763</sup>

599. It is said to be unnecessary for the Court to determine whether girls subjected to sexual abuse within the armed forces were used to participate actively in hostilities. The fact they were recruited when under the age of fifteen years is sufficient proof of enlistment, conscription or use under the Statute. The legal representative cites with approval a Decision of the Trial Chamber:

[i]t is not necessary [...] for the Chamber to engage in the critical question that otherwise arises in this application as to whether the 'use' of children for sexual purposes alone, and including forced marriage, can be regarded as conscription or enlistment into an armed force, or the use of that person to participate actively in the hostilities, in accordance with Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the Rome Statute. As just set out, the applicant has presented enough evidence to conclude, *prima facie*, that she was abducted in the broad context of the systematic conscription of children under the age of 15 into the military forces of the UPC.<sup>1764</sup>

## 2. The Chamber's Analysis and Conclusions

600. Addressing the three relevant acts, namely conscripting, enlisting children under the age of 15 or using them to participate actively in hostilities, in each instance the conduct is not defined in the Statute, the Rules or the Elements of Crimes. Accordingly, the scope of the

<sup>1763</sup> ICC-01/04-01/06-2744-Red-tENG, para. 10, citing EVD-CHM-00007, para. 21.

<sup>1764</sup> ICC-01/04-01/06-2744-Red-tENG, para. 12, citing Annex 1 to Decision on the applications by victims to participate in the proceedings, 15 December 2008, ICC-01/04-01/06-1556-Corr-Anx1, para. 103.

activities covered by Article 8(2)(e)(vii) of the Statute must be determined in accordance with Articles 21 and 22(2) of the Statute, which provide (as relevant):

**Article 21 Applicable law**

1. The Court shall apply:
  - a. In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
  - b. In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
  - c. Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

**Article 22 *Nullum crimen sine lege***

[...]

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

601. The Appeals Chamber has established that the interpretation of the Statute is governed by the Vienna Convention on the Law of Treaties,<sup>1765</sup> as follows:

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<sup>1765</sup> Vienna Convention on the Law of Treaties, adopted on 23 May 1969 and entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, Article 31(1).

The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.<sup>1766</sup>

602. The Appeals Chamber has also decided that Article 21(3) of the Statute “makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognised human rights. It requires the exercise of the jurisdiction of the Court in accordance with internationally recognized human rights norms”.<sup>1767</sup>

603. The jurisprudence of the SCSL has been considered by the Trial Chamber. Although the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute, the wording of the provision criminalising the conscription, enlistment and use of children under the age of 15 within the Statute of the SCSL<sup>1768</sup> is identical to Article 8(e)(vii) of the Rome Statute, and they were self-evidently directed at the same objective. The SCSL’s case law therefore potentially assists in the interpretation of the relevant provisions of the Rome Statute.

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<sup>1766</sup> *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, para. 33 (footnotes omitted). See also *The Prosecutor v. Katanga and Ngudjolo*, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", 27 May 2008, ICC-01/04-01/07-522, paras 38 and 39; Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486, para. 40; *The Prosecutor v. Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence", 19 November 2010, ICC-01/05-01/08-1019, para. 49.

<sup>1767</sup> Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 36.

<sup>1768</sup> Article 4(c) of the SCSL Statute: “Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.”

604. Article 4(3)(c) of Additional Protocol II to the 1949 Geneva Conventions includes an absolute prohibition against the recruitment and use of children under the age of 15 in hostilities (in the context of an armed conflict not of an international character):<sup>1769</sup>

children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

In addition, the Convention on the Rights of the Child, a widely ratified human rights treaty, requires the State Parties to “take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities”, and to “refrain from recruiting any person who has not attained the age of fifteen years into their armed forces” in all types of armed conflicts (“armed conflicts which are relevant to the child”).<sup>1770</sup>

605. These provisions recognise the fact that “children are particularly vulnerable [and] require privileged treatment in comparison with the rest of the civilian population”.<sup>1771</sup> The principal objective underlying these prohibitions historically is to protect children under the age of 15

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<sup>1769</sup> The drafters of Additional Protocol II made “provision for the consequences of any possible violation” by including a provision (Article 4(3)(d)) requiring special protection for children under 15 if they take a direct part in hostilities and are captured: ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987), page 1380. Article 77(2) of Additional Protocol I provides: “The parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.”; ICC-01/04-01/06-803-tEN, paras 242 – 243; see also Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes* (2008), page 467 at marginal note 227; Knut Dörmann, *Elements of War crimes under the Rome Statute of the International Criminal Court, Sources and Commentary* (2003), pages 376 and 470.

<sup>1770</sup> Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989; entered into force on 2 September 1990: Article 38, paras 2 and 3. See also Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, U.N.DOC.A/54/RES/263 (2000), Articles 1 to 3, and African Charter On the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), adopted on 11 July 1990 and entered into force on 29 November 1999, Article 22(2): [Armed Conflicts] “State Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.”

<sup>1771</sup> ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987), page 1377 at marginal note 4544; see also page 1379 at marginal note 4555.

from the risks that are associated with armed conflict, and first and foremost they are directed at securing their physical and psychological well-being. This includes not only protection from violence and fatal or non-fatal injuries during fighting, but also the potentially serious trauma that can accompany recruitment (including separating children from their families, interrupting or disrupting their schooling and exposing them to an environment of violence and fear).<sup>1772</sup>

606. It is to be noted that the potentially broad concept of “children associated with armed conflict” was referred to throughout the trial.<sup>1773</sup> This expression does not form part of the wording of any of the charges the accused faces, but instead – as submitted by the defence – it is clearly designed to afford children with the greatest possible protection. Although it is to be stressed that the Chamber has applied the provisions of the Statute as opposed to this more general concept, Ms Coomaraswamy gave relevant background evidence that children in this context frequently undertake a wide range of tasks that do not necessarily come within the traditional definition of warfare.<sup>1774</sup> As a result, they are exposed to various risks that include rape, sexual enslavement and other forms of sexual violence, cruel and inhumane treatment, as well as further kinds of hardship that are incompatible with their fundamental rights.

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<sup>1772</sup> Report of Ms Schauer (CHM-0001), The Psychological Impact of Child Soldiering, ICC-01/04-01/06-1729-Anx1 (EVD-CHM-00001); Gregoria Palomino Suárez, *Kindersoldaten im Völkerstrafrecht* (2009), page 124; see also Graca Machel, *Impact of Armed Conflict on Children*, 26 August 1996, UN Doc A/51/306, para.30; Francois Bugnion, “Les Enfants Soldats, le Droit International Humanitaire et la Charte Africaine des Droits et du Bien-Être de L’Enfant”, 12 *African Journal of International & Comparative Law* (2000), page 263.

<sup>1773</sup> ICC-01/04-01/06-2748-Red, paras 142 – 143; ICC-01/04-01/06-2773-Red-tENG, para. 33; T-223-ENG, page 14, line 24 to page 16, line 10; T-208-ENG, page 12, lines 16 *et seq.*

<sup>1774</sup> T-223-ENG, page 14, lines 4 – 23.

### a) Enlistment and conscription

607. The Chamber accepts the approach adopted by the Pre-Trial Chamber that “conscription” and “enlistment” are both forms of recruitment,<sup>1775</sup> in that they refer to the incorporation of a boy or a girl under the age of 15 into an armed group, whether coercively (conscription) or voluntarily (enlistment).<sup>1776</sup> The word “recruiting”, which is used in the Additional Protocols and in the Convention on the Rights of the Child, was replaced by “conscripting” and “enlisting” in the Statute. Whether a prohibition against voluntary enrolment is included in the concept of “recruitment” is irrelevant to this case,<sup>1777</sup> because it is proscribed by Article 8.

608. This interpretation gives the relevant provisions of the Statute their plain and ordinary meaning. It is to be noted that “enlisting” is defined as “to enrol on the list of a military body”<sup>1778</sup> and “conscripting” is defined as “to enlist compulsorily”.<sup>1779</sup> Therefore, the distinguishing element is that for conscription there is the added element of compulsion.<sup>1780</sup> Whether this distinction is of relevance in

<sup>1775</sup> Written submissions of Ms Coomaraswamy (CHM-0003), EVD-CHM-00007, para. 4.

<sup>1776</sup> ICC-01/04-01/06-803-tEN, para. 246, referring to SCSL, Dissenting Opinion of Justice Robertson; See also Roy S. Lee (eds.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (2001), page 205.

<sup>1777</sup> See ICC-01/04-01/06-803-tEN, para. 244 and footnote 314 & 315; see also Roy S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (1999), page 118; and Roy S. Lee (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), page 205; and SCSL, Dissenting Opinion of Justice Robertson, para. 5.

<sup>1778</sup> *Oxford Dictionary* (2002, 5<sup>th</sup> ed.), page 831. See also Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary* (2003), page 377, and Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes* (2008), page 472 at marginal note 231.

<sup>1779</sup> *Oxford Dictionary* (2002, 5<sup>th</sup> ed.), page 491; See also Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary* (2003), page 377, and Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court : Observer’s Notes* (2008), page 472 at marginal note 231.

<sup>1780</sup> Gregoria Palomino Suárez, *Kindersoldaten im Völkerstrafrecht* (2009), page 139.

this case is considered below.

609. Bearing in mind the use of the word “or” in Article 8(2)(e)(vii), in the Chamber’s view the three alternatives (*viz.* conscription, enlistment and use) are separate offences.<sup>1781</sup> It follows that the status of a child under 15 who has been enlisted or conscripted is independent of any later period when he or she may have been “used” to participate actively in hostilities, particularly given the variety of tasks that he or she may subsequently be required to undertake. Although it may often be the case that the purpose behind conscription and enlistment is to use children in hostilities, this is not a requirement of the Rome Statute. If Article 8(2)(e)(vii) is taken on its own, the position is potentially ambiguous, given it reads “[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities” (emphasis added). However, the Elements of Crimes clarify the issue by requiring “1. The perpetrator *conscripted or enlisted one or more persons* into an armed force or group or *used one or more persons to participate actively in hostilities*” (emphasis added). The Chamber therefore rejects the defence contention that “the act of enlistment consists in the integration of a person as a soldier, within the context of an armed conflict, for the purposes of participating actively in hostilities on behalf of the group.”<sup>1782</sup>

610. The expert witness, Elisabeth Schauer (CHM-0001), suggested in her report and during her evidence before the Chamber that from a psychological point of view children cannot give “informed” consent

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<sup>1781</sup> See SCSL, *AFRC Trial Judgment*, para 733; *CDF Appeal Judgment*, para. 139, and Dissenting Opinion of Justice Robertson, para. 5.

<sup>1782</sup> ICC-01/04-01/06-2773-Red-t-ENG, para. 34.

when joining an armed group, because they have limited understanding of the consequences of their choices; they do not control or fully comprehend the structures and forces they are dealing with; and they have inadequate knowledge and understanding of the short- and long-term consequences of their actions. Ms Schauer (CHM-0001) concluded that children lack the capacity to determine their best interests in this particular context.<sup>1783</sup>

611. In her written submissions, Ms Coomaraswamy (CHM-0003) notes that it can be difficult to differentiate between a conscripted and an enlisted child:

The recruitment and enlisting of children in [the] DRC is not always based on abduction and the brute use of force. It also takes place in the context of poverty, ethnic rivalry and ideological motivation. Many children, especially orphans, join armed groups for survival to put food in their stomachs. Others do so to defend their ethnic group or tribe and still others because armed militia leaders are the only seemingly glamorous role models they know. They are sometimes encouraged by parents and elders and are seen as defenders of their family and community.

[...]

Children who “voluntarily” join armed groups mostly come from families who were victims of killing and have lost some or all of their family or community protection during the armed conflict.<sup>1784</sup>

612. The Special Representative (CHM-0003) further suggests that “the line between voluntary and forced recruitment is therefore not only legally irrelevant but practically superficial in the context of children in armed conflict”.<sup>1785</sup>

613. The Chamber endorses the conclusions of the expert witnesses, in the sense that it will frequently be the case that girls and boys under

<sup>1783</sup> Report of Ms Schauer (CHM-0001), *The Psychological Impact of Child Soldiering*, EVD-CHM-00001, pages 7 – 8; T-166-ENG, page 13, lines 10 – 19; page 90, lines 1 – 4.

<sup>1784</sup> EVD-CHM-00007, paras 13 and 14.

<sup>1785</sup> EVD-CHM-00007, para. 14.



the age of 15 will be unable to give genuine and informed consent when enlisting in an armed group or force.

614. Against that background, the Chamber addresses the issue of whether the valid and informed consent of a child under 15 years of age provides the accused with a defence in these circumstances.

615. In Ms Coomaraswamy's expert testimony before the Chamber she suggested that since children under the age of 15 cannot reasonably give consent, the accused should not be able to rely on the voluntary nature of their enlistment into an armed force or group as a defence.<sup>1786</sup>

616. The Pre-Trial Chamber in the present case adopted this approach, when it determined that a child's consent does not provide a valid defence to enlistment.<sup>1787</sup> It is of note that the Appeals Chamber of the SCSL opined that "where a child under the age of 15 years is allowed to voluntarily join an armed force or group, his or her consent is not a valid defence."<sup>1788</sup> In addition, the SCSL's Trial Chamber in the case of *the Prosecutor v. Fofana and Kondewa* ("CDF" case) concluded:

[T]he distinction between [voluntary enlistment and forced enlistment] is somewhat contrived. Attributing voluntary enlistment in the armed forces to a child under the age of 15 years, particularly in a conflict setting where human rights abuses are rife, is [...] of questionable merit.<sup>1789</sup>

617. In all the circumstances, the Chamber is persuaded that the Statute in this regard is aimed at protecting vulnerable children, including when they lack information or alternatives. The manner in which a child was recruited, and whether it involved compulsion or was "voluntary", are circumstances which may be taken into consideration

<sup>1786</sup> T-223-ENG, page 11, lines 8 – 18.

<sup>1787</sup> ICC-01/04-01/06-803-tEN, para. 248.

<sup>1788</sup> SCSL, *CDF Appeal Judgment*, para. 139.

<sup>1789</sup> SCSL, *CDF Trial Judgment*, para. 192.

by the Chamber at the sentencing or reparations phase, as appropriate. However, the consent of a child to his or her recruitment does not provide an accused with a valid defence.

618. Therefore, the Chamber agrees with the Pre-Trial Chamber that under the provisions set out above, the offences of conscripting and enlisting are committed at the moment a child under the age of 15 is enrolled into or joins an armed force or group, with or without compulsion. In the circumstances of this case, conscription and enlistment are dealt with together, notwithstanding the Chamber's earlier conclusion that they constitute separate offences. These offences are continuous in nature. They end only when the child reaches 15 years of age or leaves the force or group.<sup>1790</sup>

**b) Using children under the age of 15 to participate actively in hostilities**

619. As with "conscripting" and "enlisting" children under the age of 15 into armed forces or groups, the prohibition against "using them to participate actively in hostilities" is generally intended to protect children from the risks that are associated with armed conflict, for the reasons described above.

620. The prohibition against using children under the age of 15 to participate actively in hostilities is not dependent on the individuals concerned having been earlier conscripted or enlisted into the relevant armed force or group. As set out in paragraph 609 above, if Article 8(2)(e)(vii) of the Statute is taken on its own, the position is potentially ambiguous, given it reads "[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups *or using them to*

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<sup>1790</sup> ICC-01/04-01/06-803-tEN, para. 248; see also ICTR, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Appeals Chamber, Judgement, 28 November 2007, para. 721.

participate actively in hostilities” (emphasis added). However, the Elements of Crimes clarifies the issue by requiring “1. The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities. 2. Such person or persons were under the age of 15 years” (emphasis added). Therefore, consistently with Article 22(2) of the Statute, a child can be “used” for the purposes of the Statute without evidence being provided as regards his or her earlier “conscription” or “enlistment” into the relevant armed force or group.

621. The Elements of the Crimes require that “the conduct took place in the context of and was associated with an armed conflict”. The *travaux préparatoires* of the Statute suggest that although direct participation is not necessary, a link with combat is nonetheless required.<sup>1791</sup> The Preparatory Committee’s draft Statute had postulated a broader interpretation in one of the footnotes:

The words “using” and “participate” have been adopted in order to cover both direct participation in combat and also active participation in military activities *linked* to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities *clearly unrelated to the hostilities* such as food deliveries to an airbase or the use of domestic staff in an officer’s married accommodation. However, use of children in a *direct support function* such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology. (emphasis added)<sup>1792</sup>

622. The Pre-Trial Chamber, by reference to the approach of the Preparatory Committee, decided that a child does not actively participate in hostilities if the activity in question was “clearly

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<sup>1791</sup> UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, U.N. Doc. A/CONF.183/2/Add.1, 14 April 1998, page 21 and footnote 12.

<sup>1792</sup> *Ibid.* See also Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes (2008), page 471 at marginal note 229; Roy S. Lee (ed.), The International Criminal Court: The Making of the Rome Statute (1999), page 206.

unrelated to hostilities.”<sup>1793</sup> The Pre-Trial Chamber distinguished between two categories of participation, first:

“Active participation” in hostilities means not only direct participation in hostilities, combat in other words, but also covers active participation in combat-related activities such as scouting, spying, sabotage and the use of children as decoys, couriers or at military check-points.<sup>1794</sup>

In the Pre-Trial Chamber’s formulation, guarding military objectives or acting as a bodyguard were also activities related to hostilities, *inter alia*, when “they have a direct impact on the level of logistic resources and on the organisation of operations required by the other party to the conflict”.<sup>1795</sup>

623. Second, the Pre-Trial Chamber considered that children who were engaged in activities “clearly unrelated to hostilities”<sup>1796</sup> and carry out tasks such as “food deliveries to an airbase or the use of domestic staff in married officer’s quarters” do not actively participate in hostilities.<sup>1797</sup>

624. As indicated above, the SCSL has examined the scope of active participation in hostilities in a number of decisions when applying Article 4(c) of its Statute, which is identical to Article 8(e)(vii) of the Rome Statute. In the AFRC case, ostensibly relying on the approach of the Preparatory Committee, the SCSL determined that the use of children to participate actively in hostilities is not restricted to children directly involved in combat, noting:

An armed force requires logistical support to maintain its operations. Any labour or support that gives effect to, or helps maintain, operations in a

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<sup>1793</sup> ICC-01/04-01/06-803-tEN, para. 262.

<sup>1794</sup> ICC-01/04-01/06-803-tEN, para. 261.

<sup>1795</sup> ICC-01/04-01/06-803-tEN, para. 263.

<sup>1796</sup> ICC-01/04-01/06-803-tEN, para. 262.

<sup>1797</sup> ICC-01/04-01/06-803-tEN, para. 262.

conflict constitutes active participation. Hence carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields are some examples of active participation as much as actual fighting and combat.<sup>1798</sup>

625. The SCSL therefore held that the concept of “using” children to participate actively in hostilities encompasses the use of children in functions other than as front line troops (participation in combat), including support roles within military operations.

626. The Special Representative (CHM-0003) suggested that the Trial Chamber should focus “in each case [...] [on] whether the child’s participation served an essential support function to the armed force” and she referred to the SCSL jurisprudence in the *AFRC Trial Judgment* set out above.<sup>1799</sup> The Trial Chamber in that case held that:

‘Using’ children to “participate actively in the hostilities” encompasses putting their lives directly at risk in combat.<sup>1800</sup>

627. The use of the expression “to participate actively in hostilities”, as opposed to the expression “direct participation” (as found in Additional Protocol I to the Geneva Conventions) was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence of using children under the age of 15 actively to participate in hostilities. It is noted in this regard that Article 4(3)(c) of Additional Protocol II does not include the word “direct”.<sup>1801</sup>

628. The extent of the potential danger faced by a child soldier will often

<sup>1798</sup> SCSL, *AFRC Trial Judgment*, para. 737. The first sentence of the relevant footnote of the Preparatory Committee’s draft is quoted in para 736 of the Trial Judgment.

<sup>1799</sup> Written submissions of Ms Coomaraswamy (CHM-0003), EVD-CHM-00007, para. 21.

<sup>1800</sup> SCSL, *AFRC Trial Judgment*, para. 736.

<sup>1801</sup> Article 77(2) of Additional Protocol I provides that children under 15 shall not be allowed to “take a direct part in hostilities” (Article 38(2) of the Convention on the Rights of the Child contains identical wording); Article 4(3)(c) of Additional Protocol II provides that children under 15 shall not be allowed to “take part in hostilities”, which is broader; see Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes* (2008), page 470 at marginal note 229.

be unrelated to the precise nature of the role he or she is given.<sup>1802</sup> Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target.<sup>1803</sup> The decisive factor, therefore, in deciding if an “indirect” role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target.<sup>1804</sup> In the judgment of the Chamber these combined factors – the child’s support and this level of consequential risk – mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them. Given the different types of roles that may be performed by children used by armed groups, the Chamber’s determination of whether a particular activity constitutes “active participation” can only be made on a case-by-case basis.

629. Notwithstanding the conclusions set out above, and given the submissions made at various stages of the proceedings, the Chamber needs finally to address how the issue of sexual violence is to be treated in the context of Article 8(2)(e)(vii) of the Statute. It is to be noted that although the prosecution referred to sexual violence in its

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<sup>1802</sup> Report of Ms Schauer (CHM-0001), EVD-CHM-00001, page 9.

<sup>1803</sup> Michael Wessells, *Child Soldiers: From Violence to Protection* (2006), page 57; see also Ilene Cohn and Guy Goodwin-Gill, *Child Soldiers: the Role of Children in Armed Conflict* (2003), pages 31-32; Graça Machel, *Impact of Armed Conflict on Children*, 26 August 1996, UN Doc A/51/306, paras 44 – 48; Peter Warren Singer, *Children at War* (2005), pages 57-58.

<sup>1804</sup> Gregoria Palomino Suárez, *Kindersoldaten im Völkerstrafrecht*, Berlin 2009, pages 166 to 168.

opening and closing submissions,<sup>1805</sup> it has not requested any relevant amendment to the charges. During the trial the legal representatives of victims requested the Chamber to include this conduct in its consideration of the charges, and their joint request<sup>1806</sup> led to Decisions on the issue by the Trial Chamber and the Appeals Chamber (*viz.* whether it was permissible to change the legal characterisation of the facts to include crimes associated with sexual violence).<sup>1807</sup> Not only did the prosecution fail to apply to include rape and sexual enslavement at the relevant procedural stages, in essence it opposed this step. It submitted that it would cause unfairness to the accused if he was tried and convicted on this basis.<sup>1808</sup>

630. In accordance with the jurisprudence of the Appeals Chamber, the Trial Chamber's Article 74 Decision shall not exceed the facts and circumstances (*i.e.* the factual allegations) described in the charges and any amendments to them.<sup>1809</sup> The Trial Chamber has earlier pointed out that "[f]actual allegations potentially supporting sexual slavery are simply not referred to at any stage in the Decision on the Confirmation

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<sup>1805</sup> T-107-ENG, page 11, line 17 to page 12, line 22; T-356-ENG, page 9, lines 9 – 13 and, lines 22 – 25; page 52, line 16.

<sup>1806</sup> Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, 22 May 2009, ICC-01/04-01/06-1891-tENG.

<sup>1807</sup> Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, 14 July 2009, ICC-01/04-01/06-2049; Decision issuing a second corrigendum to the "Minority opinion on the 'Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'", 31 July 2009, ICC-01/04-01/06-2069; Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, ICC-01/04-01/06-2205.

<sup>1808</sup> Prosecution's Application for Leave to Appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 12 August 2009, ICC-01/04-01/06-2074, paras 22 and 23. See also, Prosecution's Further Observations Regarding the Legal Representatives' Joint Request Made Pursuant to Regulation 55, 12 June 2009, ICC-01/04-01/06-1966.

<sup>1809</sup> See Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, ICC-01/04-01/06-2205.

of Charges”.<sup>1810</sup> Regardless of whether sexual violence may properly be included within the scope of “using [children under the age of 15] to participate actively in hostilities” as a matter of law,<sup>1811</sup> because facts relating to sexual violence were not included in the Decision on the Confirmation of Charges, it would be impermissible for the Chamber to base its Decision pursuant to Article 74(2) on the evidence introduced during the trial that is relevant to this issue.

631. In due course, the Chamber will consider whether these matters ought to be taken into account for the purposes of sentencing and reparations.

## **B. THE FACTS**

### **1. Relevant Evidential Considerations**

632. A number of witnesses called by the prosecution and the defence testified as to whether children were recruited and used by the UPC/FPLC, and evidence was given as to their age. The Chamber has considered the credibility and reliability of these witnesses, taking into account, *inter alia*, the challenges advanced during questioning and in the final briefs. It has assessed whether their individual accounts were consistent with the other relevant and reliable evidence in the case. The general approach adopted is that whenever a witness is first considered in this section, the Chamber has, at that stage, dealt with

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<sup>1810</sup> Decision on the Legal Representatives’ Joint Submissions concerning the Appeals Chamber’s Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court, 8 January 2010, ICC-01/04-01/06-2223, para. 35.

<sup>1811</sup> Ms Coomaraswamy suggested that the use for sexual exploitation of boys and girls by armed forces or groups constitutes an “essential support function”, Written submissions of Ms Coomaraswamy (CHM-0003), EVD-CHM-00007, paras 23 and 24-26.



the witness's overall credibility and reliability, against the background of the main contested aspects of their testimony. Any discrete issues relating to the witness and the evidence they provided to the Chamber are addressed within the relevant section.<sup>1812</sup>

633. In its closing brief, the prosecution rehearsed the histories of various alleged former child soldiers who gave evidence (P-0007, P-0008, P-0010, P-0011, P-0157, P-0213, P-0294, P-0297 and P-0298).<sup>1813</sup> The Chamber, as analysed elsewhere, has concluded that it is unable to rely on the evidence of any of these witnesses.<sup>1814</sup>

634. Again, as discussed above, the Chamber has concluded that the three victims who were called to testify before the Court will not be relied on for the purposes of the Article 74 Decision.

635. Although the terms "child" and "children" encompass boys and girls under the age of 18 years,<sup>1815</sup> the charges specifically relate to children under the age of 15, in accordance with Article 8(2)(e)(vii) of the Statute.

636. Some witnesses used the term "kadogo" to describe small children. For instance, P-0055 suggested that in the UPC and Ugandan armies, indeed in Africa generally, small children from about the age of 13 up to the age of 16 are called kadogos.<sup>1816</sup>

637. P-0038 testified that the expression kadogo means a child soldier – in the UPC it was used "above all" to refer to children under the age of 15. The witness indicated that in certain armies it describes the

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<sup>1812</sup> P-0031 is discussed in Section VII(E)(4).

<sup>1813</sup> ICC-01/04-01/06-2748-Red, paras 356 – 522.

<sup>1814</sup> See paras 478-484.

<sup>1815</sup> See Convention on the Rights of the Child.

<sup>1816</sup> T-174-Red2-ENG, page 40, line 5 to page 41, line 15.

youngest individual in the group (as demonstrated when the witness went for training in Rwanda and was referred to as a kadogo even though he was 18).<sup>1817</sup>

638. For P-0024 the term kadogos generally means children below 18 years of age, “right down to the lower end of the scale.”<sup>1818</sup>

639. Various witnesses also referred to the term “PMF”. Witness P-0016 linked the term to female military staff or “*personnel militaire féminin*”.<sup>1819</sup> Witnesses P-0055 and P-0089 said the term referred to a “girl soldier”<sup>1820</sup> and P-0046 had also heard of this expression.<sup>1821</sup>

640. It follows that the term kadogo is sometimes used to refer to children over the age of 15 whilst “PMF” relates to females in the army, and it does not necessarily only relate to girls under 15.

## 2. Age assessments and determinations of witness credibility

641. The Chamber heard evidence from numerous non-expert witnesses as to the age of the alleged former child soldiers. For the most part, their assessments were based on the individual’s physical appearance, including by way of comparison with other children;<sup>1822</sup> the individual’s general physical development<sup>1823</sup> (e.g. whether a girl had developed breasts,<sup>1824</sup> and factors such as height and voice);<sup>1825</sup> and his

<sup>1817</sup> T-114-Red2-ENG, page 39, line 18 to page 40, line 3.

<sup>1818</sup> T-170-Red2-ENG, page 76, lines 6 – 7.

<sup>1819</sup> T-191-Red2-ENG, page 10, lines 21-23; T-189-Red2-ENG, page 34, lines 1-4.

<sup>1820</sup> T-174-ENG, page 38, lines 14 – 21; T-196-Red-ENG, page 10, lines 8-10.

<sup>1821</sup> T-209-ENG, page 12 lines 3 – 8.

<sup>1822</sup> T-157-Red2-ENG, page 63, lines 20 – 21 (P-0017).

<sup>1823</sup> T-154-Red2-ENG, page 41, lines 23 – 25 (P-0017); T-157-Red2-ENG, page 63, lines 17 – 18 (P-0017); T-179-Red2-ENG, page 87, lines 15 – 18 (P-0014).

<sup>1824</sup> T-154-Red2-ENG, page 41, lines 17 – 19 (P-0017); T-157-Red2-ENG, page 63, lines 18 – 20 (P-0017).

<sup>1825</sup> T-203-Red2-ENG, page 36, line 15 to page 37, line 23 (P-0116); T-154-Red2-ENG, page 41, lines 24 – 25 (P-0017); T-179-Red2-ENG, page 87, lines 17 – 18 (P-0014).

or her overall behaviour.<sup>1826</sup>

642. The defence challenges the evidence given, inter alia, by P-0012, P-0014, P-0016, P-0017, P-0024, P-0030, P-0038, P-0041, P-0046, P-0055, and P-0116 on the age of children in the UPC/FPLC.<sup>1827</sup> The defence argues that their unverified, personal assessments are unreliable and it is suggested they do not establish beyond reasonable doubt the presence of children under the age of 15 in the UPC/FPLC. In this section the Chamber has addressed the various challenges advanced by the defence; it has reviewed the age assessments that were provided by a number of witnesses; and the Chamber has set out its general conclusions as to the credibility of the relevant prosecution witnesses, along with defence witnesses D-0007, D-0011, D-0019 and D-0037 (who also gave evidence on this issue). The relevant witnesses are addressed by category: first, the witnesses linked to the work of international organisations or NGOs; second the prosecution witnesses who testified primarily about military matters; third, the prosecution witnesses who principally gave evidence about selected video footage; and finally the relevant defence witnesses, in the order in which they testified.

643. Given the undoubted differences in personal perception as regards estimates of age and, most particularly in the context of this case, the difficulties in distinguishing between young people who are relatively close to the age of 15 (whether above or below), the Chamber has exercised caution when considering this evidence. Even allowing for a wide margin of error in assessing an individual's age, the Chamber

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<sup>1826</sup> T-154-Red2-ENG, page 41, lines 20 – 23; T-157-Red2-ENG, page 63, lines 18 – 20 (P-0017).

<sup>1827</sup> ICC-01/04-01/06-2773-Red-tENG, paras 587 – 589, 596, 737 – 756; ICC-01/04-01/06-2786-Red-tENG, para. 67.

has concluded that it is feasible for non-expert witnesses to differentiate between a child who is undoubtedly less than 15 years old and a child who is undoubtedly over 15. Furthermore, the sheer volume of credible evidence (analysed hereafter) relating to the presence of children below the age of 15 within the ranks of the UPC/FPLC has demonstrated conclusively that a significant number were part of the UPC/FPLC army. An appreciable proportion of the prosecution witnesses, as well as D-0004, testified reliably that children under 15 were within the ranks of the UPC/FPLC.<sup>1828</sup>

644. The prosecution relies on a number of video excerpts to establish that some of the UPC/FPLC recruits were “visibly” under the age of 15.<sup>1829</sup> The defence argues that it is impossible to distinguish reliably between a 12 or 13 year-old and a 15- or 16-year-old on the basis of a photograph or video extract alone.<sup>1830</sup> The Chamber accepts that for many of the young soldiers shown in the video excerpts, it is often very difficult to determine whether they are above or below the age of 15. Instead, the Chamber has relied on video evidence in this context only to the extent that they depict children who are clearly under the age of 15.

**a) P-0046**

645. The testimony of P-0046 focussed on her professional knowledge of children recruited and used by the UPC/FPLC and her experience of the demobilisation process. This witness worked in MONUC’s child protection programme during the period covered by the charges, and she went on her first mission to Bunia in this role during September

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<sup>1828</sup> T-243-Red2-ENG, page 20, line 21 to page 22, line 6 (D-0004).

<sup>1829</sup> ICC-01/04-01/06-2748-Red, paras 164 – 165.

<sup>1830</sup> ICC-01/04-01/06-2773-Red-tENG, paras 703 – 707.

2002. By the time she was officially based in Bunia in May 2003 she had undertaken a number of missions to the region. Previously, she had been involved in identifying child soldiers in Kenya and in northern Congo.<sup>1831</sup> P-0046 filed weekly reports addressing the security and humanitarian situation of children associated with the armed groups,<sup>1832</sup> which were based on the interviews conducted by MONUC's child protection section, as well as other sources.<sup>1833</sup> The majority of the witness's interviews with children took place between March 2003 and the end of her time in Ituri in 2004.<sup>1834</sup> P-0046 considered the situation of children associated with the armed conflict in Ituri, along with the work of MONUC and other NGOs who dealt with demobilised children, during the period covered by the charges. Her testimony was detailed, credible and reliable, particularly when it was based on her personal experience of working with demobilised children in the region.

646. The defence contends that P-0046 has insufficient personal knowledge of the events about which she testified, given she did not regularly visit Ituri until late May 2003.<sup>1835</sup> Since the witness was closely monitoring the situation in the area during the relevant period and she made a series of site visits to Ituri between January 2002 and March 2003, the Chamber is satisfied that she was able to testify about events that took place in the region during the period covered by the charges.

647. The defence further submits that the information provided to P-

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<sup>1831</sup> EVD-OTP-00493, transcript of testimony of P-0046 before Pre-Trial Chamber I (T-38-EN, page 36, line 22 to page 37, line 12); T-205-Red2-ENG, page 23, line 14 to page 25, line 4.

<sup>1832</sup> ICC-01/04-01/06-T-205-Red2-ENG, page 25, line 23 to page 26, line 20.

<sup>1833</sup> ICC-01/04-01/06-T-208-ENG, page 24, lines 8 – 22.

<sup>1834</sup> ICC-01/04-01/06-T-208-ENG, page 22, lines 14 – 22 ; EVD-OTP-00479, transcript of testimony of P-0046 before Pre-Trial Chamber I, T-37-EN, page 10, line 15 to page 12, line 12.

<sup>1835</sup> ICC-01/04-01/06-2773-Red-tENG, paras 638 – 639; para. 646.

0046 by MONUC was unreliable given the testimony of the prosecution expert witness, Gerard Prunier (P-0360).<sup>1836</sup> Although Mr Prunier questioned the accuracy of certain aspects of the UN reports, he also referred to the general lack of reliable sources, particularly as regards events during the relevant period in the countryside surrounding Bunia, and he emphasised that of the available material the most reliable information came from the UN.<sup>1837</sup>

648. The defence submits that during the course of her testimony, P-0046 “showed obvious bias in favour of the prosecution”.<sup>1838</sup> By way of example, the defence cites the witness’s reference to reports of very young children who were smaller than the Kalashnikovs they were carrying,<sup>1839</sup> along with her assertion that she was “sure [this] was an image which was exaggerated, but to reflect a reality which our informers wanted to get across, the fact that young children were associated with these groups”.<sup>1840</sup> Having reviewed the evidence of P-0046 (aside from this statement, which the witness in any event conceded may not have been entirely accurate) the Chamber is sure the witness has not exaggerated any material facts or otherwise provided biased or unreliable evidence. In addition, as set out below, it is of note that P-0038 testified that some children were lighter than the weapons they carried. Thus, P-0046’s evidence is entirely plausible.

649. It is suggested the account of P-0046 demonstrates that she and her

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<sup>1836</sup> ICC-01/04-01/06-2773-Red-tENG, paras 640 – 641, referring to T-157-CONF-FRA, page 12, line 4 to page 14, line 20.

<sup>1837</sup> ICC-01/04-01/06-T-157-Red-ENG, page 13, line 20 to page 14, line 17.

<sup>1838</sup> ICC-01/04-01/06-2773-Red-tENG, para. 645.

<sup>1839</sup> ICC-01/04-01/06-2773-Red-tENG, para. 645, referring to EVD-OTP-00479, transcript of testimony of P-0046 before Pre-Trial Chamber I, T-37-FR, page 23, lines 8-12.

<sup>1840</sup> EVD-OTP-00490, transcript of testimony of P-0046 before Pre-Trial Chamber I (T-38-ENG, page 83, lines 18 – 25).

colleagues at MONUC merely collected the statements of the children they interviewed and they failed to carry out further investigations.<sup>1841</sup>

The Chamber notes that P-0046 gave evidence that:

[I]dentity cards and documents in the Congo are not very common. Very few people have official papers, in particular, children. In fact, I never saw a child with an identity card in Ituri, so carrying out such a verification on the basis of administrative documents was not possible. So when you say independent verification, well, other than the information that the children gave regarding their schooling, that was one way we had to have an idea and to perhaps reinforce the information stated by the children.<sup>1842</sup>

650. It is significant, however, that P-0046 also testified that she used several methods to verify the information given to her by the children in interview, including comparing the dates they provided with a chronology created by military and political observers from MONUC.<sup>1843</sup> When there were doubts about the age or affiliation of a particular child, she sought verification from the relevant NGOs.<sup>1844</sup> Sometimes the NGOs supplied age assessments for the children that differed from the information the latter had supplied. This particularly applied to those who said they were older than they appeared to the witness (and the Chamber notes her evidence concerning the confirmation of her doubts by the NGOs).<sup>1845</sup>

651. P-0046 did not rely solely on the various processes of external verification in order to determine the age of the children she interviewed. Although she acknowledged the lack of any scientific procedure for assessing their ages whilst she was working as a child

<sup>1841</sup> ICC-01/04-01/06-2773-Red-tENG, para. 642, referring to EVD-OTP-00493, transcript of testimony of P-0046 before Pre-Trial Chamber I (T-38-FR, page 84, line 24 to page 85, line 8); T-206-CONF-FRA, page 10, lines 3 – 7.

<sup>1842</sup> T-206-ENG, page 9, lines 15 – 22.

<sup>1843</sup> T-205-Red2-ENG, page 39, lines 3 – 10; page 40, lines 5 – 23; T-208-ENG, page 29, lines 8 – 17.

<sup>1844</sup> T-205-Red2-ENG, page 39, line 14 to page 40, line 2.

<sup>1845</sup> T-206-ENG, page 5, line 18 to page 6, line 6.

protection officer in Bunia in 2003,<sup>1846</sup> various different factors were taken into account, including information provided by the child (particularly given some had received an education and were able to provide their age or date of birth).<sup>1847</sup> Trained social workers were used to conduct detailed interviews with the children, and the latter were asked questions about their families (including the order in which the children in the family had been born), and their academic records.<sup>1848</sup> P-0046 focussed on the children's individual stories in order to establish certain key dates, and the latter were cross-checked against the information they had provided.<sup>1849</sup>

652. P-0046 stated that physical appearance was also taken into account, but it was not used as the main criteria to determine a child's age.<sup>1850</sup> The age-assessment procedure for child soldiers was broadly similar to that used for unaccompanied children but it included the additional factor of their military experience.<sup>1851</sup> The interviewers reviewed the children's stories, their recruitment history and the battles in which they participated, in order to check their accounts.<sup>1852</sup>

653. Additionally, P-0046 testified that she evaluated children on the basis of what they said and how they acted.<sup>1853</sup> Small children cried in her office<sup>1854</sup> and the younger children had difficulty discussing their experiences, especially if one or both of their parents had died.<sup>1855</sup> Generally, the witness noticed that it was harder for younger children

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<sup>1846</sup> T-205-Red2-ENG, page 37, line 23 to page 38, line 1.

<sup>1847</sup> T-205-Red2-ENG, page 38, lines 1 – 4.

<sup>1848</sup> T-205-Red2-ENG, page 38, lines 5 – 10.

<sup>1849</sup> T-205-Red2-ENG, page 38, lines 10 – 13.

<sup>1850</sup> T-205-Red2-ENG, page 38, lines 14 – 16.

<sup>1851</sup> T-205-Red2-ENG, page 38, lines 14 – 24.

<sup>1852</sup> T-205-Red2-ENG, page 38, line 25 to page 39, line 2 and page 40, lines 10 – 23.

<sup>1853</sup> T-206-ENG, page 9, line 24 to page 10, line 3.

<sup>1854</sup> T-206-ENG, page 10, lines 3 – 6.

<sup>1855</sup> T-206-ENG, page 11, lines 10 – 17.



to talk about the death of their parents as compared with older children.<sup>1856</sup> P-0046 recalled meeting two particular little boys (she thought in the summer of 2003), who had previously been with the UPC when they were arrested.<sup>1857</sup> They were eleven and thirteen years old respectively, and had been frightened by the military.<sup>1858</sup> P-0046 thought they were very afraid because they did not know where they were being taken or what was to become of them, and when she began asking them questions one of them broke down in tears.<sup>1859</sup> P-0046 terminated the interview immediately and sent them to the CTO (a transit centre).<sup>1860</sup> Given they were so upset, P-0046 merely took down the names of their parents and their ages before referring them.<sup>1861</sup> P-0046 recalled holding the hand of the younger child when crossing the street. Her evidence was that “[h]e was so small.”<sup>1862</sup>

654. P-0046 asked numerous questions in order to verify the identity of the children: for instance, whether they had a family or relatives in the area, the schools they attended and the armed groups to which they belonged.<sup>1863</sup> She said it was important to identify the date on which the children had been conscripted or enlisted, in order to determine who was responsible for their recruitment and training; the centres they attended; the battles in which they fought; and the last commander under whom they served.<sup>1864</sup> Thereafter, P-0046 would refer the child to one of the transit centres.<sup>1865</sup>

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<sup>1856</sup> T-206-ENG, page 11, lines 17 – 20.

<sup>1857</sup> T-206-Red2-ENG, page 10, line 12 to page 11, line 9.

<sup>1858</sup> T-206-Red2-ENG, page 10, lines 11 – 24.

<sup>1859</sup> T-206-Red2-ENG, page 10, lines 9 – 17.

<sup>1860</sup> T-206-Red2-ENG, page 10, lines 17 – 18.

<sup>1861</sup> T-206-Red2-ENG, page 11, lines 3 – 9.

<sup>1862</sup> T-206-Red2-ENG, page 10, lines 18 – 21.

<sup>1863</sup> T-205-Red2-ENG, page 71, lines 8 – 14.

<sup>1864</sup> T-205-Red2-ENG, page 71, lines 14 – 19.

<sup>1865</sup> T-205-Red2-ENG, page 70, lines 20 – 21.

655. The Chamber is persuaded P-0046's professional history and personal experience with the children she interviewed enabled her to provide realistic age estimates. Given P-0046's experience and work methods, the Trial Chamber is satisfied that she is overall a reliable and credible witness.

**b) P-0024**

656. P-0024 was employed from 2001 until November 2002<sup>1866</sup> as a social worker with SOS Grands Lacs, an NGO funded by the UN International Children's Fund ("UNICEF"), and he testified about his work with the organisation during this time.<sup>1867</sup> The organisation's mission in Bunia was the demobilisation and reintegration of child soldiers.<sup>1868</sup> The witness gave evidence about what he called the sham demobilisation efforts by the UPC, and he provided information on the presence of child soldiers as well as the demobilised children he encountered during his work in Bunia, up to the end of 2002.

657. The defence challenges P-0024's evidence on the basis that to a significant extent he dealt with events outside the period of the charges,<sup>1869</sup> and his evidence related, on occasion, to the RCD/ML as opposed to the UPC.<sup>1870</sup> It is to be stressed that the Chamber has focussed only on those parts of P-0024's testimony that are relevant to the charges brought against the accused. The witness's evidence concerning the lack of demobilisation by the UPC is considered in Section XI(B)(3).

658. P-0024 testified that he saw children between 9 and 18 years of age

<sup>1866</sup> T-170-Red2-ENG, page 37, lines 6 – 12 and page 55, lines 15 – 21.

<sup>1867</sup> T-170-Red2-ENG, page 40, lines 3 – 10 and page 96, line 22 to page 97, line 12.

<sup>1868</sup> T-170-Red2-ENG, page 37, lines 15 – 21.

<sup>1869</sup> ICC-01/04-01/06-2773-Red-tENG, paras 581 and 584 – 585.

<sup>1870</sup> ICC-01/04-01/06-2773-Red-tENG, para. 585.

wearing military clothing, and carrying Kalashnikov machine guns and other weapons in various towns and cities in 2002, after the UPC took control of Bunia and following the broadcast of the first demobilisation programmes on television and Radio Candip.<sup>1871</sup> He also gave evidence that by November 2002 the UPC was recruiting demobilised children.<sup>1872</sup> He estimated they were aged between 8 ½ and 18 years of age when they entered the demobilisation programme of his NGO in 2001, before they were later re-recruited.<sup>1873</sup>

659. The defence submits that P-0024 failed to provide sufficient details of the dates when, and circumstances under which, the children he worked with were allegedly re-recruited by the UPC. It is suggested his evidence was similarly lacking as regards their identities and ages (including how, apart from his personal impression, he established the latter).<sup>1874</sup>

660. The prosecution argues that the witness's daily dealings with children enabled him to testify reliably as to their ages.<sup>1875</sup>

661. The Chamber considers that P-0024 gave honest, consistent and reliable evidence as regards his work with demobilised children. Although he did not train as a social worker, he spent over a year working with children (*viz.* from September 2001 until November 2002), including in Bunia until the end of October 2002. This enabled him to provide first-hand information on how children were re-recruited.<sup>1876</sup>

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<sup>1871</sup> T-170-Red2-ENG, page 52, lines 17 to 53, line 5, page 53, lines 17 – 21 and page 54, lines 3 – 11.

<sup>1872</sup> T-170-Red2-ENG, page 50, line 13 to page 51, line 11.

<sup>1873</sup> T-170-Red2-ENG, page 46, lines 2 – 14 and page 47, lines 3 – 25.

<sup>1874</sup> ICC-01/04-01/06-2773-Red-tENG, paras 587-589.

<sup>1875</sup> ICC-01/04-01/06-2778-Red, para. 66.

<sup>1876</sup> T-170-Red2-ENG, page 50, line 13 to page 51, line 11.

662. The witness gave credible testimony about the children he closely worked with for a period of several months, and he was able to explain the basis of his suggestion that they were later re-recruited by the UPC. Although he did not give evidence as to how he assessed the children's ages, his interaction with them during those months provides a solid and credible basis for his assessments.

663. Notwithstanding his lack of regular contact with the other children he saw on the streets, the Chamber accepts that on the basis of his professional background and experience, he was able to reach reliable assessments. Given the difference in appearance between, for instance, a 9-year-old child and a 15-year-old, the Chamber is persuaded that P-0024 gave credible and reliable evidence that he saw children well below the age of 15, even if the ages of others may have been more difficult to assess.

**c) P-0012**

664. P-0012 did not join the UPC/FPLC,<sup>1877</sup> but given his role as a high-ranking official within PUSIC at the relevant time,<sup>1878</sup> he had extensive contacts with armed groups in Ituri, including the UPC/FPLC, and he participated in monthly meetings to discuss problems relating to peace in Ituri.<sup>1879</sup> This witness gave evidence about the presence of child soldiers within the UPC/FPLC and other groups during the period of the charges.

665. The defence challenges this witness's evidence in several respects.<sup>1880</sup> It is submitted that his former role in PUSIC should lead to

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<sup>1877</sup> T-168-Red2-ENG, page 13, lines 20 – 24; T-169-Red2-ENG, page 6, line 6.

<sup>1878</sup> T-168-CONF-ENG, page 11, lines 2 – 3.

<sup>1879</sup> T-168-CONF-ENG, page 13, lines 3 – 6 and T-168-Red2-ENG, page 13, lines 7 – 17.

<sup>1880</sup> ICC-01/04-01/06-2773-Red-t-ENG, paras 537 – 543.

a cautious approach, because this group includes dissidents hostile to Thomas Lubanga.<sup>1881</sup> In addition, the defence contends that P-0012 did not personally witness a large part of the events he addressed in his testimony, as he was absent from Bunia between April 2002 and the end of July 2002, and again between mid-August 2002 and 17 March 2003.<sup>1882</sup> It is said that in the course of his evidence the witness repeatedly acknowledged that he had not personally witnessed all of the events he dealt with, but instead he rehearsed what others had told him. Indeed, it is contended that he failed to reveal the dates when these conversations occurred or their circumstances.<sup>1883</sup>

666. The defence argues that although P-0012 testified about having seen children under the age of 15 in Ituri, he did not name the armed group or groups to which they belonged.<sup>1884</sup> When he did identify child soldiers as members of the UPC, it is argued there was no basis for his conclusion.<sup>1885</sup> The defence also criticises what is said to be his failure to explain the factors that enabled him to estimate the ages of these children.<sup>1886</sup>

667. The Chamber finds that P-0012's evidence was, in the main, internally consistent and it is of note that the defence has not provided evidence to substantiate its claim that the witness's testimony is compromised by virtue of his previous position in PUSIC. The witness gave evidence concerning child soldiers within the UPC/FPLC, and he emphasised that during this period virtually every armed

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<sup>1881</sup> ICC-01/04-01/06-2773-Red-tENG, para. 537.

<sup>1882</sup> ICC-01/04-01/06-2773-Red-tENG, paras 538 – 541.

<sup>1883</sup> ICC-01/04-01/06-2773-Red-tENG, para. 542.

<sup>1884</sup> ICC-01/04-01/06-2773-Conf, paras 552 and 748.

<sup>1885</sup> ICC-01/04-01/06-2773-Red-tENG, paras 553 – 554.

<sup>1886</sup> ICC-01/04-01/06-2773-Conf, paras 553, 555 and 749.

group in the region used children.<sup>1887</sup> Although the witness was not continuously present in Ituri throughout the timeframe of the charges, he was there between March and August 2003.

668. Turning to the defence criticisms of the witness's personal assessments of age, the Chamber finds that, wherever possible, P-0012 gave details as to how he reached a conclusion. For example, when describing seeing a "tiny child" with a weapon in Bunia in May 2003 (an event that is discussed in greater detail below),<sup>1888</sup> P-0012 indicated that the child did not come up to his shoulder<sup>1889</sup> or to the top of the computer screen in front of where he was sitting in court.<sup>1890</sup> Although P-0012 was clearly only providing an estimate when he gave evidence that he was unable to say whether the child was even 12 years old,<sup>1891</sup> the detail of his account demonstrates he had a clear basis for concluding that he was below 15. Nonetheless, the Chamber has adopted a cautious approach towards P-0012's other more general remarks about the age or size of children.

669. The Chamber is satisfied that P-0012 was overall a credible and reliable witness.

#### **d) P-0055**

670. P-0055 was appointed a high-ranking official within the FPLC in 2002.<sup>1892</sup> He gave evidence about the structure of the UPC/FPLC, which included children under the age of 15.

<sup>1887</sup> T-168-Red2-ENG, page 74, lines 4 – 6 and page 76, line 18.

<sup>1888</sup> T-168-Red2-ENG, page 77, lines 6 – 10 and 78, lines 10 – 11.

<sup>1889</sup> T-168-Red2-ENG, page 77, lines 22 – 24.

<sup>1890</sup> T-168-Red2-ENG, page 78, lines 1 – 4.

<sup>1891</sup> T-168-Red2-ENG, page 77, lines 9 – 10.

<sup>1892</sup> T-174-CONF-ENG, page 32, line 25 to page 33, line 9, page 43, lines 4 – 13, page 47, lines 1 – 15, page 47, line 23 to page 48, line 7, page 49, lines 9 – 17 and page 50, line 25 to page 51, line 1; T-178-CONF-ENG, page 15, lines 16 to page 16, lines 9 – 13.

671. The defence submits that after having served in the army of the UPC/FPLC, until 2004 P-0055 was a member of the FAPC (an armed movement that was hostile to the UPC).<sup>1893</sup> It is suggested his testimony is unreliable on account of his close ties to the Ugandan government.<sup>1894</sup>

672. The defence also maintains that P-0055 acknowledged on several occasions that he was unable to assess the ages of young recruits, and he did not suggest that any of the kadogos who were recruits at the Rwampara training camp, or who worked as guards at Bosco Ntaganda's residence or as bodyguards for Thomas Lubanga (or other UPC commanders), were under the age of 15.<sup>1895</sup>

673. The defence argues that notwithstanding P-0055's evidence that he did not know whether the enlistment register at the Rwampara camp included the children's ages, he also testified that the ages of the recruits usually had to be given, thereby indicating there was a requirement to make this check:<sup>1896</sup>

[...] I don't know whether the age was mentioned in that register. Actually I wasn't really interested in verifying their ages, but generally when somebody comes to enlist for training, they're asked where they were born, when they were born, their age is mentioned, because this is an identifying element for the person, if the person has a problem, it is made easier for the parents to recognise the person.<sup>1897</sup>

In all the circumstances this somewhat contradictory evidence provides an insufficient basis for the contention that there was a rule that the ages of the recruits were to be checked.

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<sup>1893</sup> ICC-01/04-01/06-2773-Red-tENG, paras 478 – 479.

<sup>1894</sup> ICC-01/04-01/06-2773-Red-tENG, paras 480 – 481.

<sup>1895</sup> ICC-01/04-01/06-2773-Red-tENG, paras 490, 492, 494 and 495.

<sup>1896</sup> ICC-01/04-01/06-2773-Red-tENG, para. 493.

<sup>1897</sup> T-175-Red2-ENG, page 80, lines 10 – 16.

674. P-0055 indicated that although it was difficult to assess the age-range of those in the army, his conclusions in this regard were based on physical appearance.<sup>1898</sup>

675. The Chamber has relied on the details provided by this witness as to the ages of child soldiers he saw within the ranks of the UPC/FPLC, bearing in mind that he defined the age-range of kadogos as between 13 and 16 years of age.<sup>1899</sup>

676. P-0055's evidence was internally consistent, and although his testimony in court differed to an extent from his statements to the prosecution, these relatively minor discrepancies did not undermine the reliability of his evidence as a whole. Furthermore, the Chamber is unpersuaded that P-0055's connections with Uganda influenced his evidence (particularly to the detriment of the accused). P-0055 was a generally credible witness and the Chamber has relied on his evidence, save in relation to a discrete area identified below.

**e) P-0017**

677. P-0017 joined the UPC the same week the latter took control of Bunia in 2002,<sup>1900</sup> and he remained with the group until he left the city in August 2003.<sup>1901</sup> Previously, the witness had spent about four months with the RCD.<sup>1902</sup> He led one of the UPC sections in 2003,<sup>1903</sup> and he worked with heavy weapons within a field brigade.<sup>1904</sup> P-0017 gave evidence about children under the age of 15 in, and the scale of their recruitment by, the UPC/FPLC, along with the latter's military

<sup>1898</sup> T-175-Red2-ENG, page 59, lines 5 – 13.

<sup>1899</sup> T-178-Red2-ENG, page 36, lines 12 – 16.

<sup>1900</sup> T-154-Red2-ENG, page 16, lines 18 – 24.

<sup>1901</sup> T-154-Red2-ENG, page 17, lines 11 – 15.

<sup>1902</sup> T-160-Red2-ENG, page 32, lines 10 – 11.

<sup>1903</sup> T-154-Red2-ENG, page 18, line 9.

<sup>1904</sup> T-154-Red2-ENG, page 22, lines 15 – 17 and page 23, lines 8 – 11.



structure.

678. The defence emphasises the evidence from P-0015 that he acted as an intermediary between P-0017 and the prosecution.<sup>1905</sup> It is also suggested that the accused has not been provided with the exact identity of the individual who first introduced P-0017 to the prosecution, thereby preventing the defence from conducting effective verification and investigation,<sup>1906</sup> (the table of contacts indicates that contact with this witness was initially made through a prosecution investigator).<sup>1907</sup> The Chamber is invited to take these general circumstances into account, along with what is said to be P-0015's involvement in "a concerted operation aimed at presenting false testimony before the Chamber", when evaluating P-0017's account.<sup>1908</sup>

679. Notwithstanding these submissions, no evidence has been introduced to the effect that P-0015 influenced the testimony of P-0017. Generally, there is no foundation for the suggested adverse inference that the defence asks the Chamber to draw as regards the credibility of P-0017, based solely on the nature of the contact between these two witnesses.

680. As discussed in greater detail below, P-0017 testified that he saw recruits as young as 12 years old, although the defence challenges this suggestion on the grounds that it was based solely on his personal assessment, which was founded on their physical appearance.<sup>1909</sup> P-0017's conclusions as to the age of girls derive from the assumption that those over the age of 15, as well as a number of those who are 13

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<sup>1905</sup> ICC-01/04-01/06-2773-Red-tENG, para. 426, referring to T-265-CONF-Red-FRA, page 38, lines 3 – 15.

<sup>1906</sup> ICC-01/04-01/06-2773-Red-tENG, paras 426 – 427.

<sup>1907</sup> EVD-D01-01039, page 5852, No. 15, line 1.

<sup>1908</sup> ICC-01/04-01/06-2773-Red-tENG, para. 428.

<sup>1909</sup> ICC-01/04-01/06-2773-Red-tENG, para. 742.

or 14, have developed breasts.<sup>1910</sup> P-0017 gave the names of two girls who were initially in the FPLC's kadogo unit, and he said one of them was small.<sup>1911</sup> Although he had not asked them their age, he estimated that they were between 13 and 14 years,<sup>1912</sup> and he wholly rejected the defence suggestion that one of them could have been 17.<sup>1913</sup>

681. As regards boys, P-0017 indicated "you could see it from their behaviour. Some would cry for their mother when they were hungry. They would whine at night, and during the day they were playing games, children's games, even if they had their weapon next to them. So you would see that these children weren't even adolescents yet. Their voice hadn't yet broken, so they were children [...] still."<sup>1914</sup>

682. Notwithstanding the undoubted difficulties that exist as regards personal, non-expert estimates of the age of children, the Chamber is satisfied P-0017's evidence concerning the ages of recruits, and particularly the youngest (those who were in the 12 year old bracket), is to be relied upon. The Chamber found him to be a credible, consistent and reliable witness.

#### **f) P-0016**

683. P-0016 was appointed as a high-ranking official within the FPLC in 2002 after Governor Lompondo had been forced out of Bunia.<sup>1915</sup> He testified that children were part of the UPC/FPLC army. He also stated there were PMF recruits of all ages, including very young girls.<sup>1916</sup>

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<sup>1910</sup> T-154-Red2-ENG, page 41, lines 14 – 20.

<sup>1911</sup> T-158-Red2-ENG, page 26, line 8 to page 27, line 16.

<sup>1912</sup> T-158-Red2-ENG, page 26, lines 20 – 23 and T-160-Red2-ENG, page 58, lines 16 – 21.

<sup>1913</sup> T-160-Red2-ENG, page 58, line 12 to page 59, line 5.

<sup>1914</sup> T-154-Red2-ENG, page 41, lines 20 – 25.

<sup>1915</sup> T-189-Red2-ENG, page 3, lines 6 – 11; page 60, line 23 to page 61, line 4.

<sup>1916</sup> T-189-Red2-ENG, page 34, lines 7-10.

684. P-0016 remained with the UPC/FPLC until the end of November or early December 2002.<sup>1917</sup> His tasks included “giving instructions to children”, as well as talking about discipline and about military regulations.<sup>1918</sup> When asked to explain what he meant by “children” in this context, the witness simply replied that he had to provide instruction to those undergoing military training,<sup>1919</sup> but when further questioned about the ages of the soldiers he trained, he denied he had acted in that capacity.<sup>1920</sup> The Chamber is of the view that the witness, in these answers, was attempting to minimise his own role, including by suggesting that he could not properly discharge his duties.<sup>1921</sup> The Chamber has treated this aspect of his testimony with caution, given the clearly evasive nature of his evidence as to his own involvement. In addition, the Chamber had doubts as to the accuracy of another discrete area of his testimony, which is dealt with below in the section on the individual criminal responsibility of the accused.

685. The defence contends that there are reasonable grounds for concluding the witness has particularly close ties to the Congolese government, and as a result his testimony should be approached with particular care.<sup>1922</sup>

686. Notwithstanding these criticisms, on analysis, there is no evidence to support the contention that he provided false testimony out of loyalty to the DRC government, and the Chamber found him to be a generally consistent, credible and reliable witness who, in the main,

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<sup>1917</sup> T-189-Red2-ENG, page 3, line 25 to page 4, line 9.

<sup>1918</sup> T-189-Red2-ENG, page 65, lines 22 – 25.

<sup>1919</sup> T-189-Red2-ENG, page 66, lines 3 – 6.

<sup>1920</sup> T-189-Red2-ENG, page 74, lines 17 to page 75, line 8.

<sup>1921</sup> See T-189-Red2-ENG, page 65, lines 18 – 22. He also stated he had no rights with regard to instructions and had no authorisation to go to the training centre in Mandro: T-189-Red2-ENG, page 74, line 23 to page 75, line 8.

<sup>1922</sup> ICC-01/04-01/06-2773-Red-tENG, paras 405 – 407.

testified about events he personally witnessed. However, as indicated, there is a qualification to this overall assessment.

687. The defence argues that P-0016's assessment of age was based solely on his personal impressions.<sup>1923</sup> However, P-0016 was convincing on this issue. When asked how he was able to determine the ages of the young recruits,<sup>1924</sup> P-0016 replied that "you could always tell that they were children, because after training they would create groups and everything they did resembled what children do", such as playing games.<sup>1925</sup> He said they would make toys for themselves and look for sticks in order to "play at being soldiers", imitating the way soldiers went to war.<sup>1926</sup> Children put down their weapons and played marbles,<sup>1927</sup> and this, he suggested, demonstrated that they were immature.<sup>1928</sup> He also gave evidence about a 13-year-old child at the camp in August 2002 that he described as a "little one", who was "really too small", and the witness often sent him on errands, for example for cigarettes from the village behind Mandro.<sup>1929</sup> Overall, in the Chamber's view, P-0016 provided a clear and credible explanation as to how he assessed the ages of the children he encountered in the ranks of the UPC/FPLC.

#### **g) P-0038**

688. As already discussed above, P-0038 gave evidence that he was a member of the UPC army (the FPLC) between 2001 and 2005.<sup>1930</sup> During that time, he acted, *inter alia*, as a trainer in the Mandro centre,

<sup>1923</sup> ICC-01/04-01/06-2773-Red-tENG, paras 413 – 415.

<sup>1924</sup> T-189-Red2-ENG, page 16, lines 20 – 22.

<sup>1925</sup> T-189-Red2-ENG, page 16, lines 23 – 25.

<sup>1926</sup> T-189-Red2-ENG, page 17, lines 3 – 5.

<sup>1927</sup> T-189-Red2-ENG, page 17, lines 5 – 8.

<sup>1928</sup> T-189-Red2-ENG, page 17, line 8.

<sup>1929</sup> T-189-Red2-ENG, page 16, lines 7 – 19.

<sup>1930</sup> T-113-Red2-ENG, page 31, lines 11 – 15.

prior to becoming a bodyguard at Chief Kahwa's residence (during the period April to September 2002).<sup>1931</sup> He addressed the structures within the FPLC, and he described the training for the recruits and various battles. There were some recruits below 15 years at the camp at Mandro when he worked there as a military trainer (before the period of the charges),<sup>1932</sup> and he saw other children in the same age group during his time in the UPC, including many he noticed whilst he was training soldiers in Mongbwalu, who were between 13 and 16 years of age.<sup>1933</sup> P-0038 was able to assess their ages by their physical appearance, including their height, and in his view it was easy to tell who was above and who was below 15 years.<sup>1934</sup> Some of the children weighed less than their weapons, with the result that the smaller children could not carry their AK-47s for a long period of time.<sup>1935</sup> Although his group of 12 soldiers, which used heavy weapons at the battle of Mongbwalu, did not include any children,<sup>1936</sup> he indicated that children below the age of 15 acted as bodyguards, escorts and soldiers during this battle.<sup>1937</sup>

689. In addition to the challenges already addressed above,<sup>1938</sup> the defence submits that P-0038 based his assessment of the ages of children on their appearance, and it is suggested he would only have been in a position to make this assessment for the soldiers in his immediate group (*i.e.* those with whom he had the most frequent

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<sup>1931</sup> T-114-Red2-ENG, page 43, line 17 to page 44, line 3; page 46, lines 9 – 15; T-113-Red2-ENG, page 40, line 7 to page 41, line 1.

<sup>1932</sup> T-113-Red2-ENG, page 40, line 7 to page 41, line 4; T-114-Red2-ENG, page 43, line 20 to page 44, line 3.

<sup>1933</sup> T-113-Red2-ENG, page 35, line 11 to page 36, line 17.

<sup>1934</sup> T-114-Red2-ENG, page 37, lines 15 – 21.

<sup>1935</sup> T-114-Red2-ENG, page 37, lines 20 – 23.

<sup>1936</sup> T-113-Red2-ENG, page 50, line 23 to page 51, line 4.

<sup>1937</sup> T-113-Red2-ENG, page 51, line 22 to page 53, line 3.

<sup>1938</sup> See paras 340-349.

contact).<sup>1939</sup> The defence also relies on his evidence that at 18 years of age he was the youngest soldier sent for training in Rwanda, where he was referred to as “the kadogo”.<sup>1940</sup>

690. As already indicated,<sup>1941</sup> the Chamber finds that P-0038 was a generally reliable and credible witness. His account that he joined the army of the UPC in 2001 – before its armed branch was formally established – does not undermine his testimony, given D-0037 explained the group in Mandro (to which P-0038 belonged) later became the FPLC.<sup>1942</sup> In this connection, the Chamber notes that D-0006 testified that he joined the UPC at the end of May 2002.<sup>1943</sup>

691. The Chamber is persuaded he assessed age reliably, as demonstrated by the details in his testimony which help explain his conclusion that certain children were below the age of 15 (*e.g.* the difficulties some had carrying weapons), and he was clearly able to evaluate soldiers outside his immediate group. P-0038 was in constant contact with many other soldiers – for instance, during their training – and therefore he was in a position to reach reliable conclusions as to age.

692. Furthermore, the reference to P-0038 as “the kadogo” during his training in Rwanda is not determinative of the age of those similarly referred to within the UPC/FPLC. As the witness himself indicated, the term kadogo was used in the UPC/FPLC above all to refer to those

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<sup>1939</sup> ICC-01/04-01/06-2773-Red-tENG, para. 473.

<sup>1940</sup> ICC-01/04-01/06-2773-Red-tENG, para. 473; T-114-Red2-ENG, page 8, lines 4 – 9.

<sup>1941</sup> See paras 348 and 481.

<sup>1942</sup> T-349-ENG, page 7, line 23 to page 8, line 20; page 20, line 22 to page 21, line 7.

<sup>1943</sup> T-254-ENG, page 80, lines 5 – 13.

below 15 years of age.<sup>1944</sup>

693. Although the Chamber has taken into account the fact that P-0038 initially acted as a trainer at Mandro prior to the period covered by the charges, this does not affect the weight of his evidence as a whole, and most particularly the reliability of his assessment that child soldiers formed part of the UPC/FPLC whilst he was within that group (*viz.* until 2005).

#### **h) P-0041**

694. P-0041 was a member of a different group<sup>1945</sup> before Thomas Lubanga appointed him to a post within the UPC executive in September 2002<sup>1946</sup> and thereafter to another position in May 2003.<sup>1947</sup> He has known the accused since childhood.<sup>1948</sup>

695. P-0041 gave evidence that he saw child soldiers within the UPC/FPLC bearing weapons, who were between 10 and 18 years old.<sup>1949</sup> He said Thomas Lubanga and others in the UPC/FPLC used child soldiers as their bodyguards,<sup>1950</sup> and he gave a detailed account of his own bodyguard, whom he believed was about 14 years old.<sup>1951</sup> P-0041 also addressed the issue of recruitment, training and demobilisation.

696. The defence submits that although the witness claimed there were child soldiers in the UPC/FPLC, and he provided details particularly about the bodyguards of Thomas Lubanga, Floribert Kisembo, Bosco

<sup>1944</sup> T-114-Red2-ENG, page 39, line 15 to page 40, line 3.

<sup>1945</sup> T-124-CONF-ENG, page 68, lines 6 – 24.

<sup>1946</sup> T-124-CONF-ENG, page 69, lines 13 – 21.

<sup>1947</sup> T-124-CONF-ENG, page 69, line 22 to page 70, line 6.

<sup>1948</sup> T-124-Red2-ENG, page 71, line 12.

<sup>1949</sup> T-125-Red2-ENG, page 48, lines 8– 17.

<sup>1950</sup> T-125-Red2-ENG, page 54, lines 17 to 25 and page 55, lines 12 to 57, line 7.

<sup>1951</sup> T-126-Red2-ENG, page 55, line 7 to page 57, line 12. In this part of his testimony P-0041 also referred to having been assigned more bodyguards for a brief period of one week, whom he estimated to be between 14 and 16 years of age.

Ntaganda and other commanders,<sup>1952</sup> he did not provide sufficient particulars as to how he was able to estimate their ages – indeed, he conceded that this was a difficult exercise – and he did not claim he was able to assess the age of the soldiers assigned to the fighting units.<sup>1953</sup>

697. Although P-0041 was unsure of the exact age of his own bodyguards and he frankly accepted it is difficult to assess the ages of children, he testified unequivocally that children from 10 years upwards were part of the armed forces.<sup>1954</sup>

698. The evidence of P-0041 was internally consistent and the Chamber considers that this former member of the UPC executive was a reliable source as to the decisions made within the UPC during the relevant period. He provided significant detail in his answers, whilst being frank as to the matters about which he was uncertain. By way of example, notwithstanding P-0041's assessment that his bodyguards were between 14 and 16 (given their physical appearance), he agreed that it is difficult to gauge the age of a young boy or child.<sup>1955</sup> He suggested this particular evaluation depends on several factors and he accepted it was necessary to consider diet because children may have been underfed.<sup>1956</sup> In all the circumstances, the Chamber is persuaded that P-0041 saw children who were clearly under the age of 15 in the UPC/FPLC and it found him to be a credible and reliable witness.

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<sup>1952</sup> ICC-01/04-01/06-2773-Red-tENG, para. 390, referring to T-125-CONF-FRA, page 66, lines 12-17; para. 391, referring to T-125-CONF-FRA, page 59, lines 3-5.

<sup>1953</sup> ICC-01/04-01/06-2773-Red-tENG, paras 385 – 386, 388 and 390 – 391.

<sup>1954</sup> T-125-Red2-ENG, page 48, lines 8– 17.

<sup>1955</sup> T-126-Red2-ENG, page 55, lines 19 – 22.

<sup>1956</sup> T-126-Red2-ENG, page 56, lines 3 – 8.



**i) P-0014**

699. P-0014, whose work required him to be up-to-date on political matters,<sup>1957</sup> travelled to Ituri at least once a week prior to 31 January 2002, and although he was not based in the area after August 2002, he returned to Ituri sporadically.<sup>1958</sup> He gave detailed evidence – based on his personal knowledge and experience of the region – about events and the key people in Ituri between 1999 and 2003. In particular, he focussed on the composition and aims of the UPC, along with its recruitment, training and use of child soldiers under the age of 15. The witness went to the UPC headquarters nearly every day for a limited period shortly before the timeframe of the charges, when he saw the recruits and their training.<sup>1959</sup>

700. P-0014 witnessed military training at the UPC's headquarters in Bunia immediately preceding the period of the charges in 2002.<sup>1960</sup> He indicated the recruits were trained to fight the RCD-ML and the Lendu,<sup>1961</sup> and they ranged from 5 years old to adulthood.<sup>1962</sup> P-0014 estimated that 30% of approximately one hundred young recruits he saw were children aged 15 and under.<sup>1963</sup> Excluding those who were 15, he estimated about 20% of the recruits were below that age.<sup>1964</sup>

701. The prosecution highlights P-0014's evidence that there was no lower age limit for the recruitment of children and the UPC/FPLC systematically pressured Hema families to provide children for

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<sup>1957</sup> T-179-CONF-ENG, page 12, line 22 to page 17, line 16.

<sup>1958</sup> T-179-Red2-ENG, page 13, lines 6 – 10, page 14, lines 11 – 14; T-179-CONF-ENG, page 17, lines 5 – 16.

<sup>1959</sup> T-179-Red2-ENG, page 74, lines 4 – 8; T-185-Red2-ENG, page 6, lines 21 – 25.

<sup>1960</sup> T-179-CONF-ENG, page 62, lines 15 – 25, page 66, line 19 to page 67, line 11 and page 74, lines 3 – 7.

<sup>1961</sup> T-184-Red2-ENG, page 60, lines 5 – 13

<sup>1962</sup> T-179-Red2-ENG, page 83, line 4 to page 84, line 2.

<sup>1963</sup> T-179-Red2-ENG, page 86, lines 12 – 20.

<sup>1964</sup> T-182-Red2-ENG, page 32, lines 1 – 10.

military service, through “mobilisation campaigns” or “recruitment drives”.<sup>1965</sup> P-0014 gave evidence about the harsh punishment and other treatment inflicted on the child soldiers,<sup>1966</sup> and he saw children under the age of 15 with gunshot wounds.<sup>1967</sup>

702. The defence is critical of the reliability and credibility of the witness’s evidence on issues relating to the presence of child soldiers within the UPC/FPLC, *inter alia*, because he was not in Ituri throughout the period covered by the charges.<sup>1968</sup> However, the Chamber is persuaded that the witness’s frequent trips to the region before and during this time, and his account of the way in which he received information about Ituri when he was absent, means his evidence is reliable. In particular, P-0014 took steps to ensure the information was accurate, and he sought to rely on several sources who were unknown to each other.<sup>1969</sup> After the witness left Ituri, he had direct contact with various individuals who were personally involved in politics, and he spoke with people “in the field”.<sup>1970</sup> P-0014 relied on the latter to obtain information on what was happening and the “actions that were being prepared”.<sup>1971</sup>

703. The defence challenges the witness’s evidence as to having seen children aged 5 to 18 in the UPC training camps in 2002. It is argued that his testimony lacked detail (particularly on how he assessed the age of the children).<sup>1972</sup>

704. As to a particular incident recounted by P-0014 that falls within the

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<sup>1965</sup> ICC-01/04-01/06-2748-Red, paras 175, 176 and 179.

<sup>1966</sup> T-181-Red2-ENG, page 17, lines 6 – 16 and page 19, lines 10 – 20.

<sup>1967</sup> T-182-Red2-ENG, page 39, line 25 to page 40, line 3.

<sup>1968</sup> ICC-01/04-01/06-2773-Red-tENG, para. 562.

<sup>1969</sup> T-179-Conf-ENG, page 16, lines 20 – 25.

<sup>1970</sup> T-181-Red2-ENG, page 53, lines 14 – 20.

<sup>1971</sup> T-181-Red2-ENG, page 53, lines 18 – 20.

<sup>1972</sup> ICC 01/04-01/06-2773-Red-tENG, paras 572, 575 and 743.

period of the charges (*viz.* seeing a boy of 12 years among the troops of Commander Jérôme Kakwavu in Aru in March or April 2003) the defence asserts his account was lacking in detail or any indication as to how he estimated the boy's age.<sup>1973</sup> Moreover, the defence maintains that Commander Kakwavu defected from the UPC in March 2003 and that the UPC was not in Aru at the relevant time.<sup>1974</sup> This is addressed below.

705. The defence also questions P-0014's credibility as regards his evidence that he is able to differentiate between ethnic groups based on physical appearance.<sup>1975</sup> This issue is essentially irrelevant to the Chamber's Decision.

706. Assessing P-0014's evidence as a whole, the Chamber is of the view his account was credible and reliable. The witness testified in a straightforward and honest manner, distinguishing clearly between the events he had witnessed and those that were reported to him.

707. Regarding his assessments of age, the witness gave detailed evidence about the child soldiers he saw in Ituri between 1999 and 2003. As discussed below, the witness provided a precise account of the circumstances in which he saw particular individuals at various times and how he assessed their ages.

708. P-0014 observed there was "no age limit" as regards the children recruited into the UPC/FPLC, and he saw 8 – 15 year-olds who had been forcibly recruited.<sup>1976</sup> He estimated the age of a particular five-year-old child at a training centre on the basis that a six-year-old

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<sup>1973</sup> ICC-01/04-01/06-2773-Red-tENG, para. 575.

<sup>1974</sup> ICC-01/04-01/06-2773-Red-tENG, para. 575, referring to T-178-CONF-FRA, page 19, lines 5 – 23 and page 34, lines 3 – 9.

<sup>1975</sup> ICC-01/04-01/06-2773-Red-tENG, para. 576.

<sup>1976</sup> T-182-Red2-ENG, page 36, line 5 to page 37, line 25.

should be able to reach over his head and touch his opposite ear, and this child was unable to do this when asked.<sup>1977</sup> As to how he estimated the age of the other children he saw, the witness indicated that he used to be a teacher and he had been in daily contact with individuals within this age group; this helped him to identify the ages of young people he saw within the UPC/FPLC.<sup>1978</sup> The witness took into account the children's physical characteristics, including such things as the change in a boy's voice when he reaches puberty.<sup>1979</sup>

709. As with other witnesses who also gave personal estimates of ages, the Chamber has reflected the difficulties in this area; however, in the context of P-0014's evidence as a whole, the Chamber is satisfied that his evidence on this subject was credible and reliable.

#### **j) P-0002**

710. P-0002 testified about video evidence introduced during the trial. This witness worked for the UPC "since it was created" until May 2003.<sup>1980</sup> During the period following March 2003, he went to Thomas Lubanga's residence nearly every day.<sup>1981</sup> The prosecution introduced a number of videos into evidence via this witness showing UPC political speeches, assemblies, rallies and interviews. Although the defence criticises the lack of precision in P-0002's evidence on the age and identity of young people in the UPC,<sup>1982</sup> it does not challenge the authenticity of the underlying material. The Chamber is satisfied that the evidence of P-0002, in which he identified various people and

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<sup>1977</sup> T-179-Red2-ENG, page 84, lines 1 – 7 and page 86, line 21 to page 87, line 9.

<sup>1978</sup> T-179-Red2-ENG, page 87, lines 10 – 14.

<sup>1979</sup> T-179-Red2-ENG, page 87, lines 15 – 21.

<sup>1980</sup> T-160-Red2-ENG, page 69, line 19 to page 70, line 21 (stating that it was until March, which he corrected in a following transcript); T-162-Red2-ENG, page 5, lines 14 – 25.

<sup>1981</sup> T-162-Red2-ENG, page 7, lines 3 – 11.

<sup>1982</sup> ICC-01/04-01/06-2773-Red-tENG, para. 532.

locations in the videos shown to him during his evidence, along with the dates of the relevant events, is credible, consistent and reliable.

711. P-0002 declined to elaborate on his estimate as to the ages of former UPC soldiers in a video excerpt – some of whom he thought could be underage – because he had not asked them their ages.<sup>1983</sup> Given P-0002's evident caution as regards the ages of children, the Chamber is confident he only expressed an opinion on this issue when he had a proper basis for reaching a firm conclusion. Overall, P-0002 was a credible and reliable witness. The Chamber has independently assessed the ages of the children identified in the video footage, to the extent that it is possible to draw a safe conclusion based on their appearance.

**k) P-0030**

712. P-0030 principally gave evidence about a number of videos concerning UPC-related political speeches, popular assemblies, press conferences and other meetings he attended. He provided an explanation of the events reflected in the video footage, and he identified various people and locations.

713. P-0030 testified that he noticed children under the age of 15 within the ranks of the UPC/FPLC,<sup>1984</sup> including children as young as 9 years old who were part of Thomas Lubanga's presidential guard.<sup>1985</sup> He commented on a number of video excerpts that show recruits and bodyguards belonging to the UPC, some of whom were clearly under

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<sup>1983</sup> T-162-Red2-ENG, page 48, line 16 to page 49, line 5.

<sup>1984</sup> See, for instance, T-128-Red2-ENG, page 24, lines 5 – 12, page 48, lines 6 – 14; page 63, lines 2 – 14; page 65, line 12 to page 66, line 4.

<sup>1985</sup> T-128-Red2-ENG, page 20, line 14 to page 21, line 7.

the age of 15.<sup>1986</sup>

714. The defence submits the evidence of P-0030 is limited in its scope, as he was essentially called to authenticate the video extracts played during his testimony.<sup>1987</sup> However, the witness was questioned extensively about certain political events that were connected to the video footage he viewed in court, and the defence was provided with a fair opportunity to examine him on these issues. In the circumstances, the Chamber has not restricted its consideration of P-0030's evidence as suggested by the defence but instead it has taken the entirety of his testimony into account.

715. Although the defence maintains that P-0030's contact with Intermediary 143<sup>1988</sup> should be considered when evaluating his credibility,<sup>1989</sup> there is no evidence to suggest that Intermediary 143 influenced P-0030 in the evidence he gave. Accordingly, there is no basis for drawing an adverse conclusion as to his testimony based solely on any contact between them – indeed, the Chamber found the evidence of P-0030 to be consistent, credible and reliable.

716. The defence addressed his account of having seen young soldiers within the ranks of the UPC, whose age he estimated as between 9 years and adulthood. The defence emphasises this conclusion was based solely on his visual assessment.<sup>1990</sup> Similarly, the defence contends that P-0030 did not verify the ages of the bodyguards he saw at Thomas Lubanga's residence, whom he also suggested were

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<sup>1986</sup> EVD-OTP-00571, 02:47:15 – 02:47:19; EVD-OTP-00572, 00:28:42; EVD-OTP-00574, 00:36:21 and 01:49:02; EVD-OTP-00585, 00:40:08 onwards. The video excerpts will be addressed in the relevant sections below.

<sup>1987</sup> ICC-01/04-01/06-2773-Red-tENG, para. 533.

<sup>1988</sup> See table of contacts between intermediaries and trial witnesses, EVD-D01-01037 at DRC-D01-0003-5788, line 8.

<sup>1989</sup> ICC-01/04-01/06-2773-Red-tENG, para. 534.

<sup>1990</sup> ICC-01/04-01/06-2773-Red-tENG, paras 535 and 746.

between 9 years and adulthood.<sup>1991</sup> It is argued it is impossible to distinguish with sufficient certainty between a 12 or 13 year-old and a 15 or 16 year-old child on the basis of a photograph or video extract.<sup>1992</sup> Therefore, the defence asserts the video excerpts provide an uncertain basis for concluding that the adolescents in them were below the age of fifteen.<sup>1993</sup>

717. The Chamber notes that P-0030's estimate that the children guarding Mr Lubanga's residence were 9 or 10 years of age was not based solely on a limited number of visits. His account, which the Chamber accepts, was that he visited the residence frequently (two or three times per week).<sup>1994</sup> When questioned about the ages of certain 14 and 15 year-old child soldiers he had seen, the witness explained his assessment as follows:

A. Well, I can say, I can justify myself, but the images also speak. If you doubt what I say, I think that by looking at the image that the image can help you see that there were kadogos.<sup>1995</sup>

He added there might be differences in size depending on the ethnicity of the children.<sup>1996</sup>

718. The Chamber concludes that P-0030 based his assessment of age on the appearance of the individuals he saw, some of whom he encountered on a frequent, as opposed to a sporadic, basis. The Chamber is satisfied that there are instances when a reliable distinction can be drawn between a 9 or 10 year-old child and a 14 or 15 year-old child, based solely on appearance. The Chamber has independently

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<sup>1991</sup> ICC-01/04-01/06-2773-Red-tENG, paras 536 and 747.

<sup>1992</sup> ICC-01/04-01/06-2773-Red-tENG, paras 703 – 704.

<sup>1993</sup> ICC-01/04-01/06-2773-Red-tENG, paras 705 – 707.

<sup>1994</sup> T-128-Red2-ENG, page 19, line 25 to page 20, line 6.

<sup>1995</sup> T-131-Red2-ENG, page 8, line 2 to page 9, line 9.

<sup>1996</sup> T-131-Red2-ENG, page 8, line 25 to page 9, line 9.

assessed the ages of the children identified in the video footage and about whom this witness expressed a view, to the extent that it is possible to draw a safe conclusion based on their appearance. Overall, P-0030 was a credible and reliable witness.

#### I) D-0011

719. D-0011 joined the UPC in about July of 2002 when he was living in Bunia.<sup>1997</sup> He served as Thomas Lubanga's "expert consultant" and later as his "private secretary" until around September 2004.<sup>1998</sup> In the latter role, D-0011 managed Mr Lubanga's meetings, acted as his driver and prepared documents, and he was concerned with other aspects of the President's daily activities.<sup>1999</sup> He assumed responsibility for procuring rations for the troops, which were purchased by the President.<sup>2000</sup> His office was located within Thomas Lubanga's premises and sometimes he attended meetings organised by the President.<sup>2001</sup> A significant part of the testimony of this witness concerned the demobilisation process allegedly implemented by the UPC, as addressed in Section IX(B)(3)(a)(1). This includes evidence concerning the Disarmament, Demobilisation, Repatriation, Resettlement and Reintegration ("DDRRR") programme and the letter of 12 February 2003.<sup>2002</sup>

720. D-0011 testified that between September 2002 and the end of May 2003 he did not see any child soldiers in the UPC and, if there were, "perhaps they were in the interior."<sup>2003</sup> He explained that possibly

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<sup>1997</sup> T-346-ENG, page 71, lines 12 – 19.

<sup>1998</sup> T-346-ENG, page 69, line 21 to page 71, line 11 and page 74, line 13 to page 75, line 6.

<sup>1999</sup> T-346-ENG, page 75, lines 9 – 21.

<sup>2000</sup> T-346-ENG, page 75, lines 14 – 16.

<sup>2001</sup> T-346-ENG, page 75, line 22 to page 76, line 15.

<sup>2002</sup> T-347-ENG, page 45, line 17 to page 62, line 3.

<sup>2003</sup> T-347-ENG, page 35, lines 19 – 22.



there were children under the age of 15 within the umbrella of the FPLC “in the interior” (not in Bunia), who sought food or protection, and although on occasion they were asked to carry out “minor task[s]” such as transporting military equipment, they did not receive military training.<sup>2004</sup>

721. He did not know whether children under the age of 15 were used by the FPLC to fight in the front line at Lipri, Bambu and Kobu in February 2003.<sup>2005</sup> D-0011 also did not know whether children under the age of 15 were at the Rwampara military camp, and, given his absence, he was unable to give evidence about Thomas Lubanga’s visit to that camp in February 2003.<sup>2006</sup> He was unaware of any procedures for verifying the ages of the recruits, although he stated that when the armed branch of the FPLC was set up, an order was issued prohibiting the enrolment of children – who D-0011 defined as individuals below the age of 18 – into the army.<sup>2007</sup> D-0011 suggested it was possible to determine whether an individual was below the age of 18 by their physical appearance.<sup>2008</sup>

722. D-0011 testified that at the end of May 2003, Thomas Lubanga held a rally in Bunia, where they both saw a number of children carrying weapons, who appeared to be under the age of 18, amongst the group of FPLC soldiers.<sup>2009</sup> After he brought this to the attention of Mr Lubanga, the latter asked him to prepare an emergency decree “to ensure the demobilisation of soldiers within the FPLC who were

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<sup>2004</sup> T-347-ENG, page 36, line 9 to page 37, line 6.

<sup>2005</sup> T-347-ENG, page 62, line 5 to page 63, line 23.

<sup>2006</sup> T-347-ENG, page 57, line 22 to page 60, line 6 and page 20 – 23.

<sup>2007</sup> T-347-ENG, page 40, line 7 to page 41, line 22.

<sup>2008</sup> T-347-ENG, page 39, line 23 to page 40, line 1.

<sup>2009</sup> T-347-ENG, page 12, lines 19 – 21 and page 15, line 7 to page 16, line 1.

visibly child soldiers.”<sup>2010</sup> D-0011’s explanation for this new phenomenon (*viz.* the presence of children) was that before the UPDF retreated from Bunia on or about 5 May 2003, it distributed weapons to those who wished to protect themselves.<sup>2011</sup> Children within the ranks of PUSIC, and those who had been abandoned, were armed as a result,<sup>2012</sup> and he indicated this explained the “abundant presence of child soldiers in the ranks of the FPLC”.<sup>2013</sup> D-0011 suggested that child soldiers were to be found in the FPLC after the end of May 2003 as a result of a period in which they “weren’t in a position to manage affairs in the territory”, but that by end of July 2003 they had been demobilised by various organisations, due to the efforts of the commanders of the FPLC.<sup>2014</sup>

723. The defence suggests that on account of the large number of armed groups present in Bunia in May 2003, which included armed forces that had split from the UPC, it was impossible to identify the various armed groups to which the children bearing arms belonged simply by looking at them.<sup>2015</sup> D-0011 indicated that when he saw a large number of armed individuals amongst the soldiers providing security at a UPC rally in Bunia, who gave the impression of being under 18, he could not say with certainty whether they were all soldiers because some of them were dressed partially in civilian clothing.<sup>2016</sup> Notwithstanding this possible difficulty, it is clear that the individuals wearing uniforms who were obviously providing security were easier to categorise. This witness only referred to children in the sense that there were soldiers

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<sup>2010</sup> T-347-ENG, page 15, line 19 to page 16, line 8.

<sup>2011</sup> T-347-ENG, page 16, line 13 to page 17, line 1.

<sup>2012</sup> T-347-ENG, page 17, lines 1 – 8.

<sup>2013</sup> T-347-ENG, page 17, lines 8 – 10.

<sup>2014</sup> T-347-ENG, page 35, line 25 to page 36, line 8.

<sup>2015</sup> ICC-01/04-01/06-2773-Red-tENG, para. 937.

<sup>2016</sup> T-347-ENG, page 15, lines 12 – 16.

who were below the age of 18. His testimony therefore does not assist as to whether there were children below the age of 15 in the FPLC.

724. The Chamber has taken into account the close professional relationship between this witness and the accused, and it has weighed his evidence in light of the other persuasive material that indicates there were children below 15 years of age in the FPLC. The Chamber considers that this witness was frequently evasive in his testimony, which the Chamber has approached with considerable caution. In the result, the Chamber has only relied on his account when supported by other credible evidence.

**m) D-0037**

725. D-0037 is a former soldier who was with the APC army in 2001 and 2002.<sup>2017</sup> Later, he joined an armed group in Mandro which was organised to defend the Hema community under the leadership of Chief Kahwa and Commander Bosco Ntaganda.<sup>2018</sup> The witness's evidence was that he recalled joining this group around the middle or end of June 2002<sup>2019</sup> and that it later became part of the FPLC, following the takeover of Bunia in 2002.<sup>2020</sup> Within the FPLC, D-0037 became secretary to Commander Bosco Ntaganda.<sup>2021</sup> Thereafter, he was also appointed as the Chief of Administration in the UPC/FPLC (G1), around July or August 2003, following the defection of Floribert

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<sup>2017</sup> T-349-ENG, page 4, lines 1 – 19. The witness later stated he joined the APC in 2000. However, the question and answer in this regard do not seem to correspond, which may be the result of interpretation or transcription difficulties, T-349-ENG, page 20, lines 11 – 21.

<sup>2018</sup> T-349-ENG, page 5, lines 9 – 18.

<sup>2019</sup> T-349-ENG, page 20, line 22 to page 21, line 12. The witness eventually said he joined the FPLC in June 2002, but from his evidence in this series of questions, it seems that he meant the group that later turned into the FPLC rather than the FPLC itself.

<sup>2020</sup> T-349-ENG, page 7, line 22 to page 8, line 20 and page 20, line 25 to page 21, line 7.

<sup>2021</sup> T-349-ENG, page 8, lines 21 – 23; page 9, lines 5 – 13; page 21, lines 8 – 15.

Kisembo.<sup>2022</sup>

726. He gave evidence about the rebellion against the RCD/ML and he supplied information concerning the self-defence forces, the structure of the FPLC and the alleged demobilisation of children. D-0037 said that although there were children below 18 years of age within the FPLC, there were none below 15.<sup>2023</sup> The witness described how some individuals who arrived at FPLC training centres were refused training although others below the age of 18 were admitted if they were well built.<sup>2024</sup>

727. The Chamber has concluded that D-0037's evidence was, in most respects, credible, consistent and reliable although on certain discrete issues, that have been addressed to the extent necessary, his evidence was of less assistance.

**n) D-0019**

728. D-0019 was an early member of the UPC (he helped draft the UPC's programme, dated 15 September 2000)<sup>2025</sup> and he served as the UPC's national secretary for internal and customary affairs (following his original appointment as deputy national secretary).<sup>2026</sup> He also acted as spokesman and, in August 2003, as the interim president of the UPC.<sup>2027</sup> He remains a member of the UPC. D-0019 gave evidence on the origins and nature of the UPC and the FPLC; the events in Ituri during the period leading up to and including the charges; the relationship between the UPC/FPLC and the self-defence committees;

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<sup>2022</sup> T-349-ENG, page 15, lines 7 – 20 and page 23, lines 2 – 21.

<sup>2023</sup> T-349-ENG, page 61, lines 4 – 14.

<sup>2024</sup> T-349-ENG, page 61, line 24 to page 62, line 4.

<sup>2025</sup> T-342-ENG, page 16, line 16 to page 17, line 1, referring to EVD-OTP-00662.

<sup>2026</sup> T-340-ENG, page 70, lines 14 – 24.

<sup>2027</sup> T-342-ENG, page 51, line 24 to page 52, line 22; T-340-ENG, page 70, line 24.

the UPC/FPLC's attempts at demobilisation; and the situation of children, as regards the UPC army.

729. Although the prosecution and the defence rely on the testimony of D-0019, the prosecution challenges significant portions of his evidence, particularly regarding the position of Thomas Lubanga within the UPC (and the nature of the organisation) prior to the period of the charges,<sup>2028</sup> as well as his testimony as to the lack of young children within the FPLC.<sup>2029</sup>

730. The Chamber found D-0019 to be an evasive and contradictory witness on the issues that particularly concerned Thomas Lubanga, and in some instances during his testimony he demonstrated partiality towards the accused. Bearing these factors in mind, as well as his position within the UPC, the Chamber has exercised caution as regards certain aspects of his testimony. However, on issues that were not directly related to the accused, such as the structure of the UPC, his account tended to be more consistent, credible and reliable. In all the circumstances, the Chamber has accepted his testimony in these latter areas, particularly when corroborated by other credible evidence or if they were uncontroversial.

**o) D-0007**

731. D-0007, who was the co-ordinator of the Hema self-defence committees in Ituri during the relevant period,<sup>2030</sup> gave detailed and compelling evidence on the use of children under the age of 15 by the self-defence forces,<sup>2031</sup> although he suggested the latter were separate

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<sup>2028</sup> See paras 1093 *et seq.*

<sup>2029</sup> ICC-01/04-01/06-2748-Red, paras 292, 332, 347 and footnote 830.

<sup>2030</sup> T-348-ENG, page 23, line 4 to page 25, line 14.

<sup>2031</sup> T-348-ENG, page 33, line 13 to page 34, line 6.

from the UPC/FPLC.<sup>2032</sup> The Chamber found his evidence, in the main, to be credible and reliable, notwithstanding certain notable exceptions. For instance, as discussed below, his evidence on the ages of the children who were sent to the UPC/FPLC for training (and who the villagers expected to return)<sup>2033</sup> was implausible. His account, along with the prosecution's criticism of parts of it,<sup>2034</sup> is considered hereafter in the section on the self-defence groups.

### **3. Documentary evidence on the presence of child soldiers within the UPC/FPLC**

732. In this section, the Chamber considers particular items of documentary evidence that are challenged by the defence.

#### **a) Logbooks from a demobilisation centre (EVD-OTP-00474, EVD-OTP-00476 and EVD-OTP-00739)**

733. During the testimony of P-0031, the prosecution introduced several logbooks recording the entry and departure of child soldiers from a particular demobilisation centre in Bunia.<sup>2035</sup> EVD-OTP-00474 is a list drawn up by social workers containing the names, ages and other details relating to children who were to be placed with host families.<sup>2036</sup> The prosecution referred to this logbook repeatedly in relation to the alleged former child soldiers who were called to give evidence.<sup>2037</sup>

734. The prosecution submits that logbook EVD-OTP-00476 concerns 12

<sup>2032</sup> T-348-ENG, page 42, line 14 to page 43 to page 46, lines 9 – 16.

<sup>2033</sup> T-348-ENG, page 36, line 6 to page 38, line 9.

<sup>2034</sup> ICC-01/04-01/06-2748-Red, paras 353 – 354.

<sup>2035</sup> EVD-OTP-00474, T-200-Red2-ENG, page 89, lines 1 – 23; EVD-OTP-00739, T-201-Red2-ENG, page 38, lines 22 – 23 and page 39, lines 9 – 15; EVD-OTP-00476, T-201-Red2-ENG, page 25, lines 12 – 24 and T-245-Red2-ENG, page 8, line 5 to page 10, line 25.

<sup>2036</sup> T-200-Red2-ENG, page 89, lines 5 – 20 (P-0031).

<sup>2037</sup> ICC-01/04-01/06-2748-Red, paras 370 (in relation to P-0294), 391 (in relation to P-0011) and 429 (in relation to P-0007 and P-0008).

former UPC/FPLC child soldiers under the age of 15 who were at the centre prior to 13 August 2003, along with an additional 15 UPC/FPLC child soldiers below the age of 15 who arrived between 13 August 2003 and 13 September 2003 (the latter group, it is submitted, were likely to have been conscripted, enlisted or used prior to 13 August 2003).<sup>2038</sup> P-0031 gave evidence on the identity of the individual who compiled this logbook.<sup>2039</sup>

735. EVD-OTP-00739 was a record that was made to assist in monitoring children who were reunited with their families.<sup>2040</sup> The prosecution submits that EVD-OTP-00476 and EVD-OTP-00739 demonstrate the systematic nature of the plan that children were to be conscripted and enlisted into, and used by, the UPC/FPLC.<sup>2041</sup>

736. The defence challenges the reliability of these logbooks.<sup>2042</sup> First, it is submitted that since P-0031 is alleged to have manipulated other evidence, the “information provided by the organisations linked to this witness [...] cannot be considered to be sufficiently reliable.”<sup>2043</sup> Second, it is argued that given many individuals lied at the demobilisation centres about their age and status as former child soldiers for material gain, notwithstanding the reliability of the people who collected the material, the content of the logbooks is not to be trusted.<sup>2044</sup> Further, it is submitted that the information was not adequately verified, and in this respect the defence observes that although P-0031 testified that a particular organisation was supposed to confirm that the individuals mentioned in EVD-OTP-00476 had

<sup>2038</sup> ICC-01/04-01/06-2748-Red, paras 162 – 163.

<sup>2039</sup> T-201-CONF-ENG, page 25, line 23 to page 28, line 21.

<sup>2040</sup> T-201-Red2-ENG, page 91, lines 9 – 15.

<sup>2041</sup> ICC-01/04-01/06-2773-Red, para. 162.

<sup>2042</sup> ICC-01/04-01/06-2773-Red-tENG, paras 709 – 716.

<sup>2043</sup> ICC-01/04-01/06-2773-Red-tENG, para. 711.

<sup>2044</sup> ICC-01/04-01/06-2773-Red-tENG, para. 712.

belonged to an armed group, the testimony of D-0023 and P-0089 demonstrates that this did not occur.<sup>2045</sup> In an interview with the prosecution following his testimony, P-0089 stated that the Commission Nationale de Désarmement, Démobilisation et Réinsertion (“CONADER”) accepted a number of children who had falsely claimed to be demobilised soldiers, and they recorded the information provided without any process of verification.<sup>2046</sup> D-0023 similarly stated that many civilians falsely registered as former soldiers with CONADER in order to obtain financial and other benefits from the demobilisation process.<sup>2047</sup> He also testified that many individuals did not use their real names when registering with CONADER in order to avoid later prosecution.<sup>2048</sup> The defence emphasises that the UPC/FPLC is not referred to in logbook EVD-OTP-00739.<sup>2049</sup>

737. It is submitted that the list in document EVD-OTP-00474, which was prepared by MONUC along with another organisation, similarly fails to include a reference to the armed group to which the demobilised children belonged.<sup>2050</sup> Furthermore, the defence contends that the testimony of witness P-0031 – that the UPC recruited the children referred to in the list in Mongwalu in August 2002 and they were discharged by Jérôme Kakwavu on 1 April 2004 in Aru – is implausible given the RCD/ML controlled the region up until November 2002.<sup>2051</sup> In addition, the defence notes that the UPC lost control of the region of Aru in March 2003, the time when Mr

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<sup>2045</sup> ICC-01/04-01/06-2773-Red-tENG, paras 713 – 714.

<sup>2046</sup> EVD-D01-00986, page 0307, line 96 to page 0308, line 145.

<sup>2047</sup> T-266-Red2-ENG, page 42, lines 4 – 10 and page 43, line 12 to page 47, line 25.

<sup>2048</sup> T-266-Red2-ENG, page 59, lines 3 – 9.

<sup>2049</sup> ICC-01/04-01/06-2773-Red-tENG, para. 715.

<sup>2050</sup> ICC-01/04-01/06-2773-Red-tENG, para. 629.

<sup>2051</sup> ICC-01/04-01/06-2773-Red-tENG, para. 629, referring to EVD-OTP-00710.



Kakwavu defected from the UPC.<sup>2052</sup>

738. The defence submits that although witness P-0031 stated that in a general sense MONUC, UNICEF and other NGOs undertook the verification of the children's ages,<sup>2053</sup> P-0046 indicated that MONUC often relied on its partners for this purpose.<sup>2054</sup>

739. Assessing this evidence overall, the lack of information concerning the armed group or groups to which the children registered in logbook EVD-OTP-00739 and listed in EVD-OTP-00474 belonged, leads the Chamber to conclude that these two documents cannot be relied on in order to establish the presence of children within the UPC/FPLC.

740. Similarly, the Chamber is unable to rely on the contents of logbook EVD-OTP-00476, notwithstanding the fact that it contains information about the armed groups with which the children were associated, along with their dates of birth,<sup>2055</sup> because of the potential unreliability of the information when it was originally provided and the apparent lack of sufficient (or any) verification.

**b) Letter of 12 February 2003 from the National Secretary for Education to the G5 Commander of the FPLC (EVD-OTP-00518)**

741. The prosecution relies on a letter dated 12 February 2003 from the National Secretary for Education and Youth, addressed to the G5 in

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<sup>2052</sup> ICC-01/04-01/06-2773-Red-tENG, para. 629, referring to T-178-CONF-FRA, page 34, lines 3 – 4 (P-0055); T-177-CONF-FRA, page 5, lines 7 – 19 and T-178-CONF-FRA, page 18, line 20 to page 19, line 10 (P-0055); T-341-CONF-FRA, page 23, lines 18 – 28 (D-0019).

<sup>2053</sup> ICC-01/04-01/06-2773-Red-tENG, para. 632, referring to T-199-CONF-FRA page 21, lines 16 – 20 and T-201-CONF-FRA, page 19, line 20 to page 20, line 1 (P-0031); T-200-CONF-FRA, page 86, lines 4 – 6, T-199-CONF-ENG, page 23, lines 21 – 22 and T-201-CONF-FRA, page 18, lines 5 – 16 and page 19, lines 13 – 14 (P-0031).

<sup>2054</sup> ICC-01/04-01/06-2773-Red-tENG, para. 632, referring to EVD-OTP-00493, transcript of testimony of P-0046 before Pre-Trial Chamber I (T-38-FRA, page 84, line 24 to page 85, line 8) and T-206-CONF-FRA, page 18, lines 5 – 16 and page 19, lines 13 – 14 (P-0046).

<sup>2055</sup> EVD-OTP-00476, page 0194.

the UPC/FPLC and copied to Thomas Lubanga, concerning the selection of thirteen officers from the army who were to be trained in a DDRRR programme.<sup>2056</sup> The letter states that the programme is to be applied to those soldiers aged 10 to 15 or 16 who are “willing” to return to civilian life,<sup>2057</sup> which the prosecution submits confirms, first, the presence of children under the age of 15 or 16 years in the FPLC during the relevant period and, second, the accused’s awareness that this was occurring.<sup>2058</sup>

742. The prosecution argues that the testimony of D-0011 demonstrates that this letter referred to children within the FPLC.<sup>2059</sup> It is emphasised that it is a report from a UPC national secretary, addressed to the G5 who was in charge, *inter alia*, of recruitment.<sup>2060</sup>

743. The defence argues that the letter does not prove that child soldiers below the age of 15 were part of the FPLC. It emphasises that it refers to a DDRRR programme without specific mention of the FPLC.<sup>2061</sup> Rather, the reference to child soldiers (specifically between 10 and 15 or 16 years) is said to include all children targeted by the DDRRR programme, and was not restricted to those from the UPC/FPLC.<sup>2062</sup> The defence also refers to D-0011’s evidence that the programme was not solely concerned with the UPC/FPLC because he said that it also related to Rwanda and Burundi.<sup>2063</sup> In further support of its argument

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<sup>2056</sup> ICC-01/04-01/06-2748-Red, paras 303 – 304, referring to EVD-OTP-00518.

<sup>2057</sup> EVD- OTP-00518; The French original states: “ [...] a initié un programme de Démobilisation, Désarmement, Rééducation, Réinstallation et de Réinsertion (DDRRR) en faveur des Enfants-Soldats, âgés de 10 à 15/16 ans, qui acceptent volontiers leur retour à la vie civile pour une réorientation conforme de leur avenir. [...]”.

<sup>2058</sup> ICC-01/04-01/06-2748-Red, para. 304.

<sup>2059</sup> ICC-01/04-01/06-2748-Red, para. 304, referring to T-347-ENG, page 53, lines 16 – 19.

<sup>2060</sup> ICC-01/04-01/06-2748-Red, footnote 830.

<sup>2061</sup> ICC-01/04-01/06-2773-Red-tENG, para. 728.

<sup>2062</sup> ICC-01/04-01/06-2773-Red-tENG, paras 726 – 730.

<sup>2063</sup> ICC-01/04-01/06-2773-Red-tENG, para. 728, referring to T-347-CONF-FRA, page 41, lines 17 – 21.

the defence relies on the testimony of P-0046 that the DDRRR was a MONUC project to repatriate Rwandese soldiers from the DRC, and the testimony of D-0019 that it was a programme aimed at others from the east of the Congo.<sup>2064</sup>

744. D-0011 suggested that the 12 February 2003 letter (EVD-OTP-00518) concerned a nationwide DDRRR programme aimed at children in all the armed forces.<sup>2065</sup> Although the witness agreed that it was addressed to the G5 commander of the FPLC and referred to the selection of thirteen FPLC officers who were to participate in demobilisation training,<sup>2066</sup> he strongly resisted the suggestion that it solely related to children within the UPC/FPLC.<sup>2067</sup> He maintained that the UPC/FPLC was addressed because it was “the political arm that was in charge of this region”, and that, along with Save the Children, it was able to implement the DDRRR programme of demobilising children from the village self-defence committees and the other armed groups, such as PUSIC.<sup>2068</sup> D-0011 suggested that soldiers in the region were exclusively assimilated into the FPLC because it was “the only power in place”,<sup>2069</sup> although he also gave evidence that everyone under 18 was involved and “not just those enlisted in the FPC [*sic.*] once we came back from the bush.”<sup>2070</sup> However, he did not agree with the assertion that the document addressed the position of child soldiers in the FPLC or those assimilated into pro-FPLC units.<sup>2071</sup>

745. The Chamber has placed little reliance on D-0011’s evidence

<sup>2064</sup> ICC-01/04-01/06-2773-Red-tENG, para. 729, referring to EVD-OTP-00493, T-38-FRA, page 12, lines 18 – 23 and page 13, lines 8 – 11 (P-0046); T-347-CONF-FRA, page 41, lines 17 – 21.

<sup>2065</sup> T-347-ENG, page 46, line 3 to page 47, line 8.

<sup>2066</sup> T-347-ENG, page 53, line 23 to page 54, line 2.

<sup>2067</sup> T-347-ENG, page 52, line 3 to page 53, line 11.

<sup>2068</sup> T-347-ENG, page 46, line 12 to page 47, line 14 and page 49, line 14 to page 51, line 24.

<sup>2069</sup> T-347-ENG, page 51, lines 17 – 20 and page 53, lines 12 – 22.

<sup>2070</sup> T-347-ENG, page 51, lines 20 – 24.

<sup>2071</sup> T-347-ENG, page 52, line 25 to page 53, line 5.

concerning EVD-OTP-00518, a document about which he was frequently evasive and argumentative. As an example, he suggested that the letter does not include any reference to the FPLC,<sup>2072</sup> notwithstanding the fact that the G5 commander of the FPLC was the addressee.

746. Although the issue of child soldiers may well have been a concern for the entire region, the document implies that there were children between the ages of 10 and 15 or 16 within the FPLC (regardless of their nationality). PUSIC and the self-defence forces were not referred to, and D-0011 agreed that Eric Mbabazi was not PUSIC's commander and he had no control over those troops.<sup>2073</sup> Furthermore, D-0019 indicated that "[t]he programme concerned minors who wanted to leave the UPC" (although he added that "there were minors who were also active in the self-defence forces").<sup>2074</sup>

747. As addressed in greater detail above, D-0011 suggested there were no minors among Thomas Lubanga's bodyguards (or, more generally, in the UPC/FPLC until May 2003, save possibly in the "interior"), a contention that is contradicted by other witnesses and the video evidence. Therefore, the Chamber discounts his evidence about the 12 February 2003 letter to the extent that he suggests it did not concern child soldiers within the ranks of the FPLC.

748. Given this letter of 12 February 2003 was sent by the UPC/FPLC's national secretary for education to the UPC/FPLC's G5 (whose key responsibilities were training, morale and recruitment),<sup>2075</sup> its reference

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<sup>2072</sup> T-347-ENG, page 50, lines 2 – 4.

<sup>2073</sup> T-347-ENG, page 51, lines 12 – 14.

<sup>2074</sup> T-346-ENG, page 45, lines 11 – 18.

<sup>2075</sup> T-345-ENG, page 74, lines 1 – 3 (D-0019); T-154-Red-ENG, page 24, lines 4; lines 12 – 13 (P-0017); T-189-Red2-ENG, page 77, lines 11 – 19; page 82, lines 1 – 2 (the witness testified that the G5

to the demobilisation of child soldiers aged 10 to 15 or 16 years old and the testimony of D-0019 that the demobilisation programme concerned child soldiers in the UPC, the Chamber considers that regardless of whether it could also be interpreted as referring to children in the self-defence forces or other armed groups, it was clearly directed principally at the position of children in the UPC/FPLC. It follows that on this issue the Chamber found the evidence of D-0019 to be reliable – namely that the letter also concerned child soldiers within the FPLC. Therefore, this document significantly corroborates other evidence before the Chamber that child soldiers under the age of 15 were part of the UPC/FPLC during the period of the charges.

**c) Logbook of radio communications (EVD-OTP-00409)**

749. The prosecution relies on a UPC/FPLC logbook with the entry “*chez nous un seul enfant a reçu une balle mais il est encore vivant et il n'est pas gravement blessé*” to demonstrate that children under 15 were within the ranks of the UPC/FPLC.<sup>2076</sup>

750. The defence submits the true meaning of the word “children” in the UPC/FPLC military context is demonstrated by video footage of the Governor of Ituri making a speech in support of FPLC soldiers,<sup>2077</sup> which includes the following extract:

[Translation] Our march today demonstrates the support we are providing for our children and, let me quote, the patriotic force for the liberation of the Congo, FPLC. They should be congratulated today.<sup>2078</sup>

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was in charge of morale, but he never saw him involved in recruitment) (P-0016); T-175-Red2-ENG, page 75, lines 9 – 12; page 76, lines 1 – 21 (P-0055).

<sup>2076</sup> ICC-01/04-01/06-2748-Red, para. 216, referring to EVD-OTP-00409 at DRC-OTP-0017-0093 (Swahili) and EVD-OTP-00622 at DRC-OTP-0171-0987 (French translation).

<sup>2077</sup> ICC-01/04-01/06-2773-Red-tENG, para. 723.

<sup>2078</sup> EVD-OTP-00410/EVD-OTP-00678, 00:10:29 – 00:11:30; T-346-ENG, page 56, lines 5 – 7.

The defence also refers to the testimony of D-0019 who stated that in this speech the Governor of Ituri was referring to the soldiers of the FPLC as a whole and not only to those who were minors.<sup>2079</sup>

751. The defence submits the word “child” as it is used in the logbook is a synonym for “soldier”, and it therefore does not refer to those who were minors.<sup>2080</sup> The accused cites several examples in support of this contention, such as “Fataki – the children hit the target”.<sup>2081</sup> It is also contended that the logbook is merely a log of radio communications between various FPLC officers and it is not a record of the individuals wounded or killed in combat.<sup>2082</sup>

752. There is an absence of evidence demonstrating that when the word “children” was used in logbook EVD-OTP-00409 it referred to individuals under the age of 15. P-0055, when questioned about an entry in the logbook referring to an injured child, recalled the incident and indicated “this is what is written, that within our forces there is a child who is injured”.<sup>2083</sup> However, he did not remember the relevant part of the message, which in any event was incomprehensible to him, and he was unable to verify the details.<sup>2084</sup> He did not assist as to whether the message referred to a child below the age of 15. Given the lack of any reliable guide as to the meaning attributed to the word “children” in this particular context, the Chamber declines to rely on this document as support for the contention that there were children

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<sup>2079</sup> ICC-01/04-01/06-2773-Red-tENG, para. 724; T-346-ENG, page 56, lines 12 – 16. To illustrate its point in a different context, the defence suggests it would be absurd to maintain that the first words of the French national anthem, *La Marseillaise* (“*Allons enfants de la patrie ...*”), are specifically addressed to children below the age of 18, ICC-01/04-01/06-2773-Red-tENG, footnote 1497.

<sup>2080</sup> ICC-01/04-01/06-2773-Red-tENG, para. 722.

<sup>2081</sup> ICC-01/04-01/06-2773-Red-tENG, para. 722, referring to, *inter alia*, EVD-OTP-00409 at DRC-OTP-0017-0071 (Swahili) and EVD-OTP-00622 (French translation) at DRC-OTP-0171-0965.

<sup>2082</sup> ICC-01/04-01/06-2773-Red-tENG, para. 721.

<sup>2083</sup> T-176-Red2-ENG, page 77, line 14 to page 78, line 16.

<sup>2084</sup> T-176-Red2-ENG, page 78, lines 6 – 17.

under the age of 15 within the ranks of the UPC/FPLC armed forces.

**d) Monthly report by Eric Mbabazi (EVD-OTP-00457)**

753. The prosecution relies on EVD-OTP-00457, a monthly report from Bureau 5 dated 2 November 2002, along with the testimony of P-0038, to support the allegation that within the structure of the FPLC the G5, Eric Mbabazi, oversaw awareness-raising campaigns to persuade villagers to send their children for training.<sup>2085</sup> An excerpt from the monthly report was read aloud in court during the testimony of D-0019:

We note that in general the FPLC troops like each other quite well, and they have a good relationship and collaborate in a frank manner, but in a certain sense there is also tension between troops and officers as a result of the mismanagement of troops [...] this mismanagement has the following results: the deserters go back home, demoralised. Their friends and these deserters are discouraged, and therefore we no longer have the means of obtaining more children for the army.<sup>2086</sup>

754. A second excerpt included the following:

Often when one takes charge of recruits from a village, try and find the means of returning a quarter of these children in order to fill in certain gaps, because they provide security for the population in the bush. The latter have allegedly stated that they will no longer send children, because they are experiencing a feeling of complete insecurity.<sup>2087</sup>

755. The prosecution contends that this document “reveals the full picture of the recruitment drives for children early on in the army’s existence as the FPLC”.<sup>2088</sup> It also relies on the testimony of D-0037, the secretary to Bosco Ntaganda,<sup>2089</sup> to the effect that the use of the term “children” in FPLC documents relating to demobilisation was a

<sup>2085</sup> ICC-01/04-01/06-2748-Red, para. 181, referring to T-114-Red2-ENG, page 27, line 22 to page 28, line 7 (P-0038’s testimony does not refer to Eric Mbabazi in particular, but he explained the functions of the G5 within the FPLC structure), and para. 290.

<sup>2086</sup> EVD-OTP-00457, T-346-ENG, page 16, line 17 to page 17, line 3.

<sup>2087</sup> T-346-ENG, page 20, lines 13 – 18, EVD-OTP-00457.

<sup>2088</sup> ICC-01/04-01/06-2748-Red, para. 291.

<sup>2089</sup> T-349-ENG, page 8, lines 22 – 23 and page 9, lines 5 – 7.

reference to children under the age of 18.<sup>2090</sup>

756. The defence disputes the prosecution's interpretation of EVD-OTP-00457, arguing the document does not refer to an FPLC awareness-raising campaign in the villages, and that the term "children" refers to soldiers in general and not to minors.<sup>2091</sup> In support of this submission, the defence refers to the testimony of D-0019 that the word "children" as used in this document simply means FPLC soldiers.<sup>2092</sup> It is suggested the prosecution's interpretation – that the term is meant to distinguish children from adults – would lead to the conclusion that the FPLC recruited only minors, to the exclusion of any adult recruits.<sup>2093</sup> Finally, the defence submits the prosecution has not demonstrated that the report was ever sent to the accused, arguing the use of the plural in relation to "No. 01" in the original appears to rule out any reference to the accused.<sup>2094</sup>

757. The Chamber observes that EVD-OTP-00457 was shown to witness D-0019 to give him an opportunity to reconsider his evidence as regards the role of Eric Mbabazi in recruiting children for the UPC. The prosecution did not suggest the witness had previously seen the document or that he was involved in its compilation.<sup>2095</sup> Accordingly, the Chamber has approached his interpretation of the word "children" in this document with considerable caution.

758. The Chamber is of the view the prosecution's reliance on the

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<sup>2090</sup> ICC-01/04-01/06-2748-Red, para. 291, referring to T-349-ENG, page 29, lines 4 – 10.

<sup>2091</sup> ICC-01/04-01/06-2773-Red-tENG, paras 717 – 719.

<sup>2092</sup> ICC-01/04-01/06-2773-Red-tENG, para. 719, referring to T-346-FRA, page 14, line 20 to page 16, line 12.

<sup>2093</sup> ICC-01/04-01/06-2773-Red-tENG, para. 719.

<sup>2094</sup> ICC-01/04-01/06-2786-Red-tENG, para. 42; EVD-OTP-00457 at DRC-OTP-0109-0142: "[...] *Demandez aux N°01* [...]". It is to be noted that No. 1 is the calling sign of the accused, T-175-Red2-ENG, page 25, lines 18 – 19 (P-0055).

<sup>2095</sup> T-345-ENG, page 77, line 8 to page 78, line 25 and T-345-ENG, page 13, lines 10 – 18.



testimony of D-0037 in this connection is unsustainable, because the witness's testimony only concerned documents that were related to demobilisation,<sup>2096</sup> and these exclude the monthly reports. The evidence on this issue, viewed as a whole, insufficiently demonstrates that the word "children" in this report referred to those under the age of 15. Therefore, irrespective of whether the reference to more than one "No. 01" excludes the accused as an addressee, the Chamber declines to rely on this material as supporting the alleged presence of minors in the UPC/FPLC. The Chamber has, however, taken this document into consideration as regards the extent of the UPC/FPLC's recruitment work.

#### **4. Conscription and enlistment between September 2002 and 13 August 2003**

##### **a) The age range of children recruited and related issues**

759. As set out above, the crimes of conscripting and enlisting are committed at the moment a child under the age of 15 is enrolled into or joins an armed force or group, with or without compulsion. In the circumstances of this case, conscription and enlistment are dealt with together, notwithstanding the fact that they constitute separate offences.<sup>2097</sup> These offences are continuous in nature. They end only when the child reaches 15 years of age or leaves the force or group.<sup>2098</sup>

760. A number of witnesses testified that there were kadogos in the UPC/FPLC training camps, and in many cases these children were below 15 years of age. P-0055 gave evidence that sometimes children

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<sup>2096</sup> T-349-ENG, page 29, lines 4 – 10.

<sup>2097</sup> The word "recruitment" herein is thus used to refer to both conscription and enlistment.

<sup>2098</sup> See para. 618.

who were too young would try to join the army and some of them were chased away, although it was for the individual commanders to take the final decision.<sup>2099</sup> As a result some commanders took children who were “too young”, and they were kept at the headquarters.<sup>2100</sup> The witness confirmed part of a statement he had made to the investigators, to the effect that some small children joined the army when their parents were killed, and they were either sent away or they stayed at the headquarters where they were cared for and fed without being “sent off to war”.<sup>2101</sup>

761. In an earlier statement, which he confirmed in evidence,<sup>2102</sup> P-0055 had indicated that if 14 year olds were able to carry and fire a weapon, they were eligible to serve as soldiers.<sup>2103</sup> He indicated that given his lack of involvement he did not know whether this was a criterion for recruitment.<sup>2104</sup> He said there were “several types of kadogos”, but those used in the army, including those who were young, were able to bear weapons.<sup>2105</sup>

762. It was suggested by P-0055 that there were some children who were ineligible to be enlisted in the army because “you could see that they really were children, you couldn’t possibly allow them to join up”.<sup>2106</sup> However, there were other children who were “capable of it”.<sup>2107</sup>

763. P-0055 saw small children at the main staff headquarters at Bosco

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<sup>2099</sup> T-177-Red2-ENG, page 52, lines 5 – 22; T-178-Red2-ENG, page 69, line 12 to page 70, line 5 and page 70, lines 15 – 19.

<sup>2100</sup> T-178-Red2-ENG, page 69, line 14 to page 70, line 8.

<sup>2101</sup> T-177-Red2-ENG, page 53, line 15 to page 54, line 24. Only the excerpts of this statement that were read during the trial are in evidence.

<sup>2102</sup> EVD-OTP-00681, page DRC-OTP-0191-0541, lines 177 – 185.

<sup>2103</sup> T-178-Red2-ENG, page 67, lines 1 – 7 and page 68, line 8 to page 69, line 11.

<sup>2104</sup> T-178-Red2-ENG, page 69, line 2 – 20.

<sup>2105</sup> T-178-Red2-ENG, page 68, lines 22 – 25.

<sup>2106</sup> T-177-Red2-ENG, page 52, lines 15 – 22.

<sup>2107</sup> T-177-Red2-ENG, page 52, lines 15 – 22.

Ntaganda's camp and he suggested they were the ones who could not join the army.<sup>2108</sup> One mother in particular protested about her child's recruitment.<sup>2109</sup> P-0055 asked the child why he had enlisted and the child responded: "Well, I was with my friends and they asked us to come along. They came, they took the whole group."<sup>2110</sup> P-0055 decided he should be returned to his mother because he was too young for military training.<sup>2111</sup>

764. The Chamber concludes from the testimony of P-0055 (as corroborated by D-0037<sup>2112</sup>) that irrespective of whether children under 15 were actively recruited into the FPLC – the evidence on this is addressed in detail below – the age of the children was not taken into consideration when deciding to recruit them. Instead, criteria such as the size of the children and their ability to hold a weapon and to participate in training were significant factors in determining whether or not they were recruited, regardless of their ages.

765. As set out above, P-0024 gave evidence that a number of children originally taken to be trained in Kyankwanzi in 2000 were between 8 and 18 years old when, in 2001, they entered the demobilisation programme of SOS Grands Lacs, the NGO that employed him.<sup>2113</sup> Later, they were re-recruited by the UPC.<sup>2114</sup> The witness said that the situation in Bunia deteriorated once the UPC drove out the RCD.<sup>2115</sup> Their leaders, generally speaking, were from the Hema community and "pretty well all of those children went back to the (UPC's) armed

<sup>2108</sup> T-177-Red2-ENG, page 54, lines 15 – 24; T-178-Red2-ENG, page 69, lines 17 – 18 and page 69, line 25 to page 70, line 8.

<sup>2109</sup> T-177-Red2-ENG, page 54, line 25 to page 55, line 1.

<sup>2110</sup> T-177-Red2-ENG, page 55, lines 20 – 22, page 56, line 21 to page 58, line 1.

<sup>2111</sup> T-177-Red2-ENG, page 55, line 13 to page 56, line 3.

<sup>2112</sup> T-349-ENG, page 61, line 24 to page 62, line 4.

<sup>2113</sup> T-170-Red2-ENG, page 47, lines 3 – 25.

<sup>2114</sup> T-170-Red2-ENG, page 47, lines 3 – 25; page 50, line 13 to page 51, line 11.

<sup>2115</sup> T-170-Red2-ENG, page 51, lines 4 – 8.

forces".<sup>2116</sup> P-0024 indicated that by November 2002 only a few children remained in the vocational training centres or at school, and in general the mission had been a failure.<sup>2117</sup> Moreover, the children who returned to the armed groups threatened those who remained in the programme, saying: "If you do not join us, we will come and get you from your homes. You wouldn't be able to hide from us."<sup>2118</sup> P-0024 suggested that although it began gradually, as time passed, the UPC became more powerful, and it occupied an increasingly large area of territory.<sup>2119</sup> According to the witness, from 2002 to 2003 when Thomas Lubanga was the leader of the UPC, the risk for those who did not rejoin the army was that they or their families would be threatened or attacked.<sup>2120</sup> It was a highly militarised environment, and those who returned were armed and knew how to locate the individuals who had not followed them into the army.<sup>2121</sup> The children P-0024 saw in the towns and cities after "the UPC pretended to demobilise certain children" when it had control over Bunia in 2002,<sup>2122</sup> wore military clothing, and they carried Kalashnikovs and other weapons.<sup>2123</sup> The witness stated that these children were between 9 and 18 years old, and "they were pretty well all carrying weapons".<sup>2124</sup> As discussed above, the Chamber is persuaded by P-0024's assessment of the ages of the children he worked with, as well as those he saw in the towns and cities. This evidence, viewed overall, strongly supports the contention

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<sup>2116</sup> T-170-Red-ENG, page 50, lines 20 – 21; page 51, lines 2 – 11.

<sup>2117</sup> T-170-Red2-ENG, page 50, line 22 to page 51, line 1.

<sup>2118</sup> T-171-Red2-ENG, page 10, lines 7 – 21.

<sup>2119</sup> T-171-Red2-ENG, page 10, lines 21 – 22.

<sup>2120</sup> T-170-Red2-ENG, page 51, lines 9 – 19.

<sup>2121</sup> T-170-Red2-ENG, page 51, lines 21 – 24.

<sup>2122</sup> T-170-Red2-ENG, page 52, line 17 to page 53, line 21.

<sup>2123</sup> T-170-Red2-ENG, page 54, lines 3 – 6.

<sup>2124</sup> T-170-Red2-ENG, page 54, lines 7 – 11.

that children were re-recruited.<sup>2125</sup>

766. P-0046 testified that 167 children, whose cases she had recorded prior to May 2004 as part of MONUC's child protection service, had been associated with the UPC,<sup>2126</sup> and that 71 of them were below the age of 15 when they were recruited or used between mid-2002 and mid-2003.<sup>2127</sup> P-0046 was provided with information about recruitment by the UPC/FPLC in the area near Ndrele around 15 February 2003.<sup>2128</sup> This was on a market day and the armed men involved, wearing uniforms and carrying Kalashnikovs, were speaking in Swahili and Lingala.<sup>2129</sup> They recruited between 50 and 60 individuals, some of whom spoke with P-0046.<sup>2130</sup> They included three children who were taken to Mount Awa because the person who recruited them was aware that they were from Uganda.<sup>2131</sup> Adults and children were amongst the individuals recruited, and although adult women were not taken, P-0046 stated that young girls were included.<sup>2132</sup> P-0046 also spoke to a child who had returned from Uganda prior to his second mobilisation by the UPC/FPLC.<sup>2133</sup> They met on 21 October 2003, when he was 14 years old.<sup>2134</sup> The child told P-0046 that he had joined the UPC/FPLC following the fighting in Bogoro in March 2003.<sup>2135</sup>

767. D-0004 testified that street children from his neighbourhood in Bunia, who included children between 12 and 15 years of age,

<sup>2125</sup> See paras 656-663, 1322 *et seq.*

<sup>2126</sup> T-205-Red2-ENG, page 71, line 20 to page 72, line 24.

<sup>2127</sup> T-206-Red2-ENG, page 2, line 22 to page 3, line 2.

<sup>2128</sup> T-206-Red2-ENG, page 45, line 1 to page 46, line 11.

<sup>2129</sup> T-207-Red2-ENG, page 44, lines 8 – 13.

<sup>2130</sup> T-207-Red2-ENG, page 44, lines 12 – 15.

<sup>2131</sup> T-207-Red2-ENG, page 44, lines 16 – 19.

<sup>2132</sup> T-207-Red2-ENG, page 44, lines 20 – 22.

<sup>2133</sup> T-205-Red2-ENG, page 55, lines 9 – 13.

<sup>2134</sup> T-206-Red2-ENG, page 3, line 22 to page 4, line 3.

<sup>2135</sup> T-206-Red2-ENG, page 4, lines 3 – 5.

voluntarily enrolled as child soldiers in the UPC/FPLC.<sup>2136</sup> His evidence suggests this must have been in 2002.<sup>2137</sup> This witness emphasised that “it was not [Thomas Lubanga] who came to forcibly recruit.”<sup>2138</sup> He explained he did not see Mr Lubanga during the war and he heard Mr Lubanga had been in Bunia and in Fataki, whereas the training was in Mandro.<sup>2139</sup> As set out in detail in Section VII(E)(3)(b)(1) above, significant and extensive questions have arisen as to the reliability of D-0004, and as a result the Chamber has approached this witness’s testimony with considerable caution.

768. D-0019 strongly denied that there were any cases of forced conscription during the period he occupied a position within the UPC (from December 2002 onwards).<sup>2140</sup> However, when he was asked whether it was his account that during the period from September 2002 to September 2003 there were no children under the age of 15 serving in the UPC/FPLC, he replied: “one can’t exclude that some might have got through the net. When you go fishing, you can have a certain net and some fish can get through [...]” and he suggested the possibility could not be excluded that some children “got through the net and ended up in a centre and were subsequently demobilised”.<sup>2141</sup> D-0019 rejected the suggestion that the UPC/FPLC had a policy of recruiting and using children under the age of 15.<sup>2142</sup>

769. Given the consistent and cumulative evidence set out above, the Chamber is satisfied that children below the age of 15 were integrated

<sup>2136</sup> T-242-Red3-ENG, page 18, lines 2 – 18; T-243-Red2-ENG, page 20, line 12 to page 22, line 6; page 23, lines 5 – 16.

<sup>2137</sup> T-243-Red2-ENG, page 20, lines 17 – 23 and page 21, line 25 to page 22, line 3.

<sup>2138</sup> T-242-Red3-ENG, page 18, lines 17 – 18; T-243-Red2-ENG, page 23, lines 2 – 16.

<sup>2139</sup> T-243-Red2-ENG, page 23, lines 17 – 23.

<sup>2140</sup> The witness occupied a position within the UPC executive during this time: T-340-ENG, page 67, line 18 to page 68, line 10; T-341-ENG, page 10, line 23 to page 11, line 22.

<sup>2141</sup> T-345-ENG, page 39, lines 5 – 15.

<sup>2142</sup> T-345-ENG, page 39, lines 8 – 15.

into the armed wing of the UPC (the FPLC). This issue is addressed further below.

**b) Rallies, recruitment drives and mobilisation campaigns**

770. The Chamber heard evidence concerning the recruitment of young people (including children under the age of 15) into the UPC/FPLC by the party “cadres” and the FPLC army. In the course of this process, pressure was exerted on communities that did not want to surrender their children.

771. P-0055 gave evidence on the mobilisation procedure as described to him by a high-ranking official within the UPC/FPLC.<sup>2143</sup> P-0055 was told that the elder Gegere wise men persuaded the population to make young people available to the UPC, for enlistment in the armed forces in order to contribute to the protection of their ethnic group against the Lendu.<sup>2144</sup> P-0055 testified that there was consultation between the elders of the UPC from various villages, and their role was to support the UPC and to mobilise young people and enlist them in the army.<sup>2145</sup> There were elders or wise men, along with others referred to as the cadres or senior officials of the party, who raised awareness in the villages and explained the purpose of the UPC, so as to ensure the civilian population’s support.<sup>2146</sup> The elders were also involved in collecting funds and other goods in order to help the movement.<sup>2147</sup> These wise men allegedly included a Gegere elder known as “Old

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<sup>2143</sup> T-174-CONF-ENG, page 25, lines 3 – 25 and page 31, line 21 to page 32, line 11; T-175-CONF-ENG, page 57, line 22 to page 58, line 1.

<sup>2144</sup> T-174-Red2-ENG, page 30, lines 20 – 24 and page 32, lines 5 – 11.

<sup>2145</sup> T-175-Red2-ENG, page 58, lines 2 – 18.

<sup>2146</sup> T-175-Red2-ENG, page 58, lines 15 – 18; T-177-Red2-ENG, page 46, lines 5 – 25.

<sup>2147</sup> T-175-CONF-ENG, page 58, line 23 to page 59, line 4.

Mafuta”,<sup>2148</sup> who did not visit the villages himself, but instead delegated others to mobilise the young people.<sup>2149</sup> The defence challenges the evidence of P-0055 as regards Eloy Mafuta, as this witness testified that the latter was “one of the founding members of the UPC”<sup>2150</sup> whereas it is suggested that there was no one by that name within the organisation.<sup>2151</sup>

772. The defence also relies on suggested contradictions in the testimony of P-0055,<sup>2152</sup> including his statement that “I never took part in any meeting between [Mr Mafuta] and Lubanga. I cannot confirm what was said during such meetings.”<sup>2153</sup> Moreover, when asked by the prosecution whether Mr Mafuta’s role involved encouraging young men to join the UPC/FPLC, P-0055 replied, “[a]ctually, I don’t know whether that was his role.”<sup>2154</sup>

773. P-0055’s statement – that he did not know whether it was the “role” of Eloy Mafuta to encourage young men to join the UPC/FPLC – suggests that he was unsure whether this was an official or unofficial function. On the basis of the entirety of the witness’s testimony, the Chamber is persuaded that P-0055’s evidence on this issue is reliable.

774. The Chamber has also considered a video recording introduced during P-0030’s evidence showing a speech at the UPC/FPLC training camp in Katoto by Eloy Mafuta,<sup>2155</sup> which included the following:

You can see the current situation concerning your children and we would like to thank them for the work they’ve carried out [...] And it’s because of

<sup>2148</sup> T-174-Red2-ENG, page 33, line 10 to page 34, line 3.

<sup>2149</sup> T-174-Red2-ENG, page 34, lines 4 – 12.

<sup>2150</sup> T-174-Red2-ENG, page 35, lines 3 – 5.

<sup>2151</sup> ICC-01/04-01/06-2773-Red-tENG, para. 502.

<sup>2152</sup> ICC-01/04-01/06-2773-Red-tENG, para. 502.

<sup>2153</sup> T-174-Red2-ENG, page 35, lines 15 – 18.

<sup>2154</sup> T-174-Red2-ENG, page 36, lines 5 – 12.

<sup>2155</sup> EVD-OTP-00582; T-130-Red2-ENG, page 11, line 8 to page 12, line 18 and page 15, lines 2 – 9.



these children, it's thanks to these children that we are living here. We could not live here otherwise [...] My name is Eloy Mafuta. I'm the presidential advisor. I'm also military advisor to the UPC.<sup>2156</sup>

P-0030 said that the speaker was Eloy Mafuta, the special advisor to the President and the military advisor to the UPC.<sup>2157</sup> The prosecution indicated that the speech was delivered on 31 July 2004,<sup>2158</sup> *i.e.* after the period of the charges. The Chamber is persuaded that it demonstrates that Mr Mafuta played a significant role within the UPC, notwithstanding the defence suggestion there was no UPC member by that name. In addition, the Chamber notes that Eloy Mafuta was apparently one of the signatories to the document creating the UPC, dated 15 September 2000.<sup>2159</sup> In all the circumstances, P-0055 was a credible and reliable witness, and the Chamber has relied on his evidence relating to the process for mobilisation, as explained to him by an official within the UPC/FPLC.

775. P-0055 testified that the members of the cadres (who are to be distinguished from the wise men or elders) were involved in recruitment,<sup>2160</sup> and the cadres were trained in preparation for mobilisation whenever the UPC/FPLC was deployed in Ituri.<sup>2161</sup> Young people were enlisted and conscripted whenever they were encountered and the elders delivered them to the closest battalion or brigade.<sup>2162</sup> Some commanders sent groups of young people to the training camps, but others – who were responsible for recruitment – provided the training themselves in order to increase the size of their

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<sup>2156</sup> EVD-OTP-00582, 00:34.25, interpretation in Court: T-130-Red2-ENG, page 14, lines 3 – 18.

<sup>2157</sup> ICC-01/04-01/06-T-130-Red2-ENG, page 15, lines 2 – 9.

<sup>2158</sup> ICC-01/04-01/06-2748-Conf-Anx2, page 20.

<sup>2159</sup> EVD-OTP-00517.

<sup>2160</sup> T-175-Red2-ENG, page 62, lines 11 – 15.

<sup>2161</sup> T-175-Red2-ENG, page 77, lines 2 – 12.

<sup>2162</sup> T-175-Red2-ENG, page 62, lines 16 – 22.

forces.<sup>2163</sup> When additional recruits were needed, the commanders at battalion level sought out young people to train; indeed, they did all they could to secure the greatest number of soldiers.<sup>2164</sup> P-0055 indicated that the soldiers' training in the camps was organised by Mr Lubanga.<sup>2165</sup> However, as set out above, he also suggested the battalion commanders did not necessarily report these recruitment activities to their superiors<sup>2166</sup> for fear that they (*viz.* the responsible battalion commanders) might be arrested or detained.<sup>2167</sup>

776. The defence argues P-0055's testimony above concerning the cadres is unreliable, as he never participated in the awareness-raising activities he describes.<sup>2168</sup> Moreover, the defence contends that P-0055 failed to disclose the source of his information in this connection.<sup>2169</sup> P-0055 accepted he was not present during the awareness-raising campaigns, although he knew about them, and he said he did not witness the training of the cadres, although he received information about this from a commander.<sup>2170</sup> He indicated his work focussed on soldiers as opposed to the cadres,<sup>2171</sup> and he was unaware as to how the latter approached recruitment. He suggested – although he was unsure on the issue – that they may have reported to the elders.<sup>2172</sup> The Chamber found P-0055 to be a credible witness, but it has exercised caution as regards his testimony concerning the involvement of the UPC/FPLC “cadres” in recruitment, given the extent to which he

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<sup>2163</sup> T-175-Red2-ENG, page 62, line 23 to page 63, line 2.

<sup>2164</sup> T-176-Red2-ENG, page 63, lines 12 – 19.

<sup>2165</sup> T-175-Red2-ENG, page 77, lines 13 – 19.

<sup>2166</sup> T-175-Red2-ENG, page 63, lines 3 – 8.

<sup>2167</sup> T-175-Red2-ENG, page 63, lines 8 – 13.

<sup>2168</sup> ICC-01/04-01/06-2773-Red-tENG, paras 504 – 506.

<sup>2169</sup> ICC-01/04-01/06-2773-Red-tENG, para. 506.

<sup>2170</sup> T-177-CONF-ENG CT, page 47, lines 11 – 21 and T-177-Red2-ENG, page 48, line 19 to page 49, line 3.

<sup>2171</sup> T-177-Red2-ENG, page 47, line 22 to page 48, line 2.

<sup>2172</sup> T-175-Red2-ENG, page 63, line 21 to page 64, line 6.

depended on information from others.

777. P-0055 also gave evidence on the involvement of the army in recruitment. P-0055 testified that “Eric”, the G5 member within the UPC’s main staff,<sup>2173</sup> was in charge of all issues relating to recruits and he was the central person controlling the cadres.<sup>2174</sup> Amongst his various duties, Eric Mbabazi<sup>2175</sup> was involved in recruiting young people for the army, and the cadres supported him in this activity. He mobilised the community with the help of other senior figures.<sup>2176</sup> P-0055 suggested that this enabled him to meet the Chief of Staff and President Lubanga.<sup>2177</sup>

778. D-0037 agreed that Eric Mbabazi, in his role as the UPC/FPLC G5, was “trying to rally young people to go to the training centre” and although he was unable to provide further details on this or to confirm whether the G5 was recruiting children, he said that Mr Mbabazi “was responsible for routing people to go to the training centres”.<sup>2178</sup>

779. P-0002 gave evidence about video footage,<sup>2179</sup> which shows a UPC/FPLC rally on 26 February 2003 at the stadium in the centre of Bunia, opposite the Ituri Hotel,<sup>2180</sup> during which Eric Mbabazi addressed the crowd.<sup>2181</sup> At counter 00:52:14, a single young man in camouflage fatigues can be seen in the middle of the frame who is plainly under the age of 15. The Chamber considers that the fact that

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<sup>2173</sup> T-175-Red2-ENG, page 75, line 21 to page 76, line 1. P-0055 stated that he did not know the full name.

<sup>2174</sup> T-175-Red2-ENG, page 75, lines 9 – 11; page 76, lines 10 – 11.

<sup>2175</sup> T-189-Red2-ENG, page 77, lines 11 – 12 (P-0016).

<sup>2176</sup> T-175-Red2-ENG, page 75, lines 11 – 12 and page 76, lines 15 – 25.

<sup>2177</sup> T-175-Red2-ENG, page 76, lines 22 – 24.

<sup>2178</sup> T-349-ENG, page 64, lines 7 – 18.

<sup>2179</sup> T-162-Red-ENG, page 27, lines 21 – 24 and T-162-CONF-ENG, page 28, line 18 to page 30, line 7; EVD-OTP-00410/EVD-OTP-00676.

<sup>2180</sup> T-162-Red-ENG, page 31, lines 11 – 13; page 33, lines 4 – 17.

<sup>2181</sup> EVD-OTP-00410/EVD-OTP-00676, 00:38:12; T-162-CONF-ENG, page 37, lines 23 – 25 and page 39, lines 3 – 4.

he is not carrying a weapon is irrelevant, since it is clear from the overall evidence that many recruits did not have weapons or even uniforms, particularly if they had been recently recruited.<sup>2182</sup> Although P-0002 did not indicate whether he was a member of the UPC/FPLC, given this footage was taken at a UPC/FPLC rally, the Chamber is satisfied that the child in uniform belonged to the UPC/FPLC.

780. P-0014 testified that child soldiers were recruited after Mr Lubanga's return to Bunia from Kinshasa in 2002,<sup>2183</sup> and this continued undiminished.<sup>2184</sup> The defence argues that this witness's evidence is contradicted by the testimony of P-0041 that there was no "visual" regular or systematic recruitment after 2 September 2002;<sup>2185</sup> indeed, it is contended that P-0041's evidence demonstrates that the majority of the FPLC soldiers were enlisted between the witness's departure from Bunia in May 2002 and his return in late August 2002.<sup>2186</sup> The defence relies on the lack of any mention by P-0041 that the FPLC was involved in enforced enlistment.<sup>2187</sup> Equally, the defence refers to P-0041's acknowledgment that the information he provided on the FPLC enlistment procedures was based on hearsay, for which he failed to identify his source.<sup>2188</sup> In these circumstances it is argued that his testimony is insufficiently reliable.<sup>2189</sup>

781. P-0041 also testified that some families acted under an obligation, in the sense that nearly all the groups in Ituri asked parents to give one of

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<sup>2182</sup> See paras 847 and 1242.

<sup>2183</sup> T-182-Red2-ENG, page 11, line 22 to page 12, line 7.

<sup>2184</sup> T-179-Red-ENG, page 60, lines 10 – 20.

<sup>2185</sup> ICC-01/04-01/06-2773-Red-tENG, paras 375, 384 and 743, referring to testimony of P-0041: see T-125-Red2-ENG, page 65, line 17 to page 66, line 2.

<sup>2186</sup> ICC-01/04-01/06-2773-Red-tENG, para. 375, referring to T-125-CONF-FRA, page 70, lines 19-24.

<sup>2187</sup> ICC-01/04-01/06-2773-Red-tENG, para. 743.

<sup>2188</sup> ICC-01/04-01/06-2773-Red-tENG, para. 382, referring to T-125-CONF-FRA, page 67, lines 15 – 16.

<sup>2189</sup> ICC-01/04-01/06-2773-Red-tENG, para. 382.

their sons for “work”, although he was unable to say who made this request.<sup>2190</sup> While P-0041 did not witness the suggested systematic recruitment, he was able to give evidence about the pressure on families. Furthermore, P-0041 does not maintain that there was no recruitment of children by the UPC after August 2002, but merely that it was not obviously “regular” or “systematic”. He added that there was training.<sup>2191</sup> In these circumstances, the Chamber concludes that there is no contradiction between the evidence of P-0014 and P-0041 on this issue.

782. In the first half of August 2002, during the celebration marking the departure of the RCD-ML, a high-ranking UPC official told P-0014 this had been “obtained thanks to these little children”, and another individual associated with the UPC indicated that it was important for him to “contribute and to go and develop awareness of children in [his] village and bring them”.<sup>2192</sup>

783. P-0017 testified that after the battle of Mongbwalu, which he said took place at the end of 2002 or the beginning of 2003, he went to Kilo,<sup>2193</sup> where the Chief of Staff, Floribert Kisembo, also stayed for two or three days.<sup>2194</sup> Whilst there, Mr Kisembo apparently informed the “old wise man” that in order to bring peace and to avoid future problems, the community needed to contribute to the UPC forces and to provide individuals for training.<sup>2195</sup> They were asking those who

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<sup>2190</sup> T-125-Red2-ENG, page 65, lines 5 – 12.

<sup>2191</sup> T-125-Red2-ENG, page 65, lines 17 – 20.

<sup>2192</sup> T-181-CONF-ENG, page 23, lines 13 – 24.

<sup>2193</sup> T-154-Red2-ENG, page 25, lines 13 – 16 and page 23, lines 14 – 15; T-157-Red2-ENG, page 80, lines 17 – 22. P-0038 agreed that the battle of Mongbwalu took place between the end of November 2002 and the beginning of December 2002, T-113-Red2-ENG, page 48, line 25 to page 49, line 5.

<sup>2194</sup> T-157-Red2-ENG, page 82, line 22 to page 83, line 3.

<sup>2195</sup> T-157-Red2-ENG, page 83, line 11 to page 84, line 3.

were willing and able to join the army to enlist with the UPC/FPLC.<sup>2196</sup> The witness was unaware of any age limit set by the Chief of Staff, but after Mr Kisembo had talked with the old man and others, he saw recruits arriving at the camp from Kilo and the surrounding areas.<sup>2197</sup> Although the average age of the recruits was between 16 and 18, some were younger.<sup>2198</sup>

784. D-0019 testified that the UPC did not have a policy of systematically recruiting children into the FPLC.<sup>2199</sup> In addition, P-0016 gave evidence that recruitment was not necessary because “a lot of recruits came to get revenge for their families who had been killed” and so they were “very keen volunteers”.<sup>2200</sup> The Chamber notes that from P-0016’s account it appears he considers that “voluntary” enlistment is not a form of recruitment or a crime. However, in accordance with the Chamber’s approach to this issue,<sup>2201</sup> recruitment does not necessarily involve the conscription of children by force, given the many alternative, non-forceful ways of persuading children to join the military “voluntarily” that were available. Similar pressure could be applied to their families. Notwithstanding the evidence of P-0016 and D-0019, the Chamber heard compelling evidence that “awareness raising” campaigns were conducted by the UPC/FPLC during the relevant timeframe.

785. Although D-0019 testified that the UPC did not have a policy of

<sup>2196</sup> T-157-Red2-ENG, page 84, lines 5 – 8.

<sup>2197</sup> T-157-Red2-ENG, page 84, lines 11 – 14.

<sup>2198</sup> T-157-Red2-ENG, page 84, line 16 to page 85, line 6.

<sup>2199</sup> T-345-ENG, page 18, lines 18 – 21.

<sup>2200</sup> T-189-Red2-ENG, page 81, line 9 to page 82, line 2. P-0046 also gave evidence that some children, particularly older children, joined the UPC/FPLC to take revenge because their villages had been attacked or members of their families killed: T-207-Red2-ENG, page 26, lines 7 – 13. P-0016 provided additional similar testimony: T-189-Red2-ENG, page 15, lines 21 – 25.

<sup>2201</sup> See para. 608.

systematically recruiting children into the FPLC,<sup>2202</sup> on the basis of the evidence called during the trial as to the steps taken by the UPC/FPLC leaders (including Floribert Kisembo and Eric Mbabazi) and Hema elders as regards recruitment and mobilisation, the Chamber is sure that considerable pressure was exerted on various communities to send young people, including children under the age of 15, to join the UPC/FPLC army during the time frame of the charges.

**c) UPC/FPLC training centres**

786. P-0055 gave evidence about specific UPC/FPLC camps where training occurred, in Bunia, Rwampara, Bule, Fataki and Khari. He testified that members of the main staff visited the training camps, including the Chief of Staff, and that he personally visited the camps at Rwampara and Khari.<sup>2203</sup> P-0055 said President Lubanga went to Rwampara, which was not a great distance from Bunia.<sup>2204</sup> P-0055 testified that once the UPC was in control of Bunia he travelled to a UPC camp to deliver weapons to the soldiers, although he was not yet a member.<sup>2205</sup> He indicated many children were at the military camp, the great majority of whom were adults.<sup>2206</sup> Whilst P-0055 said he did not know their ages,<sup>2207</sup> he nonetheless testified that there were some “PMFs” amongst the troops.<sup>2208</sup>

787. The Chamber heard evidence on the presence of children in a number of UPC/FPLC training camps. Although D-0019 testified that the UPC/FPLC had only three training camps: Mandro, Rwampara

<sup>2202</sup> T-345-ENG, page 18, lines 18 – 21.

<sup>2203</sup> T-175-Red2-ENG, page 68, lines 2 – 25 and page 82, lines 6 – 11.

<sup>2204</sup> T-175-Red2-ENG, page 82, lines 12 – 14.

<sup>2205</sup> T-174-CONF ENG, page 25, line 17 to page 26, line 23.

<sup>2206</sup> T-174-Red2-ENG, page 39, lines 10 – 14.

<sup>2207</sup> T-174-Red2-ENG, page 39, lines 2 – 9.

<sup>2208</sup> T-174- Red-ENG, page 38, lines 10 –21.

and Bule<sup>2209</sup> (he suggested Mandro closed at the end of October 2002),<sup>2210</sup> other witnesses described training occurring elsewhere, including at the UPC/FPLC headquarters and at camps in Mongbwalu and Kilo. The Chamber has considered this issue in more detail below.

*(1) The UPC/FPLC headquarters in Bunia*

788. As mentioned above, P-0014 saw children being trained at the UPC headquarters in Bunia during the summer of 2002.<sup>2211</sup> When P-0014 asked Richard Lonema about a particular five-year-old child, he was told “if they get in early then they are going to grow up as real soldiers” and that young children of this age were trained to become informers, by selling water and groundnuts on the streets.<sup>2212</sup>

789. The defence challenges the credibility of P-0014’s account that he saw children aged 5 to 18 in the training camps between 30 July and 20 August 2002, on the basis that D-0019 testified that the UPC did not have a military wing at this time.<sup>2213</sup> However, a number of witnesses gave a significantly different account. P-0014 broadly agreed with P-0041, who suggested many FPLC soldiers had been trained prior to his return from Kinshasa in August 2002 (or were undergoing training at that time),<sup>2214</sup> and D-0037 asserted that the force under Chief Kahwa, which was re-named the FPLC in August 2002, was in existence by June 2002.<sup>2215</sup> The Chamber accepts the testimony of P-0014 that the UPC was providing military training to children under the age of 15

<sup>2209</sup> T-345-Red2-ENG, page 20, line 24 to page 23, line 17.

<sup>2210</sup> T-345-Red2-ENG, page 21, lines 18 – 23.

<sup>2211</sup> T-179-CONF-ENG, page 65, lines 13 – 24 and T-179-Red2-ENG, page 83, line 8 to page 84, line 18; T-184-CONF-ENG, page 60, lines 7 – 11.

<sup>2212</sup> T-179-Red2-ENG, page 84, lines 1 – 18.

<sup>2213</sup> ICC-01/04-01/06-2773-Red-tENG, paras 572 – 573, referring to T-342-FRA, page 4, line 25 to page 5, line 4.

<sup>2214</sup> T-125-Red2-ENG, page 67, lines 20 – 23 and page 11, lines 1 – 2.

<sup>2215</sup> T-349-ENG, page 20, line 20 to page 21, line 12.



between 30 July and 20 August 2002 and that recruitment continued thereafter.<sup>2216</sup>

790. P-0016 recounted an occasion when President Lubanga visited the UPC/FPLC staff headquarters to talk to the troops in order to boost their morale. Critically, he noted that children under the age of 15 were present.<sup>2217</sup> He could not recall the date of this event, but he indicated that it was “at the beginning of the time we came out of Mandro”.<sup>2218</sup> P-0016 arrived in Mandro a few days after the attack on Bunia when Governor Lompondo was forced to flee the city,<sup>2219</sup> and he remained there for 10 days.<sup>2220</sup> P-0016 must therefore have left Mandro at the end of August or beginning of September 2002. This coincides with Thomas Lubanga’s return to Bunia around 1 September 2002.<sup>2221</sup> On the basis of all the relevant evidence, the Chamber concludes that this visit by Thomas Lubanga to the headquarters to talk to the troops must have taken place in September 2002. Whether Thomas Lubanga was aware that children below the age of 15 were present during this particular visit will be addressed below.

791. In all the circumstances, the Chamber is satisfied that children under the age of 15 were trained by the UPC/FPLC at its headquarters from July 2002 and this continued after September 2002.

### *(2) The Rwampara training camp*

792. Video footage shown during P-0030’s evidence records a visit by Mr

<sup>2216</sup> T-182-Red2-ENG, page 11, line 22 to page 12, line 7 and T-179-Red-ENG, page 60, lines 10 – 20.

<sup>2217</sup> T-190-Red2-ENG, page 13, line 11 to page 17, line 9.

<sup>2218</sup> T-190-Red2-ENG, page 17, lines 5 – 9.

<sup>2219</sup> T-190-Red2-ENG, page 57, lines 5 – 11; T-189-Red2-ENG, page 10, line 1 to page 11, line 6.

<sup>2220</sup> T-190-Red2-ENG, page 58, lines 17 – 19.

<sup>2221</sup> T-181-Red2-ENG, page 54, lines 2 – 7 (P-0014).

Lubanga to the Rwampara training camp on 12 February 2003,<sup>2222</sup> and the defence does not dispute that this visit took place.<sup>2223</sup> The film shows recruits who were clearly under the age of 15. In particular, the Chamber considers that the child shown at counter 00:06:57 wearing military clothing and carrying a weapon is under the age of 15. The footage also shows a number of other children who are under the age of 15,<sup>2224</sup> carrying weapons or wearing military uniforms. P-0030 explained that these children were recruits but there were not even sufficient sticks for all of them to carry (as a substitute for firearms).<sup>2225</sup> The Chamber has accepted this evidence, particularly given the children were addressed at a military camp by the President of the UPC.

793. In the same video, the accused, wearing a military uniform and accompanied by armed soldiers, spoke to the recruits and encouraged them in their military training, and he said that as soon as it was completed, they would be provided with weapons, prior to being deployed to protect the population.<sup>2226</sup> He indicated they would be useful soldiers in the field.<sup>2227</sup> The Chamber has dealt with the particular arguments advanced by the defence on this video in the chapter on individual criminal responsibility. It is sufficient in this context to observe that the accused saw UPC/FPLC recruits under the age of 15 at the camp in Rwampara in February 2003.

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<sup>2222</sup> EVD-OTP-00570, T-128-CONF-ENG, page 28, line 25 to page 29, line 8 and T-128-Red2-ENG, page 37, lines 2 – 6.

<sup>2223</sup> ICC-01/04-01/06-2773-Red-tENG, para. 828.

<sup>2224</sup> EVD-OTP-00570 at 00:06:57, 00:04:13 to 00:04:18, 00:10:53 to 00:11:14, 00:13:41 to 00:13:54 and 0016:04 to 00:17:10.

<sup>2225</sup> T-128-Red2-ENG, page 30, line 22 to page 31, line 20 and page 35, line 2 to page 36, line 11.

<sup>2226</sup> T-128-Red2-ENG, page 38, lines 19 – 20.

<sup>2227</sup> T-128-Red2-ENG, page 41, lines 12 – 19.

794. P-0055 recalled he visited the Rwampara camp in 2003.<sup>2228</sup> The witness heard Bosco Ntaganda encourage the recruits,<sup>2229</sup> who were paraded in straight lines and in three rows.<sup>2230</sup> They were mostly adults, and although there were some children, P-0055's account was there were "very few" kadogos.<sup>2231</sup>

795. Once the new recruits were registered, they began their military training.<sup>2232</sup> P-0055 did not know whether their ages were included in the register, and he stated "actually, I wasn't really interested in verifying their ages."<sup>2233</sup>

796. In March 2003,<sup>2234</sup> P-0046 and her colleagues spoke to about twelve children in Rwampara who were former UPC/FPLC child soldiers. They gave their names, ages, origins and membership in this particular military group. Around half of them were below 15 years old.<sup>2235</sup>

797. When P-0046 met with demilitarised children in Bunia, she spoke with them for a few minutes (or longer, if the child was particularly talkative) in order to clarify his or her status as a child who had become separated from an armed group.<sup>2236</sup>

798. The defence challenges the evidence of P-0046 as to her interviews with young people at the Rwampara training camp in March 2003.<sup>2237</sup>

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<sup>2228</sup> T-175-CONF-ENG CT, page 69, line 2 to page 70, line 14.

<sup>2229</sup> T-175-Red2-ENG, page 70, line 13 to page 71, line 5.

<sup>2230</sup> T-175-Red2-ENG, page 71, lines 9 – 22.

<sup>2231</sup> T-175-Red2-ENG, page 73, line 16 to page 74, line 3. P-0055 testified that the term kadogo was generally applied to those between 13 and 16 years of age: T-174-Red2-ENG, page 40, line 5 to page 41, line 15.

<sup>2232</sup> T-176-ENG, page 24, lines 13 – 17.

<sup>2233</sup> T-175-Red2-ENG, page 80, lines 9 – 16.

<sup>2234</sup> EVD-OTP-00489, page 55, lines 20 – 21 and page 58, lines 10 – 11.

<sup>2235</sup> EVD-OTP-00489, page 58, line 18 to page 64, line 21.

<sup>2236</sup> T-205-Red2-ENG, page 70, lines 17 – 21.

<sup>2237</sup> ICC-01/04-01/06-2773-Red-tENG, para. 649.

It is submitted that Rwampara was under the control of the Ugandan forces and as a result it is “extremely questionable” that she would have met minors from the FPLC at the camp at that time.<sup>2238</sup> The defence further submits it was unable to conduct any investigations into the information collected by P-0046 because the report she prepared was withdrawn from the record of the case and the identities of the minors she interviewed were not disclosed.<sup>2239</sup> The Chamber has approached this evidence with particular care, given the risk of prejudice to the accused because the defence was unable to conduct relevant investigations.

799. In this regard, the Chamber notes P-0046’s evidence that the UPDF was occupying Rwampara at the time, and the children –although no longer under the control of an armed group – had previously been in the UPC. The witness explained she met UPDF commanders and a UPC commander named Commander Barongo. The latter was in charge of the camp and facilitated contact with the children.<sup>2240</sup> Notwithstanding the restrictions on defence investigations referred to above, the testimony of P-0046 concerning her interviews with former UPC/FPLC child soldiers in Rwampara was credible, consistent and reliable.

800. On the basis of the evidence set out above, the Chamber is satisfied that children under the age of 15 were trained at Rwampara camp during the period of the charges.

### (3) *Mandro*

801. P-0038 stated that before April 2002 whilst he worked as a military

<sup>2238</sup> ICC-01/04-01/06-2773-Red-tENG, paras 649 and 745.

<sup>2239</sup> ICC-01/04-01/06-2773-Red-tENG, para. 650.

<sup>2240</sup> EVD-OTP-00491, page 30, line 18 to page 33, line 33 and page 59, lines 4 – 19.

trainer at the Mandro camp, some of the recruits were under the age of 15.<sup>2241</sup> P-0038 was able to assess their ages by their physical appearance, including their height, and he considered it was easy to tell who was above and who was below 15 years.<sup>2242</sup> The smaller recruits could not carry a Kalashnikov for a long period.<sup>2243</sup> Although the evidence of P-0038 regarding training at Mandro relates specifically to the period prior to April 2002,<sup>2244</sup> it is nonetheless relevant to the charges because, as established by the evidence of D-0037, the recruits who trained there under Chief Kahwa were thereafter incorporated into the FPLC, during the summer of 2002. In addition, as developed below, P-0016 testified that training took place before he arrived in Mandro in August and continued after he left.<sup>2245</sup>

802. P-0038 gave evidence that military training, including target practice, was undertaken in the UPC camp at Mandro.<sup>2246</sup> Moreover, even when the training was complete, the rules of the military (including as regards behaviour and discipline) were taught at each parade.<sup>2247</sup> P-0016 gave evidence that at Mandro the recruits learnt basic drill and how to use a firearm,<sup>2248</sup> although a piece of wood was substituted for a real weapon,<sup>2249</sup> at approximately the same weight.<sup>2250</sup> They stood in front of each other and pretended to shoot, but it “wasn’t enough training”.<sup>2251</sup> All the recruits – men, women, boys and

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<sup>2241</sup> T-113-Red2-ENG, page 40, line 7 to page 42, line 4.

<sup>2242</sup> T-114-Red2-ENG, page 37, lines 15 – 21.

<sup>2243</sup> T-114-Red2-ENG, page 37, lines 20 – 23.

<sup>2244</sup> T-114-Red2-ENG, page 43, line 13 to page 44, line 3.

<sup>2245</sup> T-189-Red2-ENG, page 25, lines 8 – 15.

<sup>2246</sup> T-189-Red2-ENG, page 40, lines 16 – 21.

<sup>2247</sup> T-189-Red2-ENG, page 41, lines 7 – 13.

<sup>2248</sup> T-189-Red2-ENG, page 41, lines 14 – 18.

<sup>2249</sup> T-189-Red2-ENG, page 41, lines 19 – 22.

<sup>2250</sup> T-189-Red2-ENG, page 41, lines 22 – 23.

<sup>2251</sup> T-189-Red2-ENG, page 41, lines 23 – 25.

girls – were involved.<sup>2252</sup>

803. P-0038 was familiar with the final stages of training,<sup>2253</sup> which the commander conducted with the new arrivals; this included children under 15, as well as adults.<sup>2254</sup> All the recruits were taught how to use AK-47s and light arms, and how to fight the enemy.<sup>2255</sup> They were instructed as to the appropriate way to welcome the President.<sup>2256</sup> Children wore the same uniforms as the older soldiers, which were adjusted by the tailor if they were too big.<sup>2257</sup> The uniforms were green camouflage, with green boots.<sup>2258</sup> The children were armed with AK-47s<sup>2259</sup> and they were deployed throughout the armed forces on the basis of their training.<sup>2260</sup>

804. P-0016 testified that he was at the Mandro training camp for about 10 days<sup>2261</sup> in August or early September 2002, after the battle of Bunia, by which time Thomas Lubanga had become president.<sup>2262</sup> There were over a hundred recruits and others at the camp, three quarters of whom were children.<sup>2263</sup> Many of these children had lost their parents.<sup>2264</sup> There were a considerable number of attacks before the FPLC was established, and the witness indicated that many children used those attacks as an opportunity to join the army, in order to take

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<sup>2252</sup> T-189-Red2-ENG, page 42, lines 7 – 11.

<sup>2253</sup> T-114-Red2-ENG, page 11, lines 2 – 4.

<sup>2254</sup> T-114-Red2-ENG, page 11, lines 3 – 7.

<sup>2255</sup> T-114-Red2-ENG, page 11, lines 12 – 13.

<sup>2256</sup> T-114-Red2-ENG, page 11, lines 8 – 12.

<sup>2257</sup> T-114-Red2-ENG, page 38, lines 5 – 7.

<sup>2258</sup> T-114-Red2-ENG, page 38, lines 12 – 18.

<sup>2259</sup> T-114-Red2-ENG, page 38, line 7.

<sup>2260</sup> T-114-Red2-ENG, page 11, lines 7 – 8.

<sup>2261</sup> T-189-Red2-ENG, page 13, lines 14 – 23.

<sup>2262</sup> T-189-Red2-ENG, page 3, lines 6 – 11, page 9, line 22 to page 11, line 24 and page 17, lines 9 – 14.

<sup>2263</sup> T-189-Red2-ENG, page 15, lines 7 – 21.

<sup>2264</sup> T-189-Red2-ENG, page 15, lines 20 – 22.

revenge.<sup>2265</sup> The ages of the children ranged from 13 to 17 years old.<sup>2266</sup>

805. P-0016 was asked how many of the children were aged 14 and below during his training at Mandro.<sup>2267</sup> He said he did not know the exact number,<sup>2268</sup> but it was less than 50 percent.<sup>2269</sup> Training was an ongoing activity,<sup>2270</sup> and when he arrived two or three batches of children were already at Mandro, and others had already been assigned to other places, such as Tchomia, Nizi, Iga-Barrière and Kasenyi.<sup>2271</sup> According to P-0016, none of the children at Mandro in August or early September 2002 were younger than 13 years.<sup>2272</sup>

806. The defence criticises the witness's evidence as to the proportion of the children he saw at Mandro who were under 15 years, describing the evidence as "extremely confused".<sup>2273</sup> The Chamber does not agree with this assessment.

807. P-0016 testified that he knew a number of very young girls<sup>2274</sup> who cooked at Mandro camp.<sup>2275</sup> When P-0016 was asked how he concluded there were only young girls at Mandro,<sup>2276</sup> he indicated that "[a]s a parent and as a man of experience", he could tell by the appearance of the person, as well as by their behaviour and actions.<sup>2277</sup> On his account, there were no girls at the camp who were above the

<sup>2265</sup> T-189-Red2-ENG, page 15, lines 22 – 25.

<sup>2266</sup> T-189-Red2-ENG, page 16, line 3.

<sup>2267</sup> T-189-Red2-ENG, page 23, lines 18 – 21; page 24, lines 6 – 13.

<sup>2268</sup> T-189-Red2-ENG, page 24, line 10.

<sup>2269</sup> T-189-Red2-ENG, page 24, lines 17 – 18; page 25, lines 12 – 13.

<sup>2270</sup> T-189-Red2-ENG, page 25, lines 14 – 15.

<sup>2271</sup> T-189-Red2-ENG, page 25, lines 8 – 11; page 24, lines 3 – 5.

<sup>2272</sup> T-189-Red2-ENG, page 16, lines 4 – 7.

<sup>2273</sup> ICC-01/04-01/06-2773-Red-tENG, para. 415.

<sup>2274</sup> T-189-Red2-ENG, page 26, lines 11 – 15.

<sup>2275</sup> T-189-Red2-ENG, page 26, lines 13 – 14.

<sup>2276</sup> T-189-Red2-ENG, page 26, lines 16 – 17.

<sup>2277</sup> T-189-Red2-ENG, page 26, lines 18 – 22.

age of 17.<sup>2278</sup> He did not give an exact indication of their ages, but said that “they must have been very young” as they behaved “like girls who were still at home”.<sup>2279</sup> He said their manner of playing, and the way they lived in the community, demonstrated that they were very young.<sup>2280</sup> He indicated they braided a particular type of grass in the way that young girls who have not reached the age of maturity tend to do, as if they are braiding the hair of a doll.<sup>2281</sup>

808. The Chamber has already discussed the defence challenge to P-0016’s assessment of the age of the children he saw and it has concluded he provided a reliable explanation as to how he estimated their ages.

809. When P-0017 went to the Mandro training camp in late 2002 he saw a number of recruits, including boys and girls between 12 and 14 years old.<sup>2282</sup> The recruits, who were dressed in civilian clothes, did not carry weapons, but boys and girls “in service” had weapons with them.<sup>2283</sup> When P-0017 returned to Mandro in March 2003, it had been attacked and the recruits had left, leaving only soldiers who had taken up combat positions in the camp, including one “young” soldier who was a bodyguard for one of the commanders.<sup>2284</sup>

810. P-0041 suggested that Bosco Ntaganda indicated he was responsible for training the soldiers at Mandro.<sup>2285</sup>

811. Given the consistency and credibility of these witnesses, the

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<sup>2278</sup> T-189-Red2-ENG, page 27, line 1.

<sup>2279</sup> T-189-Red2-ENG, page 27, lines 4 – 7.

<sup>2280</sup> T-189-Red2-ENG, page 27, lines 9 – 10.

<sup>2281</sup> T-189-Red2-ENG, page 27, line 10 to page 28, line 1.

<sup>2282</sup> T-154-Red2-ENG, page 40, line 16 to page 41, line 13.

<sup>2283</sup> T-154-Red2-ENG, page 41, line 21 to page 42, line 7.

<sup>2284</sup> T-154-Red2-ENG, page 42, line 8 to page 44, lines 7 – 18.

<sup>2285</sup> T-125-Red2-ENG, page 52, lines 4 – 7.



Chamber is satisfied there were a significant number of children under the age of fifteen who were trained by the UPC/FPLC at Mandro camp during the period of the charges.

**(4) Mongbwalu**

812. The Chamber has heard evidence that children under the age of 15 years were trained at the UPC camp in Mongbwalu. Two witnesses, P-0016 and P-0038, gave credible, reliable and consistent evidence to this effect. As discussed above, the Chamber is of the view that it can rely on the age estimates of these witnesses.

813. P-0017 visited the training camp in Mongbwalu during his time with the UPC, between late August/early September 2002 and August 2003.<sup>2286</sup> He saw between 380 and 420 recruits there, including children under the age of 15.<sup>2287</sup>

814. During the final military training at Mongbwalu that involved P-0038, around the end of 2002,<sup>2288</sup> many of the trainee child soldiers were within the age range of 13 to 16, although the witness was unable to estimate the exact number.<sup>2289</sup>

815. On the basis of this evidence, the Chamber concludes that children under the age of 15 were trained by the UPC/FPLC at Mongbwalu during the period of the charges.

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<sup>2286</sup> P-0017 joined the UPC when it took over Bunia, which was in late August / early September 2002. T-154-Red2, page 16, lines 18 – 24. He remained in the UPC until August 2003, T-154-Red2, page 17, line 11 – 15.

<sup>2287</sup> T-154-Red2-ENG, page 41, lines 12 – 13 (stating that “children” means those from 12 – 14 years of age); page 44, line 21 to page 46, line 3.

<sup>2288</sup> T-114-Red2-ENG, page 6, line 22 to page 14, line 21.

<sup>2289</sup> T-113-Red2-ENG, page 35, line 15 to page 36, line 10.

**(5) Kilo**

816. P-0017 worked in Kilo at the beginning of 2003,<sup>2290</sup> and on one occasion a child soldier was killed when they were ambushed.<sup>2291</sup> The witness did not know his age, although they found his body.<sup>2292</sup> It follows that the Chamber is unable to rely on this particular piece of testimony.

817. According to P-0017, an appreciable number of recruits came to the camp at Kilo at this time,<sup>2293</sup> who in the main were between 16 and 20.<sup>2294</sup> There were pygmies who were short but older.<sup>2295</sup> The average age was between 16 and 18 and no one was older than 30.<sup>2296</sup>

818. However, this witness also indicated that although most recruits were above 16 years,<sup>2297</sup> on one occasion there was a problem with a child whose mother came to the camp to complain.<sup>2298</sup> She was crying,<sup>2299</sup> and the battalion commander spoke with her.<sup>2300</sup> The woman said that her child was only 12 and she wanted him back.<sup>2301</sup> She cried at the camp entrance for days. She repeatedly said: "Give me my son back, he's only 12."<sup>2302</sup> This was the youngest child the witness saw at the camp.<sup>2303</sup> The UPC soldiers eventually chased his mother away.<sup>2304</sup>

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<sup>2290</sup> P-0017 testified that after the battle of Mongbwalu, which he stated took place at the end of 2002, close to the beginning of 2003, he went on to Kilo. T-154-Red2-ENG, page 25, lines 13 – 16 and page 23, lines 14 – 15; T-157-Red2-ENG, page 80, lines 17 – 22. P-0038 stated that the battle of Mongbwalu took place between end of November 2002 and the beginning of December 2002, T-113-Red2-ENG, page 48, line 25 to page 49, line 5.

<sup>2291</sup> T-157-Red2-ENG, page 86, lines 16 – 19; page 88, lines 3 – 8.

<sup>2292</sup> T-157-Red2-ENG, page 87, lines 24 – 25.

<sup>2293</sup> T-157-Red2-ENG, page 84, lines 14 – 15.

<sup>2294</sup> T-157-Red2-ENG, page 84, line 19.

<sup>2295</sup> T-157-Red2-ENG, page 84, line 20.

<sup>2296</sup> T-157-Red2-ENG, page 85, lines 3 – 5.

<sup>2297</sup> T-157-Red2-ENG, page 85, lines 5 – 6.

<sup>2298</sup> T-157-Red2-ENG, page 84, lines 20 – 22.

<sup>2299</sup> T-157-Red2-ENG, page 85, line 16.

<sup>2300</sup> T-157-Red2-ENG, page 85, lines 16 – 17.

<sup>2301</sup> T-157-Red2-ENG, page 84, lines 21 – 23; page 85, line 8.

<sup>2302</sup> T-157-Red2-ENG, page 84, lines 21 – 22; page 85, lines 6 – 8.

<sup>2303</sup> T-157-Red2-ENG, page 84, lines 23 – 24.

The Chamber has taken this evidence into account, although it is unable to conclude on the basis of this single incident that children under the age of 15 were trained at Kilo.

### *(6) Conclusion*

819. Given the consistency of these witnesses, the Chamber is sure that between September 2002 and 13 August 2003 children under the age of 15 were recruited into the UPC/FPLC, and they were taken either to the UPC headquarters in Bunia or to the military camps at Rwampara, Mandro, and Mongbwalu for training. The submission of the prosecution that the UPC had 20 training camps has not been substantiated.

### **5. Use of child soldiers**

820. As set out above, those who actively participated in hostilities included a wide range of individuals, from those on the front line, who participated directly, through to those who were involved in a myriad of roles supporting the combatants. The decisive factor in deciding whether an indirect role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger by becoming a potential target. The ages of the children are dealt with in the Chamber's consideration of the detailed evidence relating to each of them, as set out below.

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<sup>2304</sup> T-157-Red2-ENG, page 85, line 7, lines 9 - 10; page 86, lines 5 - 6.

**a) Participation in battles and presence on the battlefield**

821. P-0038 stated that once the children had completed their training they were deployed across the UPC/FPLC military structure.<sup>2305</sup> According to P-0016 they were provided with equipment (*e.g.* weapons and uniforms) at Mandro,<sup>2306</sup> although there were insufficient uniforms for all the recruits once they were fully integrated.<sup>2307</sup> Thereafter, the children were sent to Bunia prior to being posted.<sup>2308</sup> P-0038 stated that they fought in battles,<sup>2309</sup> either as soldiers or as bodyguards for the commanders,<sup>2310</sup> and some were deployed in this way on a permanent basis.<sup>2311</sup>

822. P-0038 saw adults and children (including some under the age of 15),<sup>2312</sup> whilst he was serving in his brigade within the UPC during late 2002.<sup>2313</sup>

823. The Chief of Staff provided children below 15 years of age with weapons when their training was completed, and some were assigned to P-0038's brigade.<sup>2314</sup> The latter indicated that children in this age group primarily fought as soldiers, although the commanders also used them as bodyguards.<sup>2315</sup> They fought in battles,<sup>2316</sup> and P-0038 saw children – under instructions from the commanders – shooting at the enemy along with the adults,<sup>2317</sup> in circumstances that exposed them to

<sup>2305</sup> T-113-Red2-ENG, page 44, lines 16 – 17.

<sup>2306</sup> T-189-Red2-ENG, page 57, lines 12 – 13 and 18 and page 58, lines 1 – 2.

<sup>2307</sup> T-189-Red2-ENG, page 57, line 22 to page 58, line 1 (P-0016).

<sup>2308</sup> T-189-Red2-ENG, page 57, lines 13 – 14 and 18 – 19 (P-0016).

<sup>2309</sup> T-113-Red2-ENG, page 44, lines 21 – 24 (P-0038).

<sup>2310</sup> T-113-Red2-ENG, page 44, lines 18 – 20.

<sup>2311</sup> T-114-Red2-ENG, page 14, lines 9 – 12 (P-0038).

<sup>2312</sup> T-113-Red2-ENG, page 35, lines 5 – 20.

<sup>2313</sup> T-114-Red2-ENG, page 6, line 22 to page 24, line 21.

<sup>2314</sup> T-114-Red2-ENG, page 14, lines 2 – 14.

<sup>2315</sup> T-113-Red2-ENG page 44, lines 18 – 20.

<sup>2316</sup> T-113-Red2-ENG, page 44, lines 21 – 24.

<sup>2317</sup> T-113-Red2-ENG, page 44, line 25 to page 45, line 3.

enemy fire.<sup>2318</sup> Indeed, P-0038 was aware that children were killed.<sup>2319</sup> They were not as strong as adults, and since they could not run as fast when fleeing some were caught or came under fire from the enemy.<sup>2320</sup> P-0038 particularly referred to children being wounded or killed whilst fighting for the UPC during the second “liberation” of Bunia in May 2003 and he noted that one of the bodyguards of the Chief of Staff received fatal shrapnel wounds.<sup>2321</sup> Furthermore, some children were shot and killed when they entered Mongbwalu in November 2002,<sup>2322</sup> and others who were under the age of 15 took part in the battle of Kobu in February or March 2003.<sup>2323</sup>

824. P-0038 testified that two brigades were involved in a battle against the Lendu in Mongbwalu at the end of November 2002 and the beginning of December 2002.<sup>2324</sup> The first brigade was Salumu’s, which was reinforced by other soldiers, and the second was Jérôme Kakwavu’s from Aru and Mbidjo.<sup>2325</sup> There were numerous soldiers in Salumu’s brigade, including adults and children.<sup>2326</sup> The witness gave evidence that children of 13 and 14 years old were used in this battle, acting as bodyguards, escorts and as front-line soldiers.<sup>2327</sup>

825. P-0016 did not accept the recruits were sent to different sites depending on whether they were adults or children.<sup>2328</sup> He said that once the recruits left the centre, they were soldiers and they were all

<sup>2318</sup> T-113-Red2-ENG, page 45, lines 4 – 12.

<sup>2319</sup> T-113-Red2-ENG, page 45, lines 13 – 15.

<sup>2320</sup> T-113-Red2-ENG, page 45, lines 17 – 20.

<sup>2321</sup> T-114-Red2-ENG, page 17, line 13 to page 18, line 1.

<sup>2322</sup> T-114-Red2-ENG, page 18, lines 1 – 4.

<sup>2323</sup> EVD-OTP-00623 at DRC-OTP-0074-0481 (stating that the UPC/FPLC attacked the Lendu in Kobu in February/March 2003); T-114-Red2-ENG, page 14, lines 13 – 23 (confirming that his entire brigade, including children, fought at Kobu); page 21, line 1 to page 22, line 25 (describing the battle in Kobu).

<sup>2324</sup> T-113-Red2-ENG, page 48, line 24 to page 50, line 22.

<sup>2325</sup> T-113-Red2-ENG, page 50, lines 13 – 22.

<sup>2326</sup> T-113-Red2-ENG, page 51, line 25 to page 52, line 2.

<sup>2327</sup> T-113-Red2-ENG, page 52, line 13 to page 53, line 3.

<sup>2328</sup> T-189-Red2-ENG, page 60, lines 10 – 17.

similarly deployed, irrespective of age.<sup>2329</sup> Accordingly, youth did not bestow any particular advantage in this context.<sup>2330</sup>

826. P-0012 gave evidence that he saw child soldiers, many of whom were under 15,<sup>2331</sup> in the armed groups in Bunia in 2003.<sup>2332</sup> He described how some from the UPC/FPLC were in the front line at the battle of Bunia on 12 May 2003.<sup>2333</sup>

827. At about this time in Bunia, a child soldier from the UPC/FPLC in civilian clothing, who was carrying a Kalashnikov,<sup>2334</sup> asked P-0012 for his telephone.<sup>2335</sup> The child did not come up to the witness's shoulder as they stood beside each other,<sup>2336</sup> and P-0012 could not say whether he was even 12 years old.<sup>2337</sup> P-0012 knew his UPC/FPLC commander, whom he had met two days earlier.<sup>2338</sup>

828. The defence maintains that each soldier in the FPLC had a uniform, and therefore this child's civilian clothing casts serious doubt as to whether he was a member of that particular armed group.<sup>2339</sup> It is further contended that the statements of P-0012 fail otherwise to demonstrate the link between the child and the UPC/FPLC – indeed it is suggested they tend to indicate that he was within the troops of Commander Tchaligonza.<sup>2340</sup>

829. D-0037 and D-0019 both testified that conditions in Bunia in May

<sup>2329</sup> T-189-Red2-ENG, page 60, lines 14 – 16.

<sup>2330</sup> T-189-Red2-ENG, page 60, lines 16 – 17.

<sup>2331</sup> T-168-Red2-ENG, page 75, line 22 to page 76, line 1.

<sup>2332</sup> T-168-Red2-ENG, page 73, lines 9 – 11.

<sup>2333</sup> T-168-Red2-ENG, page 76, line 19 to page 77, line 16; page 74, lines 1 – 3. P-0012 corrected the date (12 May 2003) of the attack in Bunia: T-168-Red2-ENG, page 75, lines 4 – 6.

<sup>2334</sup> T-168-Red2-ENG, page 76, line 19 to page 78, line 11.

<sup>2335</sup> T-168-Red2-ENG, page 77, lines 7 – 9.

<sup>2336</sup> T-168-Red2-ENG, page 77, lines 22 – 24.

<sup>2337</sup> T-168-Red2-ENG, page 77, lines 9 – 10.

<sup>2338</sup> T-168-Red2-ENG, page 79, line 22 to page 80, line 15.

<sup>2339</sup> ICC-01/04-01/06-2773-Red-tENG, para. 554.

<sup>2340</sup> ICC-01/04-01/06-2773-Red-tENG, para. 554.

2003 were chaotic and it was very difficult to distinguish between the FPLC and other military forces.<sup>2341</sup> D-0019 gave evidence that FPLC soldiers abandoned their uniforms after 6 March 2003, and that fighters from other groups had also collected them from the warehouses at the Chief of Staff's offices, so that "pretty much everyone" wore these particular FPLC uniforms, and there was a "state of total confusion".<sup>2342</sup> According to D-0037, the only way to identify the force to which a soldier belonged was by identifying his commander.<sup>2343</sup>

830. The Chamber is satisfied that the testimony of P-0012 concerning the young UPC/FPLC soldier he saw in May 2003 is accurate. Furthermore, due to the prevailing circumstances in Bunia at that time (as described by various witnesses), it was not uncommon for soldiers, including from the FPLC, to wear civilian clothing. The Chamber is equally satisfied that the witness was well placed to give evidence about the matters set out above, given he was inside the MONUC zone in Bunia where he was able to photograph UPC/FPLC soldiers and he could talk with the relevant UPC/FPLC commander.<sup>2344</sup>

831. The youngest child that P-0046 personally referred to the demobilisation centres in Bunia was 11 years old.<sup>2345</sup> The witness interviewed this child in October or November of 2003.<sup>2346</sup> He had been with the UPC for a year, having been recruited when he was 10 years old.<sup>2347</sup> He participated in battles and had been a bodyguard for

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<sup>2341</sup> T-349-ENG, page 16, line 12 to page 17, line 2 (D-0037); T-341-ENG, page 33, line 10 to page 34, line 17 (D-0019).

<sup>2342</sup> T-341-ENG, page 34, lines 4 – 17.

<sup>2343</sup> T-349-ENG, page 17, lines 10 – 12.

<sup>2344</sup> T-168-Red2-ENG, page 76, line 19 to page 80, line 15.

<sup>2345</sup> T-205-Red2-ENG, page 68, lines 15 – 17; page 69, lines 7 – 12.

<sup>2346</sup> T-205-Red2-ENG, page 69, lines 15 – 21.

<sup>2347</sup> T-205-Red2-ENG, page 69, lines 15 – 24.

Mr Kisembo in Bunia.<sup>2348</sup> The witness stated that it was possible that the centres received even younger children of whom she was unaware.<sup>2349</sup>

832. P-0014 also gave specific examples of having seen or having met child soldiers, including two children aged 14 or younger, among the injured in Kampala in October 2002, who the witness said were Gegeres and Hemas who were fighting for the UPC.<sup>2350</sup>

833. Based on notes of meetings with children in Rwampara and Bunia, P-0046 testified that 26 of them who were under 15 years served with the UPC/FPLC army, including by participating in combat, between mid-2002 and mid-2003.<sup>2351</sup>

834. On the basis of the evidence analysed above, the Chamber is satisfied that children under the age of 15 were used by the UPC/FPLC between September 2002 and 13 August 2003, in order to participate in combat in Bunia, Kobu and Mongbwalu, amongst other places.

#### **b) The use of child soldiers as military guards**

835. P-0016, who joined the UPC in late August 2002,<sup>2352</sup> gave evidence that children deployed in Bunia after being trained at Mandro acted as guards at the military headquarters, the presidency or Camp Ndromo.<sup>2353</sup> Outside Bunia, it was easiest to deploy children to Tchomia, Kasenyi, Bogoro and Nyamavi, where it was generally quiet.<sup>2354</sup> Additional soldiers were sometimes used to guard the border

<sup>2348</sup> T-205-Red2-ENG, page 69, line 23 to page 70, line 1.

<sup>2349</sup> T-205-Red2-ENG, page 69, lines 12 – 14.

<sup>2350</sup> T-182-Red2-ENG, page 41, lines 4 – 16.

<sup>2351</sup> T-207-Red2-ENG, page 12, lines 18 – 22; T-206-Red2-ENG, page 48, line 24 to page 49, line 13.

<sup>2352</sup> P-0016's evidence was that he joined in the UPC around late August 2002 and left in November 2002. T-189-Red2-ENG, page 3, line 6 to page 4, line 9.

<sup>2353</sup> T-189-Red2-ENG, page 58, lines 17 – 19.

<sup>2354</sup> T-189-Red2-ENG, page 58, lines 22 – 24.



area between the Congo and Uganda,<sup>2355</sup> and soldiers were sent to other places such as Katoto, Iga-Barrière and Centrale.<sup>2356</sup> These were “very sensitive” zones where the Lendu made “trouble”.<sup>2357</sup> As a result, it was necessary to send soldiers to “calm things down”,<sup>2358</sup> who had to be ready for any eventuality.<sup>2359</sup> Soldiers were posted at the port at Mahagi and along the lake to prevent the Ugandans from “coming to do misdeeds in the Congo.”<sup>2360</sup>

836. After his arrest in October 2002 by the UPC/FPLC, P-0024 was beaten by armed UPC militiamen and left in a pit near the EPO School, and child soldiers guarded him.<sup>2361</sup> These guards were about 10, 11, or 12 years old – “no more than that”<sup>2362</sup> – and other kadogos aged 10 to 12 were nearby.<sup>2363</sup>

837. The defence relies on the fact that these estimates as to age were based solely on the witness’s personal assessment.<sup>2364</sup> However, as set out above, the Chamber has accepted that it is generally possible to identify children who are clearly below 15 years of age, and the witness’s evidence that he was guarded by children aged between 10 and 12 is credible and reliable, particularly given he had worked for more than a year with demobilised child soldiers in Ituri, and was accordingly familiar with children within this age range.

838. The Chamber concludes, on the basis of the testimony of P-0016 and P-0024, that a significant number of children under the age of 15 were

<sup>2355</sup> T-189-Red2-ENG, page 58, line 23 to page 59, line 20.

<sup>2356</sup> T-189-Red2-ENG, page 59, lines 10 – 12.

<sup>2357</sup> T-189-Red2-ENG, page 59, lines 17 – 18.

<sup>2358</sup> T-189-Red2-ENG, page 60, lines 3 – 4.

<sup>2359</sup> T-189-Red2-ENG, page 60, lines 8 – 9.

<sup>2360</sup> T-189-Red2-ENG, page 59, lines 23 – 25.

<sup>2361</sup> T-170-Red2-ENG, page 72, line 13 to page 75, line 14.

<sup>2362</sup> T-170-Red2-ENG, page 76, lines 1 – 3.

<sup>2363</sup> T-170-Red2-ENG, page 76, lines 3 – 4.

<sup>2364</sup> ICC-01/04-01/06-2773-Red-tENG, para. 588.

used by the UPC/FPLC as military guards during the period of the charges.

**c) Bodyguards and escorts of commanders and other high-ranking UPC/FPLC officials**

839. P-0055 testified that all the members of the main staff had escorts, and these included kadogos.<sup>2365</sup> During his visits to the commanders in the field, P-0055 saw kadogos acting as their bodyguards.<sup>2366</sup> Given P-0055's testimony that the kadogos ranged in age from 13 to 16 years old, the Chamber is unable to conclude on the basis of his evidence alone that the children at the various places he mentioned in his testimony were necessarily younger than 15, and has only drawn conclusions from his evidence when it was corroborated by the testimony of other witnesses.

840. P-0014 also testified about a 14 year old child who worked as a bodyguard with the express permission of Thomas Lubanga.<sup>2367</sup>

841. On 6 March 2003, P-0017 saw Commander Bosco Ntaganda's aide-de-camp, known as 6-1 Sierra, in Bunia. The witness thought that his bodyguards included two child soldiers who were below 15 years of age.<sup>2368</sup> One of these boys was dressed in civilian clothes with a military hat, whilst the other wore a civilian t-shirt, and military trousers and boots.<sup>2369</sup> They were carrying Kalashnikovs.<sup>2370</sup> At one point, the children ran from their positions because shells, fired from the airport, were falling close by, and one of the boys lost his boots

<sup>2365</sup> T-176-Red2-ENG, page 46, lines 19 – 22; page 47, lines 5 – 6; page 47, line 25 to page 48, line 3.

<sup>2366</sup> T-177-CONF-ENG, page 32, lines 10 – 19.

<sup>2367</sup> T-185-CONF-ENG, page 12, line 25 to page 13, line 2 and page 26, line 21 to page 27, line 8.

<sup>2368</sup> T-158-CONF-ENG, page 17, line 8 to page 19, line 2.

<sup>2369</sup> T-158-Red2-ENG, page 19, lines 4 – 7.

<sup>2370</sup> T-158-Red2-ENG, page 19, lines 15 – 18.

because they were too large for him.<sup>2371</sup>

842. After this incident, the soldiers travelled towards Mongbwalu,<sup>2372</sup> but the route thereafter (they took the road to Baku, Mamedi and Maitulu)<sup>2373</sup> was in total chaos.<sup>2374</sup> P-0017 was with his unit,<sup>2375</sup> and en route to Mamedi he saw the Chief of Staff, Floribert Kisembo, along with other members of the general staff, such as the G4 (known by the name Papa Romeo Charlie), the G5 Eric Mbabazi and various commanders and staff members, along with representatives of the various brigades.<sup>2376</sup> He gave evidence that there were children amongst the soldiers.<sup>2377</sup>

843. The Chief of Staff tried to establish how many soldiers had arrived in Mamedi,<sup>2378</sup> but the situation was in disarray and some had fled.<sup>2379</sup> The Chief of Staff wanted to reorganise in order to set up a new structure,<sup>2380</sup> and given the commanders had a large number of bodyguards and there was a lack of soldiers for the units, the Chief of Staff asked the bodyguards to join the troops.<sup>2381</sup> P-0017 gave evidence that this explained why young children who acted as bodyguards for the commanders joined the troops.<sup>2382</sup>

844. D-0019 and P-0017 both testified that they spent approximately a month in Mamedi.<sup>2383</sup> D-0019 said that on 11 March 2003 he left

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<sup>2371</sup> T-158-Red2-ENG, page 19, lines 7 – 10.

<sup>2372</sup> T-158-Red2-ENG, page 19, lines 21 – 22.

<sup>2373</sup> T-158-Red2-ENG, page 19, lines 23 – 25.

<sup>2374</sup> T-158-Red2-ENG, page 19, lines 22 – 23; page 20, line 4.

<sup>2375</sup> T-158-Red2-ENG, page 20, lines 14 – 15.

<sup>2376</sup> T-158-Red2-ENG, page 20, line 22 to page 21, line 11.

<sup>2377</sup> T-158-Red2-ENG, page 21, lines 12 – 15.

<sup>2378</sup> T-158-Red2-ENG, page 22, lines 3 – 4.

<sup>2379</sup> T-158-Red2-ENG, page 22, lines 6 – 7 and 10.

<sup>2380</sup> T-158-Red2-ENG, page 22, lines 10 – 11.

<sup>2381</sup> T-158-Red2-ENG, page 22, lines 12 – 14.

<sup>2382</sup> T-158-Red2-ENG, page 22, lines 14 – 16.

<sup>2383</sup> T-344-Red-ENG, page 42, line 20 to page 43, line 1; T-158-Red2-ENG, page 21, lines 21 – 25.

Mongbwalu – together with a group of FPLC soldiers led by Floribert Kisembo – following attacks by the UPDF and the Lendu, and several days later they reached Mamedi where they remained for a month.<sup>2384</sup> Some of the FPLC commanders arrived at Mamedi with their bodyguards, whose ages D-0019 described as follows: “quite possibly they were under 18, but that doesn’t mean they were under 15 [...] you did have commanders with small bodyguards, but being small in Ituri does not mean you’re a child”.<sup>2385</sup> D-0019’s suggestion that the bodyguards who arrived at Mamedi were under the age of 18, but not necessarily under the age of 15, coupled with the testimony of P-0017, is insufficient to contradict the statements that commanders used bodyguards under the age of 15.

845. The Chamber is of the view that P-0017 provided an honest and accurate account, particularly as regards the ages of the children he saw and their roles in connection with the armed forces. He witnessed children under the age of 15, including girls, amongst the UPC/FPLC troops in Lalo, some of whom were in the military units but the majority, particularly the girls, acted as bodyguards.<sup>2386</sup> P-0038 also gave evidence that certain commanders used girls as their bodyguards.<sup>2387</sup> P-0017 testified, “in general at the UPC it was easy for a young child to end up being a bodyguard. They were not very demanding, they were not asking for money to buy what they wanted, they didn’t have a girlfriend, they couldn’t drink, whereas older young soldiers had other troubles as well. A child – as long as he can wash and eat, that’s all he needs, while adults, elder soldiers, want more

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<sup>2384</sup> T-341-ENG, page 25, line 16 to page 27, line 16; T-344-Red-ENG, page 43, line 2 to page 44, line 11.

<sup>2385</sup> T-345-ENG, page 3, line 24 to page 6, line 6.

<sup>2386</sup> T-154-Red2-ENG, page 29, lines 15 – 18; page 81, line 18 to page 83, line 15.

<sup>2387</sup> T-114-Red2-ENG, page 24, line 1.

than that.”<sup>2388</sup> P-0017 indicated that as regards the children at Lalo, “you can see the difference with other older children that might be there, and it’s something you could really see. You saw they were less than 15.”<sup>2389</sup> His evidence was that their ages may have been in the range of 10 to 12 – they varied – but they were younger than 15.<sup>2390</sup>

846. When P-0041 was first appointed to his position in the UPC/FPLC, a commander assigned him approximately 12 bodyguards.<sup>2391</sup> The witness assessed they were between 13 or 14 to about 16 years of age and, in any event, none of the guards had reached the fourth year of primary school. Therefore, they were very young<sup>2392</sup> and each of them was still a boy.<sup>2393</sup> The witness lived in a hotel where the bodyguards waited for him at the front. When P-0041 left the hotel, he was accompanied by one of the guards, leaving the others at the hotel.<sup>2394</sup> After several days<sup>2395</sup> a single bodyguard replaced the twelve,<sup>2396</sup> and the commander told the witness that he had returned them to the front.<sup>2397</sup>

847. P-0041’s replacement bodyguard was a small child – he gave his age as 14 – who had been trained at Mandro after 8 August 2002.<sup>2398</sup> P-0041 said that he thought he was 14 or 15 years old.<sup>2399</sup> The younger brother of the new bodyguard, who was also serving as a bodyguard in

<sup>2388</sup> T-154-Red2-ENG, page 83, lines 7 – 12.

<sup>2389</sup> T-154-Red2-ENG, page 63, lines 12 – 22.

<sup>2390</sup> T-154-Red2-ENG, page 82, lines 1 and 2.

<sup>2391</sup> T-125-Red2-ENG, page 50, line 5 to page 54, line 14.

<sup>2392</sup> T-125-Red2-ENG, page 50, lines 15 – 21.

<sup>2393</sup> T-125-Red2-ENG, page 52, lines 14 – 16.

<sup>2394</sup> T-125-Red2-ENG, page 52, lines 20 – 25.

<sup>2395</sup> The witness later agreed that the 12 bodyguards worked for him for one week. T-126-Red2-ENG, page 55, lines 11 – 13. The Chamber has concluded that this slight variance in his testimony on this subject does not affect his credibility.

<sup>2396</sup> T-125-Red2-ENG, page 50, lines 4 – 12; T-126-Red-ENG, page 48, lines 12 – 15.

<sup>2397</sup> T-125-Red2-ENG, page 53, line 8 to page 54, line 14.

<sup>2398</sup> T-125-Red2-ENG, page 48, line 24 to page 49, line 11.

<sup>2399</sup> T-125-Red2-ENG, page 56, lines 8 – 10.

Mongbwalu, frequently visited P-0041's residence.<sup>2400</sup> The new bodyguard began working with P-0041 in December 2002, immediately after his training (he had been given a uniform but not a weapon).<sup>2401</sup> He was with the witness between January and March.<sup>2402</sup> The witness gave him a weapon although he did not appreciate this meant he was committing a crime.<sup>2403</sup>

848. The witness took this child as his bodyguard because he knew his family.<sup>2404</sup> Whenever the police saw these young guards (the kadogos) they seized their weapons, saying to them "you can't carry out guard service". On these occasions, the witness spoke with the commander in charge in order to recover the confiscated weapon.<sup>2405</sup>

849. P-0041 said that all those who held a similar position in the UPC had bodyguards, and that "[u]sually bodyguards were young persons. We were not taking adults. We were using young persons." His evidence was that the majority of the soldiers serving in the UPC were over 22 years of age but some were 10 to 13, and above.<sup>2406</sup>

850. P-0041 gave evidence that younger soldiers (those in the region of 14 to 16 years of age) were selected because they were obedient. They needed little care because they did not have children or family responsibilities.<sup>2407</sup>

851. P-0038 testified that child soldiers, both girls and boys, were "more used" as body guards (acting as escorts for several of the

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<sup>2400</sup> T-125-Red2-ENG, page 56, lines 11 – 14.

<sup>2401</sup> T-125-Red2-ENG, page 49, lines 15 – 19.

<sup>2402</sup> T-126-Red2-ENG, page 56, line 16 to page 57, line 5.

<sup>2403</sup> T-126-Red2-ENG, page 57, lines 6 – 18.

<sup>2404</sup> T-125-Red2-ENG, page 49, lines 18 – 19.

<sup>2405</sup> T-125-Red2-ENG, page 49, lines 21 – 25.

<sup>2406</sup> T-125-Red2-ENG, page 54, line 15 to page 55, line 8.

<sup>2407</sup> T-125-Red2-ENG, page 56, lines 17 – 25.

commanders), because children were fearless – in contrast with adults – and they did not ask a great deal of their commanders.<sup>2408</sup> There was no particular criteria applied when assigning children, save that some commanders preferred to have young children as they were “more desirable”.<sup>2409</sup> The younger children followed their orders more diligently than older children.<sup>2410</sup>

852. According to P-0038, General Kisémbó, Bosco Ntaganda and Chief Kahwa each had children under the age of 15 working as their bodyguards and escorts.<sup>2411</sup> Although he was not sure of the exact number of bodyguards used by General Kisémbó, they were divided into two separate platoons – one for children and one for adults.<sup>2412</sup>

853. The children, whilst acting as bodyguards, watched over their commanders and protected their residences. They controlled access by visitors to the commanders,<sup>2413</sup> and they followed them everywhere, including to war.<sup>2414</sup> P-0038 indicated that the child bodyguards wore military uniforms and they carried arms: indeed, according to the witness, all UPC personnel bore arms.<sup>2415</sup> Bodyguards accompanied commanders such as Abelanga when they went to war.<sup>2416</sup>

854. Video footage taken on 14 January 2003<sup>2417</sup> and introduced during the evidence of P-0030 shows a group from the UPC meeting with Lendu representatives near the city of Lipri.<sup>2418</sup> The UPC delegation

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<sup>2408</sup> T-113-Red2-ENG, page 36, lines 11 – 23.

<sup>2409</sup> T-114-Red2-ENG, page 14, line 24 to page 15, line 6.

<sup>2410</sup> T-114-Red2-ENG, page 15, lines 16 – 17.

<sup>2411</sup> T-113-Red2-ENG, page 36, line 24 to page 37, line 5.

<sup>2412</sup> T-114-Red2-ENG, page 16, lines 6 – 11.

<sup>2413</sup> T-113-Red2-ENG, page 37, lines 11 – 17.

<sup>2414</sup> T-113-Red2-ENG, page 37, lines 17 – 18.

<sup>2415</sup> T-113-Red2-ENG, page 37, lines 21 – 23.

<sup>2416</sup> T-114-Red2-ENG, page 24, lines 9 – 11 (P-0038).

<sup>2417</sup> T-129-Red2-ENG, page 4, lines 20 23.

<sup>2418</sup> EVD-OTP-00572 and T-128-Red2-ENG, page 60, line 18 to page 61, line 6.

included Commander Ali,<sup>2419</sup> John Tinanzabo and Mathieu Amboko Bebetu. They were escorted by armed UPC/FPLC soldiers wearing uniforms, some of whom are clearly below the age of 15.<sup>2420</sup>

855. P-0014 also said he saw several children serving under Commander Jérôme Kakwavu in Aru in March or April 2003.<sup>2421</sup> One child was acting as an escort to Commander Kakwavu, whilst another was punished for having made a mistake (this particular child refused to give up his weapon when he was imprisoned).<sup>2422</sup>

856. As set out above, the defence has challenged this evidence,<sup>2423</sup> which the Chamber has not relied on because it is not clear whether Mr Kakwavu's forces were under the control of Thomas Lubanga at the relevant time.<sup>2424</sup>

857. Based on the entirety of the evidence, the Chamber is satisfied that a significant number of children under the age of 15 were used by the UPC/FPLC as escorts and bodyguards for the main staff and the commanders, between September 2002 and 13 August 2003.

#### **d) Thomas Lubanga's bodyguards**

858. As discussed above, P-0030 testified that he went to Thomas Lubanga's residence in Bunia about two or three times a week at certain periods during the timeframe of the charges when Mr Lubanga visited the town. On these occasions he noticed bodyguards as young as nine or ten years old, wearing uniforms and bearing weapons,

<sup>2419</sup> T-128-Red2-ENG, page 61, line 15 to page 62, line 4.

<sup>2420</sup> EVD-OTP-00572, 00:00:50; 00:02:47; 00:28:42; T-128-Red2-ENG, page 63, lines 2- 9 and page 65, line 9 to page 66 line 1; T-129-Red2-ENG, page 28, line 20 to page 29, line 17.

<sup>2421</sup> T-182- Red2-ENG, page 25, line 20 to page 26, line 1.

<sup>2422</sup> T-182-Red2-ENG, page 26, lines 1 – 22.

<sup>2423</sup> ICC-01/04-01/06-2773-Red-tENG, para. 575.

<sup>2424</sup> Commander Kakwavu's departure from the UPC was discussed in T-178-CONF-ENG, page 19, line 16 to page 20, line 5 (P-0055).



guarding the accused's residence.<sup>2425</sup> It follows that his assessment of their ages is not based on an isolated visit. As discussed elsewhere in this Judgment, there is video footage of a MONUC delegation visiting Mr Lubanga's office on 24 February 2003 (an occasion when P-0030 played with the kadogos who formed part of the military guard) that shows a UPC bodyguard who is clearly under the age of 15.<sup>2426</sup>

859. The defence observes that during his examination in court, P-0030 agreed he told prosecution investigators that the kadogos he saw at the UPC headquarters in Bunia appeared to be between 14 and 15 years of age.<sup>2427</sup> The witness gave similar evidence in Court as regards the ages of the bodyguards of Mr Ntaganda and Mr Kisémbó (he said that they were aged 13 and upwards)<sup>2428</sup> He stated additionally that Mr Lubanga had bodyguards as young as 9 years old.<sup>2429</sup> The witness therefore did not contradict himself on this issue.

860. P-0030 testified about video footage taken during a presidential rally at the city stadium on 11 January 2002<sup>2430</sup> which was held for Mr Lubanga when he returned from a trip to Goma.<sup>2431</sup> Children wearing uniforms and carrying machine guns guarded the accused. It is clear some of these children were under the age of 15.<sup>2432</sup>

861. Other video footage, taken on 23 January 2003, shows a public event

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<sup>2425</sup> T-128-CONF-ENG, page 8, line 5 to page 9, line 20 and T-128-Red2-ENG, page 19, line 11 to page 21, line 19.

<sup>2426</sup> EVD-OTP-00574, 01:49:02 and T-129-Red2-ENG, page 57, line 13 to page 58, line 4.

<sup>2427</sup> T-131-Red2-ENG, page 8, lines 2 – 6.

<sup>2428</sup> T-128-Red2-ENG, page 24, lines 3 – 12 and page 55, line 2 – 6.

<sup>2429</sup> T-128-Red2-ENG, page 19, line 11 to page 21, line 19.

<sup>2430</sup> T-128-Red2-ENG, page 51, lines 19 – 20.

<sup>2431</sup> T-128-Red2-ENG, page 51 lines 15 – 20.

<sup>2432</sup> EVD-OTP-00571, 02:47:15 – 02:47:19. In addition the Chamber observes that at 02:22:52 – 02:22:54 there are children who could be under the age of 15 but they appear too briefly to enable a definite finding.

attended by Mr Lubanga,<sup>2433</sup> along with other UPC leaders such as the military commander, Eric Mbabazi.<sup>2434</sup> A young man, evidently under the age of 15, is filmed wearing camouflage clothing and carrying weapons.<sup>2435</sup> P-0030 testified that he belonged to the same group as the other soldiers in the footage, namely the UPC/FPLC.<sup>2436</sup>

862. Mr Lubanga is also filmed returning to his residence after an event at the Hellenique Hotel on the same day (23 January 2003),<sup>2437</sup> travelling in a vehicle accompanied by members of the presidential guard.<sup>2438</sup> Two young individuals in camouflage clothing, who are clearly under the age of 15, are to be seen sitting with armed men wearing military clothing.<sup>2439</sup> The size and general appearance of these two young individuals, when compared with other children and the men who are with them in the vehicle, leads to the conclusion that they are under the age of 15.

863. P-0055 gave evidence that the President's escort protected his convoy when he was travelling.<sup>2440</sup> The witness was unsure as to the exact size of this escort but he suggested it was considerable,<sup>2441</sup> and included adults and children.<sup>2442</sup> He testified about two particular PMFs who were part of the accused's convoy.<sup>2443</sup> In addition, he said

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<sup>2433</sup> T-129-Red2-ENG, page 16, line 20 to page 19, line 19 and EVD-OTP-00571, 02:04:22 (Mr Lubanga's delegation arrives at the scene).

<sup>2434</sup> EVD-OTP-00571, 02:03:41, T-129-Red2-ENG, page 18, lines 18 – 20.

<sup>2435</sup> EVD-OTP-00571, 02:02:44.

<sup>2436</sup> T-129-Red2-ENG, page 18 lines 4 – 14.

<sup>2437</sup> EVD-OTP-00574, 00:34:52, T-129-Red2-ENG, page 27, lines 22 – 25.

<sup>2438</sup> EVD-OTP-00574, 00:35:44, T-129-Red2-ENG, page 28, lines 3 – 25.

<sup>2439</sup> EVD-OTP-00574, 00:36:21.

<sup>2440</sup> T-176-Red2-ENG, page 49, lines 8 – 15.

<sup>2441</sup> P-0055 stated that the escort was like a battalion and he specified that in the UPC, a battalion comprised between 150 and 200 soldiers: T-176-Red2-ENG, page 48, lines 10 – 13; page 49, lines 4 – 7.

<sup>2442</sup> T-176-Red2-ENG, page 48, lines 23 – 24.

<sup>2443</sup> T-176-Red2-ENG, page 49, lines 16 – 18.

the kadogos in the main staff, including the PMFs<sup>2444</sup> and those who accompanied the President, wore uniforms and carried arms.<sup>2445</sup>

864. P-0016 testified that there were ten children under the age of 17 in the “Presidential Protection Unit” (“PPU”), acting as the President’s personal bodyguards.<sup>2446</sup> Initially he indicated the youngest of these children “could have been 14”,<sup>2447</sup> and then he stated there were “no more than four” children who were 13 and 14 years of age within the PPU.<sup>2448</sup> The defence submits the witness did not explain how he assessed the ages of these guards with this degree of accuracy, and in any event it is argued it is impossible to make a sufficiently accurate visual distinction between teenagers in this age group.<sup>2449</sup> However, as discussed above, this witness gave a persuasive explanation as to how he generally assessed the ages of children. Although he did not specify how he came to the conclusion that the youngest members of the PPU were 13 or 14, and notwithstanding the Chamber’s recognition that differentiating between the ages of children can be difficult, on the basis of his detailed evidence the Chamber is satisfied that he was in a position to make a precise evaluation in this regard. Given he was in the vicinity of the PPU on a daily basis, the Chamber is satisfied that he saw children who were under the age of 15 years amongst the guards within the PPU.

865. P-0041 gave evidence about President Thomas Lubanga’s bodyguards, who were located not far from the witness’s place of

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<sup>2444</sup> T-178-Red2-ENG, page 77, lines 9 – 15.

<sup>2445</sup> T-176-Red2-ENG, page 50, lines 2 – 6.

<sup>2446</sup> T-189-Red2-ENG, page 28, lines 19 – 25 and page 30, line 22 to page 31, line 14.

<sup>2447</sup> T-189-Red2-ENG, page 30, line 15 to page 31, line 19.

<sup>2448</sup> T-189-Red2-ENG, page 30, line 15 to page 31, line 19; page 35, line 22 to page 36, line 2.

<sup>2449</sup> ICC-01/04-01/06-2773-Red-tENG, para. 417.

work<sup>2450</sup> (150 – 200 metres away),<sup>2451</sup> and who comprised a mixture of adults and young people.<sup>2452</sup> The bodyguards of the National Secretaries<sup>2453</sup> were dressed and armed in a similar manner to those assigned to the witness (unlike the guards of the military commanders who had different weapons and were dressed differently).<sup>2454</sup>

866. D-0019 testified that he went to Thomas Lubanga’s office regularly between September 2002 and 6 March 2003 and he never saw children under the age of 18 within the presidential guard.<sup>2455</sup> However, as discussed above, the Chamber has approached the testimony of D-0019 that directly relates to Thomas Lubanga with caution and in light of the contradictory evidence provided by other witnesses, does not rely on this statement.

867. D-0011 also gave evidence that between September 2002 and March 2003 and again from May 2003 until Mr Lubanga’s departure from Kinshasa, he was at Mr Lubanga’s side on a daily basis and he did not, on any occasion, see minors in the accused’s bodyguard.<sup>2456</sup>

868. The Chamber notes D-0011 somewhat qualified this evidence during examination by the prosecution, when he indicated he was not with Mr Lubanga in Rwampara on 12 February 2003, and although he “mostly accompanied” the accused, in reality he usually remained in Bunia when the President travelled, which he suggested was a rare event.<sup>2457</sup> The Chamber also notes that D-0011 was unaware of any

<sup>2450</sup> T-125-Red2-ENG, page 55, lines 21 – 23.

<sup>2451</sup> T-125-Red2-ENG, page 55, line 24 to page 56, line 1.

<sup>2452</sup> T-125-Red2-ENG, page 56, lines 2 – 5.

<sup>2453</sup> T-125-Red2-ENG, page 55, lines 14 – 20.

<sup>2454</sup> T-125-Red2-ENG, page 57, lines 1 – 7.

<sup>2455</sup> T-341-ENG, page 12, lines 2 – 18.

<sup>2456</sup> T-347-ENG, page 29, line 19 to page 30, line 11; page 69, lines 15 – 19.

<sup>2457</sup> T-347-ENG, page 57, line 22 to page 58, line 25.

official procedures for verifying the ages of the recruits.<sup>2458</sup>

869. As set out above, the Chamber has determined that P-0016, P-0030, P-0041 and P-0055 were consistent, credible and reliable witnesses, and when their accounts are considered alongside the video footage described above – which clearly portrays children amongst Mr Lubanga’s bodyguards – the Chamber discounts the essentially irreconcilable evidence of D-0011 and D-0019 on this issue. On the basis of the accounts of P-0016, P-0030, P-0041 and P-0055 as well as the video footage, the Chamber is satisfied that between September 2002 and 13 August 2003, Thomas Lubanga, as President and Commander-in-Chief of the UPC/FPLC, used a significant number of children under the age of 15 within his personal escort and as his bodyguards.

#### **e) The Kadogo Unit**

870. D-0019 saw nineteen children staying near Floribert Kisembo in the compound at Mamedi. They were assumed to be orphans who had sought the safety of the military camp, and they included former soldiers.<sup>2459</sup> D-0019 denied they were engaged in military activities.<sup>2460</sup> His evidence was that the children he saw were under the age of 18 but not necessarily under the age of 15,<sup>2461</sup> and D-0019 rejected the suggestion that Mr Kisembo decided to create a Kadogo Unit in Mamedi.<sup>2462</sup>

871. However, P-0017 testified that the Chief of Staff instituted the

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<sup>2458</sup> T-347-ENG, page 41, lines 17 – 22.

<sup>2459</sup> T-341-ENG, page 29, line 12 to page 30, line 15 and T-345-ENG, page 6, line 7 to page 7, line 19.

<sup>2460</sup> T-345-ENG, page 8, lines 4 – 12, page 10, line 24 to page 11, line 2 and page 12, line 23 to page 13, line 16.

<sup>2461</sup> T-345-ENG, page 5, lines 12 – 20 and page 7, line 25 to page 8, line 3.

<sup>2462</sup> T-345-ENG, page 12, line 12 to page 13, line 16.

Kadogo Unit<sup>2463</sup> at Mamedi and Maitulu.<sup>2464</sup> He said it was nearly the size of a whole platoon (there were slightly fewer than 45 members),<sup>2465</sup> and the members were less than 15 years old.<sup>2466</sup> The witness thought that the youngest member “must have been around 12” years old.<sup>2467</sup> The Chief of Staff transferred these individuals to the general staff in order to take care of them,<sup>2468</sup> and P-0017 suggested they were protected on account of their vulnerability.<sup>2469</sup> During this period, some of the children acted as bodyguards for the Chief of Staff,<sup>2470</sup> although it was stipulated that they were not to be the first to go into the town; indeed, they became “almost untouchable”.<sup>2471</sup>

872. The defence contends that P-0017 failed to give an accurate account of the ages of the children in the Kadogo Unit, and instead he simply made an estimate that the youngest child was “around” 12 without conducting any process of verification.<sup>2472</sup> Given that the UPC/FPLC generally failed to establish the ages of children within the armed forces, the evidence of P-0017 that children under 15 years of age were within the Kadogo Unit (particularly those as young as 12) was consistent, credible and reliable.

873. P-0017 testified that a child soldier, who had been a member of the Kadogo Unit, died in battle just before the Artemis force arrived in June 2003.<sup>2473</sup> The Unit was still at the General Staff when a MONUC

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<sup>2463</sup> T-158-Red2-ENG, page 22, lines 17 – 18.

<sup>2464</sup> T-158-Red2-ENG, page 22, lines 19 – 22.

<sup>2465</sup> T-158-Red2-ENG, page 22, line 23 to page 23, line 2.

<sup>2466</sup> T-158-Red2-ENG, page 23, line 6.

<sup>2467</sup> T-158-Red2-ENG, page 23, lines 7 – 9.

<sup>2468</sup> T-158-Red2-ENG, page 23, lines 19 – 21; page 23, line 24 to page 24, line 5.

<sup>2469</sup> T-158-Red2-ENG, page 23, lines 22 – 23.

<sup>2470</sup> T-158-Red2-ENG, page 24, lines 6 – 12.

<sup>2471</sup> T-158-Red2-ENG, page 45, lines 18 – 19.

<sup>2472</sup> ICC-01/04-01/06-2773-Red-tENG, paras 444 and 742.

<sup>2473</sup> T-158-Red2-ENG, page 46, lines 15 – 16; page 56, lines 21 – 24.

representative visited the general headquarters during that month.<sup>2474</sup>  
The witness stated that at “[...] this time Ete” was the commander of the kadogo platoon.<sup>2475</sup>

874. P-0017 indicated that two girls were part of the Unit when it was first established, and in due course he saw them with the commander.<sup>2476</sup> The witness assessed<sup>2477</sup> they were around 13 or 14 years old.<sup>2478</sup>

875. It was P-0017’s account that at an early stage the commanders ordered the kadogos to take property from certain local villages.<sup>2479</sup> Later, they were followed when they came under the care of the general staff (see above). As a result, it was more difficult to leave the camp to visit the villages,<sup>2480</sup> and the trainers monitored them to ensure they did not behave improperly.<sup>2481</sup>

876. The defence submits the testimony of P-0017 demonstrates that grouping the kadogos within a unit was intended to protect them.<sup>2482</sup> It is emphasised that when P-0017 was asked if members of the kadogo unit undertook military duties, he said “[d]uring that period of time they had no special responsibility”<sup>2483</sup> and “[s]ome people were bodyguards for the Chief of Staff. These were in charge of following him around [...] but about military tasks, I’m not sure that they went to patrol or to fetch water or anything else they were asked to do.”<sup>2484</sup>

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<sup>2474</sup> T-158-Red2-ENG, page 45, lines 5 – 8.

<sup>2475</sup> T-158-Red2-ENG, page 45, lines 8 – 15.

<sup>2476</sup> T-158-Red2-ENG, page 26, lines 8 – 11.

<sup>2477</sup> T-160-Red2-ENG, page 58, lines 19 – 25.

<sup>2478</sup> T-158-Red2-ENG, page 26, lines 20 – 23.

<sup>2479</sup> T-158-Red2-ENG, page 28, line 24 to page 29, line 2.

<sup>2480</sup> T-158-Red2-ENG, page 29, lines 2 – 5.

<sup>2481</sup> T-158-Red2-ENG, page 29, lines 13 – 14.

<sup>2482</sup> ICC-01/04-01/06-2773-Red-tENG, para. 442.

<sup>2483</sup> ICC-01/04-01/06-2773-Red-tENG, para. 443, T-158-Red-ENG, page 24, lines 6 – 9.

<sup>2484</sup> T-158-Red2-ENG, page 24, lines 10 – 16.

He indicated “Loringa”, a member of Floribert Kisembo’s general staff, was in charge of the kadogos.<sup>2485</sup> The children were made to sing military songs, and Loringa taught them how to march and he “took care of them”.<sup>2486</sup> The songs helped the children forget their suffering.<sup>2487</sup>

877. The Chamber concludes from the evidence of P-0017 that approximately 45 child soldiers within the ranks of the UPC/FPLC, some of them under the age of 15, were grouped together in the spring of 2003 in a “Kadogo Unit”. Save for his denial that Floribert Kisembo created a “Kadogo Unit”, of which the Chamber is unpersuaded because D-0019 demonstrated partiality on this matter during his testimony, the details of D-0019’s evidence on the children in Mamedi largely supports the testimony given by P-0017. The existence of this unit further demonstrates the presence of children within the UPC/FPLC during the period of the charges.

#### **f) Domestic work**

878. P-0055 testified that although PMFs acted as bodyguards and served within the companies, their most important role was to assist the commanders by cooking, along with “other feminine tasks, routine tasks carried out by women.”<sup>2488</sup> Nonetheless, PMFs also participated in combat, they acted as guards and went out with the patrols, and in this sense they undertook the same routine duties as the other soldiers.<sup>2489</sup>

879. D-0019 gave evidence that he saw a young girl between 14 and 16

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<sup>2485</sup> T-158-Red2-ENG, page 24, line 22 to page 25, line 2.

<sup>2486</sup> T-158-Red2-ENG, page 24, line 11 to page 25, line 22.

<sup>2487</sup> T-158-Red2-ENG, page 25, lines 12 – 22.

<sup>2488</sup> T-178-Red2-ENG, page 77, line 24 to page 78, line 3.

<sup>2489</sup> T-178-Red2-ENG, page 78, lines 6 -10.



years of age<sup>2490</sup> assisting the Chief of Staff's wife with domestic work at Mamedi.<sup>2491</sup>

880. P-0017 stated that girl soldiers were usually assigned household tasks.<sup>2492</sup> As analysed above, P-0016 stated that a number of very young girls cooked at the camp at Mandro.<sup>2493</sup>

881. When P-0038 was asked about the functions performed by the girls, and whether cooking was their only responsibility,<sup>2494</sup> he replied that the girls (also) did everything undertaken by the others,<sup>2495</sup> and they cooked twice each day.<sup>2496</sup>

882. The Chamber has taken into account the evidence concerning domestic work undertaken by girls under the age of 15 when the support provided by the girl exposed her to danger by becoming a potential target. On the basis of the evidence overall, the Chamber concludes that during the period of the charges a significant number of girls under the age of 15 were used for domestic work, in addition to the other tasks they carried out as UPC/FPLC soldiers, such as involvement in combat, joining patrols and acting as bodyguards.

### **g) Conditions of use of child soldiers**

#### ***(1) Punishment***

883. P-0016 indicated that there were many different types of punishment at Mandro camp, and some recruits died as a result.<sup>2497</sup>

<sup>2490</sup> T-345-ENG, page 8, line 13 to page 10, line 23.

<sup>2491</sup> T-345-ENG, page 8, lines 13 – 14 and page 9, lines 2 – 4; T-341-ENG, page 29, lines 17 – 18.

<sup>2492</sup> T-160-Red2-ENG, page 60, lines 14 – 25

<sup>2493</sup> See para. 807.

<sup>2494</sup> T-189-Red2-ENG, page 28, lines 2 – 4.

<sup>2495</sup> T-189-Red2-ENG, page 28, lines 5 – 6.

<sup>2496</sup> T-189-Red2-ENG, page 28, lines 6 – 9.

<sup>2497</sup> T-189-Red2-ENG, page 44, lines 13 – 14.

The witness described a punishment referred to as “kafuni”.<sup>2498</sup> Typically, a type of cane with a small bulge at the end was used for this purpose, called a gongo.<sup>2499</sup> Sometimes those punished received in the region of 300 strokes and if hit on the nape of the neck they could “die easily from that”.<sup>2500</sup> Indeed, two individuals at Mandro died in this way,<sup>2501</sup> one of whom was “more or less an adolescent” and the other was aged about 14 years.<sup>2502</sup> At first nobody talked about these deaths because they were afraid, but in due course some of them raised the issue because they “could not stomach it any more”.<sup>2503</sup> P-0016 learnt what was happening from the children,<sup>2504</sup> and one individual who provided this information was flogged until he lost the use of his right arm, which remains defective.<sup>2505</sup> The two deaths occurred approximately four days before P-0016’s return to Bunia from Mandro, in late August or early September 2002.<sup>2506</sup>

884. Another punishment was called “kiboko” which involved a whip.<sup>2507</sup> This was administered on parade, during training or in places that were out of sight in the camp.<sup>2508</sup> Torture was used,<sup>2509</sup> such as whipping people who were tied up,<sup>2510</sup> and a wide range of objects featured during punishment<sup>2511</sup> (as administered by the commander of

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<sup>2498</sup> T-189-Red2-ENG, page 44, lines 16 – 17; page 45, lines 2 – 3.

<sup>2499</sup> T-189-Red2-ENG, page 45, lines 6 – 9.

<sup>2500</sup> T-189-Red2-ENG, page 44, lines 18 – 19; page 45, lines 3 – 4.

<sup>2501</sup> T-189-Red2-ENG, page 46, lines 18 – 21.

<sup>2502</sup> T-189-Red2-ENG, page 47, lines 14 – 18.

<sup>2503</sup> T-189-Red2-ENG, page 46, lines 21 – 23.

<sup>2504</sup> T-189-Red2-ENG, page 46, line 25 to page 47, line 3.

<sup>2505</sup> T-189-Red2-ENG, page 47, lines 3 – 4 and 7 – 10.

<sup>2506</sup> T-190-Red2-ENG, page 65, lines 8 – 10.

<sup>2507</sup> T-189-Red2-ENG, page 44, line 18; page 45, line 13.

<sup>2508</sup> T-189-Red2-ENG, page 45, lines 19 – 20.

<sup>2509</sup> T-189-Red2-ENG, page 44, lines 19 – 20.

<sup>2510</sup> T-189-Red2-ENG, page 46, lines 13 – 14.

<sup>2511</sup> T-189-Red2-ENG, page 45, lines 4 – 5.

the centre).<sup>2512</sup>

885. P-0014 also saw recruits punished at the headquarters if they committed certain errors.<sup>2513</sup> Their buttocks were whipped, for instance whilst they were lying on the ground or when their hands and legs were held.<sup>2514</sup>

886. P-0014 also gave evidence about seeing an apparently hungry child, who was crying and calling for his mother.<sup>2515</sup> P-0014 stated:

[...] the reaction of those who were with me [...] was to say, "you see, that is good. They are going to grow up as true soldiers."<sup>2516</sup>

887. While there is the possibility that some of the incidents described by P-0016 occurred in September 2002, P-0014's evidence immediately precedes the timeframe of the charges. However, as analysed above, there is no indication that there was demobilisation in August 2002, before the period of the charges. Therefore, the Chamber relies on this evidence as demonstrating practices that would have continued into the period of the charges, and it supports the testimony of other witnesses as to the type of punishment that was administered to the recruits during the relevant timeframe.

888. P-0017 testified that it was common in the UPC for individuals to be whipped<sup>2517</sup> and imprisoned (although the latter less frequently).<sup>2518</sup> He described a particular occasion when he witnessed some young soldiers being punished. He was told that having smoked cannabis,

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<sup>2512</sup> T-189-Red2-ENG, page 45, lines 15 – 16.

<sup>2513</sup> T-179-Red2-ENG, page 83, lines 16 – 17.

<sup>2514</sup> T-181-Red2-ENG, page 17, lines 6 – 10.

<sup>2515</sup> T-181-Red2-ENG, page 19, lines 9 – 12.

<sup>2516</sup> T-181-Red2-ENG, page 19, lines 13 – 15.

<sup>2517</sup> T-158-Red2-ENG, page 31, lines 20 – 21.

<sup>2518</sup> T-158-Red2-ENG, page 31, lines 21 – 22.

they “became insubordinate” and threatened to use a gun.<sup>2519</sup> They were arrested and whipped, whilst lying on the ground.<sup>2520</sup> He said the trainers were responsible for this punishment.<sup>2521</sup> Sanctions for violations of UPC regulations or orders were generally the responsibility of the senior person present,<sup>2522</sup> although on occasion someone further up in the hierarchy took the decision as to punishment.<sup>2523</sup> P-0017 described a further punishment that involved putting those concerned in a trench.<sup>2524</sup>

889. Based on this evidence, the Chamber concludes that a number of recruits would have been subjected to a range of punishments during training with the UPC/FPLC, particularly given there is no evidence to suggest they were excluded from this treatment. These punishments are described as part of the context in which children under the age of 15 were conscripted, enlisted and used by the UPC/FPLC.

## *(2) Sexual Violence*

890. According to the evidence of P-0046, all the girls she met at the demobilisation centres, except for a few who had been protected by certain women in the camps, told the witness that they had been sexually abused, most frequently by their commanders but also by other soldiers.<sup>2525</sup> Some fell pregnant, resulting in abortions;<sup>2526</sup> and there were instances of multiple abortions.<sup>2527</sup> The witness gave evidence that the psychological and physical state of some of these

<sup>2519</sup> T-158-Red2-ENG, page 32, lines 5 – 8.

<sup>2520</sup> T-158-Red2-ENG, page 32, lines 7 – 9.

<sup>2521</sup> T-158-Red2-ENG, page 32, lines 10 – 11.

<sup>2522</sup> T-158-Red2-ENG, page 67, lines 20 – 21.

<sup>2523</sup> T-158-Red2-ENG, page 67, lines 21 – 23.

<sup>2524</sup> T-158-Red2-ENG, page 32, lines 15 – 23.

<sup>2525</sup> T-207-Red2-ENG, page 30, line 14 to page 31, line 1.

<sup>2526</sup> T-207-Red2-ENG, page 31, lines 2 – 4.

<sup>2527</sup> T-207-Red2-ENG, page 38, lines 11 – 14.

young girls was catastrophic.<sup>2528</sup>

891. The youngest victim of this sexual abuse interviewed by P-0046 was 12 years old.<sup>2529</sup> The witness stated that some of those who became pregnant were thrown out of the armed group and ended up on the streets of Bunia.<sup>2530</sup> Others went to join their relatives, and although they may have felt they remained part of the UPC, the latter failed to provide them with support.<sup>2531</sup> It was difficult to reintegrate them into their families because the girls were stigmatised, and significant mediation was necessary.<sup>2532</sup> The witness stated that the children provided her with a clear account of systematic sexual violence in the camps.<sup>2533</sup>

892. In answer to a question as to whether sexual violence was committed against the PMFs during training,<sup>2534</sup> P-0016 indicated the trainers and the other guards in the centre took advantage of the situation and raped the recruits, and that the perpetrators included the commander of the centre.<sup>2535</sup> The female recruits at Mandro were raped, irrespective of their age and notwithstanding a strict prohibition in this regard.<sup>2536</sup> P-0016 gave evidence of the common practice amongst some high-ranking UPC officials of using young girl recruits as domestic servants in their private residences.<sup>2537</sup> The commander of the centre at Mandro had four such individuals, and the other instructors used girls for housework, as well as sexually

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<sup>2528</sup> T-207-Red2-ENG, page 31, lines 16 – 18.

<sup>2529</sup> T-207-Red2-ENG, page 35, lines 17 – 23.

<sup>2530</sup> T-207-Red2-ENG, page 37, lines 12 – 20.

<sup>2531</sup> T-207-Red2-ENG, page 37, lines 20 – 23.

<sup>2532</sup> T-207-Red2-ENG, page 39, lines 3 – 19.

<sup>2533</sup> T-207-Red2-ENG, page 31, lines 4 – 6.

<sup>2534</sup> T-191-Red2-ENG, page 15, lines 15 – 18.

<sup>2535</sup> T-191-Red2-ENG, page 15, lines 19 – 21 and page 30, line 4 to page 31, line 8.

<sup>2536</sup> T-191-Red2-ENG, page 16, lines 1 – 13.

<sup>2537</sup> T-191-Red2-ENG, page 16, lines 14 – 17.

abusing them.<sup>2538</sup> However, P-0016 also said that it was difficult to determine the age of the recruits who were raped from their appearance.<sup>2539</sup>

893. P-0055 gave evidence that when he visited the camps he received complaints “along those lines” that there was sexual violence against girl soldiers, sexual slavery and forced impregnation, although he indicated these events were infrequent.<sup>2540</sup>

894. The evidence from P-0038 was that although girls acted as bodyguards, they were often used to prepare food and to provide sexual services for the commanders.<sup>2541</sup> The commanders particularly treated the girls as if they were their “women” or their wives.<sup>2542</sup>

895. P-0038 said Commander Abelanga kept a girl under 15 years old at his home, and Commander Ndjabu retained another as his bodyguard (she later became pregnant by the brigade commander).<sup>2543</sup> P-0038 noticed that Commander Abelanga had a particular girl with him for a considerable period of time, in Mongbwalu and in Bunia.<sup>2544</sup> It was commonly known and commented on that this girl was Commander Abelanga’s “wife”.<sup>2545</sup> She prepared the commander’s food and notwithstanding her saying “I don’t want to”,<sup>2546</sup> her cries were heard at night.<sup>2547</sup>

896. In the view of the Majority, given the prosecution’s failure to

<sup>2538</sup> T-191-Red2-ENG, page 16, line 18 to page 17, line 4.

<sup>2539</sup> T-191-Red2-ENG, page 29, lines 20 – 25.

<sup>2540</sup> T-178-Red2-ENG, page 78, line 11 to page 79, line 7.

<sup>2541</sup> T-114-Red2-ENG, page 23, lines 16 – 18.

<sup>2542</sup> T-114-Red2-ENG, page 23, lines 18 – 19.

<sup>2543</sup> T-114-Red2-ENG, page 23, lines 21 – 25.

<sup>2544</sup> T-114-Red2-ENG, page 24, lines 17 to page 25, line 4.

<sup>2545</sup> T-114-Red2-ENG, page 25, lines 8 – 11.

<sup>2546</sup> T-114-Red2-ENG, page 27, lines 2 – 7.

<sup>2547</sup> T-114-Red2-ENG, page 26, lines 21 – 25.

include allegations of sexual violence in the charges, as discussed above, this evidence is irrelevant for the purposes of the Article 74 Decision save as regards providing context. Therefore, the Chamber has not made any findings of fact on the issue, particularly as to whether responsibility is to be attributed to the accused. In due course, the Chamber will hear submissions as to whether the issue assists as regards sentence and reparations.

**h) The self-defence forces<sup>2548</sup>**

897. The Chamber heard evidence about the local self-defence forces that allegedly included children below the age of 15. D-0007, who was the co-ordinator of the Hema self-defence committees in Ituri during the relevant period,<sup>2549</sup> gave extensive evidence on the creation and the circumstances of these groups.<sup>2550</sup> He said they included children under the age of 15.<sup>2551</sup> Indeed, he suggested age was not taken into account and anyone able to fight could become a member:<sup>2552</sup> “[i]f somebody could fight with a machete or with a spear, and if there were weapons, if he could carry a firearm, we would give it to him.”<sup>2553</sup> D-0019 confirmed that children below the age of 15 were included in these groups.<sup>2554</sup> The Chamber is only able to consider this evidence for the purposes of the charges if the self-defence forces were under the control of the UPC/FPLC.

898. The prosecution submits that the self-defence forces were in existence prior to the period of the charges and they were incorporated

<sup>2548</sup> The terms “self-defence forces”, “self-defence groups” and “self-defence committees” have been used interchangeably by the witnesses before the Chamber.

<sup>2549</sup> T-348-ENG, page 25, lines 1 – 3.

<sup>2550</sup> T-348-ENG, page 23, line 4 to page 31, line 5.

<sup>2551</sup> T-348-ENG, page 34, lines 3 – 6.

<sup>2552</sup> T-348-ENG, page 24, lines 8 – 15.

<sup>2553</sup> T-348-ENG, page 24, lines 13 – 15.

<sup>2554</sup> T-340-ENG, page 70, lines 5 – 13.

into the UPC/FPLC when that organisation was created.<sup>2555</sup> It is submitted the UPC/FPLC had control over these former village forces,<sup>2556</sup> and that children of all ages were sent to be trained by the UPC/FPLC, including children under the age of 15.<sup>2557</sup>

899. The defence argues these groups maintained their independent existence after September 2002,<sup>2558</sup> and they continued acting autonomously during and well beyond the period of the charges.<sup>2559</sup>

900. Although D-0007 gave evidence to the effect that children under the age of 15 were used by the self-defence forces,<sup>2560</sup> he suggested they were separate from the UPC/FPLC – indeed, the UPC “threatened to disarm” the self-defence fighters.<sup>2561</sup> He testified that his self-defence committee was created at a meeting of commanders of the APC in Fataki in 1999; every village in which the Hema lived had self-defence committees; and they continued to exist until 2004.<sup>2562</sup> D-0007 indicated “young boys” were sent to train with the UPC/FPLC in Mandro,<sup>2563</sup> but they never returned and instead remained with the UPC troops.<sup>2564</sup> However, D-0007 denied that the self-defence groups sent boys under the age of 15 to be trained by the UPC, and he emphasised that adults alone were involved and the boys below the age of 15 stayed at home.<sup>2565</sup> He stated that age was taken into account because “you can’t send a child to follow military training”.<sup>2566</sup> It is significant there was

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<sup>2555</sup> ICC-01/04-01/06-2748-Red, paras 349 and 350.

<sup>2556</sup> ICC-01/04-01/06-2748-Red, para. 352.

<sup>2557</sup> ICC-01/04-01/06-2748-Red, para. 355.

<sup>2558</sup> ICC-01/04-01/06-2773-Red-tENG, paras 929 and 930.

<sup>2559</sup> ICC-01/04-01/06-2773-Red-tENG, paras 931 – 933.

<sup>2560</sup> T-348-ENG, page 33, line 13 to page 34, line 6.

<sup>2561</sup> T-348-ENG, page 42, line 14 to page 43, line 18; page 46, lines 9 – 15.

<sup>2562</sup> T-348-ENG, page 23, line 12 to page 24, line 3 and page 24, lines 24 – 25.

<sup>2563</sup> T-348-ENG, page 36, lines 6 – 11 and page 36, line 20 to page 37, line 1.

<sup>2564</sup> T-348-ENG, page 36, lines 12 – 19.

<sup>2565</sup> T-348-ENG, page 37, lines 5 – 11.

<sup>2566</sup> T-348-ENG, page 38, lines 4 – 9.



no challenge during the trial as regards D-0007's testimony that young people from the self-defence forces who were sent to train with the UPC/FPLC never returned.

901. Regarding D-0007's evidence as to age,<sup>2567</sup> the prosecution argues it is inconceivable that the self-defence forces would restrict the age of the recruits who were sent to train with the UPC/FPLC in order to enhance protection for the Hema villages.<sup>2568</sup> The prosecution submits that given D-0007 did not meet with the accused or receive any orders from him or the FPLC until February 2003 – when he was first advised that children under 15 should not be armed – it is unlikely the self-defence groups would have imposed an age restriction which was limited to those who were sent to train with the UPC/FPLC.<sup>2569</sup> The prosecution argues that D-0007 would have been unaware whether children under the age of 15 were trained or used by the UPC/FPLC because he did not visit all the villages.<sup>2570</sup>

902. Given the inconsistency between D-0007's testimony that children of all ages were included in the self-defence groups and that “young boys” were sent to the UPC for training, and his later account that only those above 15 were sent, the Chamber has disregarded his evidence on this issue. In any event it is implausible to suggest that the self-defence forces made special arrangements (based on age) as regards the recruits who were sent for training with the UPC/FPLC, when they did not verify the ages of the children who were given weapons and who they allowed to fight. On this basis, there is a strong inference to be drawn that some of the young people sent by the self-defence forces

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<sup>2567</sup> T-348-ENG, page 60, lines 1 – 6.

<sup>2568</sup> ICC-01/04-01/06-2748-Red, para. 353.

<sup>2569</sup> ICC-01/04-01/06-2748-Red, para. 354, referring to T-348-ENG, page 60, lines 10 – 14 and page 39, lines 7 – 16.

<sup>2570</sup> ICC-01/04-01/06-2748-Red, para. 354.

to train with the UPC/FPLC were under the age of 15.

903. D-0037 described the self-defence forces as organisations that were set up within the villages, and he emphasised that they were separate entities that had not been incorporated into, and did not belong to, the FPLC.<sup>2571</sup> He indicated that even when FPLC structures were adopted, the self-defence forces remained independently active, and (in contrast) those who were trained as soldiers remained with the FPLC.<sup>2572</sup> D-0037 distinguished the self-defence force in Mandro he had belonged to, which had been integrated into the FPLC,<sup>2573</sup> from the other self-defence forces in the villages that remained independent of the FPLC.<sup>2574</sup> Although D-0037 stated that “[a]t the training centre in Mandro, everyone went there. It was a time when the war against the Hemas targeted the entire community, hence everyone came to join the group”,<sup>2575</sup> he indicated that when his group joined the FPLC structure, other independent self-defence forces remained active.<sup>2576</sup> D-0037 further emphasized that people often confused the self-defence forces with the FPLC, notwithstanding their separate command structures.<sup>2577</sup> Despite D-0037’s acceptance that the FPLC demobilisation orders<sup>2578</sup> referred to the self-defence forces, he stated they were not part of its chain of command, and he suggested the orders issued by the Chief of Staff were “perhaps” directed at commanders who were located close to where self-defence fighters might have been operating.<sup>2579</sup> D-0037 additionally gave evidence that

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<sup>2571</sup> T-349-ENG, page 58, lines 1 – 6 and page 59, lines 6 – 8.

<sup>2572</sup> T-349-ENG, page 59, lines 4 – 11.

<sup>2573</sup> T-349-ENG, page 58, line 12 to page 59, line 6.

<sup>2574</sup> T-349-ENG, page 59, lines 4 – 6.

<sup>2575</sup> T-349-ENG, page 7, lines 12 – 14.

<sup>2576</sup> T-349-ENG, page 59, lines 8 – 11.

<sup>2577</sup> T-349-ENG, page 60, lines 5 – 12.

<sup>2578</sup> EVD-D01-01096 and EVD-D01-01097. These will be addressed in detail in Section IX(B)(3).

<sup>2579</sup> T-349-ENG, page 59, line 25 – page 60, line 16.

demobilisation was to be enforced regardless of the hierarchy of the self-defence groups “everywhere and wherever [child soldiers] are found”.<sup>2580</sup> D-0037 further testified that the demobilisation orders were “perhaps” directed at commanders in the area where self-defence groups were active. This, however, was only an assumption on his part. Nonetheless, D-0037’s evidence on these issues was credible and reliable.

904. In addition, a report dated 16 February 2003 addressed to the UPC’s general administrator of security refers to the demobilisation instructions of 21 October 2002 and 27 January 2003, and it indicates they had been correctly disseminated to all the major units. Guidance was requested, given the opposition from the self-defence forces to demobilise and disarm the children in their groups.<sup>2581</sup> D-0037 testified that he had drafted and signed this document on the orders of Bosco Ntaganda.<sup>2582</sup> It follows that even though the FPLC had control of the region at the time and interacted with the self-defence groups, many of the latter remained independent of the FPLC.

905. D-0019 also gave evidence about the self-defence committees, indicating that the issue of children within those groups was discussed within the executive.<sup>2583</sup> He suggested the UPC resisted sharing power with other groups.<sup>2584</sup> Moreover, D-0019 testified that the self-defence groups did not necessarily follow the policies of the UPC at the time, and because there were children amongst them who needed to be reintegrated within their communities, they “had to be disarmed first and foremost, regardless of the age of the militants in those

<sup>2580</sup> T-349-ENG, page 60, lines 16 – 20.

<sup>2581</sup> EVD-D01-01097.

<sup>2582</sup> EVD-D01-01097; T-349-ENG, page 12, lines 5 – 12 and page 13, lines 22 – 24 (D-0037).

<sup>2583</sup> T-341-ENG, page 4, lines 13 – 15.

<sup>2584</sup> T-341-ENG, page 4, lines 15 – 17.

groups.”<sup>2585</sup> He added the UPC had established a mechanism to assist with the reintegration process and to take responsibility for children under the age of 18 from all the armed groups, including the “vigilante forces”.<sup>2586</sup> Although the Chamber has approached D-0019’s testimony with caution, other credible evidence supports his account on this issue, and the Chamber accepts his testimony that the self-defence groups remained separate entities.

906. The Chamber is therefore persuaded the evidence given by D-0007, D-0037 and D-0019, along with the report referred to above, demonstrates that some of the self-defence forces remained independent of the FPLC. D-0037’s statement that “everyone came to join the group” must be viewed in the context of the entirety of his evidence, and it is clear he was not asserting that all the village self-defence groups were trained at Mandro prior to incorporation into the FPLC.

907. Given their independent existence, the UPC/FPLC was not responsible for any children below the age of 15 who were recruited or used by these groups, save that the Chamber accepts the evidence of D-0007 demonstrates that some children below the age of 15 were sent to the UPC/FPLC for training and never returned.

908. The Chamber sought to call D-0005 as a Court witness, to explore whether children under the age of 15 were included in some of the Hema self-defence groups and whether the accused took any steps to facilitate their demobilisation.<sup>2587</sup> Although this witness did not

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<sup>2585</sup> T-341-ENG, page 4, lines 18 – 24

<sup>2586</sup> T-341-ENG, page 5, lines 4 – 17.

<sup>2587</sup> Redacted Decision on the Prosecution’s Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWWW-0005, 28 April 2011, ICC-01/04-01/06-2727-Red, paras 62-67.

testify,<sup>2588</sup> there is sufficient reliable evidence on this issue for the Chamber to reach any necessary conclusions on this issue.

## **6. Overall Conclusions as regards conscription, enlistment and use of children under the age of 15 within the UPC/FPLC**

909. It is alleged that the accused conscripted and enlisted children under the age of 15 years into the armed forces of the UPC/FPLC and that he used them to participate actively in hostilities between 1 September 2002 and 13 August 2003.

910. The Chamber has already set out its conclusion that the UPC/FPLC was an armed group.<sup>2589</sup>

### **a) Conscription and enlistment in the UPC/FPLC**

911. The Chamber finds that between 1 September 2002 and 13 August 2003, the armed wing of the UPC/FPLC was responsible for the widespread recruitment of young people, including children under the age of 15, on an enforced as well as a “voluntary” basis. The evidence of witnesses P-00055, P-0014 and P-0017, coupled with the documentary evidence establishes that during this period certain UPC/FPLC leaders, including Thomas Lubanga, Chief Kahwa, and Bosco Ntaganda, and Hema elders such as Eloy Mafuta, were particularly active in the mobilisation drives and recruitment campaigns that were directed at persuading Hema families to send their children to serve in the UPC/FPLC army.<sup>2590</sup>

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<sup>2588</sup> T-355-ENG, page 3, line 13 to page 6, line 16.

<sup>2589</sup> See paras 546-547.

<sup>2590</sup> See paras 770 and 785.

912. P-0014, P-0016, P-0017, P-0024, P-0030, P-0038, P-0041, P-0046 and P-0055 testified credibly and reliably that children under 15 were “voluntarily” or forcibly recruited into the UPC/FPLC and sent to either the headquarters of the UPC/FPLC in Bunia or its training camps, including at Rwampara, Mandro, and Mongbwalu. Video evidence introduced during the testimony of P-0030 clearly shows recruits under the age of 15 in the camp at Rwampara.<sup>2591</sup> The letter of 12 February 2003, (EVD-OTP-00518) further corroborates other evidence that there were children under the age of 15 within the ranks of the UPC.

913. The evidence of P-0016, P-0014 and P-0017 demonstrates that children in the camps endured a harsh training regime and they were subjected to a variety of severe punishments. The evidence of P-0055, P-0017 and P-0038 establishes that children, mainly girls, were used for domestic work for the UPC commanders. The Chamber heard evidence from witnesses P-0046, P-0016, P-0055 and P-0038 that girl soldiers were subjected to sexual violence and rape. P-0046 and P-0038 specifically referred to girls under the age of 15 who were subjected to sexual violence by UPC commanders. As discussed above, in the view of the Majority, sexual violence does not form part of the charges against the accused, and the Chamber has not made any findings of fact on the issue, particularly as to whether responsibility is to be attributed to the accused.

914. In all the circumstances, the evidence has established beyond reasonable doubt that children under the age of 15 were conscripted and enlisted into the UPC/FPLC forces between 1 September 2002 and

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<sup>2591</sup> EVD-OTP-00570.

13 August 2003.

**b) Use of children under 15 to participate actively in hostilities**

915. The testimony of P-0002, P-0016, P-0017, P-0024, P-0030, P-0038, P-0046, P-0055, D-0019 and D-0037 and the documentary evidence has demonstrated that children under the age of 15 were within the ranks of the UPC/FPLC between 1 September 2002 and 13 August 2003. The evidence of P-0038, P-0016, P-0012, P-0046, P-0014, D-0019 and D-0037 proves that children were deployed as soldiers in Bunia, Tchomia, Kasenyi, Bogoro and elsewhere, and they took part in fighting, including at Kobu, Songolo and Mongbwalu.<sup>2592</sup> The evidence of witnesses P-0016 and P-0024 establishes that the UPC used children under the age of 15 as military guards. The evidence of P-0017 reveals that a special “Kadogo Unit” was formed, which was comprised principally of children under the age of 15. The evidence of P-0014, P-0017, D-0019, P-0038 and P-041, as well as the video footage EVD-OTP-00572, demonstrates that commanders in the UPC/FPLC frequently used children under the age of 15 as bodyguards.<sup>2593</sup> The accounts of P-0030, P-0055, P-0016 and P-0041, along with the video evidence, clearly prove that children under the age of 15 acted as bodyguards or served within the presidential guard of Mr Lubanga.<sup>2594</sup>

916. In all the circumstances, the evidence has established beyond reasonable doubt that children under the age of 15 were conscripted, enlisted and used by the UPC/FPLC to participate actively in hostilities between 1 September 2002 and 13 August 2003.

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<sup>2592</sup> See Section VIII(B)(2).

<sup>2593</sup> See Section VIII(B)(2) and (5).

<sup>2594</sup> EVD-OTP-00571, 02:47:15 – 02:47:19; EVD-OTP-00574, 00:36:21 and 01:49:02.

## XI. INDIVIDUAL CRIMINAL RESPONSIBILITY OF THOMAS LUBANGA (ARTICLE 25(3)(a) OF THE STATUTE)

### A. THE LAW

#### 1. The Mode of Liability Charged

917. The prosecution charged Thomas Lubanga as a co-perpetrator under Article 25(3)(a) of the Statute, and the Pre-Trial Chamber confirmed the charges on this basis.<sup>2595</sup>

#### Article 25 Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, **jointly with another** or through another person, regardless of whether that other person is criminally responsible; (emphasis added)

[...]

#### 2. The Decision on the Confirmation of Charges

918. In its Decision on the Confirmation of Charges, Pre-Trial Chamber I held that liability as a co-perpetrator under Article 25(3)(a) attaches only to individuals who can be said to have “control over the crime”.<sup>2596</sup>

919. The Confirmation Decision outlined three main approaches to

<sup>2595</sup> ICC-01/04-01/06-803-tEN, para. 410.

<sup>2596</sup> ICC-01/04-01/06-803-tEN, paras 326–338.



distinguish between principals and accessories if a crime is committed by a number of individuals: the *objective* approach, the *subjective* approach and *the control over the crime approach*.<sup>2597</sup>

920. The Pre-Trial Chamber held that under the control over the crime approach, in contrast to the objective approach,<sup>2598</sup> the principals to a crime are not limited to those who physically carry out the objective elements of the offence. Rather, principals also include those individuals who, in spite of their absence from the scene of the crime, control or mastermind its commission because they decide whether and, if so, how the offence will be committed.<sup>2599</sup>

921. The Pre-Trial Chamber described the subjective approach as “mov[ing] the focus from the level of contribution to the commission of the offence as the distinguishing criterion between principals and accessories and plac[ing] it instead on the state of mind in which the contribution to the crime was made”.<sup>2600</sup> It was said that “[a]s a result, only those who make their contribution with the shared intent to commit the offence can be considered principals to the crime, regardless of the level of their contribution to its commission”.<sup>2601</sup> Declining to follow the subjective approach, the Pre-Trial Chamber held that the level or degree of the contribution to a crime was a central element in determining the liability of principals.<sup>2602</sup>

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<sup>2597</sup> ICC-01/04-01/06-803-tEN, paras 326–330.

<sup>2598</sup> ICC-01/04-01/06-803-tEN, para. 328.

<sup>2599</sup> ICC-01/04-01/06-803-tEN, para. 330.

<sup>2600</sup> ICC-01/04-01/06-803-tEN, para. 329.

<sup>2601</sup> ICC-01/04-01/06-803-tEN, para. 329.

<sup>2602</sup> ICC-01/04-01/06-803-tEN, para. 329. An additional argument rejecting the subjective approach was made in paragraphs 334 and 335 of the Confirmation Decision: in the Pre-Trial Chamber’s view, those who know of the intent of a group of persons acting with a criminal purpose to commit a crime, or who aim to further the criminal activity by intentionally contributing to its commission (Article 25(3)(d) of the Statute) would be considered principals rather accessories to a crime, “had the drafters of the Statute opted for a subjective approach for distinguishing between principals and accessories.”

922. Applying this interpretation of Article 25(3)(a), the Pre-Trial Chamber held that co-perpetration “is rooted in the notion of the division of essential tasks for the purpose of committing a crime by two or more persons acting in a concerted manner”.<sup>2603</sup> As a result “although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task”.<sup>2604</sup>

923. In the Decision on the Confirmation of Charges, the Pre-Trial Chamber set out what it described as the objective elements of co-perpetration as follows: (i) the “existence of an agreement or common plan between two or more persons”;<sup>2605</sup> and (ii) the “co-ordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime.”<sup>2606</sup> As regards the subjective elements of co-perpetration, it stated that “[t]he Chamber [...] requires above all that the suspect fulfil the subjective elements of the crime with which he or she is charged [...]”.<sup>2607</sup> These subjective elements are said to be: (i) “the suspect and the other co-perpetrators [...] must all be mutually aware of the risk that implementing their common plan may result in the realisation of the objective elements of the crime”;<sup>2608</sup> and (ii) the suspect must be aware of the “factual circumstances enabling him or her to jointly control the crime.”<sup>2609</sup>

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<sup>2603</sup> ICC-01/04-01/06-803-tEN, para. 342.

<sup>2604</sup> ICC-01/04-01/06-803-tEN, paras 342 and 347.

<sup>2605</sup> ICC-01/04-01/06-803-tEN, para. 343.

<sup>2606</sup> ICC-01/04-01/06-803-tEN, para. 346.

<sup>2607</sup> ICC-01/04-01/06-803-tEN, para. 349.

<sup>2608</sup> ICC-01/04-01/06-803-tEN, para. 361.

<sup>2609</sup> ICC-01/04-01/06-803-tEN, para. 366.

**a) The Pre-Trial Chamber’s Conclusions on the  
“Objective” Elements**

924. Addressing the first objective element (the “existence of an agreement or common plan between two or more persons”), the Pre-Trial Chamber held that the “plan must include an element of criminality, although it does not need to be specifically directed at the commission of a crime”.<sup>2610</sup> The Chamber decided that it suffices:

(i) that the co-perpetrators have agreed: (a) to start the implementation of the common plan to achieve a non-criminal goal, and (b) to only commit the crime if certain conditions are met; or

(ii) that the co-perpetrators (a) are aware of the risk that implementing the common plan (which is specifically directed at the achievement of a non-criminal goal) will result in the commission of the crime, and (b) accept such an outcome.<sup>2611</sup>

925. Turning to the second objective element (a “co-ordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime”), the Pre-Trial Chamber indicated that “only those to whom essential tasks have been assigned – and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks – can be said to have joint control over the crime”.<sup>2612</sup>

**b) The Pre-Trial Chamber’s Conclusions on the  
“Subjective” Elements**

926. The Pre-Trial Chamber addressed the mental element of the crimes under Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute. First, it noted that the general subjective element(s) for all crimes within the jurisdiction of the Court set out in Article 30 of the Statute apply

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<sup>2610</sup> ICC-01/04-01/06-803-tEN, para. 344.

<sup>2611</sup> ICC-01/04-01/06-803-tEN, para. 344.

<sup>2612</sup> ICC-01/04-01/06-803-tEN, paras 342 and 347.

“unless otherwise provided”.<sup>2613</sup> In particular, the Pre-Trial Chamber indicated that “intent” and “knowledge” can only be established:

- i) if the person is [aware] that a circumstance exists or a consequence will occur in the ordinary course of events; and
- ii) if the person means to engage in the relevant conduct and means to cause the relevant consequences or is aware that it will occur in the ordinary course of events.<sup>2614</sup>

927. It suggested that “the “cumulative” reference to “intent” and “knowledge” “requires the existence of a volitional element on the part of the suspect”. This “volitional element” was described as encompassing three situations (dolus directus of the first degree, dolus directus of the second degree and *dolus eventualis*).<sup>2615</sup>

928. As the Pre-Trial Chamber observed, Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Elements of Crimes provide that the offence under consideration is committed if it is established that the accused “knew or should have known” that the relevant individual was under 15 years.<sup>2616</sup> It concluded that this is one of the exceptions to the requirement of “intent and knowledge” under Article 30.<sup>2617</sup>

929. Notwithstanding that conclusion, the Pre-Trial Chamber determined that the “should have known” standard within the relevant Elements of Crimes was not applicable in the present case, given that “co-perpetration based on joint control over the crime requires that all the co-perpetrators, including the suspect, be mutually aware of, and mutually accept, the likelihood that implementing the common plan would result in the realisation of the objective elements

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<sup>2613</sup> ICC-01/04-01/06-803-tEN, para. 350.

<sup>2614</sup> ICC-01/04-01/06-803-tEN, para. 350.

<sup>2615</sup> ICC-01/04-01/06-803-tEN, paras 351-352.

<sup>2616</sup> ICC-01/04-01/06-803-tEN, para. 357.

<sup>2617</sup> ICC-01/04-01/06-803-tEN, para. 359.

of the crime.”<sup>2618</sup>

930. The Pre-Trial Chamber decided that mutual awareness and acceptance on the part of the co-perpetrators that the plan “may result in the realisation of the objective elements of the crime” justifies the conclusion that the individual contributions “may be attributed” to each participant and that each of them is to be held criminally responsible “as principals to the whole crime”.<sup>2619</sup>

931. The Pre-Trial Chamber distinguished between two scenarios as regards *dolus eventualis*: first, when there is a substantial risk the objective elements of the crime will occur (i.e. in the ordinary course of events), and second, when the risk is low. In the first scenario, “mutual acceptance” can be inferred from: “(i) the awareness by the suspect and the other co-perpetrators of the substantial likelihood that implementing the common plan would result in the realisation of the objective elements of the crime; and (ii) the decision by the suspect and the other co-perpetrators to implement the common plan despite such awareness.”<sup>2620</sup> As to the second scenario, the participants “must have clearly or expressly accepted the idea that implementing the common plan would result in the realisation of the objective elements of the crime”.<sup>2621</sup>

932. The Pre-Trial Chamber further observed, with respect to the existence of an armed conflict, that “the Elements of Crimes require only that ‘[t]he perpetrator was aware of factual circumstances that established the existence of an armed conflict’, without going as far as to require that he or she conclude[s], on the basis of a legal assessment

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<sup>2618</sup> ICC-01/04-01/06-803-tEN, para. 365.

<sup>2619</sup> ICC-01/04-01/06-803-tEN, paras 361 and 362.

<sup>2620</sup> ICC-01/04-01/06-803-tEN, para. 363.

<sup>2621</sup> ICC-01/04-01/06-803-tEN, para. 364.

of the said circumstances, that there was an armed conflict”.<sup>2622</sup>

933. The Pre-Trial Chamber considered that an element of “joint control over the crime” is that the suspect was aware of “the factual circumstances enabling him to jointly control the crime”. It found “this requires the suspect to be aware (i) that his or her role is essential to the implementation of the common plan, and hence in the commission of the crime, and (ii) that he or she can – by reason of the essential nature of his or her task – frustrate the implementation of the common plan, and hence the commission of the crime, by refusing to perform the task assigned to him or her”.<sup>2623</sup>

### 3. The Submissions

#### a) The Prosecution

##### *Submissions on the “Objective” Elements of the Crime*

934. In its closing submissions, the prosecution accepts that under “co-perpetration” the accused, in the function or role assigned to him, needs to exercise control over the crime.<sup>2624</sup> It is submitted that this can be established either because (i) he was “assigned a role that was central to the implementation of the common plan, in the sense that the common plan would not have been carried out in the manner agreed upon without that role being performed” (emphasis added),<sup>2625</sup> or (ii) “the role assigned to the accused ex ante was central to the implementation of the plan, [but] it appears in retrospect that his or her contribution was substantial though not essential, to the

<sup>2622</sup> ICC-01/04-01/06-803-tEN, para. 360.

<sup>2623</sup> ICC-01/04-01/06-803-tEN, para. 367.

<sup>2624</sup> ICC-01/04-01/06-2748-Red, para. 64.

<sup>2625</sup> ICC-01/04-01/06-2748-Red, para. 64.

implementation of the common plan” (original emphasis).<sup>2626</sup>

935. As to (i) above, the central role will be made out “where an accused has actually made an essential contribution to the implementation of the common plan”<sup>2627</sup> (*i.e.* an *ex post facto* essentiality analysis).

936. As to (ii), the prosecution submits that “[a] contribution is ‘substantial’ where the crime might still have occurred absent the contribution of the Accused, but not without great difficulty.”<sup>2628</sup> The prosecution argues that “functional control remains a requirement for this second scenario, as it is determined *ex ante* and on the basis of the role assigned to the Accused and not on the basis of the actual contribution”.<sup>2629</sup>

937. Therefore, by the prosecution’s formulation, the accused can be said to have had “control over the crime” either because his actual contribution at the execution stage was “essential” to the commission of the crime or the role assigned to the accused was “central to the implementation of the plan” but “it appears in retrospect that his actual contribution was “substantial” though not essential.”<sup>2630</sup>

938. The prosecution further asserts that it is not necessary to establish that the accused “physically perpetrated any of the elements of the crimes or that he was present at the crime scene”. It is suggested it is unnecessary to prove “that the objective elements of an offence have been personally perpetrated by the co-perpetrators”. Instead, it is argued in accordance with the Confirmation Decision that it is sufficient for the prosecution to establish “that the objective elements

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<sup>2626</sup> ICC-01/04-01/06-2748-Red, para. 65.

<sup>2627</sup> ICC-01/04-01/06-2748-Red, para. 65.

<sup>2628</sup> ICC-01/04-01/06-2748-Red, para. 65.

<sup>2629</sup> ICC-01/04-01/06-2748-Red, para. 65.

<sup>2630</sup> ICC-01/04-01/06-2748-Red, para. 65.

of (the) offence (were) carried out by a plurality of persons acting within the framework of a common plan”.<sup>2631</sup>

939. The prosecution relies on the Pre-Trial Chamber’s finding that although the common plan “need not be specifically directed at the commission of a crime,” it “must include an element of criminality.”<sup>2632</sup>

*Submissions on the “Subjective” Elements of the Crime*

940. The prosecution submits that, in order to establish that the accused acted with **intent**, it must prove that he “meant to engage in the relevant conduct and meant to bring about the objective elements of the crimes or was aware that they would occur in the ordinary course of events (Articles 30(2)(a) and (b) of the Statute).<sup>2633</sup> As to knowledge, the prosecution suggests it must prove that the accused was aware of the existence of the circumstances relevant to the underlying crimes, and that, in the ordinary course of events, his conduct would bring about the objective elements of the crimes.”<sup>2634</sup>

941. It is argued by the prosecution that in order to establish proof of the relevant circumstances of co-perpetration, it must establish (i) “the Accused was aware that the common plan amounted to or involved the commission of a crime;” and (ii) he “was aware of the factual circumstances that enabled him to exercise functional control over the crime.”<sup>2635</sup>

942. The prosecution’s submissions on the impact of the Elements of Crimes on the mental element of the relevant offences are particularly

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<sup>2631</sup> ICC-01/04-01/06-2748-Red, para. 66.

<sup>2632</sup> ICC-01/04-01/06-2748-Red, footnote 105.

<sup>2633</sup> ICC-01/04-01/06-2748-Red, para. 68.

<sup>2634</sup> ICC-01/04-01/06-2748-Red, para. 69.

<sup>2635</sup> ICC-01/04-01/06-2748-Red, para. 70.



significant. For the crimes established under Articles 8(2)(b)(xxvi) and 8(2)(e)(vii), the Elements of Crime provides as regards the issue of age “[t]he perpetrator should have known that such persons were under the age of 15 years”. The prosecution suggests that since the accused has been charged as a co-perpetrator, “[...] in light of the general requirements for co-perpetration [...], this special subjective element may not be applicable in this case” (emphasis added).<sup>2636</sup> This is further elaborated in the relevant footnote:

See the requirements of a common plan and of awareness by the accused that the plan involves the commission of a crime and that the implementation of the plan will bring about the objective elements of the crime in the ordinary course of events. In this case, the Prosecution argues that the Accused *knew* that children under the age of 15 would be conscripted, enlisted or used to participate actively in hostilities as a result of the implementation of the Common Plan.<sup>2637</sup>

943. This stance was confirmed in the Prosecution’s Reply to the ‘Conclusions finales de la Défense’:

The specific *mens rea* required for the crime of enlistment, as stipulated in Article 8 of the Rome Statute, is inapplicable in this case where the Accused is charged with co-perpetration based on joint control over the crimes. That the Accused, and all co-perpetrators, must be mutually aware of and accept the likelihood that implementing the common plan would result in the execution of the objective elements of the crimes, renders the “should have known” standard redundant.<sup>2638</sup>

944. It follows that the prosecution does not invite a conviction of the accused on the basis that “he should have known” that the individuals who were conscripted or enlisted, or who were used, were under the age of 15 years. Rather, it submits the Chamber should only convict the accused if the Chamber finds he knew that children under 15 years of age were being conscripted or enlisted into the national armed

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<sup>2636</sup> ICC-01/04-01/06-2748-Red, para. 72.

<sup>2637</sup> ICC-01/04-01/06-2748-Red, para. 72, footnote 123.

<sup>2638</sup> ICC-01/04-01/06-2778-Red, para. 39.

forces or were being used to participate actively in hostilities.

945. Finally, the prosecution submits that, while it must prove that the accused was aware of the factors that establish the existence of a relevant armed conflict, it does not have to prove that the accused was aware that those factors amounted to an “armed conflict”, whether international or non-international in character.<sup>2639</sup>

## **b) The Defence**

### *Submissions on the “Objective” Elements of the Crime*

946. The defence suggests that under Article 67(1)(a) of the Statute, the accused is “[to] be informed promptly and in detail of the nature, cause and content of the charge” and, under Article 74(2), the Trial Chamber’s decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. It is argued against this statutory framework, his liability is to be assessed solely on the basis of the charges confirmed by the Pre-Trial Chamber. The defence relies on certain jurisprudence from the ad hoc tribunals to the effect that an accused should not be at risk of a conviction on a basis that differs from the “mode of responsibility” alleged when the proceedings were instituted.<sup>2640</sup> It is submitted that the indictment must concisely specify the crimes and the supporting facts, and identify the legal basis and the form of liability. Any ambiguity in this context is to be avoided.<sup>2641</sup> It is argued the other modes of liability provided for in Articles 25(3)(b), (c), (d) and 28 of the Statute, as well

<sup>2639</sup> ICC-01/04-01/06-2748-Red, para. 73.

<sup>2640</sup> ICC-01/04-01/06-2773-Red-tENG, paras 48 and 49; referring to ICTY, *The Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Chamber, Judgement, 22 March 2006, para. 62; ICTR, *The Prosecutor v. Rukundo*, Case No. ICTR-2001-70-A, Appeals Chamber, Judgement, 20 October 2010, para. 37.

<sup>2641</sup> ICC-01/04-01/06-2773-Red-tENG, para. 50; referring to ICTY, *The Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Chamber, Judgement, 17 September 2003, para. 138.

as indirect involvement under Article 25(3)(a), are unavailable in this case, particularly given the absence of any application under Regulation 55 of the Regulations of the Court to modify the legal characterisation of the facts.<sup>2642</sup> Therefore, the defence argues the accused can only be guilty of an offence committed jointly with another person rather than committed “through” another person.<sup>2643</sup>

947. The defence takes issue with the Pre-Trial Chamber’s formulation of co-perpetration based on “control over the crime”, submitting it represents “an excessively broad interpretation of Article 25(3)(a)” and is in breach of Article 22(2).<sup>2644</sup>

948. Indeed, the defence suggests it is insufficient for the prosecution to prove that the accused had the power to frustrate the crimes or to punish the perpetrators.<sup>2645</sup> Instead, it is contended the prosecution must establish “a positive, personal and direct contribution without which the crime would not have existed”.<sup>2646</sup> The defence argues that the responsibility of those who do not participate directly in the execution of a crime can only be based on Article 25(3)(b).<sup>2647</sup>

949. The defence advocates a more restrictive co-perpetration test than that set out by the Pre-Trial Chamber. In particular, the defence asserts Article 25(3)(a) requires a “positive act of participation” that is personally and directly undertaken by the accused himself.<sup>2648</sup> The defence argues the use of the verb “commits” means that by his personal acts the accused must have made a contribution without

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<sup>2642</sup> ICC-01/04-01/06-2773-Red-tENG, paras 50–56.

<sup>2643</sup> ICC-01/04-01/06-2773-Red-tENG, para. 57.

<sup>2644</sup> ICC-01/04-01/06-2773-Red-tENG, para. 65; ICC-01/04-01/06-803-tEN, para. 341.

<sup>2645</sup> ICC-01/04-01/06-2773-Red-tENG, para. 65.

<sup>2646</sup> ICC-01/04-01/06-2773-Red-tENG, para. 65.

<sup>2647</sup> ICC-01/04-01/06-2773-Red-tENG, para. 67.

<sup>2648</sup> ICC-01/04-01/06-2773-Red-tENG, para. 68.

which the crime would not have occurred.<sup>2649</sup>

950. Moreover, the defence submits that under Article 25(3)(a), the contribution of the accused must have been “essential”, in the sense the crime would not have been committed absent his contribution. In other words, the contribution must have been a “*conditio sine qua non* for the commission of the crime.”<sup>2650</sup>

951. The defence contends that the determination of whether the accused’s role was “essential” must be made in light of the established facts and it should not be based on the role assigned to him within the overall plan, in the abstract. The defence puts the matter thus:

It follows that responsibility under article 25(3)(a) requires direct participation in the crime itself in the form of a “contribution” of greater magnitude than that required for complicity, that is to say, an essential contribution to the commission of the crime. The “contribution” required under article 25(3)(a) must be such that the crime would not have been committed had there been no such contribution. It must be a *conditio sine qua non* for the commission of the crime. Contrary to the argument advanced by the Prosecutor, the essential character of this contribution must be assessed in the light of the events as they actually occurred and not, abstractly, having regard to the “role” assigned to the accused within the framework of a prior concerted plan.<sup>2651</sup>

952. In support of this position, the defence relies on the Pre-Trial Chamber’s decision confirming the charges in the *Katanga and Ngudjolo* case.<sup>2652</sup>

953. Furthermore, the defence submits the approach adopted by the ad hoc tribunals whereby the alleged participation of aiders, abettors and accomplices must substantially contribute to the crime, while co-perpetration requires an essential contribution, further reinforces the

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<sup>2649</sup> ICC-01/04-01/06-2773-Red-tENG, para. 65; ICC-01/04-01/06-803-tEN, para. 341.

<sup>2650</sup> ICC-01/04-01/06-2773-Red-tENG, para. 64.

<sup>2651</sup> ICC-01/04-01/06-2773-Red-tENG, para. 64.

<sup>2652</sup> *The Prosecutor v. Katanga and Ngudjolo*, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 525; ICC-01/04-01/06-2773-Red-tENG, para. 64, footnote 59.

contention that responsibility under Article 25(3)(a) involves a significantly greater contribution than that required for complicity.<sup>2653</sup>

954. It follows the defence takes issue with the prosecution's contention that a "substantial" contribution to the execution of a plan is sufficient.

955. The defence argues that to establish criminal liability on the basis of co-perpetration, the common plan must be intrinsically criminal. It is submitted that participation in a plan which "in itself is not criminal but merely capable of creating conditions conducive to the commission of criminal acts cannot be regarded as characterising the *actus reus* of criminal co-perpetration".<sup>2654</sup> Therefore, it is suggested "mere knowledge 'of the risk that implementing the common plan will result in the commission of the crime' is insufficient to engage criminal responsibility by way of co-perpetration."<sup>2655</sup>

*Submissions on the "Subjective" Elements of the Crime*

956. The defence submits the prosecution must prove that the accused had the relevant level of intent and knowledge when carrying out the material elements of the crime (Article 30(1) of the Statute). The defence argues an accused can only be considered to have had the requisite intention if he meant to engage in the conduct and, as to consequences, he either meant to cause them or was aware that they would occur in the ordinary course of events (Article 30(2)(a) and (b)).<sup>2656</sup> Similarly, "Article 30 provides that "intent" and knowledge [...] mean an awareness that a circumstance exists or a consequence

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<sup>2653</sup> ICC-01/04-01/06-2773-Red-tENG, paras 63 and 64.

<sup>2654</sup> ICC-01/04-01/06-2773-Red-tENG, para. 77.

<sup>2655</sup> ICC-01/04-01/06-2773-Red-tENG, para. 78.

<sup>2656</sup> ICC-01/04-01/06-2773-Red-tENG, paras 858, 865.

will occur in the ordinary course of events."<sup>2657</sup>

957. The defence challenges the approach of the Pre-Trial Chamber that mens rea is established if the accused "is aware of the risk that the objective elements of the crime may result from his or her actions or omissions and accepts such an outcome by reconciling himself or herself with it or consenting to it [also known as *dolus eventualis*]" . The defence observes the Pre-Trial Chamber based its conclusions on the first instance Decision in *The Prosecutor v. Milomir Stakić*.<sup>2658</sup> It contends awareness that something will happen "in the ordinary course of events" is not to be equated with the accused's awareness of a "risk" that the crime will occur, particularly if that result is improbable. In essence, the defence suggests the concept of *dolus eventualis*, an "indirect intention" that arises when the possibility of a certain consequence is appreciated by the accused, but he or she proceeds with a reckless disregard as to whether it will occur, does not form any part of Article 30.<sup>2659</sup> To this extent, the defence adopts the approach of Pre-Trial Chamber II when it concluded:

[...] the suspect could not be said to have intended to commit any of the crimes charged, unless the evidence shows that he was at least aware that, in the ordinary course of events, the occurrence of such crimes was a virtually certain consequence of the implementation of the common plan.<sup>2660</sup> The text of article 30 of the Statute does not encompass *dolus eventualis*, recklessness or any lower form of culpability.<sup>2661</sup>

958. Finally, the defence refers approvingly to the conclusion of Pre-Trial Chambers I and II that one of the requirements is that:

<sup>2657</sup> ICC-01/04-01/06-2773-Red-tENG, para. 79.

<sup>2658</sup> ICTY, *The Prosecutor v. Stakić, Case No. IT-97-24-T*, Trial Chamber, Judgement, 31 July 2003, para. 587; ICC-01/04-01/06-2773-Red-tENG, para. 80, referring to ICC-01/04-01/06-803-tEN, para. 352, which quotes this ICTY judgement.

<sup>2659</sup> ICC-01/04-01/06-2773-Red-tENG, paras 81-82.

<sup>2660</sup> ICC-01/04-01/06-2773-Red-tENG, para. 83.

<sup>2661</sup> ICC-01/04-01/06-2773-Red-tENG, para. 82; ICC-01/05-01/08-424, para. 369.

[...] the suspect must be "aware of his essential role in the implementation of the crime" and must be aware, "due to such essential role, [that he is] capable of frustrating its implementation and accordingly, the commission of the crime".<sup>2662</sup>

959. This requirement has been similarly described by Pre-Trial Chamber II, namely that a co-perpetrator must "be aware of his essential role in the implementation of the crime; and [...] due to such essential role, [...] be capable of frustrating its implementation and accordingly the commission of the crime".<sup>2663</sup>

960. Focussing on the mental element for crimes under Article 8(2)(b)(xxvi) and 8(2)(e)(vii) as expressly set out in the Elements of Crimes – that "the perpetrator knew or should have known that such person or persons were under the age of 15 years" – the defence accepts this is a statutory exception to the requirement under Article 30 that the accused must have had knowledge of the material elements, together with the necessary intent. However, it is submitted that, as an exception, it should be interpreted "most strictly".<sup>2664</sup> Therefore, it is argued that the expression "should have known" requires the finding that the accused was legally obliged, either under domestic or international law, to establish the age of the recruits and that a lesser, loosely-formulated obligation simply based on his involvement in recruitment is insufficient.<sup>2665</sup> Further, it is submitted this legal obligation must be assessed in the context of the circumstances of the case. For instance, it would be relevant if the accused was unable to check the age of the recruits.<sup>2666</sup>

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<sup>2662</sup> ICC-01/04-01/06-2773-Red-tENG, para. 85, referring to ICC-01/04-01/06-803-tEN, paras 366-367 and ICC-01/05-01/08-424, para. 371.

<sup>2663</sup> ICC-01/05-01/08-424, para. 371.

<sup>2664</sup> ICC-01/04-01/06-2773-Red-tENG, para. 87.

<sup>2665</sup> ICC-01/04-01/06-2773-Red-tENG, para. 88.

<sup>2666</sup> ICC-01/04-01/06-2773-Red-tENG, para. 89.

### c) The Legal Representatives of Victims

#### *The OPCV's Submissions on the "Objective" Elements of the Crime*

961. The OPCV supports, in its entirety, the approach adopted by the Pre-Trial Chamber in the Confirmation Decision as regards the elements of co-perpetration based on joint control over the crime.<sup>2667</sup>

962. The OPCV additionally endorses a particular aspect of Pre-Trial Chamber I's decision in the confirmation of charges in the *Katanga and Ngudjolo* case, namely that the "commission of a crime through another person" can be based on the notion of "control over an organisation" and it is suggested that this is a widely accepted legal concept.<sup>2668</sup>

963. The OPCV "submits that the forms of individual criminal responsibility set out in Articles 25(3)(b), 25(3)(c), 25(3)(d) and 28 of the Statute are subordinate to those in article 25(3)(a)," and it is suggested that "although they may be applicable under the crime[s] defined in article[s] 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute, they can only be taken into account if the Chamber decides that the accused person cannot be considered as the principal to the crime imputed to him either individually or as co-perpetrator."<sup>2669</sup>

#### *The OPCV's Submissions on the "Subjective" Elements of the Crime*

964. Addressing the mental element of the war crimes established by Articles 8(2)(b)(xxvi) and 8(2)(e)(vii), the OPCV submits that although the prosecution must prove that the accused met the intent and knowledge requirements of Article 30, as regards the age of the child

<sup>2667</sup> ICC-01/04-01/06-2744-Red-tENG, paras 22-26.

<sup>2668</sup> ICC-01/04-01/06-2744-Red-tENG, paras 27-28.

<sup>2669</sup> ICC-01/04-01/06-2744-Red-tENG, para. 29.



or children, the requirement is that of negligence: the perpetrator “should have known” that the “person or persons were under the age of 15 years”.<sup>2670</sup> As to the mental element of Article 30, the OPCV interprets it as follows:

[...] the individual concerned (i) knows that his or her actions or omissions will bring about the objective elements of the crime, and (ii) undertakes such actions or omissions with the concrete intent to bring about the objective elements of the crime (also known as “*dolus directus* of the first degree”).<sup>2671</sup>

965. However, it is suggested that intention on the part of the accused can also be established in the following two ways:

The aforementioned intentional element also encompasses other manifestations of *dolus* such as (i) those situations in which the individual in question, without having the concrete intent to bring about the objective elements of the crime, is aware that such elements will be the necessary result of his or her actions or omissions (also known as “*dolus directus* of the second degree”), and (ii) those situations in which the individual concerned (a) is aware of the risk that the objective elements of the crime may result from his or her actions or omissions, and (b) accepts this result by reconciling himself or herself with it or consenting to it (also known as “*dolus eventualis*”).<sup>2672</sup>

966. As regards the “should have known” test for the age of the child or the children, the OPCV submits this is met if the accused:

(i) did not know that the victims were under the age of fifteen years at the time they were enlisted, conscripted or used to participate actively in hostilities; and (ii) lacked such knowledge as a result of having failed to act with due diligence in the circumstances in question (it can only be said that the individual should have known if the individual’s lack of knowledge is due to a failure to comply with his or her duty to act with due diligence).<sup>2673</sup>

967. The OPCV observes this is an exception to the “intent and knowledge” requirement established in Article 30 that is to be applied as regards the age of the person or the persons concerned. Otherwise, the Article 30 requirement is applicable to the elements of the war

<sup>2670</sup> ICC-01/04-01/06-2744-Red-tENG, para. 16.

<sup>2671</sup> ICC-01/04-01/06-2744-Red-tENG, para. 16.

<sup>2672</sup> ICC-01/04-01/06-2744-Red-tENG, para. 17.

<sup>2673</sup> ICC-01/04-01/06-2744-Red-tENG, para. 19.

crimes under Articles 8(2)(b)(xxvi) and 8(2)(e)(vii), and “including the existence of an armed conflict and the nexus between the acts charged and the armed conflict”.<sup>2674</sup>

*Submissions of the Legal Representatives of the V01 and V02 Groups of Victims on the Objective Elements of the Crime*

968. The legal representatives of the V01 and V02 groups of victims did not address the objective requirements.

*Submissions of the Legal Representatives of the V01 and V02 Groups of Victims on the Mental Element of the Crime*

969. The legal representatives of the V01 group of victims accept that Article 30 requires that the material elements of a crime must be committed with “intent and knowledge”.<sup>2675</sup> However, they argue if the accused was in doubt as to the age of the children, this would not “preclude a conviction”.<sup>2676</sup> It is suggested this issue should be approached on the basis of the true context of the case, namely that Thomas Lubanga is “accused of having recruited an entire army consisting mainly of minors, many of whom were children under the age of 15 years”. It is argued that the Court should consider, in light of the extent of the recruitment in Ituri, a militia of several thousand people, whether he “knew or should have known that that would necessarily entail the recruitment of children under the age of 15 years.”<sup>2677</sup> The legal representatives note “in a country or region where the majority of births are not registered in a civil status registry, where minors do not hold an identity document stating their age, and where many children and even adults do not know their own age, the issue

<sup>2674</sup> ICC-01/04-01/06-2744-Red-tENG, para. 19.

<sup>2675</sup> ICC-01/04-01/06-2746-Red-tENG, para. 39.

<sup>2676</sup> ICC-01/04-01/06-2746-Red-tENG, paras 40 and 43.

<sup>2677</sup> ICC-01/04-01/06-2746-Red-tENG, para. 43.

arises as to how a recruiter must act when faced with a child whose age is unknown”.<sup>2678</sup>

970. It is argued the use of child soldiers in the DRC is a “phenomenon” that stretches back to the mid-1990s<sup>2679</sup> and that when the UPC army was created “the use of child soldiers in armed groups was the rule, not the exception”.<sup>2680</sup> In those circumstances, it is submitted Mr Lubanga must have known that in order to avoid recruiting child soldiers into this new armed group, strict instructions prohibiting their conscription or enlistment were necessary.<sup>2681</sup> Finally, the legal representatives suggest the accused “could not have been unaware of the unlawful and criminal nature of this practice”.<sup>2682</sup>

971. The legal representatives of the V02 group of victims adopt a broadly similar position to the OPCV as regards the mental element the prosecution is required to establish. They submit that Pre-Trial Chamber I correctly identified Article 30, with its requirement of “intent and knowledge”, as providing the applicable mental element for the crimes charged,<sup>2683</sup> with the exception of the “should have known” level of knowledge about the ages of children who were recruited.<sup>2684</sup> The Chamber notes the V02 legal representatives did not advance any submissions on the Pre-Trial Chamber’s final conclusions that this lower standard does not apply in the circumstances of this case, on the basis that the accused is charged as a co-perpetrator.

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<sup>2678</sup> ICC-01/04-01/06-2746-Red-tENG, para. 41.

<sup>2679</sup> ICC-01/04-01/06-2746-Red-tENG, para. 44.

<sup>2680</sup> ICC-01/04-01/06-2746-Red-tENG, para. 47.

<sup>2681</sup> ICC-01/04-01/06-2746-Red-tENG, paras 44-48.

<sup>2682</sup> ICC-01/04-01/06-2746-Red-tENG, para. 50.

<sup>2683</sup> ICC-01/04-01/06-2747-Red-tENG, paras 90-91.

<sup>2684</sup> ICC-01/04-01/06-2747-Red-tENG, paras 92-95.

#### 4. Relevant provisions

972. In accordance with Article 21 of the Statute, the Chamber has considered the following provisions.

973. Article 25 of the Statute establishes the modes of individual criminal responsibility under the Statute, as follows:

##### **Article 25 Individual criminal responsibility**

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

974. Article 30 establishes the general mental element required for all the

crimes under the jurisdiction of the Court:

**Article 30 Mental element**

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
  - a) In relation to conduct, that person means to engage in the conduct;
  - b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

975. The mental element and the application of Article 30 is addressed in the Elements of Crimes in the General Introduction and the section concerning crimes under Article 8:

**Elements of Crimes General Introduction**

[...]

2. As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies. Exceptions to the article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below.

3. Existence of intent and knowledge can be inferred from relevant facts and circumstances.

[...]

## **Article 8 War crimes**

### **Introduction**

The elements for war crimes under article 8, paragraph 2 (c) and (e), are subject to the limitations addressed in article 8, paragraph 2 (d) and (f), which are not elements of crimes.

The elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea.

With respect to the last two elements listed for each crime:

(a) There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;

(b) In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;

(c) There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms 'took place in the context of and was associated with'.

### **Article 8 (2) (e) (vii) War crime of using, conscripting and enlisting children**

#### **Elements**

[...]

3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.

4. The conduct took place in the context of and was associated with an armed conflict not of an international character.

5. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

## 5. Analysis

### a) The Objective Requirements

976. In the view of the Majority, both the Romano Germanic and the Common Law legal systems have developed principles about modes of liability. However, at their inception, neither of these systems was intended to deal with the crimes under the jurisdiction of this Court, *i.e.* the most serious crimes of concern to the international community as a whole. The Statute sets out the modes of liability in Articles 25 and 28 and, they should be interpreted in a way that allows properly expressing and addressing the responsibility for these crimes.

977. Articles 25(3)(a) to (d) establish the modes of individual criminal responsibility under the Statute, other than the “[r]esponsibility of commanders and other superiors”, which is addressed in Article 28. Under Article 25(3)(a), an individual can be convicted of committing a crime: (i) individually; (ii) jointly with another; or (iii) through another person. Under Articles 25(3)(b) to (d), an individual can be convicted of: (i) ordering, soliciting or inducing a crime; (ii) acting as an accessory to a crime; or (iii) contributing to a crime committed by a group acting with a common purpose.

978. The Pre-Trial Chamber decided, pursuant to Article 61(7) of the Statute, there was sufficient evidence to establish substantial grounds to believe that Mr Lubanga committed the crimes charged, under Article 25(3)(a), as a direct co-perpetrator. The Chamber will limit its analysis of Mr Lubanga’s responsibility to this mode of liability.

979. In considering the scope of liability under Article 25(3)(a) of the

Rome Statute, the Chamber notes, as set out above,<sup>2685</sup> that the Appeals Chamber has stated that the provisions of the Statute are to be interpreted in conformity with Article 31(1) of the Vienna Convention on the Law of Treaties.<sup>2686</sup> Hence, the relevant elements of Article 25(3)(a) of the Statute, that the individual “commits such a crime [...] jointly with another [...] person”, must be interpreted in good faith in accordance with the ordinary meaning to be given to the language of the Statute, bearing in mind the relevant context and in light of its object and purpose.<sup>2687</sup>

### *(1) The Common Plan or Agreement*

980. Article 25(3)(a) stipulates that a crime can be committed not only by an individual acting by himself or through another person, but also by an individual who acts jointly with another. To establish liability as a co-perpetrator under Article 25(3)(a), it is necessary there are at least two individuals involved in the commission of the crime. This is evident from the use of terms “jointly with another” in Article 25(3)(a).

981. As the Pre-Trial Chamber concluded, co-perpetration requires the existence of an agreement or common plan between the co-perpetrators. This provides for a sufficient connection between the

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<sup>2685</sup> See paras 601-602.

<sup>2686</sup> See *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, para. 33; *The Prosecutor v. Katanga and Ngudjolo*, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", 27 May 2008, ICC-01/04-01/07-522, paras 38 and 39; Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486, para. 40; *The Prosecutor v. Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence", 19 November 2010, ICC-01/05-01/08-1019, footnote 74.

<sup>2687</sup> Vienna Convention on the Law of Treaties, adopted on 23 May 1969 and entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, Article 31(1).



individuals who together commit the crime and it allows responsibility to be established on a “joint” basis.<sup>2688</sup>

982. As set out above, the Pre-Trial Chamber decided that the plan “must include “an element of criminality”, although it does not need to be specifically directed at the commission of a crime.”<sup>2689</sup> In the Confirmation Decision, it was held to be sufficient:

(i) that the co-perpetrators have agreed: (a) to start the implementation of the common plan to achieve a non-criminal goal, and (b) to only commit the crime if certain conditions are met; or

(ii) that the co-perpetrators (a) are aware of the risk that implementing the common plan (which is specifically directed at the achievement of a non-criminal goal) will result in the commission of the crime, and (b) accept such outcome.<sup>2690</sup>

983. While the prosecution supports this interpretation,<sup>2691</sup> the defence argues that in order to establish criminal liability on the basis of co-perpetration, the common plan must be intrinsically criminal. It is argued that participation in a plan which “in itself is not criminal but merely capable of creating conditions conducive to the commission of criminal acts cannot be regarded as characterising the actus reus of criminal co-perpetration”.<sup>2692</sup> Therefore, it is suggested “mere knowledge ‘of the risk that implementing the common plan will result in the commission of the crime’ is insufficient to engage criminal responsibility by way of co-perpetration.”<sup>2693</sup>

984. In the view of the Majority of the Chamber, the prosecution is not required to prove that the plan was specifically directed at committing

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<sup>2688</sup> ICC-01/04-01/06-803-tEN, para. 343.

<sup>2689</sup> ICC-01/04-01/06-803-tEN, para. 344.

<sup>2690</sup> ICC-01/04-01/06-803-tEN, para. 344.

<sup>2691</sup> ICC-01/04-01/06-2748-Red, footnote 105.

<sup>2692</sup> ICC-01/04-01/06-2773-Red-tENG, para. 77.

<sup>2693</sup> ICC-01/04-01/06-2773-Red-tENG, para. 78.

the crime in question (the conscription, enlistment or use of children), nor does the plan need to have been intrinsically criminal as suggested by the defence. However, it is necessary, as a minimum, for the prosecution to establish the common plan included a critical element of criminality, namely that, its implementation embodied a sufficient risk that, if events follow the ordinary course, a crime will be committed.

985. In order to establish the statutory scope of this first objective requirement, the Majority of the Chamber finds guidance in the manner that the plan is mirrored in the mental element. A combined reading of Articles 25(3)(a) and 30 leads to the conclusion that committing the crime in question does not need to be the overarching goal of the co-perpetrators.

986. The conscription, enlistment and use of children under the age of 15 and using them to participate actively in hostilities is said by the prosecution to have been the result of the implementation of the common plan.<sup>2694</sup> Under Article 30(2)(b), intent is established if the person is aware that a consequence will occur in the ordinary course of events. Similarly, Article 30(3) provides that “knowledge” of a consequence means awareness that it (the consequence) “will occur in the ordinary course of events”. Hence, in the view of the Majority, the mental requirement that the common plan included the commission of a crime will be satisfied if the co-perpetrators knew that, in the ordinary course of events, implementing the plan will lead to that result. “Knowledge”, defined as awareness by the co-perpetrators that a consequence will occur (in the future), necessarily means that the co-

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<sup>2694</sup> ICC-01/04-01/06-2748-Red, paras 74 and 75.

perpetrators are aware of the risk that the consequence, prospectively, will occur. This interpretation is discussed in greater detail below in the section dealing with the mental element.

987. The Majority of the Chamber concludes that as to the objective part of this requirement, this means that the agreement on a common plan leads to co-perpetration if its implementation embodies a sufficient risk that, in the ordinary course of events, a crime will be committed.

988. Furthermore, co-perpetration does not require that the agreement or the common plan is explicit in order for the individual conduct of each co-perpetrator to be connected.<sup>2695</sup> Finally, although direct evidence of the plan is likely to assist in demonstrating its existence, this is not a legal requirement. The agreement can be inferred from circumstantial evidence.

### *(2) The Essential Contribution*

989. The Pre-Trial Chamber concluded that the contribution of the alleged co-perpetrator must be “essential”.<sup>2696</sup> It stated its conclusion as follows:

In the view of the Chamber, when the objective elements of an offence are carried out by a plurality of persons acting within the framework of a common plan, only those to whom essential tasks have been assigned – and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks – can be said to have joint control over the crime.<sup>2697</sup>

990. The prosecution submits that co-perpetration requires that the accused has “functional control” over the crime:

This means that, when conceiving the common plan, the Accused must have

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<sup>2695</sup> ICC-01/04-01/06-803-tEN, para. 345.

<sup>2696</sup> ICC-01/04-01/06-803-tEN, paras 342 and 347.

<sup>2697</sup> ICC-01/04-01/06-803-tEN, para. 347.

been assigned a role that was central to the implementation of the common plan, in the sense that the common plan would not have been carried out in the manner agreed upon without that role being performed. This concept has been labelled as “functional control”.<sup>2698</sup>

991. However, the prosecution qualifies this suggested requirement by submitting that as long as the accused was assigned a central role in the implementation of the plan, it will suffice if in retrospect it appears his or her contribution was substantial, rather than essential. A “substantial” contribution is said to be established when “the crime might still have occurred absent the contribution of the Accused, but not without great difficulty”.<sup>2699</sup>

992. The defence contends that a “substantial” contribution is insufficient. It argues the contribution should be *conditio sine qua non* of the crime and this requirement must be assessed in light of the facts as they actually occurred, rather than assessed on the basis of the “role” assigned to the accused within the framework of a pre-agreed plan.<sup>2700</sup>

993. An analysis of the accused’s contribution gives rise to two interrelated questions. The first question is whether it is necessary for the prosecution to establish a connection between the accused’s contribution, taken in isolation, and the crimes that were committed. The second question relates to the nature of the contribution that gives rise to joint responsibility: should it be described as either “more than *de minimis*”, “substantial” or “essential”?

994. In the view of the Majority of the Chamber, the wording of Article 25(3)(a), namely that the individual “commits such a crime [...] jointly with another”, requires that the offence be the result of the combined

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<sup>2698</sup> ICC-01/04-01/06-2748-Red, para. 64.

<sup>2699</sup> ICC-01/04-01/06-2748-Red, para. 65.

<sup>2700</sup> ICC-01/04-01/06-2773-Red-tENG, para. 64.

and coordinated contributions of those involved, or at least two of them. None of the participants exercises, individually, control over the crime as a whole but, instead, the control over the crime falls in the hands of a collective as such.<sup>2701</sup> Therefore, the prosecution does not need to demonstrate that the contribution of the accused, taken alone, caused the crime;<sup>2702</sup> rather, the responsibility of the co-perpetrators for the crimes resulting from the execution of the common plan arises from mutual attribution, based on the joint agreement or common plan.

995. Article 25(3)(a) must be read in the context of the section establishing the modes of liability, in accordance with the Appeals Chamber's jurisprudence set out above.<sup>2703</sup>

996. Both Articles 25(3)(a) and (d) address the situation in which a number of people are involved in a crime. In the judgment of the Majority, the critical distinction between these provisions is that under Article 25(3)(a) the co-perpetrator "commits" the crime, whilst under Article 25(3)(d) the individual "contributes in any other way to the commission" of a crime by a group of individuals acting with a common purpose. The Majority's view is that a systematic reading of these provisions leads to the conclusion that the contribution of the co-perpetrator who "commits" a crime is necessarily of greater significance than that of an individual who "contributes in any other way to the commission" of a crime.

997. Article 25(3)(c) establishes the liability of accessories – those who aid, abet or otherwise assist in the commission or attempted

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<sup>2701</sup> Stratenwerth, *Schweizerisches Strafrecht, Allgemeiner Teil I, Die Straftat* (2011), 13/49; Maurach/Gössel/Zipf, *Strafrecht, Allgemeiner Teil, second volume* (1989), page 288.

<sup>2702</sup> Claus Roxin, *Strafrecht Allgemeiner Teil, volume II* (2003), 25/213.

<sup>2703</sup> See paras 601-602.

commission of the crime. In the view of the Majority, principal liability “objectively” requires a greater contribution than accessory liability. If accessories must have had “a **substantial** effect on the commission of the crime”<sup>2704</sup> to be held liable, then co-perpetrators must have had, pursuant to a systematic reading of this provision, more than a substantial effect.

998. The conclusion that principal liability must require more than accessory liability is supported, in the view of the Majority, by the statutory provision on attempt liability (Article 25(3)(f) of the Statute). Only those individuals who attempt “to commit” a crime, as opposed to those who participate in a crime committed by someone else, can be held liable under that provision. The same conclusion is supported by the plain language of Articles 25(3)(b) and (c), which require for secondary liability that the perpetrator at least attempt to commit the crime. As such, secondary liability is dependent on whether the perpetrator acts. Conversely, principal liability, which is closer to the violation of the legal interests protected by the norm, is not the subject of such dependence. Hence, the Majority concludes that this confirms

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<sup>2704</sup> ICTY, *The Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber, Opinion and Judgment, 7 May 1997, paras 688 – 692; ICTY, *The Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, paras 325 – 329; ICTY, *The Prosecutor v. Naletilić & Martinović*, Case No. IT-98-34-T, Trial Chamber, Judgment, 31 March 2003, para. 63; ICTY, *The Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Trial Chamber, Judgment, 17 January 2005, para.726; ICTY, *The Prosecutor v. Mucić et al.*, Case No. IT-96-21-A, Judgment, Appeals Chamber, 20 February 2001, para. 352; ICTY, *The Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, paras 226, 229, 231, 233 – 235; ICTY, *The Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Trial Chamber, Judgment, 25 June 1999, para. 61; ICTY, *The Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 229; ICTY, *The Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeals Chamber, Judgment, 25 February 2004, para. 102; ICTY, *The Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, paras 46, 48; ICTY, *The Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 271; ICTR, *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Trial Chamber, Judgment, 6 December 1999, para. 43; ICTR, *The Prosecutor v. Musema*, Case No. ICTR-96-13-T, Trial Chamber, Judgment and Sentence, 27 January 2000, para. 126; ICTR, *The Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Trial Chamber, Judgment, 22 January 2004, para. 597; ICTR, *The Prosecutor v. Ntakirutimana & Ntakirutimana*, Case No. ICTR-96-10 & ICTR-96-17-T, Trial Chamber, Judgment, 21 February 2003, para. 787; SCSL, *CDF Appeal Judgment*, para. 73.

the predominance of principal over secondary liability, which, in turn, supports a notion of principal liability that requires a greater contribution than accessory liability.

999. The Majority is of the view that the contribution of the co-perpetrator must be **essential**, as has been consistently and invariably established in this Court's jurisprudence.<sup>2705</sup> The Statute differentiates between the responsibility and liability of those persons who commit a crime (at Article 25(3)(a)) and those who are accessories to it (at Articles 25(3)(b) to (d)). It would be possible to expand the concept of principal liability (or "commission" or "perpetration"), to make it more widely applicable, by lowering the threshold that the accused's contribution be essential. However, lowering that threshold would deprive the notion of principal liability of its capacity to express the blameworthiness of those persons who are the most responsible for the most serious crimes of international concern. Instead, a notion of co-perpetration that requires an essential contribution allows for the

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<sup>2705</sup> ICC-01/04-01/06-803-tEN, paras 346-348; *The Prosecutor v. Katanga and Ngudjolo*, Decision on the confirmation of the charges, 30 September 2008, ICC-01/04-01/07-717, paras 524 to 526; *The Prosecutor v. Bemba*, Decision pursuant to Article 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, ICC-01/05-01/08-424, para 350; *The Prosecutor v. Banda and Jerbo*, Corrigendum of the "Decision on the Confirmation of Charges", ICC-02/05-03/09-121-Corr-Red, 7 March 2011, paras 136-138; *The Prosecutor v. Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, para. 153; *The Prosecutor v. Callixte Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, 28 September 2010, ICC-01/04-01/10-1, para. 30, and Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, paras 273 and 279; *The Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 212; *The Prosecutor v. Ruto, Kosgey and Sang*, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, ICC-01/09-01/11-01, para. 40, and Decision on the Confirmation of Charges against William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 23 January 2012, ICC-01/09-01/11-373, para. 40; *The Prosecutor v. Muthaura, Kenyatta and Ali*, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01, para. 36, and Decision on the Confirmation of Charges against Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 23 January 2012, ICC-01/09-02/11-382-Red, paras 297, 401-404 and 419; *The Prosecutor v. Gbagbo*, Warrant of Arrest for Laurent Koudou Gbagbo, 23 November 2011, ICC-02/11-01/11-1, para. 10; the Chamber established that "by implementing the plan, the **co-perpetrators** exercised joint control over the crimes. Given the position of each member and their role as regards the plan, they made a **coordinated and essential contribution** to its realisation" [emphasis added].

different degrees of responsibility to be properly expressed and addressed.

1000. The determination as to whether the particular contribution of the accused results in liability as a co-perpetrator is to be based on an analysis of the common plan and the role that was assigned to, or was assumed by the co-perpetrator, according to the division of tasks.<sup>2706</sup> In the view of the Majority what is decisive is whether the co-perpetrator performs an essential role in accordance with the common plan, and it is in this sense that his contribution, as it relates to the exercise of the role and functions assigned to him, must be essential.

1001. Furthermore, the co-perpetrator's role is to be assessed on a case-by-case basis. This assessment involves a flexible approach, undertaken in the context of a broad inquiry into the overall circumstances of a case.

1002. The defence submits that co-perpetration requires "personal and direct participation in the crime itself",<sup>2707</sup> and that the responsibility of those who do not participate directly in the execution of a crime is reflected in Article 25(3)(b) rather than Article 25(3)(a).<sup>2708</sup> It contends that Article 25(3)(a) requires direct participation in the crime.<sup>2709</sup>

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<sup>2706</sup> Thomas Weigend, "Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges", *Journal of International Criminal Justice* 6 (2008), page 480; Stratenwerth/Kuhlen Allgemeiner Teil I, *Die Straftat* (2011), 12/83. See also Gerhard Werle, "Individual Criminal Responsibility in Article 25 ICC Statute", *Journal of International Criminal Justice* 5 (2007), page 962; Gerhard Werle, *Principles of International Criminal Law* (2009), paras 466 to 468 and 472; Roger S. Clark, "Drafting a general part to a penal code: some thoughts inspired by the negotiations on the Rome Statute of the International Criminal Court and by the Court's first substantive law discussion in the *Lubanga Dyilo* confirmation proceedings", *Criminal law forum* (2008), pages 545 *et seq*; William A. Schabas, *The International Criminal Court - A Commentary on the Rome Statute* (2010), page 429; Kai Ambos, *La parte general del derecho penal internacional* (2005), page 189.

<sup>2707</sup> ICC-01/04-01/06-2773-Red-tENG, para. 66.

<sup>2708</sup> ICC-01/04-01/06-2773-Red-tENG, para. 67.

<sup>2709</sup> ICC-01/04-01/06-2773-Red-tENG, para. 73.



1003. However, the Chamber agrees with the conclusions, firstly, of the Pre-Trial Chamber that criminal liability in this context is “not limited to those who physically carry out the objective elements of the offence, but also include(s) those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed”.<sup>2710</sup> Secondly, the Chamber agrees with the prosecution that “[i]t is not necessary that the accused physically perpetrated any of the elements of the crimes or that he was present at the crime scene”.<sup>2711</sup>

1004. Those who commit a crime jointly include, *inter alia*, those who assist in formulating the relevant strategy or plan, become involved in directing or controlling other participants or determine the roles of those involved in the offence. This conclusion makes it unnecessary for the prosecution to establish a *direct* or *physical* link between the accused’s contribution and the commission of the crimes.

1005. Hence, the Chamber is of the view that the accused does not need to be present at the scene of the crime, so long as he exercised, jointly with others, control over the crime.

1006. The Majority therefore concludes that the commission of a crime jointly with another person involves two objective requirements: (i) the existence of an agreement or common plan between two or more persons that, if implemented, will result in the commission of a crime; and (ii) that the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime. These two requirements must be assessed on the basis of all the

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<sup>2710</sup> ICC-01/04-01/06-803-tEN, para. 330.

<sup>2711</sup> ICC-01/04-01/06-2748-Red, para. 66.

evidence related to the alleged crime.

**b) The Mental Element**

1007. Article 30 defines the requirement of “intent” by reference to three particular factors: conduct, consequence and circumstance. First, pursuant to Article 30(2)(a), a person has intent if he or she “means to engage in the conduct”. Second, under Article 30(2)(b) and in relation to a consequence, it is necessary that the individual “means to cause that consequence or is aware that it will occur in the ordinary course of events”. Third, by Article 30(3) “knowledge” “means awareness that a circumstance exists or a consequence will occur in the ordinary course of events”.

1008. As noted earlier, the Pre-Trial Chamber decided that the subjective elements that the suspect must fulfil<sup>2712</sup> are the following: (i) “[t]he suspect and the other co-perpetrators [...] must all be mutually aware of the risk that implementing their common plan may result in the realisation of the objective elements of the crime, and [...] must all mutually accept such a result by reconciling themselves with it or consenting to it”;<sup>2713</sup> and (ii) “the awareness by the suspect of the factual circumstances enabling him or her to jointly control the crime”.<sup>2714</sup>

1009. The Pre-Trial Chamber decided that the “cumulative” reference to “intent” and “knowledge” in Article 30 means there must be a “volitional element” on the part of the accused. This encompasses not only situations in which the suspect:

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<sup>2712</sup> ICC-01/04-01/06-803-tEN, para. 349.

<sup>2713</sup> ICC-01/04-01/06-803-tEN, para. 361.

<sup>2714</sup> ICC-01/04-01/06-803-tEN, para. 366.

i) knows that his or her actions or omissions will bring about the objective elements of the crime, and ii) undertakes such actions or omissions with the concrete intent to bring about the objective elements of the crime (also known as *dolus directus* of the first degree)<sup>2715</sup>

but also the “other forms of the concept of *dolus*”.<sup>2716</sup> The Pre-Trial Chamber was of the view that these include:

i) situations in which the suspect, without having the concrete intent to bring about the objective elements of the crime, is aware that such elements will be the necessary outcome of his or her actions or omissions (also known as *dolus directus* of the second degree),<sup>2717</sup> and

ii) situations in which the suspect (a) is aware of the risk that the objective elements of the crime may result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it (also known as *dolus eventualis*).<sup>2718</sup>

1010. The Pre-Trial Chamber considered that within *dolus eventualis* “two kinds of scenarios are distinguishable”. First, if the co-perpetrator was aware of a *substantial* risk that his conduct will bring about “the objective elements of the crime”, his intent can be inferred from the fact that he acted in the manner agreed in spite of this level of awareness.<sup>2719</sup> Second, if there was a low risk of bringing about “the objective elements of the crime”, “the suspect must have clearly or expressly accepted the idea that such objective elements may result from his or her actions or omissions”.<sup>2720</sup>

1011. The conscription or enlistment of children under the age of 15 or using them to participate actively in hostilities is said by the prosecution to have been the *result* of the implementation of a common

<sup>2715</sup> ICC-01/04-01/06-803-tEN, para. 351.

<sup>2716</sup> ICC-01/04-01/06-803-tEN, para. 352.

<sup>2717</sup> ICC-01/04-01/06-803-tEN, para. 352.

<sup>2718</sup> ICC-01/04-01/06-803-tEN, para. 352.

<sup>2719</sup> ICC-01/04-01/06-803-tEN, para. 353.

<sup>2720</sup> ICC-01/04-01/06-803-tEN, paras 354 and 364.

plan.<sup>2721</sup> The drafting history of the Statute suggests that the notion of *dolus eventualis*, along with the concept of recklessness, was deliberately excluded from the framework of the Statute (e.g. see the use of the words “unless otherwise provided” in the first sentence of Article 30).<sup>2722</sup> The plain language of the Statute, and most particularly the use of the words “will occur” in Article 30(2)(b) as opposed to “may occur”, excludes the concept of *dolus eventualis*.<sup>2723</sup> The Chamber accepts the approach of Pre-Trial Chamber II on this issue.<sup>2724</sup>

1012. In the view of the Majority of the Chamber, the “awareness that a consequence will occur in the ordinary course of events” means that the participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence will occur in the future. This prognosis involves consideration of the concepts of “possibility” and “probability”, which are inherent to the notions of “risk” and “danger”. Risk is defined as “danger, (exposure to) the possibility of loss, injury or other adverse circumstance”.<sup>2725</sup> The co-perpetrators only “know” the consequences of their conduct once they have occurred. At the time the co-perpetrators agree on a common plan and throughout its implementation, they must know the existence of a risk that the consequence will occur. As to the degree of risk, and pursuant to the wording of Article 30, it must be no less than awareness on the

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<sup>2721</sup> ICC-01/04-01/06-2748-Red, paras 74 and 75.

<sup>2722</sup> Roger S. Clark, “The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the elements of offences”, *Criminal Law Forum* (2001), page 301; Roger S. Clark, “Drafting a General Part to a Penal Code: some thoughts inspired by the negotiations on the Rome Statute of the International Criminal Court and by the Court’s first substantive law discussion in the *Lubanga Dyilo* confirmation proceedings”, *Criminal Law Forum* (2008), page 529; War Crimes Research Office, *Modes of Liability and the Mental Element: Analyzing the early jurisprudence of the International Criminal Court*, Washington College of Law, American University (September 2010), page 69 *et seq.*

<sup>2723</sup> War Crimes Research Office, *Modes of Liability and the Mental Element: Analyzing the early jurisprudence of the International Criminal Court*, Washington College of Law, American University (September 2010), page 69 *et seq.*

<sup>2724</sup> ICC-01/05-01/08-424, paras 364-369.

<sup>2725</sup> See *Oxford Dictionary* (2002, 5<sup>th</sup> ed).

part of the co-perpetrator that the consequence “will occur in the ordinary course of events”. A low risk will not be sufficient.

1013. The Chamber is of the view that the prosecution must establish, as regards the mental element, that:

(i) the accused and at least one other perpetrator meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities or they were aware that in implementing their common plan this consequence “will occur in the ordinary course of events”; and

(ii) the accused was aware that he provided an essential contribution to the implementation of the common plan.

1014. As already highlighted, the general mental element contained in Article 30(1) (“intent” and “knowledge”) applies to all crimes under the jurisdiction of the Court “[u]nless otherwise provided”. Article 8(2)(e)(vii), which gives the Court jurisdiction over the war crime of “conscripting and enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities” does not derogate from this principle. However, under Article 8(2)(e)(vii) of the Elements of Crimes the following requirement is set out:

3. The perpetrator knew or should have known that such a person or persons were under the age of 15 years.

1015. This lesser mental element raises a number of issues, including:

(i) whether it is possible, under the framework of the Rome Statute, for the Elements of Crimes to alter any of the material elements of the crimes established in the Statute; and (ii) the scope and interpretation

of this “should have known” requirement. However, as set out above, the prosecution does not invite a conviction of the accused on the basis “he should have known” that the individuals who were conscripted or enlisted, or who were used, were under the age of 15 years. It submits the Chamber should convict the accused only if it finds he knew there were children under 15 years.<sup>2726</sup> The Majority of the Chamber considers it is unnecessary to approach the case on any other basis, and it would be inappropriate to rule on these substantive issues in the abstract.

1016. Addressing the contextual elements, and in accordance with Element 5 of Article 8(2)(e)(vii) and the introduction to Article 8 of the Elements of Crimes, the accused must be “aware of [the] factual circumstances that established the existence of an armed conflict.” It is not necessary for the prosecution to prove he knew that there was an armed conflict.<sup>2727</sup> The accused must also be aware of the link between these factual circumstances and his conduct.

1017. Judge Fulford has written a concurring opinion which is attached to this Judgment.

## **6. Conclusions of the Chamber**

1018. For the reasons set out above, the prosecution must prove in relation to each charge that:

- (i) there was an agreement or common plan between the accused and at least one other co-perpetrator that, once

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<sup>2726</sup> ICC-01/04-01/06-2748-Red, para. 72, footnote 123; ICC-01/04-01/06-2778-Red, para. 39 *et seq.*

<sup>2727</sup> ICC-01/04-01/06-803-tEN, para. 360.

implemented, will result in the commission of the relevant crime in the ordinary course of events;

(ii) the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime;

(iii) the accused meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities or he was aware that by implementing the common plan these consequences “will occur in the ordinary course of events”;

(iv) the accused was aware that he provided an essential contribution to the implementation of the common plan; and

(v) the accused was aware of the factual circumstances that established the existence of an armed conflict and the link between these circumstances and his conduct.

## **B. THE FACTS**

1019. The prosecution submits Thomas Lubanga, Floribert Kisembo, Bosco Ntaganda, Chief Kahwa Panga Mandro, Rafiki Saba Aimable, and other senior FPLC commanders, including commanders Tchaligonza, Bagonza and Kasangaki – the alleged co-perpetrators in this case<sup>2728</sup> – agreed upon a plan and acted together in order to build an army that included young people and to create a political

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<sup>2728</sup> ICC-01/04-01/06-2748-Red, para. 77.

movement. Furthermore, it is said they used political and military means to take control of Bunia and to exercise authority throughout Ituri. The accused is alleged to have coordinated and to have had the “final say” as to the group’s activities.<sup>2729</sup> As a result, children under the age of 15 were allegedly conscripted and enlisted, and used to participate actively in hostilities.<sup>2730</sup>

1020. The defence contends that the prosecution modified its allegations as to this “common plan” to the extent that the crimes charged were first described as a consequence rather than an objective of the implementation of the plan, but in due course they were said to be an integral element.<sup>2731</sup> The defence submits that as a result the nature of the case against the accused significantly changed, and it argues the responsibility of Thomas Lubanga should only be considered within the framework of the facts and the law established by the Pre-Trial Chamber.<sup>2732</sup>

1021. The Chamber has concluded that the enlistment of children under the age of 15 and using them to participate actively in hostilities was the result of the implementation of the common plan.<sup>2733</sup> As discussed above, it is not necessary for the plan to have been directed specifically at committing the crime in question, and the Chamber has considered the issue on this basis.<sup>2734</sup>

1022. The defence contends that the events prior to September 2002 fall outside the period covered by the charges, and therefore they are

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<sup>2729</sup> ICC-01/04-01/06-2748-Red, para. 78.

<sup>2730</sup> ICC-01/04-01/06-2748-Red, para. 74.

<sup>2731</sup> ICC-01/04-01/06-2786-Red-tENG, paras 5 – 9.

<sup>2732</sup> ICC-01/04-01/06-2786-Red-tENG, paras 7 and 8.

<sup>2733</sup> ICC-01/04-01/06-2748-Red, para. 74 and ICC-01/04-01/06-803-tENG, paras 344 and 377.

<sup>2734</sup> See para. 984.



not covered by the present Judgment.<sup>2735</sup> The prosecution has advanced contrary submissions.<sup>2736</sup> In the view of the Chamber, evidence relating to the period before September 2002 may assist in establishing the background and context of the events that fall within the timeframe of the charges. In addition, evidence concerning an earlier period of time may be directly relevant and admissible as regards the crimes confirmed by the Pre-Trial Chamber, including the relationship between the accused and his alleged co-perpetrators, depending on the circumstances as analysed below.

1023. In determining whether Thomas Lubanga is criminally responsible for the crimes charged, the Chamber has considered, first, whether a common plan existed between the accused and his alleged co-perpetrators, and, second, whether the contribution of the accused amounted to an essential contribution. The Chamber has examined the context of the creation of the UPC;<sup>2737</sup> the objectives of that organisation; the events leading up to the takeover of Bunia; the creation and the structures of the FPLC (the armed wing of the UPC); and the roles of Thomas Lubanga and the alleged co-perpetrators, before and during the timeframe of the charges. Thereafter, the Chamber has examined whether the prosecution has proved the required mental element on the part of the accused.

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<sup>2735</sup> ICC-01/04-01/06-2773-Red-tENG, para. 801.

<sup>2736</sup> ICC-01/04-01/06-2778-Red, para. 11.

<sup>2737</sup> As explained above in Section III, The letters “RP” were added to the end of “UPC” in September 2002. See T-342, lines 15 – 16 (D-0019) and T-125-Red-ENG, page 17, line 19 to page 19, line 20 (P-0041). However, the Chamber notes that the witnesses usually referred to the “UPC” and often treated the UPC and FPLC interchangeably. Herein, the Chamber refers to the UPC and the UPC/RP as “UPC”, and the UPC with its army the FPLC as the UPC/FPLC.

## 1. COMMON PLAN

### a) The co-perpetrator's alleged alliance (Summer 2000 – March 2002)

1024. To establish the existence of a common plan between the alleged co-perpetrators, the Chamber has examined whether they were in contact with one another and, if so, what the nature of the contact and their relationship was in the period preceding September 2002.

1025. The prosecution suggests that Thomas Lubanga and his co-perpetrators had formed a political and military alliance by September 2000.<sup>2738</sup> It is submitted that in the summer of 2000 they began recruiting Hema youths who later formed the armed wing of the UPC.<sup>2739</sup>

1026. The defence disputes this submission, and in particular contests the prosecution's assertion that the UPC was created by the same soldiers who participated in a 2000 rebellion against the RCD-ML, the then government in power.<sup>2740</sup> The defence further submits it has not been proved that the accused maintained contact with the mutiny's leaders between July 2000 and March 2002.<sup>2741</sup>

1027. P-0012 gave evidence that 15 September 2000 – the date when the UPC was created – was also when Thomas Lubanga became the spokesman for a group of young Hema mutineers who had rebelled against Professor Wamba dia Wamba (because the latter had failed to assist them in their conflict with the Lendus).<sup>2742</sup> P-0012 testified that

<sup>2738</sup> ICC-01/04-01/06-2748-Red, paras 83 – 85.

<sup>2739</sup> ICC-01/04-01/06-2748-Red, para. 8.

<sup>2740</sup> ICC-01/04-01/06-2773-Red-tENG, paras 777, 778 and 781.

<sup>2741</sup> ICC-01/04-01/06-2773-Red-tENG, paras 776 and 781.

<sup>2742</sup> T-168-Red2-ENG, page 16, line 22 to page 17, line 14.

the rebels set up a mobile force that was trained at Kyankwanzi, Uganda, in June or July 2000.<sup>2743</sup> Adults and children were selected for this training, the latter having been sent by traditional chiefs and their parents, including, as seen by P-0012, “a lot of really small young children”.<sup>2744</sup> P-0012 explained that the future commanders were given separate training in Jinja.<sup>2745</sup> The mutineers who broke away from the RCD-ML<sup>2746</sup> and founded the UPC were military men. They included General Tchaligonza, Commander Kasangaki, Chief Kahwa Panga Mandro, Bosco Ntaganda and Floribert Kisembo,<sup>2747</sup> some of whom later held positions in the UPC/FPLC.<sup>2748</sup>

1028. P-0012 indicated Thomas Lubanga acted as the “spokesperson” for the youths who had been involved in the mutiny after they returned to Ituri from their training in Uganda.<sup>2749</sup> However, he also suggested Mr Lubanga was not actively involved with these children because, at that stage, they were under the guidance of Jean Tibasima,<sup>2750</sup> who had charge of them.<sup>2751</sup> Additionally, P-0012 was unable to describe Thomas Lubanga’s duties as their spokesperson.<sup>2752</sup>

1029. The defence contends P-0012’s evidence was that Jean Tibasima rather than the accused was responsible for sending these youths to Uganda for training.<sup>2753</sup> The defence further challenges the prosecution’s assertion that Thomas Lubanga became the spokesman

<sup>2743</sup> T-168-Red2-ENG, page 17, lines 1 – 12, page 20, lines 3 – 6 and page 33, lines 20 – 23.

<sup>2744</sup> T-168-Red2-ENG, page 22, line 20 to page 23, line 15.

<sup>2745</sup> T-168-Red2-ENG, page 20, lines 7 – 9.

<sup>2746</sup> The armed branch of the RCD-ML was the APC.

<sup>2747</sup> T-168-Red2-ENG, page 19, lines 5 – 8 and page 21, lines 7 – 25 (P-0012).

<sup>2748</sup> T-168-Red2-ENG, page 21, lines 20 – 24 (P-0012).

<sup>2749</sup> T-168-Red2-ENG, page 19, lines 15 – 17.

<sup>2750</sup> T-168-Red2-ENG, page 20, lines 3 – 12.

<sup>2751</sup> T-168-Red2-ENG, page 23, lines 16 – 23.

<sup>2752</sup> T-168-Red2-ENG, page 23, line 24 to page 25, line 1.

<sup>2753</sup> ICC-01/04-10/06-2773-Red-tENG, para. 599, referring to testimony of P-0012. See T-168-Red2-ENG, page 23, line 8 to page 24, line 1.

for the mutineers who broke away from the APC.<sup>2754</sup>

1030. The defence highlighted<sup>2755</sup> the fact that P-0012 did not witness the events surrounding the mutiny of Hema soldiers in July 2000, and instead his account was based on discussions with some of the participants, in particular Chief Kahwa and General Tchaligonza.<sup>2756</sup> The Chamber has scrutinised this indirect evidence with care. D-0019 testified that commanders Tchaligonza, Kasangaki, Bagonza, as well as Bosco Ntaganda and Floribert Kisembo were amongst the leaders of the mutiny against the RCD-ML.<sup>2757</sup> He indicated the press reported that the Ugandan authorities had offered to provide training for the mutineers at Kyankwanzi and Jinja in Uganda.<sup>2758</sup> As set out above, the Chamber has approached certain aspects of D-0019's testimony with caution. However, on these issues, his evidence, which essentially corroborates the testimony of P-0012, was credible and reliable.

1031. P-0116 also gave evidence about the training in Kyankwanzi, and in particular Thomas Lubanga's involvement in the operation. P-0116, who was based in Bunia during the period shortly before the timeframe of the charges,<sup>2759</sup> testified he was told that the accused had sent children to Uganda<sup>2760</sup> during the summer of 2000,<sup>2761</sup> and that Mr Lubanga was with them at the camp.<sup>2762</sup> Chief Kahwa was allegedly also involved in this recruitment.<sup>2763</sup> The Chamber has concluded that this evidence was sufficiently reliable given the circumstances in

<sup>2754</sup> ICC-01/04-01/06-2773-Red-tENG, paras 773 - 774.

<sup>2755</sup> ICC-01/04-01/06-2773-Red-tENG, paras 544 - 546.

<sup>2756</sup> T-169-Red2-ENG, page 26, lines 11 - 19 and T-168-Red2-ENG, page 24, lines 4 - 19.

<sup>2757</sup> T-343-ENG, page 4, lines 7 - 11, page 6, lines 9 - 10 and T-340-ENG, page 55, lines 19 - 23.

<sup>2758</sup> T-343-ENG, page 13, lines 7 - 16.

<sup>2759</sup> T-209-CONF-ENG, page 32, line 3 to page 34, line 24.

<sup>2760</sup> T-203-Red2-ENG, page 43, lines 7 - 13, page 44, lines 6 - 8 and page 47, lines 17 - 24..

<sup>2761</sup> Although at one stage the witness referred to 2001 (at T-203-CONF-ENG, page 78, line 7 to page 79, line 3) he amended his response. T-208-CONF-ENG, page 81, lines 21 - 25.

<sup>2762</sup> T-203-CONF-ENG, page 45, lines 18 - 24 and page 47, lines 11 - 13.

<sup>2763</sup> T-209-Red2-ENG, page 53, line 24 to page 54, line 1.

which it was obtained by P-0116.<sup>2764</sup> Official and humanitarian sources had informed P-0116 in advance there was “a group, a militia, which was managed by Mr Thomas and that was developing and becoming stronger to set up an army”.<sup>2765</sup>

1032. Further, it was said Thomas Lubanga had visited the children at the camp and he personally underwent military training and was initiated into military life.<sup>2766</sup> Indeed, evidence was given that the accused said they were “his” children; he had sent them there; and he had the power to bring them back.<sup>2767</sup> P-0116 observed that approximately 165 children, between the ages of 13 and 18, were removed from the training camp, following a surprise visit by UNICEF and other humanitarian organisations.<sup>2768</sup> P-0116 gave evidence that the children concerned were predominantly Hema, and a number of them were under the age of 15.<sup>2769</sup>

1033. Some of those who witnessed this transfer of about 700 youths to Uganda told P-0116 they had been taken on Ugandan cargo planes, and it appeared that the accused was in contact with the Ugandan military authorities who gave him the necessary military support.<sup>2770</sup>

1034. P-0024 gave evidence that some of the children he interviewed in the course of the demobilisation process were under the age of 15.<sup>2771</sup> P-0024 started working for SOS Grands Lacs between July and

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<sup>2764</sup> T-209-CONF-ENG, page 40, line 9 to page 41, line 3 and T-203-CONF-ENG, page 45, line 24 to page 47, line 16.

<sup>2765</sup> T-203-Red2-ENG, page 42, line 24 to page 43, line 7.

<sup>2766</sup> T-203-CONF-ENG, page 45, lines 23 – 25 and page 47, lines 12 – 16.

<sup>2767</sup> T-203-CONF-ENG, page 45, line 25 to page 46, line 18.

<sup>2768</sup> P-0116 stated only some 12 to 15 were over the age of 18, and “15 or 20” were under the age of 15; see T-203-CONF-ENG, page 30, lines 2 – 7 and page 32, lines 2 – 9.

<sup>2769</sup> T-203-CONF-ENG, page 31, line 6 to page 32, line 10 and page 28, lines 21 – 22 (P-0116).

<sup>2770</sup> T-209-Red2-ENG, page 47, lines 6 – 18.

<sup>2771</sup> T-170-Red2-ENG, page 45, line 19 to page 46, line 1 and page 47, lines 1 – 25 (P-0024).

September 2001.<sup>2772</sup> He stated that the mission of SOS Grands Lacs was to assist with the demobilisation and reintegration of child soldiers who had been brought to Uganda for training.<sup>2773</sup> He suggested the children had been sent to Kyankwanzi because the rebel movement needed additional troops and they resorted to recruiting young children and preparing them for use by the military.<sup>2774</sup> In his view the rebel group that sent the children for training was affiliated with the Hema community.<sup>2775</sup>

1035. The defence challenges the suggestion that Thomas Lubanga was involved in recruiting these children. It is argued P-0116's allegedly "uncorroborated hearsay evidence" is unreliable and, given the children's identities were not disclosed to the defence, it has not been possible to investigate this information.<sup>2776</sup>

1036. In the judgment of the Chamber, P-0116's testimony was credible and reliable. His evidence, that tends to establish Thomas Lubanga's involvement in these events, is based on credible sources and the information was verified by the witness. In addition, his account of Thomas Lubanga visiting the children at the camp and personally undergoing training is entirely credible. The Chamber notes that P-0116 had left Bunia by the fall of 2002. Thereafter, he remained professionally involved with the issue of child recruitment in the DRC.<sup>2777</sup> He was undoubtedly well qualified to give evidence on these issues, and his account was credible and reliable.

1037. The defence relies on the evidence of D-0011, who testified that

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<sup>2772</sup> T-170-Red2-ENG, page 36, lines 13 – 15.

<sup>2773</sup> T-170-Red2-ENG, page 37, lines 7 – 14.

<sup>2774</sup> T-170-Red2-ENG, page 38, lines 18 – 23 and page 43, line 24 to page 44, line 12.

<sup>2775</sup> T-170-Red2-ENG, page 45, line 20 to page 46, line 1.

<sup>2776</sup> ICC-01/04-10/06-2773-Red-tENG, paras 596 – 599, 775.

<sup>2777</sup> T-209-CONF-ENG, page 32, line 13 to page 36, line 5.

Thomas Lubanga, in conjunction with the NGO SOS Grands Lacs, organised the social reintegration of the children from Kyankwanzi.<sup>2778</sup>

1038. Notwithstanding a lack of detail, P-0024 suggested that the NGO SOS Grands Lacs cooperated with the RCD-ML and that Thomas Lubanga was probably involved with the demobilised children from Kyankwanzi given his role as the RCD-ML Minister of Defence.<sup>2779</sup>

1039. D-0019 gave evidence that Thomas Lubanga was part of a delegation sent to dissuade Uganda from attacking the mutineers.<sup>2780</sup> He said Thomas Lubanga did not represent the mutineers, but instead he had been sent by prominent individuals in the area to ensure the stability of the town of Bunia, and to protect it in the event of an attack by the Ugandans.<sup>2781</sup>

1040. D-0019 also gave evidence that Floribert Kisembo, Bosco Ntaganda, and commanders Kasangaki and Bagonza were absent from Ituri following the summer of 2000 through to March 2002, at the latest.<sup>2782</sup> P-0012 similarly testified that the majority of the alleged co-perpetrators were not in Ituri for the greater part of the period between the summer of 2000 and February/March 2002.<sup>2783</sup>

1041. P-0041 testified that around July 2000, Thomas Lubanga convened a meeting at his home of those who were to become the signatories to the founding documents of the UPC, in order to discuss

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<sup>2778</sup> ICC-01/04-01/06-2773-Red-tENG, para. 775, referring to T-346-ENG, page 69, line 22 to page 70, line 25.

<sup>2779</sup> T-170-Red-ENG, page 56, line 12 to page 57, line 6. P-0116 also gave evidence that is relevant to this issue, T-203-CONF-ENG, page 69, line 14 to page 73, line 5.

<sup>2780</sup> T-343-ENG, page 6, line 23 to page 7, line 14.

<sup>2781</sup> T-343-ENG, page 9, lines 8 – 14. In this connection the prosecution refers to a draft letter, dated 27 July 2000 and addressed to the Ugandan authorities, written by the “parents des militaires de l’Armée du Peuple Congolais”, that lists the name of Thomas Lubanga under the heading “Pour les parents des militaires retranchés en brousse”, EVD-OTP-00669.

<sup>2782</sup> T-343-ENG, page 49, lines 9 – 24.

<sup>2783</sup> T-168-Red2-ENG, page 26, line 14 to page 27, line 22.

the creation of a political party.<sup>2784</sup> Those documents,<sup>2785</sup> including the statute <sup>2786</sup> and the organisation's programme, <sup>2787</sup> are dated 15 September 2000 and they are all signed by Thomas Lubanga. The document constituting the UPC and the statute are also signed by numerous other members of the UPC, including Richard Lonema and Rafiki Saba.<sup>2788</sup> The Chamber notes that of the co-perpetrators identified by the prosecution, only Rafiki Saba signed both of these documents.

1042. The prosecution relies on a photograph of the accused together with Floribert Kisembo, Bosco Ntaganda, Rafiki Saba, Commander Kasangaki and others that appeared in the 1 August 2002 edition of a local newspaper, and it is suggested it demonstrates that the accused was associated with the others in the photograph and they had a military agenda.<sup>2789</sup> The defence argues the photograph was taken in July 2000, therefore over two years before the events of August 2002, at a time when the accused had agreed to join talks with the Ugandan authorities in order to resolve the crisis created by the rebellion.<sup>2790</sup> Accordingly, it is suggested the photograph is irrelevant to an alleged "common plan" in July and August 2002.<sup>2791</sup>

1043. The Chamber is persuaded that commanders Tchaligonza, Kasangaki, Bagonza, as well as Bosco Ntaganda and Floribert Kisembo were amongst the leaders of the mutiny against the RCD-ML. The evidence is inconclusive as to Thomas Lubanga's alleged role as

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<sup>2784</sup> T-125-Red2-ENG, page 15, lines 8 – 18.

<sup>2785</sup> EVD-OTP-00517.

<sup>2786</sup> EVD-OTP-00661; EVD-OTP-00715 (with handwritten annotations); EVD-OTP-00726.

<sup>2787</sup> EVD-OTP-00662.

<sup>2788</sup> EVD-OTP-00517 and EVD-OTP-00661.

<sup>2789</sup> ICC-01/04-01/06-2748-Red, para. 119; EVD-OTP-00529.

<sup>2790</sup> ICC-01/04-01/06-2773-Red-tENG, para. 792.

<sup>2791</sup> ICC-01/04-01/06-2773-Red-tENG, para. 792 and ICC-01/04-01/06-2786-Red-tENG, para. 16.



spokesperson for the mutineers. However, the evidence of D-0019, P-0012 and P-0116 conclusively demonstrates that Floribert Kisembo, Bosco Ntaganda, Chief Kahwa and commanders Tchaligonza, Bagonza and Kasangaki were involved in organizing military training in Uganda for Hema youths, including young children during the summer of 2000. Although the Chamber considers the evidence is inconclusive as regards the details of how the children were transported to Uganda and whether Mr Lubanga was in touch with the Ugandan authorities during the relevant period, the evidence of P-0012, P-0116 and P-0024 demonstrates he was involved with the group of soldiers, which included children, sent by the mutineers to Uganda for training. Indeed, very young children were included in this group. However, it is unnecessary for the Chamber to reach a precise determination of their individual ages because this incident falls outside the period of the charges and is relevant only for general contextual and background purposes.

1044. Although there is persuasive evidence that the accused was involved in the recruitment of these children, his precise role is unclear. The evidence fails to establish the exact nature of the relationship between the accused and the alleged co-perpetrators, and whether there was regular contact between any of them in 2000. However, given his overall involvement, and particularly his visit to the soldiers in the camp in Uganda, the Chamber infers he was in contact with the leaders of the mutiny and Chief Kahwa. The Chamber accepts P-0041's evidence that Thomas Lubanga was also in touch with his alleged co-perpetrator Rafiki Saba in the summer of 2000, when the founding documents of the UPC were prepared. In addition, the Chamber notes that if the photograph referred to above was taken in

July 2000, as suggested by the defence, it demonstrates contact between some of the alleged co-perpetrators at that time.

1045. Viewed overall, the evidence rehearsed above provides strong support for the suggestion that during the period prior to the confirmation of the charges – specifically in the summer of 2000 – the accused and some of his principal alleged co-perpetrators, including Floribert Kisembo, Bosco Ntaganda, Chief Kahwa and commanders Kisangaki, Tchaligonza, and Bagonza, were jointly involved in organising the training of Hema youths in the context of the mutiny. Mr Lubanga, *inter alia*, visited the children, liaised with individuals in Uganda to prevent attacks against the mutineers and was involved in the reintegration of the children following their training.

#### **b) Events leading up to and the take-over of Bunia**

1046. In determining whether there was a common plan for the purposes of the charges, the Chamber found it of assistance to examine the events surrounding the takeover of Bunia and the events leading to the emergence of the UPC.

##### *(1) The emergence of the UPC and of Thomas*

##### *Lubanga as its leader*

1047. The origins of the UPC are disputed. The prosecution suggests that “in parallel with the recruitment and training for the militia” in Uganda, on 15 September 2000 Thomas Lubanga and Mr Rafiki, together with others, signed the founding documents of the UPC. The prosecution describes the UPC in September 2000 as “the political and military group into which [the soldiers trained in Uganda] would be

incorporated and which would eventually take control of Ituri".<sup>2792</sup>

1048. As discussed above, P-0041 gave evidence that Thomas Lubanga was behind the creation of this political party in the summer of 2000. The founding documents were signed in September of that year.

1049. Further, the prosecution contends that from its inception the UPC had the aim of using military force to achieve its goals, whereas the defence denies that the UPC had military objectives prior to September 2002.<sup>2793</sup>

1050. It is submitted by the defence that Mr Lubanga's position in the government of the RCD-ML during this time is inconsistent with the prosecution's theory that the UPC existed as a political/military organisation during the same period.<sup>2794</sup> The defence argument is that from April to August 2002, the accused acted for an organisation called the *Front pour la réconciliation et la paix* or "FRP", which it is said engaged in initiatives of a purely political nature in order to bring about the end of the government of Mr Mbusa Nyamwisi with the help of the Ugandan authorities.<sup>2795</sup> It is suggested Thomas Lubanga only began his opposition to the RCD-ML in April 2002 when he and others approached the Ugandan authorities in an attempt to have the organisation removed from Bunia.<sup>2796</sup>

1051. It is undisputed that Thomas Lubanga served as Minister of Defence for the RCD-ML, having been appointed by Mr Mbusa

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<sup>2792</sup> ICC-01/04-10/06-2748-Red, para. 86, referring to EVD-OTP-00726, EVD-OTP-00661, EVD-OTP-00715; see also the *curriculum vitae* of Thomas Lubanga (EVD-OTP-00621 at page 0379), stating that he has been the UPC President since its creation in 2000.

<sup>2793</sup> ICC-01/04-01/06-2773-Red-tENG, paras 777, 778 and 781.

<sup>2794</sup> ICC-01/04-01/06-2773-Red-tENG, paras 777 - 779.

<sup>2795</sup> ICC-01/04-01/06-2773-Red-tENG, para. 785.

<sup>2796</sup> ICC-01/04-01/06-2773-Red-tENG, para. 779.

Nyamwisi.<sup>2797</sup> In this position, which he held until April 2002,<sup>2798</sup> the accused was responsible for the deployment of various commanders, including Bosco Ntaganda, whom he appointed as his assistant commander of operations.<sup>2799</sup> During this time, he also served as the leader of the UPC.<sup>2800</sup>

1052. P-0041 testified that Bosco Ntaganda<sup>2801</sup> and Kisembo Bahemuka<sup>2802</sup> were a part of the “guard” of Thomas Lubanga when he was RCD-ML defence minister.<sup>2803</sup> The defence disputes his description of their roles,<sup>2804</sup> and relies on the testimony of D-0019 that Bosco Ntaganda and Floribert Kisembo were not Thomas Lubanga’s bodyguards or under his command.<sup>2805</sup>

1053. On this issue, the Chamber notes P-0041’s account concerning the role of Floribert Kisembo, whom he had not seen before, was based on having seen him with Thomas Lubanga<sup>2806</sup> and he was unable to assist during questioning as regards the suggestion that Floribert Kisembo, as opposed to being a bodyguard, was one of the

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<sup>2797</sup> T-343-ENG, page 44, line 5 to page 46, line 19 (D-0019, stating that Thomas Lubanga was the defence minister but not confirming the date). T-168-Red2-ENG, page 27, lines 9 – 24 (P-0012). P-0012 testified that Thomas Lubanga had been appointed the Minister of Defence by Mr Mbusa Nyamwisi by February or March 2002.

<sup>2798</sup> P-0041 stated that in April 2002, Thomas Lubanga was the “Commissioner of Defence”, for the RCD-ML. T-124-Red2-ENG, page 78, lines 11 – 14.

<sup>2799</sup> T-344-Red-ENG, page 8, lines 11 – 22 (D-0019). D-0019 was not sure, however, whether Thomas Lubanga was able to exercise direct control over the RCD-ML troops. T-343-ENG, page 48, line 17 to page 49, line 2.

<sup>2800</sup> T-343-ENG, page 47, lines 15 – 17 (D-0019).

<sup>2801</sup> T-125-Red2-ENG, page 3, lines 7 – 10.

<sup>2802</sup> The Chamber notes the discrepancy between the names “Floribert Kisembo” and “Kisembo Bahemuka”. However, P-0002 gave evidence that the Chief of Staff of the UPC was General Kisembo Bahemuka (T-162-Red2-ENG, page 12, line 20 to page 13, line 7). In document EVD-OTP-00512, in a letter written on behalf of the Chief of Staff, Mr Kisembo is similarly named as “Kisembo Bahemuka”. In addition, numerous witnesses testified that General Floribert Kisembo was the Chief of Staff (see paras 725, 783, 842), leading to the conclusion that Floribert Kisembo and Kisembo Bahemuka are the same person.

<sup>2803</sup> T-125-Red2-ENG, page 3, lines 11 – 12 and T-126-Red2-ENG, page 3, line 22, to page 4, line 3 and page 4, line 21 to page 5, line 10.

<sup>2804</sup> ICC-01/04-01/06-2773-Red-tENG, para. 377.

<sup>2805</sup> T-340-ENG, page 46, line 6 to page 47, line 16.

<sup>2806</sup> T-126-Red2-ENG, page 4, line 21 to page 5, line 2.

commanders in charge of operations in the APC.<sup>2807</sup> The Chamber, therefore, does not accept P-0041's suggestion that Floribert Kisembo and Bosco Ntaganda acted as guards for the accused. However, this weakness in his evidence as regards their precise roles before they were appointed to senior positions within the UPC/FPLC does not undermine P-0041's evidence as a whole.

1054. P-0014 suggested that during this period, Thomas Lubanga, as the President of an "emerging" group called the UPC,<sup>2808</sup> acted as the leader of a number of people.<sup>2809</sup> The evidence of P-0014 was that at the outset the accused referred to the need to organise an army in order to fight against Mr Mbusa Nyamwisi's military force.<sup>2810</sup> P-0014 stated that at one meeting in early June 2002 a significant amount of time was devoted to discussing the tactics to be adopted – using both military and diplomatic means, including the press – in order to develop the awareness of the population in Ituri and to mobilise its people.<sup>2811</sup> According to the witness, Thomas Lubanga suggested "Iturians had to wake up, they had to rise, and team up with him to chase out Mbusa".<sup>2812</sup> The accused is said to have explained that all available resources and means – military and diplomatic – should be used to eject Mr Mbusa Nyamwisi and the RCD-ML, and he assigned tasks to various individuals and groups.<sup>2813</sup>

1055. P-0014 learned about the UPC at this meeting in June 2002 with Paul Avochi, John Tinanzabo, Dr. Kabagambe, Mama Akiki, Adèle

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<sup>2807</sup> T-126-Red2-ENG, page 5, lines 3 – 10.

<sup>2808</sup> T-179-CONF-ENG, page 39, lines 18 – 25.

<sup>2809</sup> T-181-CONF-ENG, page 26, lines 4 – 5 and page 92, lines 16 – 21; T-179-CONF-ENG, page 42, line 4 to page 43, line 13.

<sup>2810</sup> T-179-Red-ENG, page 45, lines 14 – 21.

<sup>2811</sup> T-179-Red2-ENG, page 45, lines 4 – 24.

<sup>2812</sup> T-179-Red2-ENG, page 38, line 7 to page 39, line 3.

<sup>2813</sup> T-179-CONF-ENG, page 39, lines 8 – 17, page 43, lines 17 – 19 and page 45, lines 16 – 24.

Lotsove,<sup>2814</sup> Kisembo Bitamara and others, and that the organisation was “leading the fight, the combat, and wanted to group together all Iturians to continue the combat”.<sup>2815</sup>

1056. P-0014 also gave evidence about Thomas Lubanga’s leadership role by reference to this meeting in Kampala, stating “[...] it was always Thomas Lubanga who took the decision, who took -- who had the final word on everything while he was there. If he said no, then it would be no; and if he gave his approval, then what he approved had to be carried out. [...] I would like to tell you that Thomas Lubanga was indeed the leader who approved and disapproved of everything that happened.”<sup>2816</sup>

1057. According to P-0014, at one point during the meeting, the accused ordered Chief Kahwa and Mr Beiza to go to Rwanda to obtain weapons.<sup>2817</sup> The witness noticed that Chief Kahwa and Mr Beiza were not in the hotel the following morning,<sup>2818</sup> and he received confirmation of these arrangements from those involved.<sup>2819</sup>

1058. The defence challenges P-0014’s credibility, suggesting that several of his statements about the Kampala meeting are inaccurate. For instance, his testimony is criticised on the basis that he did not know whether all the members of the delegation in Kampala in June 2002 were UPC members, and he was unable to say in which capacity two of the participants attended the meeting.<sup>2820</sup> The defence notes P-0014’s evidence that the first time he heard of the UPC was at the

<sup>2814</sup> T-179-CONF-ENG, page 44, lines 14 – 16.

<sup>2815</sup> T-179-CONF-ENG, page 44, lines 2 – 10 and page 45, lines 23 – 24.

<sup>2816</sup> T-184-CONF-ENG, page 43, lines 16 – 25.

<sup>2817</sup> T-179-Red2-ENG, page 46, line 2 to page 47, line 13.

<sup>2818</sup> T-179-Red2-ENG, page 46, line 24 to page 47, line 3.

<sup>2819</sup> T-179-CONF-ENG, page 46, lines 2 -12 and T-184-CONF-ENG, page 39, line 18 to page 40, line 22.

<sup>2820</sup> ICC-01/04-01/06-2773-Red-tENG, para. 571. See T-184-CONF-ENG, page 37, lines 3 – 18.

Kampala meeting, even though the UPC had been in existence prior to June 2002.<sup>2821</sup> However, in light of the fact that P-0014 was not a UPC member, the Chamber does not consider his lack of knowledge on these issues undermines his credibility as to what he observed during the Kampala meeting.

1059. The defence also questions P-0014's evidence that Thomas Lubanga ordered Mr Beiza and Chief Kahwa to obtain arms in Rwanda, asserting this was simply a deduction based on the fact they were absent for part of the Kampala meeting.<sup>2822</sup> In the Chamber's view, P-0014's evidence about the trip is credible and reliable; he spoke with numerous people about this issue; and he gave consistent evidence when examined.

*(2) The arrest and detention of Thomas Lubanga,  
interim power and communications during  
detention (July – August 2002)*

1060. It is undisputed that while he was attending the meeting referred to above in Kampala, Uganda, in the summer of 2002<sup>2823</sup> the accused, along with others in his delegation, was arrested and transferred to Kinshasa. There he was detained in the government facility for political prisoners, DEMIAP (*"d etection militaire anti patrie"* [Detection of Unpatriotic Activities]), for approximately a month.<sup>2824</sup> In due course, Mr Lubanga was placed under house arrest at the Kinshasa Grand H tel<sup>2825</sup> and he was eventually released and

<sup>2821</sup> ICC-01/04-01/06-2773-Red-tENG, para. 571.

<sup>2822</sup> ICC-01/04-01/06-2773-Red-tENG, para. 571.

<sup>2823</sup> T-126-Red2-ENG, page 6, lines 5 – 12 (P-0041).

<sup>2824</sup> T-Red2-ENG, page 8, line 11 to page 10, line 19 and T-126-CONF-ENG, page 9, line 9 to page 10, line 19 (P-0041); T-340-ENG, page 45, lines 10 – 25 and T-346-ENG, page 73, lines 10 – 16 (D-0019).

<sup>2825</sup> T-125-Red2-ENG, page 10, lines 15 – 19 and T-126-CONF-ENG, page 10, line 22 to page 11, line 12 (P-0041).

transferred to Bunia at the end of August 2002, at the instigation of the Kinshasa authorities.<sup>2826</sup>

1061. P-0014 testified that once Thomas Lubanga discovered his group was to be detained and sent to Kinshasa, he delegated authority to Richard Lonema (who was to act as President on an interim basis) and Mbuna Dieudonné, his private secretary. He gave them and others responsibility for the awareness campaigns, mobilisation, supervising recruitment and the army, along with various political matters such as liaising with the relevant groups and parties.<sup>2827</sup>

1062. The defence suggests that despite this account, P-0014 also described Mr Lubanga's arrest and transfer to Kinshasa as coming as a complete surprise to the delegates, which caused panic.<sup>2828</sup> The defence notes P-0041 stressed the "*manu militari*"<sup>2829</sup> nature of the transfer of the delegates to Kinshasa, and it highlights his account that no arrangements were made in Kampala for the September 2002 appointments within the UPC.<sup>2830</sup> However, the Chamber understood P-0041 used the expression "*manu militari*" to describe his involuntary transfer to Kinshasa. Furthermore, P-0014 testified that although the precise moment of Thomas Lubanga's arrest came as a surprise, the latter had had the foresight to make advance arrangements, given the information that was in circulation.<sup>2831</sup> In all the circumstances, P-0014 and P-0041 have not given contradictory evidence on this issue.

1063. The prosecution relies on the evidence of P-0014 and P-0041 to

<sup>2826</sup> See ICC-01/04-01/06-2773-Red-tENG, para. 373.

<sup>2827</sup> T-179-CONF-ENG, page 67, lines 23 – 25, page 78, lines 6 – 12 and page 81, line 24 to page 82, line 14. (P-0014); D-0019 confirmed that Mr Lonema and Dieudonné Mbuna managed to avoid an arrest and returned to Bunia, T-344-Red-ENG, page 17, lines 8 – 11.

<sup>2828</sup> ICC-01/04-01/06-2773-Red-tENG, para. 571; T-184-Red2-ENG, page 44, lines 8 – 14.

<sup>2829</sup> T-125-Red2-ENG, page 9, lines 1 – 2.

<sup>2830</sup> ICC-01/04-01/06-2773-Red-tENG, para. 571.

<sup>2831</sup> T-184-CONF-ENG, page 44, lines 11 – 14 and page 45, line 4 to page 46, line 7.



support the suggestion that between July 2002 and the end of August 2002 Thomas Lubanga was in contact with Richard Lonema and others in Bunia.<sup>2832</sup>

1064. The defence contends that this evidence which involved telephone contact between the detainees and the UPC headquarters in Bunia is implausible because, as P-0041 accepted,<sup>2833</sup> mobile telephones were inoperative in Bunia.<sup>2834</sup>

1065. P-0014 testified that Thomas Lubanga talked with Richard Lonema at some point during his detention.<sup>2835</sup> He said Mr Lonema received orders from Thomas Lubanga by telephone while he was acting on the accused's behalf, between July and August 2002.<sup>2836</sup> P-0014 gave evidence that members of the UPC at the headquarters in Bunia used satellite telephones because there was no cell phone network.<sup>2837</sup> P-0014 also testified that the detainees at DEMIAP had cell phones,<sup>2838</sup> although this evidence was contradicted by P-0041, who suggested that their mobile phones were confiscated and the detainees at DEMIAP had no means of communication.<sup>2839</sup>

1066. P-0041, who was in Kinshasa at the same time as Thomas Lubanga, agreed there had been communication between the accused and Bunia in August 2002, and as a result the accused discovered that

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<sup>2832</sup> ICC-01/04-01/06-2748-Red, paras 103 -104, referring to T-179-CONF-ENG, page 80, lines 6 – 20, page 75, lines 20 – 25, page 76, lines 1 – 25 and page 77, lines 1 – 9; T-181, page 24, lines 2 – 6 (P-0014); and T-125-CONF-ENG, page 10, lines 18 – 19, page 11, lines 12 – 23, page 12, lines 1 – 3 and page 14, lines 16 – 18.

<sup>2833</sup> T-184-CONF-ENG, page 51, line 2.

<sup>2834</sup> ICC-01/04-01/06-2773-Red-tENG, para. 373.

<sup>2835</sup> T-179-CONF-ENG, page 75, line 20 to page 79, line 24.

<sup>2836</sup> T-179-CONF-ENG, page 81, line 11 to page 83, line 3.

<sup>2837</sup> T-184-CONF-ENG, page 51, lines 2 – 9.

<sup>2838</sup> T-184-Red2-ENG, page 51, lines 19 – 22.

<sup>2839</sup> T-126-CONF-ENG, page 9, lines 9 – 17.

Bunia had been occupied by RCD-ML dissidents.<sup>2840</sup> P-0041 testified that when the delegates were released from DEMIAP they travelled from their hotel nearly every day in order to visit Thomas Lubanga, who was held at the Grand Hotel.<sup>2841</sup> The accused gave them a telephone to contact him.<sup>2842</sup>

1067. The Chamber is uncertain of P-0014's evidence that the detainees were able to communicate by cell phone whilst they were detained at DEMIAP, given the circumstances of their detention and the evidence just rehearsed. However, it is sure that contact by telephone was possible after they were moved to "house arrest" in a hotel, (no later than the end of July/early August 2002).<sup>2843</sup>

1068. The defence submits P-0041's evidence does not support the prosecution suggestion that there was concerted action between the accused and the leaders of the armed rebellion.<sup>2844</sup> The Chamber has concluded, however, that his evidence, as corroborated by P-0014, has demonstrated that the accused and at least some of his alleged co-perpetrators were in contact with each other while he was in Kinshasa and Thomas Lubanga thus had the opportunity to give orders and directions. The Chamber found the evidence of P-0014 and P-0041 to be consistent, credible and reliable.

1069. In addition, P-0041 gave evidence that Richard Lonema, who worked with Daniel Litsha, represented Thomas Lubanga whilst the

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<sup>2840</sup> T-125-Red2-ENG, page 14, lines 14 – 18 and T-126-Red2-ENG, lines 7 – 9.

<sup>2841</sup> T-126-Red2-ENG, page 10, line 22 to page 11, line 21.

<sup>2842</sup> T-126-Red2-ENG, page 10, line 22 to page 11, line 21.

<sup>2843</sup> T-126-Red2-ENG, page 10, line 22 to page 11, line 21. See also ICC-01/04-01/06-2773-Red-tENG, para. 372, setting out the timeline of Mr Lubanga's arrest with reference to the testimony of P-0041.

<sup>2844</sup> ICC-01/04-01/06-2773-Red-tENG, para. 787.

latter was in detention.<sup>2845</sup> By this he meant Richard Lonema acted in place of the President of the UPC in Bunia.<sup>2846</sup> P-0041 did not know who appointed Richard Lonema as Thomas Lubanga's representative, but he suggested it was probably the President of the UPC himself because "I don't think another person would appoint you to act on behalf of a different official".<sup>2847</sup>

1070. P-0014 gave similar evidence that Richard Lonema stood in for the accused and he discharged the routine duties of the president, including supervising all the activities of the army such as those that concerned recruitment, military rations, equipment and the army's general well-being. In addition, he maintained contact with various external groups.<sup>2848</sup> P-0014 testified that Richard Lonema publicly indicated that he was standing in for the President.<sup>2849</sup> As mentioned above, P-0014 said that Richard Lonema received orders from Thomas Lubanga while he was acting on the accused's behalf between July and August 2002, and he discussed general policy matters with the accused.<sup>2850</sup>

1071. P-0002 testified that during this period Richard Lonema was "like a vice-president" because Thomas Lubanga was absent from Ituri.<sup>2851</sup> He indicated that a rally was held in Bunia, attended by a large number of UPC members, including Bosco Ntaganda, Floribert Kisembo and Chief Kawha, at which Richard Lonema represented the

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<sup>2845</sup> T-125-Red2-ENG, page 24, lines 6 – 17.

<sup>2846</sup> Mr Lonema returned to Bunia from Kampala, whilst the others were compelled to travel to Kinshasa. T-125-Red2-ENG, page 25, lines 3 – 8.

<sup>2847</sup> T-125-Red2-ENG, page 25, lines 13 – 18.

<sup>2848</sup> T-179-Red2-ENG, page 81, line 25 to page 82, line 14 and page 74, line 16 to page 75, line 9.

<sup>2849</sup> T-179-Red2-ENG, page 75, lines 1 – 9 and T-184-CONF-ENG, page 46, lines 8 – 18.

<sup>2850</sup> T-179-CONF-ENG, page 81, line 11 to page 83, line 3.

<sup>2851</sup> T-160-CONF-ENG, page 72, lines 9 – 10 and T-162-CONF-ENG, page 4, lines 23 – 25.

UPC.<sup>2852</sup> Colonel Maguru represented the Kinshasa government, whose role was to reconcile the opposing groups in Bunia.<sup>2853</sup>

***(3) Recruitment and training before the takeover  
of Bunia (Summer 2002)***

1072. The prosecution submits that throughout the summer of 2002 the co-perpetrators each contributed to the implementation of the common plan – namely, establishing political and military control of Bunia – by setting up training camps, recruiting young people (including children under the age of 15) and securing weapons and uniforms for the recruits. The overall objective was to remove the RCD-ML in order to take control of Bunia in the name of Thomas Lubanga and the UPC/FPLC.<sup>2854</sup>

1073. The defence disputes the suggested involvement by Thomas Lubanga or the UPC in the mutiny against the RCD-ML in April and May 2002, given he was absent from Ituri for long periods.<sup>2855</sup> Since the accused was abroad or in detention, the defence submits he could not have contributed to a large-scale recruitment campaign between May and August 2002, as argued by the prosecution.<sup>2856</sup> It is said Mr Lubanga's activities within the FRP, which did not have an armed wing, were of a purely political nature.<sup>2857</sup> The defence suggests Thomas Lubanga would only have learnt about the existence and outcome of the recruitment campaigns once he returned to Bunia in

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<sup>2852</sup> T-162-CONF-ENG, page 4, line 13 to page 5, line 4.

<sup>2853</sup> T-160-CONF-ENG, page 71, line 21 to page 72, line 10 and T-162-CONF-ENG, page 4, lines 13 – 22 (P-0002).

<sup>2854</sup> ICC-01/04-01/06-2748-Red, para. 105.

<sup>2855</sup> ICC-01/04-01/06-2773-Red-tENG, para. 787.

<sup>2856</sup> ICC-01/04-01/06-2773-Red-tENG, para. 788.

<sup>2857</sup> ICC-01/04-01/06-2773-Red-tENG, paras 784 – 788.

late August 2002.<sup>2858</sup>

1074. P-0038 testified that he joined “the army of the UPC” in 2001,<sup>2859</sup> after Chief Kahwa and Bosco Ntaganda held a meeting with the whole village of Mabanga, including children under the age of 15, during which they were encouraged to join the army.<sup>2860</sup> After the meeting, vehicles were “loaded up with young people”, including children under 15, who were taken to Mandro for training.<sup>2861</sup> Chief Kahwa was known at the time to be the leader of the training centre at Mandro.<sup>2862</sup>

1075. P-0038 suggested he was Chief Kahwa’s bodyguard at Mandro between April and September 2002,<sup>2863</sup> and he accompanied him to the frequent meetings he held in Katoto, Barrière and other villages.<sup>2864</sup> Chief Kahwa provided information to parents about sending their children, and others, to be trained as soldiers.<sup>2865</sup> On these occasions Chief Kahwa was dressed either in military uniform or civilian clothing, and his bodyguards carried his weapon.<sup>2866</sup> Chief Kahwa indicated to those with whom he spoke that the Lendu were threatening the villages, and they were asked to assist by sending children they needed for training at Mandro.<sup>2867</sup> He threatened that if they did not assist, when war came to their town “we would not come to rescue them”.<sup>2868</sup>

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<sup>2858</sup> ICC-01/04-01/06-2773-Red-tENG, para. 788.

<sup>2859</sup> T-113-Red2-ENG, page 31, lines 9 – 12. The Chamber notes that in his answer in the transcript, the year 2000 is given. However, in view of the question asked, the answer given to the previous question, and the comparison to the French transcript, the correct year is clearly 2001.

<sup>2860</sup> T-113-Red2-ENG, page 39, lines 3 – 18; T-114-Red2-ENG, page 44, lines 4 – 7.

<sup>2861</sup> T-113-Red2-ENG, page 39, line 19 to page 41, line 4.

<sup>2862</sup> T-114-Red2-ENG, page 42, line 19 to page 43, line 8.

<sup>2863</sup> T-114-Red2-ENG, page 43, lines 13 – 19.

<sup>2864</sup> T-113-Red2-ENG, page 53, line 13 to page 54, line 14.

<sup>2865</sup> T-113-Red2-ENG, page 53, lines 20 – 22.

<sup>2866</sup> T-114-Red2-ENG, page 85, lines 12 – 15.

<sup>2867</sup> T-113-Red2-ENG, page 54, lines 17 – 21.

<sup>2868</sup> T-113-Red2-ENG, page 54, lines 19 – 21.

1076. Children were made available following these meetings,<sup>2869</sup> and the new recruits were driven to the training centre at Mandro in vehicles provided by traders. They were accompanied by Chief Kahwa and his commanders.<sup>2870</sup> The vehicles were either given voluntarily or the commanders seized them from the traders.<sup>2871</sup> Although P-0038 did not see children taken forcibly, they arrived at Mandro immediately after the meetings.<sup>2872</sup> These trips to the villages were frequent,<sup>2873</sup> and boys as well as girls “volunteered”.<sup>2874</sup> As discussed above,<sup>2875</sup> P-0038 was, generally speaking, a credible and reliable witness.

1077. P-0116 testified that the recruitment of children continued during the summer of 2002 “because the UPC was striving to consolidate its position as a strong political movement in the Ituri region. [...] And this was common knowledge to everyone.”<sup>2876</sup>

1078. Other witnesses testified about the recruitment of children at this time. D-0006 joined the UPC towards the end of May 2002 and he was trained at Mandro.<sup>2877</sup> P-0046 was told about the Hema recruitment campaigns in Bunia and elsewhere in March, April and July 2002.<sup>2878</sup>

1079. D-0037 left the APC in 2002, along with other soldiers, and he joined a group in order to defend the Hema community, for which Chief Kahwa set up a training centre in Mandro, involving Bosco

<sup>2869</sup> T-113-Red2-ENG, page 54, lines 22 – 24.

<sup>2870</sup> T-113-Red2-ENG, page 54, line 24 to page 55, line 1.

<sup>2871</sup> T-113-Red2-ENG, page 58, lines 9 – 11.

<sup>2872</sup> T-113-Red2-ENG, page 58, lines 15 – 18.

<sup>2873</sup> T-113-Red2-ENG, page 55, lines 5 – 13.

<sup>2874</sup> T-114-Red2-ENG, page 84, lines 19 – 25.

<sup>2875</sup> See paras 340-349.

<sup>2876</sup> T-203-CONG-ENG, page 96, lines 16 – 20.

<sup>2877</sup> T-254-CONF-ENG, page 71, lines 7 – 12.

<sup>2878</sup> EVD-OTP-00489: T-37-EN, page 51, line 13 to page 53, line 19 (testimony of P-0046 before the Pre-Trial Chamber).

Ntaganda.<sup>2879</sup> D-0037 emphasised that this group only became the FPLC when Governor Lompondo was driven out of Bunia.<sup>2880</sup>

1080. D-0019 heard that the mutineers withdrew from Bunia around July 2002 in order to live in Mandro, where there was some form of military training.<sup>2881</sup> He said that Floribert Kisembo, Commander Tchaligonza and Bosco Ntaganda were the leaders of the mutineers, although Chief Kahwa was “a leading figure in that particular group”.<sup>2882</sup> There were discussions in the surrounding areas about the recruitment and training of new soldiers at Mandro.<sup>2883</sup>

1081. P-0014 testified that during the summer of 2002, in accordance with the UPC’s plan, the recruits were trained to fight against their primary enemy, the RCD-ML.<sup>2884</sup> P-0014 suggested that the Lendus, whom the UPC had been fighting for some time, were a secondary target.<sup>2885</sup> The main military leaders during July and August 2002 included the Chief of Staff Floribert Kisembo, Bosco Ntaganda and Chief Kahwa.<sup>2886</sup>

1082. P-0016, who was a former APC soldier, described his arrest by the Ugandans and the visits he received, whilst in detention, from Floribert Kisembo who told him to organise all the APC soldiers he knew so as to form a new army.<sup>2887</sup> FPLC soldiers took the witness, and other former APC soldiers he had gathered together, to the camp at Mandro in August 2002. Bosco Ntaganda decided they would teach

<sup>2879</sup> T-349-ENG, page 4, line 16 to page 5, line 18.

<sup>2880</sup> T-349-ENG, page 7, line 23 to page 8, line 20 and page 20, line 22 to page 21, line 7.

<sup>2881</sup> T-344-Red-ENG, page 17, lines 17 – 18 and page 18, lines 5 – 9.

<sup>2882</sup> T-344-Red-ENG, page 18, lines 10 – 15 and T-340-ENG, page 53, line 13 to page 54, line 22.

<sup>2883</sup> T-344-Red-ENG, page 18, lines 16 – 18.

<sup>2884</sup> T-184-CONF-ENG, page 60, lines 5 – 11.

<sup>2885</sup> T-184-CONF-ENG, page 60, lines 12 – 13.

<sup>2886</sup> T-181-Red2-ENG, page 12, line 22 to page 13, line 4 (P-0014).

<sup>2887</sup> T-189-Red2-ENG, page 9, line 22 to page 10, line 16.

young soldiers how to use the weapons they had received from the UPC.<sup>2888</sup> P-0016 stayed at the camp for about 10 days.<sup>2889</sup> He was appointed to a position within the FPLC by the end of August or early September.<sup>2890</sup> P-0016 indicated that the accused was the President of the UPC whilst he was at the camp at Mandro.<sup>2891</sup>

1083. The defence submits that P-0016's evidence demonstrates that his training at Mandro and appointment to a post within the UPC/FPLC predate Thomas Lubanga's return to Bunia.<sup>2892</sup> It is suggested this proves the armed forces who took over Bunia were under the command of Floribert Kisembo and other rebel leaders, and Thomas Lubanga played no role in the recruitment of soldiers acting under their orders.<sup>2893</sup> In light of P-0016's evidence as set out above, the Chamber is not persuaded that his appointment took place before Thomas Lubanga returned from Bunia. The role of the accused with respect to the soldiers that took over Bunia is considered below.

*(4) The takeover of Bunia (August 2002) and the formal establishment of the UPC/FPLC as a political and military organisation*

1084. It is the prosecution's submission that the UPC was responsible for the takeover of Bunia on 9 August 2002.<sup>2894</sup>

1085. The prosecution relies on a letter sent on 6 June 2002<sup>2895</sup> from

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<sup>2888</sup> T-189-Red2-ENG, page 10, line 17 to page 11, line 19.

<sup>2889</sup> T-189-Red2-ENG, page 11, line 20 to page 12, line 5.

<sup>2890</sup> T-189-CONF-ENG, page 9, line 22 to page 12, line 15 and page 61, lines 9 – 12. The Chamber has come to this result on account of the witness's description of the various time periods of detention, time spent contacting other former APC soldiers and his stay in the training camp.

<sup>2891</sup> T-189-CONF-ENG, page 11, lines 21 – 24 and page 17, lines 11 - 14.

<sup>2892</sup> ICC-01/04-01/06-2773-Red-tENG, paras 408 - 411.

<sup>2893</sup> ICC-01/04-01/06-2773-Red-tENG, para. 412.

<sup>2894</sup> ICC-01/04-01/06-2748-Red, paras 113 - 114.

<sup>2895</sup> EVD-OTP-00686.



Governor Molondo Lompondo to the President of the RCD-ML, to suggest that Thomas Lubanga and his movement, the UPC, were organising a militia in Mandro comprised of the Gegere tribes, in order to create an independent state of Ituri and to remove the RCD-ML.<sup>2896</sup> It is argued Mr Lubanga had the support of Chief Kahwa Panga Mandro, and they recruited young people between the ages of 9 and 13, in defiance of the prohibitions of the UN, the Organisation of the African Union, and the Lusaka Agreements against the use of child soldiers.<sup>2897</sup> Governor Lompondo warned of a possible attack by Thomas Lubanga's militia.<sup>2898</sup>

1086. The defence suggests this letter from Governor Lompondo may not be genuine, on the basis it is an unauthenticated copy and the prosecution failed to describe the circumstances in which it came into the possession of the UN. Furthermore, it is said there is no evidence as to who provided it to the prosecution and it is suggested that it appears to have come from someone whose antipathy to the accused is well known, but who was not interviewed.<sup>2899</sup> When this document was admitted from the bar table, the Chamber indicated that although it was admissible, its weight, authenticity and reliability would be dealt with at a later stage.<sup>2900</sup>

1087. The letter bears the letterhead of the RCD-ML, it is dated, and it carries what appear to be an official stamp and the signature of the Governor of Ituri, Mr Molondo Lompondo.<sup>2901</sup> The prosecution obtained it from the United Nations on 24 January 2005, before the

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<sup>2896</sup> EVD-OTP-00686.

<sup>2897</sup> EVD-OTP-00686.

<sup>2898</sup> EVD-OTP-00686.

<sup>2899</sup> ICC-01/04-01/06-2773-Red-tENG-Anx2, page 14.

<sup>2900</sup> ICC-01/04-01/06-1981-Anx, pages 15 - 16 (item 27).

<sup>2901</sup> EVD-OTP-00686.

arrest warrant against the accused was issued. No explanation has been provided as to why a false document of this kind would have been provided at that stage to the UN and otherwise its validity has not been previously questioned. However, given there is no evidence before the Chamber as to the circumstances in which the document was drafted or obtained, it has not been relied on for purposes of this Judgment.

1088. P-0024 and P-0014 testified that Bunia came under the control of the UPC in August 2002.<sup>2902</sup> P-0014 gave evidence that on 9 August the UPC drove out the RCD-ML.<sup>2903</sup> After the fall of Bunia the President (Mr Lubanga) made it known he was very proud of them, since they had worked to achieve this objective.<sup>2904</sup> D-0011 gave a somewhat different account, in that he attributed the expulsion of the RCD-ML from Bunia to mutineers within the armed wing of the RCD-ML (the APC), who were eventually joined by the UPC.<sup>2905</sup> He indicated the UPC became the UPC-RP – in the absence of Thomas Lubanga, who was in prison – when a core group of soldiers from the RCD-ML mutinied and split away from the APC, with the assistance of the UPC.<sup>2906</sup> This account is partially corroborated by D-0019, who said that the takeover of Bunia in August 2002 was not linked to the UPC of Thomas Lubanga, and instead the mutineers only decided to entrust the leadership to Thomas Lubanga at the end of August 2002.<sup>2907</sup>

1089. The prosecution refers to the 17 April 2002 “Political Declaration of the Managerial Staff of Ituri in the Face of Institute Injustice by the

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<sup>2902</sup> T-171-Red2-ENG, page 29, lines 22 – 25 (P-0024) and T-179-Red2-ENG, page 76, lines 13 – 17 (P-0014).

<sup>2903</sup> T-179-Red-ENG, page 76, lines 13 – 17.

<sup>2904</sup> T-179-Red-ENG, page 76, lines 7 – 10.

<sup>2905</sup> T-346-ENG, page 74, lines 2 – 4.

<sup>2906</sup> T-346-ENG, page 73, line 23 to page 74, line 4.

<sup>2907</sup> T-343-ENG, page 3, lines 16 – 24 and T-342, page 42, lines 1 – 15.

RCD/KIS-ML under His Excellency Mr. Mbusa Nyamwisi's Presidency" ("Political Declaration of 17 April 2002"), signed by Thomas Lubanga, which accused the RCD-ML of ethnic discrimination, and of seeking to take over Ituri.<sup>2908</sup> The prosecution suggests this demonstrates that Thomas Lubanga demanded the departure of Mr Mbusa Nyamwisi and Governor Molondo Lomondo.<sup>2909</sup>

1090. The defence also relies on the Political Declaration of 17 April 2002,<sup>2910</sup> contending that Thomas Lubanga's signature is not accompanied by any reference to a position held by him in the UPC – indeed, the UPC is not mentioned throughout the entire document.<sup>2911</sup> The Political Declaration of 17 April 2002 contains the following:

5. Ask our soldiers serving in Ituri to keep calm and let us invite under Congolese Flag all our glorious soldiers (ex. FAZ, FAC, APC) left to their sad fate by the discriminatory politics of the RCD/KIS-ML.<sup>2912</sup>

1091. The defence suggests this document does not support the conclusion that those who signed it had their own armed forces available to them. It is argued that no documents have been introduced for the period before September 2002 to indicate that forces of that kind existed, and the defence relies on P-0041's evidence that the FRP did not have a military wing.<sup>2913</sup>

1092. P-0041 testified that the signatories of the Political Declaration of 17 April 2002 were members of the FRP, save for the 12th signatory,

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<sup>2908</sup> ICC-01/04-01/06-2748-Red, para. 92, EVD-D01-00050.

<sup>2909</sup> ICC-01/04-01/06-2748-Red, para. 92.

<sup>2910</sup> EVD-D01-00050.

<sup>2911</sup> ICC-01/04-01/06-2773-Red-tENG, para. 780.

<sup>2912</sup> EVD-D01-00050 at DRC-0127-0112.

<sup>2913</sup> ICC-01/04-01/06-2773-Red-tENG, paras 370, 785; ICC-01/04-01/06-2786-Red-tENG, paras 14 - 15.

Bayau Wa Naiba.<sup>2914</sup> P-0041 suggested Thomas Lubanga was the President of the FRP at that time.<sup>2915</sup> As noted above, D-0019 gave evidence that at least 11 of the 13 signatories were, or later became, members of the UPC.<sup>2916</sup> D-0019 stated that although he had not seen this declaration, he was aware of its content, given it features in all the later UPC decrees. He said it reflected “a landmark event” in the history of the UPC,<sup>2917</sup> when the UPC began to distance itself from the RCD-ML.<sup>2918</sup> However, he declined to comment on whether members of the UPC wanted to remove the RCD-ML.<sup>2919</sup> As mentioned above, the declaration does not refer to the UPC.

1093. The prosecution suggests that within days of the Political Declaration of 17 April 2002, the same individuals who had orchestrated the first mutiny within the APC in 2000 (Floribert Kisembo, Bosco Ntaganda, commanders Tchaligonza, Kasangaki, and Bagonza) organised a second revolt by Hema soldiers in the APC against President Nyamwisi and the RCD-ML, in the summer of 2002.<sup>2920</sup>

1094. Similarly, D-0019 said that Floribert Kisembo, Bosco Ntaganda, as well as commanders Tchaligonza, Kasangaki and Bagonza were amongst the soldiers who participated in the April 2002 mutiny within the APC.<sup>2921</sup> P-0012 testified that in April 2002 the conflict began between the rebellious Hema soldiers, who had joined Thomas Lubanga, and Mr Mbusa Nyamwisi’s soldiers when the head of Mr

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<sup>2914</sup> T-126-Red2-ENG, page 23, line 10 to page 26, line 22.

<sup>2915</sup> T-125-Red2-ENG, page 14, line 24 to page 15, line 2.

<sup>2916</sup> T-343-ENG, page 57, line 1 to page 58, line 22 and page 61, line 19 to page 62, line 12.

<sup>2917</sup> T-343-ENG, page 63, lines 6 – 14 and page 66, lines 8 – 9.

<sup>2918</sup> T-343-ENG, page 67, lines 8 – 16.

<sup>2919</sup> T-343-ENG, page 66, line 21 to page 68, line 22.

<sup>2920</sup> ICC-01/04-01/06-2748-Red, para. 93.

<sup>2921</sup> T-343-Red ENG, page 49, lines 9- 24 and page 76, lines 10 – 16.

Mbusa Nyamwisi's personal guard was assassinated.<sup>2922</sup>

1095. D-0019 indicated that Bunia was divided between the mutineers and the troops loyal to Governor Molondo Lompondo.<sup>2923</sup> The prosecution concedes D-0019 rejected the suggestion that the mutineers were loyal or otherwise connected to Thomas Lubanga,<sup>2924</sup> but it is suggested that other evidence contradicts his account.<sup>2925</sup> The prosecution refers to a document entitled "*Histoire de l'Union des Patriotes Congolais (U.P.C.)*", which states that Bunia was "carved up into two zones of influence, one held by partisans of Thomas Lubanga and the other by men of Governor Mulondo".<sup>2926</sup>

1096. This document, the "*Histoire de l'Union des Patriotes Congolais (U.P.C.)*",<sup>2927</sup> was shown to D-0019, who said it was a "rough copy" that did not reflect the reality of what occurred, and he rejected the suggestion that the mutineers were loyal to Thomas Lubanga or that UPC soldiers had been responsible for the expulsion of Governor Lompondo in August 2002. However, the witness conceded that Thomas Lubanga had probably read the document and seemingly had corrected the first paragraph on page 6, which contains references to two zones of influence in Bunia.<sup>2928</sup>

1097. The document is dated 30 June 2004 and it bears Mr Lubanga's handwritten annotations.<sup>2929</sup> A paragraph, to which no annotations were made, reads as follows:

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<sup>2922</sup> T-168-CONF-ENG, page 29, lines 1 – 11.

<sup>2923</sup> T-343-ENG, page 82, lines 11 – 20 and page 84, lines 1 – 3.

<sup>2924</sup> T-340-ENG, page 47, lines 8 – 20 and page 59, lines 11 – 23.

<sup>2925</sup> ICC-01/04-01/06-2748-Red, para. 94.

<sup>2926</sup> EVD-OTP-00672, interpreted in Court at T-343-ENG, page 81, line 8 to page 82, line 9 (D-0019).

The spelling of the name varies in the transcript: "Mulondo" and "Molondo".

<sup>2927</sup> EVD-OTP-00672.

<sup>2928</sup> T-343-ENG, page 80, line 9 to page 84, line 24 and T-344-Red-ENG, page 3, line 12 to page 7, line 3.

<sup>2929</sup> EVD-OTP-00672; T-343-ENG, pages 78 - 79; interpretation at page 81, line 8 to page 82, line 7.

On the 17<sup>th</sup> of April, through a political statement, the UPC withdrew its trust from Mbusa, and the UPC turned itself into a military political movement. This is because part of the army joined Lubanga's ranks and created the nucleus of the armed unit of the UPC.<sup>2930</sup>

1098. The 11 August 2002 "Political Declaration of the FRP"<sup>2931</sup> declares that "[t]he armed dissidents of the RCD-ML aligned behind the ex-Minister of Defence of the RCD-ML, Thomas Lubanga, took control of Bunia and its surroundings [...]".<sup>2932</sup> P-0041 testified Thomas Lubanga was the president of the FRP, and he suggested that although the FRP did not have an armed wing, the "armed dissidents" referred to in this declaration were Thomas Lubanga's "guards".<sup>2933</sup>

1099. The defence takes issue with the claim that some of the dissidents were Thomas Lubanga's "guards".<sup>2934</sup> As discussed above, P-0041 appeared to be mistaken about the roles of Floribert Kisembo and Bosco Ntaganda when Thomas Lubanga was the Minister of Defence of the RCD-ML, given he erroneously assumed they were part of the guard of the Ministry of Defence.<sup>2935</sup> It is clear P-0041 referred to the armed dissidents as guards because of this mistake, and therefore P-0041's account supports other evidence in the trial that Floribert Kisembo and Bosco Ntaganda were involved in the military takeover of Bunia.

1100. P-0041 also said the Ugandans supported RCD-ML dissidents in chasing Governor Molondo Lomondo from Bunia,<sup>2936</sup> although he expressed doubts as to whether an "organised" army existed in

<sup>2930</sup> EVD-OTP-00672, as interpreted in Court at T-343-ENG, page 81, line 8 to page 82, line 7 (D-0019).

<sup>2931</sup> EVD-OTP-00663.

<sup>2932</sup> Unofficial translation of EVD-OTP-00663.

<sup>2933</sup> T-125-Red2-ENG, page 13, line 23 to page 14, line 23.

<sup>2934</sup> ICC-01/04-01/06-2773-Red-tENG, para. 377.

<sup>2935</sup> See paras 1052-1053. T-125-Red2-ENG, page 3, lines 7 – 12.

<sup>2936</sup> T-126-Red2-ENG, page 12, lines 10 – 13.

August 2002.<sup>2937</sup> Notwithstanding the prosecution's submission that a loyal base of Hema soldiers and other supporters backed Thomas Lubanga, the evidence relied on from P-0041 only tends to demonstrate the existence of the rivalry between Thomas Lubanga and Mr Mbusa Nyamwisi.<sup>2938</sup> D-0019, whilst describing this conflict, did not indicate that Thomas Lubanga was supported by Hema soldiers.<sup>2939</sup>

1101. The defence argues that the Political Declaration of the FRP of 11 August 2002 fails to establish that Thomas Lubanga was in control of an armed force affiliated with either the FRP or the UPC.<sup>2940</sup> The defence relies on the testimony of D-0019, who suggested that as regards the takeover of Bunia, "[s]everal people were trying to claim this military victory".<sup>2941</sup> P-0041 agreed with the contention that it was likely that the FRP wanted to gain political capital from the takeover of Bunia, but he did not suggest the document contained inaccurate information.<sup>2942</sup> In all the circumstances, the evidence discussed above is inconclusive as to whether the FRP or the UPC had their own armed forces available to them in the summer of 2002.

1102. The defence further relies on P-0041's testimony to suggest a wide cross-section of the population was represented in the UPC and the UPC-RP, and that the Hema were only a small minority.<sup>2943</sup> P-0041 was asked to describe the ethnicity of the signatories to the decree appointing members of the executive of the UPC-RP dated 3

<sup>2937</sup> T-125-Red2-ENG, page 14, lines 19 – 23.

<sup>2938</sup> T-124-Red2-ENG, page 80, line 20 to page 81, line 4.

<sup>2939</sup> T-343-ENG, page 50, line 12 to page 52, line 6.

<sup>2940</sup> ICC-01/04-01/06-2773-Red-tENG, paras 378 – 380 and ICC-01/04-01/06-2786-Red-tENG, para. 15.

<sup>2941</sup> T-344-Red-ENG, page 28, line 7 to page 29, line 19.

<sup>2942</sup> T-124-Red2-ENG, page 80 line 20 to page 81, line 4 and T-126-Red2-ENG, page 15, lines 20 – 25, and T-125-Red2-ENG, page 13, lines 16 – 17.

<sup>2943</sup> ICC-01/04-01/06-2773-Red-tENG, paras 399, 781.

September 2002,<sup>2944</sup> and he indicated they included individuals from thirteen different ethnic groups.<sup>2945</sup>

1103. A declaration dated 14 September 2002 from the UPC/FPLC Presidency, printed on official UPC letterhead and signed by Thomas Lubanga, sets out the objectives of the UPC-RP and states “the UPC-RP has taken [up] arms to remove all the forces that contribute to the destruction of Ituri” and has “put an end to the management of Ituri by the RCD-ML”.<sup>2946</sup> D-0019 stated this declaration accurately described the objectives of the UPC-RP.<sup>2947</sup>

1104. A document dated 22 September 2002 on official UPC/FPLC letterhead, signed by Professor Dhetchuvi, states:

The Union of the Congolese Patriots for Reconciliation and Peace, the acronym of which is the UPC/RP, under the direction of Mr. Thomas Lubanga, is a political and military movement that was created on the 15th of September 2000.<sup>2948</sup>

1105. The defence contends that all the documents from the UPC archives suggesting that the UPC was involved in securing control of Bunia are unreliable as they were only intended as political propaganda.<sup>2949</sup> However, the Chamber does not accept the suggestion that these documents were created, at least in part, for this false purpose. Although they do not demonstrate the UPC had resorted to military action prior to the year 2002, they provide clear support for the oral evidence of various witnesses linking the armed takeover of Bunia with Thomas Lubanga.

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<sup>2944</sup> EVD-OTP-00721.

<sup>2945</sup> T-126-CONF-ENG, page 27, line 9 to page 31, line 25. P-0041 did not know the ethnicity of three individuals on the list and one individual seems to have been skipped during questioning.

<sup>2946</sup> EVD-OTP-00674, T-344-Red-ENG, page 36, lines 16 – 19.

<sup>2947</sup> T-344-Red-ENG, page 36, lines 13 – 23.

<sup>2948</sup> EVD-D01-00078.

<sup>2949</sup> ICC-01/06-2773-Red-tENG, para. 786.



1106. In addition, during an interview Thomas Lubanga gave at his residence in Bunia in June 2003,<sup>2950</sup> the accused stated the following about the UPC:<sup>2951</sup>

[...] We came up in arms in 2000, in September. We did so to react to the short-comings and irresponsible behaviour of the RCD/ML that was managing the area. We didn't appreciate their policies. They didn't manage to solve the problems in Ituri and mainly the massacres that had almost become commonplace and institutionalised, and that's why we came up in arms. And the revolution was for -- in the interests of the Congolese in Ituri but also to ensure an amount of discipline among the leading politicians in the Congo. So our work in the UPC has both a political character to it, and on top of that, there's been a lot of conflict with the RCD/ML, *because in 2002, on the 9th of August, we actually chased the RCD/ML out of Ituri and we occupied the whole of Ituri.* [...]

#### (5) Conclusion

1107. While there is no doubt Thomas Lubanga was a founding member of the UPC at its creation in September 2000, together with at least his co-perpetrator Rafiki Saba, there is a clear dispute as to the nature of the UPC's aims prior to late August/early September 2002. The UPC's founding documents describe a political programme as well as the organisation's military ambitions. Other contemporary documents, including the 22 October 2002 declaration signed by Thomas Lubanga,<sup>2952</sup> indicate the UPC-RP was a "political-military movement", established on 15 September 2000, which had taken up arms against the RCD-ML.

1108. On the available material there is real uncertainty as to whether, at the outset, the UPC was created as part of a plan to build an army in

<sup>2950</sup> EVD-OTP-00584; T-130-Red2-ENG, page 36, line 18 and page 39, lines 5 – 10 and lines 22 – 23. The Chamber notes that the prosecution submits that the interview took place on 5 June 2003, ICC-01/04-01/06-2748-Red, para. 281. However, the accused refers to 12 June 2003 in the interview (T-130-Red2-ENG, page 48, line 23). The Chamber is satisfied that the interview took place in June 2003.

<sup>2951</sup> EVD-OTP-00584, interpretation taken from the transcript of the hearing, T-130-Red2-ENG, page 45, lines 13 – 24 (emphasis added). The English transcript refers to the year 2000, but the French transcript (reflecting the original language of the interview) contains the correct date of 9 August 2002.

<sup>2952</sup> EVD-OTP-00665.

order take control of Ituri. Further, although there is evidence that members of the FRP became members of the UPC, the exact relationship between the two groups in the period before August 2002 is unclear. That said, the evidence of witnesses such as P-0041, P-0014 and P-0012, together with the documentary evidence, has established that by the summer of 2002 Thomas Lubanga personally intended to take control of Bunia. His leadership role and ambitions – particularly overthrowing Mr Mbusa Nyamwisi and taking control of Ituri – are reflected in the evidence about the meeting in Kampala in June 2002.

1109. It is also clear that he was in contact with Bosco Ntaganda and Floribert Kisembo while he acted as Minister of Defence for the RCD-ML.

1110. On the basis of the evidence of P-0041, P-0014 and P-0002, the Chamber is persuaded that Thomas Lubanga was represented by Richard Lonema in his absence in the summer of 2002. Mr Lubanga was able to give orders and instructions to his co-perpetrators and other individuals (including Richard Lonema), whilst in detention in Kinshasa.

1111. The Chamber is satisfied that recruitment and training was carried out during the summer of 2002. P-0038's testimony concerning various recruitment activities carried out by Chief Kahwa and Bosco Ntaganda between 2001 and September 2002 is corroborated by D-0006 and D-0037, who gave evidence about joining the UPC or its armed group and the training centre in Mandro, with which both Chief Kawha and Bosco Ntaganda were involved. P-0116 and P-0046 similarly referred to recruitment by the UPC or within the Hema community, and P-0014 and P-0016 testified about military training in

Mandro that was conducted by the UPC. The Chamber accepts P-0014's testimony that the main military leaders in July and August 2002 included Floribert Kisembo, Bosco Ntaganda and Chief Kahwa.

1112. The documents discussed above demonstrate the link between Thomas Lubanga and the armed forces that took control of Bunia. Document EVD-D01-00050, which is a declaration of the managerial staff signed, *inter alia*, by Mr Lubanga, indicates the signatories were dissatisfied the RCD-ML was in power and they were seeking a change of government. Although the UPC is not referred to in this document, D-0019 confirmed that 11 of the 13 signatories, including the accused, would later form part of the UPC. Document EVD-OTP-00663, a political declaration of the FRP dated 11 August 2002, signed by Mr Lubanga and three others (the latter also signed document EVD-D01-00050) sets out that the FRP, assisted by the armed dissidents from the APC who supported Thomas Lubanga, took control of Bunia and it declared the end of the RCD-ML's power in Ituri. Whether the forces were officially affiliated to the UPC, as suggested in some of the founding documents, is not determinative. What is relevant is that many of the individuals who signed these two declarations were, or became, members of the UPC/FPLC, the body that exercised control over Ituri after the departure of the RCD-ML from Bunia. Although the involvement of the UPC in the mutiny against the RCD-ML and the subsequent takeover of Bunia in August 2002 is a highly contested issue, the military aims of those who are said to have acted with the accused – including Floribert Kisembo, Chief Kahwa, Bosco Ntaganda and commanders Tchaligonza, Kasangaki, and Bagonza – and their involvement in the August 2002 rebellion are clear. Confirmation of this was provided by D-0019, P-

0012 and, to an extent, P-0041. The document, the *“Histoire de l’Union des Patriotes Congolais (U.P.C.)”*,<sup>2953</sup> suggests that there were two conflicting parties, namely those loyal to Mr Lubanga and those loyal to Governor Mulondo, and it implies that the forces that took over Bunia were affiliated to the UPC. Document EVD-OTP-00674, along with the evidence of D-0019, demonstrate that the UPC/FPLC Presidency, namely, the accused, acknowledged in September 2002 that the UPC had taken control of Bunia from the RCD-ML by military means. In addition, in the interview Thomas Lubanga gave in June 2003,<sup>2954</sup> he attributed the military takeover of Bunia in August 2002 to the UPC.

1113. P-0016 testified that to his knowledge the structure of the FPLC, and in particular the main staff, was created after the UPC took control over Bunia.<sup>2955</sup> However, the Chamber has not accorded any significant weight to this evidence because its source was not explained.

1114. Regardless of the extent of the UPC’s military involvement in the defeat of the RCD-ML, the UPC-RP claimed responsibility for the victory. It appears that on 2 September 2002 the name “FRP” was dropped.<sup>2956</sup>

1115. Thomas Lubanga returned to Bunia around 1 September 2002<sup>2957</sup> and was appointed President of the UPC and Commander in Chief of

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<sup>2953</sup> EVD-OTP-00672.

<sup>2954</sup> EVD-OTP-00584.

<sup>2955</sup> T-190-CONF-ENG, page 75, line 25 to page 76, line 8.

<sup>2956</sup> P-0041 testified that on 2 September 2002 a decree, signed by Thomas Lubanga, was issued to name the group “UPC/RP” rather than “FRP/UPC”. T-125-Red-ENG, page 17, line 19 to page 19, line 20.

<sup>2957</sup> T-181-Red2-ENG, page 53, lines 21 – 22 (P-0014).

the FPLC army (the military wing of the UPC).<sup>2958</sup> This event appears to constitute the formal establishment of the FPLC.

1116. On 2 and 3 September 2002 he appointed the executive of the UPC/FPLC,<sup>2959</sup> including Floribert Kisembo and Bosco Ntaganda – the same men who had been the architects of the rebellion against the RCD-ML and who had been actively involved in recruiting and training recruits prior to the takeover of Bunia.

### **c) The goals of the UPC/FPLC after September 2002**

1117. The Chamber heard evidence on the aims of the UPC/FPLC after it had taken control of Bunia and came officially under the leadership of Thomas Lubanga.

1118. P-0012 gave evidence that prior to the accused's official appointment as President of the UPC/FPLC, it did not function as a political party<sup>2960</sup> and he suggested it only became a separate party when they took control of the city of Bunia after the RCD-ML left.<sup>2961</sup>

1119. D-0019 testified that in September 2002 the armed force that had been under the leadership of Chief Kahwa, Floribert Kisembo and Commander Tchaligonza was restructured by the UPC and was named the FPLC.<sup>2962</sup> D-0037 gave similar evidence.<sup>2963</sup>

1120. As previously indicated, a declaration from the presidency

<sup>2958</sup> T-168-Red2-ENG, page 17, lines 18 – 21 (P-0012) and T-181-Red2-ENG, page 53, line 25 to page 56, line 10 (P-0014).

<sup>2959</sup> T-181-Red2-ENG, page 54, line 19 to page 55, line 21 (P-0014); T-124-Red2-ENG, page 69, lines 13 – 19 (P-0041); T-174-Red2-ENG, page 47, line 23 to page 48, line 7, T-175-Red2-ENG, page 4, line 22 to page 5, line 7; T-346-ENG, page 73, lines 10 – 16 (D-0011); D-0011 stated that he thought it was the end of September 2002, but in light of the totality of the evidence, the Chamber is sure that it was in fact at the start of that month.

<sup>2960</sup> T-168-Red2-ENG, page 17, lines 19 – 23.

<sup>2961</sup> T-168-CONF-ENG, page 17, lines 15 – 18 and page 20, lines 23 - 24.

<sup>2962</sup> T-340-ENG, page 68, lines 11 – 17.

<sup>2963</sup> T-349-ENG, page 7, line 12 to page 8, line 20 and page 21, lines 1 – 7.

(dated 14 September 2002)<sup>2964</sup> and another from the UPC/FPLC concerning the Inter-Congolese dialogue (dated 22 October 2002)<sup>2965</sup> describe the UPC-RP as a political and military movement that had been in conflict with the RCD-ML.<sup>2966</sup> The Chamber does not accept the defence suggestion that these documents were created as propaganda – the UPC-RP was a political and military body, and it is of note that the defence accepts that the UPC-RP resorted to arms after its formation in September 2002.<sup>2967</sup>

1121. A message from the President of the UPC/FPLC dated 11 September 2002 that was broadcast over Radio Candip provided an account of the creation of the UPC and the means of achieving a lasting peace in Ituri.<sup>2968</sup> The aim of the UPC was said to be “genuine reconciliation” and a “durable peace”.<sup>2969</sup> The message ended with the words “*Vive le territoire sous contrôle de l’Union des Patriotes Congolais pour la Réconciliation et Paix*”.<sup>2970</sup> It is undisputed that by the beginning of September 2002, at the latest, the UPC/FPLC was in control of Bunia.<sup>2971</sup> Thomas Lubanga set out in a letter to Kinshasa that his movement was in effective political and military control of the territory.<sup>2972</sup>

1122. Moreover, members of the UPC/FPLC publicly described the role that the UPC’s armed forces should play in Ituri. As discussed in

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<sup>2964</sup> EVD-OTP-00674.

<sup>2965</sup> EVD-OTP-00665, read aloud and interpreted in Court at T-342-ENG, page 25, line 23 to page 26, line 5 (D-0019).

<sup>2966</sup> Moreover, D-0019 conceded that the UPC-RP as of September 2002 had a political and military character. T-342-ENG, page 36, line 23 to page 37, line 1.

<sup>2967</sup> ICC-01/04-01/06-2773-Red-tENG, para. 794.

<sup>2968</sup> EVD-OTP-00735; T-125-Red2-ENG, page 21, line 25 to page 22, line 22 and page 23 line 22 to page 24, line 5 (P-0041).

<sup>2969</sup> EVD-OTP-00735, pages 3 - 4.

<sup>2970</sup> EVD-OTP-00735, page 4.

<sup>2971</sup> T-346-ENG, page 74, lines 6 – 12 (D-0019).

<sup>2972</sup> EVD-OTP-00664.

greater detail hereafter, Thomas Lubanga spoke of the military aims of the UPC/FPLC, for example when addressing recruits at the Rwampara training camp on 12 February 2003.<sup>2973</sup> P-0002, who attended<sup>2974</sup> a rally on 26 February 2003 at the stadium in the centre of Bunia,<sup>2975</sup> identified Commander Eric Mbabazi<sup>2976</sup> of the UPC from a video excerpt.<sup>2977</sup> Mr Mbabazi (who was the G5 within the UPC/FPLC)<sup>2978</sup> stated as follows:

Our young people enlisted in the army in order to seek change. Our army is now called the revolutionary army. It's an army which first and foremost wants change, change in its country. We need change in our villages, in our land, in our territory. The population wants to see change. The population must be able to see the difference between good and bad. The population will need to see change, and when our young people started this work in the army, it was to chase out a group that was making the Congolese population in the country suffer [...] When the army will follow this objective we will tell the population of Ituri to support us, and you know we face a lot of difficulties, and you know young people are sacrificing themselves.<sup>2979</sup>

1123. This was echoed in a speech delivered at the rally on the same day by an Iturian governor, Mr Misaka:

I would like to congratulate you for walking. You are behind the movement of the UPC and its president, and our march today also shows the support that we provide to our children who work night and day. Here I'm referring to the Patriotic Forces for the Liberation of the Congo, forces patriotiques pour la libération du Congo, and we congratulate them. They are -- they are giving their blood for us to be able to live in peace, for us to be able to live in calm. That's why we congratulate them. They must move on forward. They have given their bodies, their life to protect the population. Without the population, there is no president. If there is no population, there are no soldiers. There are no governors.<sup>2980</sup>

1124. The media was also used to spread the military aims of the

<sup>2973</sup> See para. 1242.

<sup>2974</sup> T-162-Red2-ENG, page 29, line 24 to page 30, line 1.

<sup>2975</sup> T-162-Reds-ENG, page 31, lines 11 – 13 and page 33, lines 1 – 13.

<sup>2976</sup> T-162-Red2-ENG, page 37, line 24 to page 38, line 5.

<sup>2977</sup> EVD-OTP-00410/EVD-OTP-00676, from time code 00:34:58 to 00:00:38; T-162-Red-ENG, page 35, line 7 to page 37, line 23 (P-0002).

<sup>2978</sup> T-154-Red2-ENG, page 24, lines 3 – 4 (P-0017).

<sup>2979</sup> Interpretation in court, T-162-Red-ENG, page 36, line 21 to page 37, line 23.

<sup>2980</sup> Interpretation in court. T-162-Red2-ENG, page 32, lines 8 – 17.

UPC/FPLC, and P-0041 indicated that the UPC/FPLC alone was able to broadcast on Radio Candip between September 2002 and March 2003.<sup>2981</sup> P-0014 acknowledged the existence of this restriction, and he noticed many changes in the organisation of the radio programmes.<sup>2982</sup> Each time P-0014 heard Floribert Kisembo on the radio, he spoke from a military perspective and delivered a message that was favourable to the army.<sup>2983</sup> P-0014 understood Floribert Kisembo's opinion was that peace could only be secured by force and, in essence, he was referring to the Lendus when he spoke about their enemies.<sup>2984</sup>

1125. On the basis of the evidence rehearsed above, including the testimony of D-0019 and D-0037, the Chamber finds that by September 2002, at the latest, the UPC had a military wing (the FPLC). The Chamber is persuaded that the UPC exercised political and military control over Bunia, and that it had clear military aims, particularly to expand its role in Ituri.

#### **d) Conclusion and legal findings on the common plan**

1126. The prosecution submits that by September 2002, the first phase of the common plan had been successfully coordinated and implemented, given the UPC/FPLC controlled Ituri; Thomas Lubanga was President and Commander-in-Chief; the co-perpetrators held senior positions in the movement; and the military wing had an official position, as well as a source of recruits.<sup>2985</sup> The prosecution submits that in order to remain in power and to extend its territorial

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<sup>2981</sup> T-125-Red2-ENG, page 23 line 22 to page 24, line 5.

<sup>2982</sup> T-182-Red2-ENG, page 44, lines 13 – 16.

<sup>2983</sup> T-182-Red2-ENG, page 45, lines 5 – 7.

<sup>2984</sup> T-182-Red2-ENG, page 45, lines 8 – 10.

<sup>2985</sup> ICC-01/04-01/06-2748-Red, para. 137.



control, the army needed to grow in size and strength.<sup>2986</sup>

1127. The defence argues the evidence fails to demonstrate the existence of a concerted plan of any kind between Thomas Lubanga and his alleged co-perpetrators prior to early September 2002,<sup>2987</sup> and that from September 2002, the evidence regarding the institutional links between Thomas Lubanga and the civil and military officials of the UPC-RP and the FPLC fails to establish a “concerted plan” of a criminal character. In particular, it is suggested that gaining control of a territory by military means and enlisting recruits, do not in themselves reveal a relevant “element of criminality”, and any crimes that were committed should not be regarded as the inevitable consequence of the underlying project.<sup>2988</sup>

1128. The evidence shows there was a significant conflict between Thomas Lubanga and the RCD-ML from at least April 2002, and that the accused headed a group that sought to bring about political changes in Ituri, including the removal of Mr Mbusa Nyamwisi and Governor Molondo Lompondo. As the Chamber has already observed, it is notable that eleven of the signatories of the 17 April 2002 Declaration were later to become members of the UPC/FPLC. Furthermore, the second APC revolt, which occurred at the same time, was directed at Mr Mbusa Nyamwisi and the RCD-ML and once again involved Floribert Kisembo, Bosco Ntaganda, as well as commanders Tchaligonza, and Kasangaki, all of whom are alleged to have been co-perpetrators with the accused. The “*Histoire de l’Union des Patriotes Congolais (U.P.C.)*” is of significance in this context: the accused read

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<sup>2986</sup> ICC-01/04-01/06-2748-Red, para. 137.

<sup>2987</sup> ICC-01/04-01/06-2773-Red-tENG, para. 801.

<sup>2988</sup> ICC-01/04-01/06-2773-Red-tENG, para. 801.

and annotated it, and whilst he made certain changes he did not alter or comment on the assertion that on 17 April 2002 the UPC became a political-military movement. Furthermore, this document – which, in all the circumstances, the Chamber is satisfied the accused approved, given the detail of the alterations he inserted – sets out that in 2002 part of Bunia was held by his partisans. The Chamber accepts the evidence of P-0014 that he was told in June 2002 by Mr Lubanga that the people of Ituri needed to rise up to oust Mr Mbusa Nyamwisi, and this would be achieved by both diplomatic and military means. For reasons set out elsewhere, the Chamber is satisfied, notwithstanding the criticisms of the defence, that P-0014 was a credible and reliable witness.

1129. Furthermore, the Chamber is of the view the inevitable inference to be drawn from the evidence of P-0014 is that Chief Kahwa and Mr Beiza were sent by the accused to Rwanda to obtain arms.

1130. On all the relevant material, the Chamber is persuaded the accused intended to organise an army in order to fight Mr Nyamwisi and the RCD-ML. Additionally, Mr Lubanga sent a letter which set out that in the summer of 2002 the UPC delegation had been detained in Kinshasa, and it was against the background of his detention that he was provided with assistance in order to exercise his authority by Richard Lonema, Chief Kahwa and others, which included recruiting, mobilising and supervising the army. This conclusion is unaffected by the fact that there may have been little notice of the impending detention of the delegation sent to Kampala in June 2002. The Chamber accepts the evidence that the accused gave Richard Lonema instructions between July and August 2002, and the Chamber notes that, certainly in part, P-0041 agreed with this evidence. Critically, the

evidence demonstrates the accused and Mr Lonema discussed the general policy that was to be adopted, and the former gave instructions that Mr Lonema acted on. The latter was the accused's delegate, and Mr Lubanga was kept informed about, and controlled the activities of, the UPC from detention.

1131. During the course of July and August 2002, the main players in the armed group that was eventually transformed into the UPC's armed branch, the FPLC, included Floribert Kisembo, Bosco Ntaganda and Chief Kahwa, three of the accused's alleged co-perpetrators, and they had particular responsibility for recruitment and training.

1132. On all the evidence, the Chamber is persuaded the accused was involved, along with some of his co-perpetrators, in the takeover of Bunia. The lack of certainty as to his formal position within the UPC at the time is largely irrelevant because it is the objectives and acts of the co-perpetrators, including the accused, which are critical for the charges. The evidence of P-0016 as to Floribert Kisembo's and Bosco Ntaganda's involvement in transferring him (P-0016) and other former APC soldiers to the training camp in Mandro in order to build a new army, and the evidence of D-0037 that the Mandro force was subsequently transformed into the FPLC immediately after the takeover of Bunia, suggests that there was close coordination between the rebels and the members of the UPC. In all the circumstances, D-0019's evidence that the rebels only transferred political leadership to Thomas Lubanga after Bunia came under their control lacks credibility.

1133. The evidence has demonstrated that Thomas Lubanga, following his return to Bunia in September 2002, appointed members

of staff and filled positions within the UPC/FPLC. Elements of the group which became officially known as the FPLC in September 2002, at the latest, had taken up arms during the summer of 2002 to remove the forces that it considered were contributing to the destruction of Ituri, particularly the RCD-ML.

1134. Therefore, at least from September 2002, the accused as President of the UPC-RP endorsed a common plan to build an effective army to ensure the UPC/FPLC's domination of Ituri, and he was actively involved in its implementation. Thomas Lubanga appointed Chief Kahwa, Floribert Kisembo and Bosco Ntaganda to senior posts within the UPC/FPLC, and they played significant roles in relation to the recruitment and training of soldiers. This plan, including the accused's involvement, remained essentially unchanged during the time-frame of the charges.

1135. As to the events that took place prior to the period of the charges, the central issue – given the continuous nature of the offences – is whether the co-perpetrators, including the accused, knew that children below the age of 15 who had been previously recruited would remain within the UPC/FPLC following September 2002. The Chamber is satisfied that the armed forces which had been recruited and trained by Chief Kahwa, Floribert Kisembo and Bosco Ntaganda prior to the takeover of Bunia, in due course became part of the FPLC, and the training camps that had been established by Chief Kahwa and Bosco Ntaganda in Mandro continued to be used in this context.

1136. It has been proved that by September 2002 at the latest Thomas Lubanga, the President of the UPC/FPLC, had entered into an agreement, and thereafter participated in a common plan, with his co-

perpetrators to build an effective army in order to ensure the UPC/FPLC's political and military control over Ituri. This plan resulted in the conscription, enlistment and use of children under the age of 15 to participate actively in hostilities, a consequence which occurred in the ordinary course of events. This conclusion satisfies the common-plan requirement under Article 25(3)(a).

## 2. THOMAS LUBANGA'S ESSENTIAL CONTRIBUTION

1137. Given the requirement that Thomas Lubanga provided an essential contribution, it is necessary to analyse his role and his contribution in accordance with the common plan.

1138. The prosecution contends that "[w]ithout the contribution of the accused as head of the UPC/FPLC and architect of its policies, the implementation of the common plan using criminal means – the recruitment and use of child soldiers – would have been frustrated".<sup>2989</sup> It is argued that to demonstrate an essential contribution by the accused in the implementation of the common plan, "it is sufficient in this case that the Accused was in control over the FPLC and had an instrumental role in the functioning of the military".<sup>2990</sup>

1139. The defence argues that the accused has not been prosecuted as a civil or military commander who is responsible for the acts of his subordinates, but instead for his personal responsibility for the alleged crimes.<sup>2991</sup> It suggests that whether Thomas Lubanga had effective control over the FPLC and had knowledge of the crimes is immaterial in the instant case. Further, it is argued that Thomas Lubanga's alleged

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<sup>2989</sup> ICC-01/04-01/06-2778-Red, para. 18.

<sup>2990</sup> ICC-01/04-01/06-2778-Red, para. 19.

<sup>2991</sup> ICC-01/04-01/06-2773-Red-tENG, para. 818.

central role in the functioning of this organisation cannot be characterised as amounting to an “essential contribution” and it is insufficient to form the basis of responsibility as a co-perpetrator.<sup>2992</sup> The defence submits the accused’s logistical and organisational role as regards military operations, including providing the FPLC with weapons and ammunition, is irrelevant to his alleged contribution to the crimes with which he is charged.<sup>2993</sup> The defence suggests the leader of a political-military group cannot be considered criminally responsible for crimes committed by his or her troops solely on the basis of having provided logistical support or having facilitated their activities.<sup>2994</sup> Therefore, it is argued that activities of this kind cannot constitute an essential contribution to the recruitment or use of children under the age of 15 in combat, because the offences were not dependent on the alleged role the accused.<sup>2995</sup> The defence submission is that an overall coordinating falls short of an essential contribution.<sup>2996</sup>

1140. In order to determine whether Thomas Lubanga performed an essential role in accordance with the common plan, the Chamber has examined his position within the UPC/FPLC and the entirety of the contribution he made to the conscription, enlistment and use of children under the age of 15 to participate actively in hostilities.

#### **a) Thomas Lubanga’s role in the UPC/FPLC**

##### ***(1) Thomas Lubanga’s position in the UPC/FPLC***

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<sup>2992</sup> ICC-01/04-01/06-2773-Conf, paras 818 – 820 and ICC-01/04-01/06-2786-Red-tENG, paras 24 – 28.

<sup>2993</sup> ICC-01/04-01/06-2773-Red-tENG, paras 824 and 825.

<sup>2994</sup> ICC-01/04-01/06-2773-Red-tENG, para. 824.

<sup>2995</sup> ICC-01/04-01/06-2773-Red-tENG, para. 824.

<sup>2996</sup> ICC-01/04-01/06-2773-Red-tENG, para. 826.

1141. The Chamber heard evidence relating to the issue of Thomas Lubanga's role within the UPC/FPLC and to the question of whether he was, *de facto*, in a position to exercise the authority accorded to him in his official role as President of the UPC/FPLC.

1142. It is undisputed that Thomas Lubanga was the President of the UPC and Commander-in-Chief of its armed wing, the FPLC,<sup>2997</sup> throughout the period of the charges.<sup>2998</sup> Several witnesses gave evidence that decisions were taken and orders were issued by the President or the Presidency, and they were all under the President's authority.<sup>2999</sup> P-0012 stated the accused was never referred to by any title other than the President of the UPC,<sup>3000</sup> and P-0016 indicated that he understood the expression "the Presidency" to refer to Thomas Lubanga.<sup>3001</sup> His evidence was that the FPLC was commanded by the Presidency,<sup>3002</sup> and that Thomas Lubanga, as the President of the UPC, was therefore the Commander-in-Chief.<sup>3003</sup> P-0014 indicated that in accordance with the laws that were announced over the radio,<sup>3004</sup> Thomas Lubanga, as President of the UPC/FPLC, was also the National Secretary for Defence.<sup>3005</sup> On this basis, P-0014 concluded Thomas Lubanga was the political leader of the army, and he observed that there had been a clear statement to the effect that he was the

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<sup>2997</sup> See the Agreement entitled "Agreement between the UPC/RP and the UPDF" signed on behalf of the "UPC/RP (FPLC)", EVD-OTP-00693; T-349-ENG, page 8, lines 15 – 20 and page 20, line 20 to page 21, line 12 (D-0037).

<sup>2998</sup> T-168-Red2-ENG, page 17, lines 18 – 21 and page 72, lines 3 – 6 (P-0012); T-170-Red2-ENG, page 51, lines 12 – 14 (P-0024); T-179-Red2-ENG, page 39, line 23 (P-0014); T-189-Red2-ENG, page 4, lines 10 – 15 (P-0016); T-113-Red2-ENG, page 32, lines 1 – 5 (P-0038) .

<sup>2999</sup> T-179-Red-ENG, page 39, lines 23 – 25 (P-0014); T-125-Red2-ENG, page 40, lines 17 – 19 (P-0041); T-175-CONF-ENG, page 20, lines 3 – 4 and page 22, lines 12 – 23 (P-0055).

<sup>3000</sup> T-168-Red2-ENG, page 72, lines 3 – 6.

<sup>3001</sup> T-189-Red2-ENG, page 4, lines 21 – 24.

<sup>3002</sup> T-189-Red2-ENG, page 4, lines 19 – 20 (P-0016).

<sup>3003</sup> T-189-Red2-ENG, page 4, lines 21 – 24; T-190-Red2-ENG, page 37, line 24 to page 38, line 5 (P-0016).

<sup>3004</sup> T-181-Red2-ENG, page 54, line 24 to page 55, line 5.

<sup>3005</sup> T-181-Red2-ENG, page 56, lines 1 – 5.

Commander-in-Chief of the army – put otherwise, there was no one in command above him.<sup>3006</sup>

1143. When he returned to Bunia around 1 September 2002,<sup>3007</sup> Thomas Lubanga, as President, appointed members of his staff and filled positions within the UPC/FPLC.<sup>3008</sup> P-0041 testified that the decree of 2 September 2002 which gave the group the name UPC-RP, instead of the FRP-UPC, was signed by Thomas Lubanga, although he could not say who decided on the change.<sup>3009</sup> As President of the UPC/FPLC, Thomas Lubanga also issued a decree appointing the Governor and the two Vice-Governors of Ituri.<sup>3010</sup>

1144. The disputed evidence from P-0014 was that civilians and members of the military made suggestions to Thomas Lubanga for his decision.<sup>3011</sup> The witness gave evidence that after 20 August 2002, once the accused had arrived, the members of the political and military elite included Thomas Lubanga, John Tinanzabo, Daniel Litsha, Adèle Lotsove, Pilo Kamaragi, Richard Lonema and, at the outset, Chief Kahwa.<sup>3012</sup>

1145. P-0055 stated that the Chief of Staff and the Deputy Chief of Staff were responsible for implementing any plans concerning the structure of the army, in particular the establishment of sectors and brigades, and these decisions were subject to the approval of President

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<sup>3006</sup> T-181-Red2-ENG, page 56, lines 5 – 10.

<sup>3007</sup> T-181-Red2-ENG, page 53, line 21 to page 54, line 7 (P-0014).

<sup>3008</sup> T-181-Red2-ENG, page 54, line 19 to page 55, line 15 (P-0014); T-124-CONF-ENG, page 69, lines 13 – 21 (P-0041); T-174-CONF-ENG, page 47, line 23 to page 48, line 7, T-175-CONF-ENG, page 4, line 22 to page 5, line 7 (P-0055). See also the decree appointing members of the government, EVD-OTP-00721 dated 3 September 2002, signed by Thomas Lubanga.

<sup>3009</sup> T-125-Red2-ENG, page 17, line 19 to page 19, line 5.

<sup>3010</sup> EVD-OTP-00734.

<sup>3011</sup> T-181-CONF-ENG, page 94, line 1 to page 95, line 8.

<sup>3012</sup> T-181-CONF-ENG, page 92, line 23 to page 93, lines 7 – 17.



Lubanga.<sup>3013</sup> When dealing with meetings the accused held on military matters, P-0014 gave evidence that, at the outset, the accused had insufficient technical knowledge of military matters, but he learnt quickly and easily became familiar with the subject.<sup>3014</sup> P-0014 was told, even at this early stage, that Mr Lubanga either approved or disapproved certain operations that were being planned.<sup>3015</sup>

1146. As an example of Thomas Lubanga's authority within the UPC/FPLC, P-0014 gave evidence that after September 2002, all the members of the UPC executive<sup>3016</sup> had been ordered by President Lubanga to go to Mandro for two weeks' training.<sup>3017</sup> The defence challenged this indirect evidence, but P-0014 maintained his account.<sup>3018</sup>

1147. After several months in power, Thomas Lubanga appointed a new executive by the UPC/FPLC decree of 11 December 2002.<sup>3019</sup> Article 1 stated that defence and security were the responsibility of the Presidency and the positions of Minister and Deputy Minister for Defence were unassigned.<sup>3020</sup> Thomas Lubanga therefore retained the defence and security portfolio for himself.

1148. The Chamber heard evidence on the involvement of the accused in planning and contributing to operations. Thomas Lubanga's private secretary (D-0011) gave evidence that whilst he was working for the accused from, approximately, August 2002 to September 2004,<sup>3021</sup> he

<sup>3013</sup> T-175-CONF-ENG, page 33, lines 13 – 14.

<sup>3014</sup> T-181-CONF-ENG, page 97, lines 2 – 4.

<sup>3015</sup> T-181-CONF-ENG, page 97, lines 4 – 6.

<sup>3016</sup> T-185-Red2-ENG, page 11, lines 9 – 11.

<sup>3017</sup> T-182-CONF-ENG, page 19, lines 19 – 25.

<sup>3018</sup> T-185-Red2-ENG, page 13, lines 18 – 21.

<sup>3019</sup> EVD-OTP-00687.

<sup>3020</sup> EVD-OTP-00687.

<sup>3021</sup> T-346-ENG, page 74, lines 6 – 15 and page 75, lines 3 – 6.

was responsible for procuring the military rations or supplies that had been purchased by Thomas Lubanga.<sup>3022</sup>

1149. During an interview at his residence in Bunia,<sup>3023</sup> the accused indicated the UPC/FPLC had bought ammunition from Uganda,<sup>3024</sup> and in a letter dated 12 July 2003, a General in the “*Force Multinationale Intérimaire*” was requested to return weapons seized from the UPC/FPLC at a camp in Miala.<sup>3025</sup> The Chamber notes the accused did not sign this letter personally and someone signed it on his behalf.

1150. P-0016 gave evidence to the effect that President Lubanga was not involved in planning military operations conducted by the FPLC because he was not a soldier, and instead he waited at his residence for reports from his Chief of Staff and others.<sup>3026</sup> Instead, he suggested Mr Lubanga had a role securing the provisions that were used by the soldiers during these operations.<sup>3027</sup> P-0016 indicated the accused issued instructions for this purpose, in that he “would give it to the Chief of Staff. And the G4 would go out to get food.”<sup>3028</sup> P-0016 testified that Mr Lubanga negotiated with the traders, whom P-0016 referred to as the “brothers” of the accused, to collect money or vehicles for the army (the latter were used to secure food or for transport).<sup>3029</sup> P-0016 also indicated “he couldn’t have another role” other than providing logistical support.<sup>3030</sup> P-0016 testified that following “negotiations” between Mr Lubanga, Bosco Ntaganda,

<sup>3022</sup> T-346-ENG, page 75, lines 14 – 16.

<sup>3023</sup> EVD-OTP-00584 at 01:03:00 – 01:04:00; T-130-Red2-ENG, page 39, lines 5 – 10 and lines 22 – 23.

<sup>3024</sup> EVD-OTP-00584, interpretation from transcript T-130-Red2-ENG, page 48, lines 14 – 19.

<sup>3025</sup> EVD-OTP-00685.

<sup>3026</sup> T-190-Red2-ENG, page 9, lines 19 – 24.

<sup>3027</sup> T-190-Red2-ENG, page 10, line 10 to page 11, line 8.

<sup>3028</sup> T-190-Red2-ENG, page 10, lines 10 – 12.

<sup>3029</sup> T-190-Red2-ENG, page 10, line 24, to page 11, line 8.

<sup>3030</sup> T-190-Red2-ENG, page 10, line 10.

“Ali”<sup>3031</sup> and the RCD,<sup>3032</sup> weapons were dropped from aircraft at the military base in Mandro, where there was a weapons depot.<sup>3033</sup> The Chamber concludes there is strong evidence that the accused provided support for the troops in this way. However, the Chamber does not accept the evidence of P-0016 as to the extent of Mr Lubanga’s control over operations. His account was, at least in part, inconsistent and it was difficult to follow, and it was improbable when compared with other witnesses on this issue, whose evidence the Chamber has accepted.

1151. Other evidence demonstrates the accused was involved substantively in military affairs. P-0055 testified that the accused was involved in planning a particular operation in 2003 before fighting occurred between the UPC/FPLC and the UPDF in Bunia.<sup>3034</sup> The witness suggested the arrangements for this operation were made in the presence of the accused at the latter’s residence.<sup>3035</sup> More generally, the witness stated that when Bosco Ntaganda and the main staff planned operations, they informed the President of their requirements and he secured the necessary finances and logistical support.<sup>3036</sup> P-0055 also described an occasion when the accused gave instructions in the course of a tense military event and a “battle plan” was drawn up by the Chief of Staff in his office.<sup>3037</sup>

1152. P-0017 testified that after the operations in Kobu, Bambu and

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<sup>3031</sup> The Chamber notes that “Ali” could be referring to Ali Mbuyi, who was said to have replaced Idriss Bobale as G2. P-0016 said the G2 was responsible for security, T-189-CONF-ENG, page 5, line 20 to page 6, line 1 and page 80, lines 7 – 10 (P-0016).

<sup>3032</sup> T-189-Red2-ENG, page 43, line 20 to page 44, line 5.

<sup>3033</sup> T-189-Red2-ENG, page 43, lines 20 – 24.

<sup>3034</sup> T-175-CONF-ENG, page 10, lines 1 – 13.

<sup>3035</sup> T-175-Red2-ENG, page 10, line 24 to page 11, line 8.

<sup>3036</sup> T-178-Red2-ENG, page 61, line 21 to page 62, line 18 and page 63, lines 5 – 16; T-175-Red2-ENG, page 11, lines 8 – 11 and lines 20 – 21.

<sup>3037</sup> T-178-CONF-ENG, page 29, line 2 to page 31, line 19.

Lipri, most of his brigade returned to Bunia where it was billeted in the EPO camp close to the residence of the accused.<sup>3038</sup> While the witness was in Bunia, he escorted his brigade commander, Salumu, to the accused's residence although he was unaware of the reasons for the visit.<sup>3039</sup> After about an hour and a half, Commander Salumu left the meeting with the accused and told P-0017 that "[t]he orders were just to take the camp".<sup>3040</sup> The witness did not understand this to mean that Thomas Lubanga had issued these orders, but rather the commander did not want to tell him anything.<sup>3041</sup> Notwithstanding this lack of detail, P-0017's evidence concerning this meeting lends support to the account of P-0055.

1153. P-0014 testified that after August 2002, Adèle Lotsove, Neme Ngonza, Floribert Kisembo and Chief Kahwa were in Aru in order to deploy UPC soldiers peacefully and to mobilise the population in support of the UPC.<sup>3042</sup> The witness also testified that Adèle Lotsove had been entrusted by Thomas Lubanga to speak with the "notables" in Aru so as to gain support for the accused.<sup>3043</sup> They each made reports by telephone to Thomas Lubanga.<sup>3044</sup>

1154. P-0014 suggested the military participated in this exercise, given there were troops in Aru, and the Chief of Staff, Floribert Kisembo, led the UPC contingent and Commander Jérôme Kakwavu, who was accompanied by troops, was also present.<sup>3045</sup> The witness indicated Thomas Lubanga received reports from Floribert Kisembo

<sup>3038</sup> T-158-Red2-ENG, page 13, line 17 to page 14, line 10.

<sup>3039</sup> T-158-Red2-ENG, page 14, lines 3 to 17 and page 15, line 20 to page 16, line 13.

<sup>3040</sup> T-158-Red2-ENG, page 16, line 15 to page 17, line 1 (P-0017).

<sup>3041</sup> T-158-Red2-ENG, page 17, lines 2 – 7 (P-0017).

<sup>3042</sup> T-181-CONF-ENG, page 82, line 16 to page 84, line 6.

<sup>3043</sup> T-181-CONF-ENG, page 83, lines 19 – 22 and T-181-Red2-ENG, page 84, lines 15 – 23.

<sup>3044</sup> T-181-Red2-ENG, page 82, lines 20 – 21.

<sup>3045</sup> T-181-Red2-ENG, page 83, line 23 to page 84, line 3 and lines 7 – 11.

by telephone,<sup>3046</sup> and Chief Kahwa and Floribert Kisembo spoke to Thomas Lubanga, who had ordered the transfer of soldiers from Bunia.<sup>3047</sup> P-0014 stated that Chief Kahwa and Floribert Kisembo were informed by Thomas Lubanga that soldiers would be arriving shortly.<sup>3048</sup> P-0014 understood this was an order, given the soldiers then arrived.<sup>3049</sup> P-0014 noticed they were wearing new uniforms and they had been given new weapons.<sup>3050</sup>

1155. In this context P-0014 also gave evidence on the accused's involvement in procuring weapons and uniforms.<sup>3051</sup> According to information he received, weapons and uniforms had been airdropped near Mandro, having come from Rwanda pursuant to an agreement between the UPC and Rwanda.<sup>3052</sup> P-0014 testified that Chief Kahwa and Beiza Nembe had already established contacts in this context.<sup>3053</sup> The witness suggested the weapons delivery was arranged on the basis of instructions given by the accused before he was detained in Kinshasa, and that the accused was informed about developments in the field and was in direct contact with the Rwandan authorities.<sup>3054</sup> The Chamber accepts this evidence.

1156. However, the Chamber also heard evidence to the effect that Thomas Lubanga may not have been in full control of the FPLC, and that other members of his staff made decisions that he had not

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<sup>3046</sup> T-181-CONF-ENG, page 82, lines 20 – 21, page 83, line 11 and page 85, lines 9 – 14.

<sup>3047</sup> T-181-CONF-ENG, page 83, line 3 to page 86, line 3.

<sup>3048</sup> T-181-CONF-ENG, page 82, line 13 to page 86, line 21.

<sup>3049</sup> T-181-CONF-ENG, page 83, lines 3 – 11 and page 85, lines 16 – 25.

<sup>3050</sup> T-181-Red2-ENG, page 87, lines 11 – 19.

<sup>3051</sup> T-181-CONF-ENG, page 87, line 11 to page 89, line 25.

<sup>3052</sup> T-181-CONF-ENG, page 88, line 21 to page 89, line 10 and page 89, line 23 to page 91, line 23. P-0014 received the same information from another source as well. T-181-CONF-ENG, page 90, lines 14 – 15.

<sup>3053</sup> T-181-CONF-ENG, page 88, line 21 to page 89, line 4 and page 89, line 23 to page 91, line 8 (P-0014).

<sup>3054</sup> T-181-CONF-ENG, page 90, line 24 to page 92, line 6.

necessarily agreed to or authorised.

1157. P-0012 testified that although on 5 March 2003 Thomas Lubanga had indicated that he did not want the FPLC to attack the UPDF forces, his view had not prevailed.<sup>3055</sup> Similar evidence was given by P-0038, who said that Commander Salumu, as one of the UPC/FPLC brigade commanders in the field, was very angry after a meeting attended by the brigade commanders, the Chief of Staff and Thomas Lubanga, and he told P-0038 that the accused did not want to attack the Ugandans.<sup>3056</sup> However, Commander Salumu instructed P-0038 they were nonetheless to attack the following morning,<sup>3057</sup> and the battle of Bunia – when the FPLC attacked the Ugandan troops – took place on 6 March 2003.<sup>3058</sup> It is to be emphasised that the Chamber heard contradictory evidence concerning this incident.<sup>3059</sup>

1158. The defence suggests the evidence of P-0012 and P-0038 shows that the Military High Command could reverse Thomas Lubanga's decisions and thus he did not have effective power or control over the FPLC.<sup>3060</sup> However, the evidence concerning the battle with the Ugandans is unclear and it is of note that P-0012 and P-0038 gave indirect evidence. Although the witnesses corroborate each other to the extent that Thomas Lubanga may not, certainly at one stage, have agreed with the final decision, it is impossible to determine whether Thomas Lubanga was overruled or if he was persuaded by his staff that the battle should occur. In any event, the evidence shows that the accused was centrally involved in these discussions and was consulted

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<sup>3055</sup> T-169-CONF-ENG, page 48, line 22 to page 49, line 14 and page 50, lines 5 – 8.

<sup>3056</sup> T-114-Red2-ENG, page 74, line 15 to page 75, line 17.

<sup>3057</sup> T-114-Red2-ENG, page 75, lines 17 – 18.

<sup>3058</sup> T-114-Red2-ENG, page 74, lines 7 – 11.

<sup>3059</sup> See references in ICC-01/04-01/06-2748-Conf, para. 260.

<sup>3060</sup> ICC-01/04-01/06-2773-Conf, paras 474 - 475.

on relevant military decisions.

1159. In addition to his evidence on the logistical assistance provided by the accused, P-0016 also appeared to suggest, at least potentially, that the Chief of Staff, Floribert Kisembo, and his two deputies, Bosco Ntaganda and Mr Nfomo, presented various military issues to the President only after they had been resolved.<sup>3061</sup> The inferences to be drawn from this particular evidence are uncertain. However, in light of the material overall, including an incident during which Bosco Ntaganda and Floribert Kisembo were reprimanded for acting without informing the accused,<sup>3062</sup> the Chamber is not persuaded that it demonstrates, or establishes the real possibility, that the authority of the accused was limited or undermined by his staff.

1160. On the issue of appointments within the FPLC, P-0016 understood that the Chief of Staff, Floribert Kisembo, proposed his own appointment within the FPLC hierarchy.<sup>3063</sup> Further, P-0016 suggested that Idriss Bobale was removed as the G2 responsible for military and civilian security and replaced by one of Bosco Ntaganda's brothers, Ali Mbuyi, because Mr Ntaganda wanted to have a member of his family in this position.<sup>3064</sup>

1161. Similarly, P-0055 indicated that although President Lubanga officially appointed him to his position within the hierarchy of the FPLC,<sup>3065</sup> he believed the decision may have been made by certain leaders within the main staff (the "high command"), and thereafter

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<sup>3061</sup> T-189-Red2-ENG, page 64, lines 3 – 20.

<sup>3062</sup> See reference to evidence of the relevant witness in ICC-01/04-01/06-2748-Conf, para. 262.

<sup>3063</sup> T-189-Red2-ENG, page 62, lines 8 – 16.

<sup>3064</sup> T-189-Red-ENG, page 8, line 11 to page 9, line 14.

<sup>3065</sup> T-174-CONF-ENG, page 47, line 23 to page 48, line 7, T-175-CONF-ENG, page 4, line 22 to page 5, lines 5 – 7 and T-178-CONF-ENG, page 16, lines 18 – 22.

simply endorsed by Thomas Lubanga.<sup>3066</sup> P-0055 indicated that a member of the main FPLC staff treated him as a member of the UPC/FPLC prior to his appointment and he helped him with insignificant tasks, despite the lack of a letter of appointment at that time.<sup>3067</sup> The defence suggests the circumstances of P-0055's later appointment confirm that the accused did not exercise any *de facto* control over the military.<sup>3068</sup> The defence also refers to a mission when P-0055 accompanied a high-ranking FPLC official to distribute weapons prior to his appointment, and suggests Mr Lubanga was unaware of this involvement by P-0055.<sup>3069</sup> However, the latter stated that although he participated in this weapons delivery at a particular location, he accompanied the high-ranking FPLC officer "as a visitor" rather than in an official capacity.<sup>3070</sup>

1162. The Chamber is satisfied that notwithstanding the undoubted influence and the various duties of Floribert Kisembo and Bosco Ntaganda as regards appointments and other staffing matters, given the inevitable necessity for the President to delegate a large number of significant tasks and the structure of the UPC/FPLC, they remained under his ultimate authority.

1163. That said, it is necessary to address further evidence on this issue. P-0017 confirmed the extensive statements he had made to the investigators to the effect that Floribert Kisembo was in charge of the army; that his influence was greater than that of Thomas Lubanga; and

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<sup>3066</sup> T-178-CONF-ENG, page 12, lines 20 – 24, page 13, line 3 to page 14, line 22.

<sup>3067</sup> T-178-CONF-ENG, page 10, lines 19 – 24.

<sup>3068</sup> ICC-01/04-01/06-2773-Red-tENG, para. 484.

<sup>3069</sup> ICC-01/04-01/06-2773-Red-tENG, para. 484.

<sup>3070</sup> T-178-Red2-ENG, page 9, lines 2 – 15.



the latter played a political rather than a military role.<sup>3071</sup> This witness never personally heard President Thomas Lubanga give military commands, and he said it was the Chief of Staff, Floribert Kisembo, who visited the army and issued orders.<sup>3072</sup> P-0017 testified that while he was in Mamedi with Mr Kisembo and they were discussing their return to Bunia, Mr Kisembo commented that the President habitually talked about political affairs, but “this time” they would use arms to pacify the situation if necessary.<sup>3073</sup> P-0017 also described an incident when Floribert Kisembo, accompanied by Thomas Lubanga, visited the soldiers on their return from military training in Rwanda, in about November 2002.<sup>3074</sup> P-0017 suggested he and other soldiers were surprised to see Mr Lubanga wearing a military uniform, because the President was a political figure.<sup>3075</sup> According to P-0017:

I went to Mandro. There were recruits there. I did not hear the name of Thomas. Nobody talked about the influence of Thomas. There was more talk of Kahwa instead, and that's why I have always considered, even after I left the UPC, I have always considered that the person in charge of military affairs in the UPC is Kahwa. That's my opinion. When I look at the activities carried out by Mr. Lubanga when we were in the UPC, when I look at those activities, I will say that he, rather, handled the political side of things.<sup>3076</sup>

1164. The prosecution suggests P-0017 may not necessarily have been aware of the accused's role in giving military orders, because he was with Commander Salumu's brigade.<sup>3077</sup> The Chamber notes that although P-0017 provided detailed evidence about lower-level military structures and practices in the field, his testimony that Thomas

<sup>3071</sup> T-160-Red2-ENG, page 41, lines 18 – 25, page 42, line 17 to page 43, line 11 and page 44, line 10 to page 46, line 16.

<sup>3072</sup> T-160-Red2-ENG, page 44, line 25 to page 45, line 2 and page 45, lines 8 – 11.

<sup>3073</sup> T-160-Red2-ENG, page 45, lines 4 – 8.

<sup>3074</sup> T-154-Red2-ENG, page 40, lines 7 – 12, page 66, line 25 to page 67, line 2 and page 69, line 2 to page 71, line 11.

<sup>3075</sup> T-160-Red2-ENG, page 49, line 12 to page 50, line 6.

<sup>3076</sup> T-160-Red2-ENG, page 46, lines 18 – 25.

<sup>3077</sup> ICC-01/04-01/06-2748-Red, para. 254.

Lubanga did not play a military role was essentially a general impression he had formed, based in part on the fact that “nobody [at Mandro] talked about the influence of Thomas”.<sup>3078</sup> The witness made it clear he never “personally heard or assisted or attended personally an occasion in which orders were given by President Thomas Lubanga”.<sup>3079</sup> However, when asked if the Chief of Staff had to report to anyone above him, the witness unequivocally stated that whilst Floribert Kisembo, the Chief of Staff, “was the supreme chief in the army, the president of the UPC was the person above him”.<sup>3080</sup> Therefore, although P-0017 may have formed the impression that Floribert Kisembo’s influence in the army was greater than that of the accused, he critically conceded that the President of the UPC/FPLC was the Chief of Staff’s superior within the hierarchy.

1165. P-0017 further testified that, after the Artemis operation in June 2003<sup>3081</sup> and the ensuing fighting, Floribert Kisembo attempted to become the President of the UPC/FPLC when Thomas Lubanga was in Kinshasa, and in fact proclaimed himself President of the UPC/FPLC when he returned to Bunia.<sup>3082</sup> However, the attempted coup in December 2003 was unsuccessful and the accused was confirmed in his role as President of the UPC/FPLC the same month.<sup>3083</sup> Given the date of the incident, it is not an indication of a lack of authority on the part of the accused during the period of the charges.

1166. D-0011 referred to a period before May 2003 “during which we

<sup>3078</sup> T-160-Red2-ENG, page 46, lines 18 – 19.

<sup>3079</sup> T-160-Red2-ENG, page 44, line 25 to page 45, line 2.

<sup>3080</sup> T-154-Red2-ENG, page 24, lines 14 – 19.

<sup>3081</sup> D-0019 stated that Artemis was deployed in June 2003, T-345-ENG, page 51, line 25 to page 52, line 3.

<sup>3082</sup> T-160-Red2-ENG, page 56, lines 7 – 20.

<sup>3083</sup> Letter condemning the attempted coup and confirming Thomas Lubanga as President, signed by the Interim President of the UPC/FPLC, dated 9 December 2003: EVD-D01-01092; D-0019 confirmed that he was Interim President in the absence of Thomas Lubanga, T-342-ENG, page 52, lines 2 – 9.

[the UPC/FPLC] weren't in a position to manage affairs in the territory".<sup>3084</sup> D-0037 likewise gave testimony that there was a period when the structures within the UPC/FPLC may not have been functioning: D-0037 stated that the various divisions of the main staff continued to function in Bunia up until the war with the Ugandans.<sup>3085</sup> After the UPC was driven out of Bunia on 6 March 2003, the witness joined other troops in order to find shelter from the Ugandans, who were hunting down anyone who had served with the FPLC.<sup>3086</sup> When the Ugandans left in May 2003, the FPLC and other armed groups returned to Bunia.<sup>3087</sup> D-0037 maintained it was difficult to distinguish the FPLC troops from other forces,<sup>3088</sup> given everyone carried weapons and there was a lack of control over those in the military.<sup>3089</sup> This apparently chaotic situation is reflected in the minutes, drafted and signed by D-0037, of a meeting on 16 June 2003 in Bunia<sup>3090</sup> that was attended by, amongst others, Rafiki Saba and Bosco Ntaganda.<sup>3091</sup> It was reported that unlike the period before 6 March 2003, the army was undisciplined and the issue of "independent" troops needed to be addressed.<sup>3092</sup> It was also said it was necessary to demobilise the child soldiers and to deliver them to the NGOs, and in this context there was reference to a UPC demobilisation decree of 1 June 2003.<sup>3093</sup>

1167. The defence further suggests the FPLC was a precarious alliance

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<sup>3084</sup> T-347-ENG, page 35, line 25 to page 36, line 5; D-0011 described where he and the accused went when they had to flee between the 6 March 2003 when the UPC/FPLC was forced out of Bunia and the end of May when the FPLC had retaken Bunia and they could return, T-347-ENG, page 12, line 5 to page 14, line 9.

<sup>3085</sup> T-349-ENG, page 23, line 25 to page 24, line 5.

<sup>3086</sup> T-349-ENG, page 15, line 21 to page 16, line 1.

<sup>3087</sup> T-349-ENG, page 16, lines 9 – 23.

<sup>3088</sup> T-349-ENG, page 16, line 24 to page 17, line 2.

<sup>3089</sup> T-349-ENG, page 17, lines 4 – 12.

<sup>3090</sup> T-349-ENG, page 17, lines 21 – 25 and page 19, lines 6 – 15 (D-0037).

<sup>3091</sup> EVD-D01-01098 and T-349-ENG, page 18, line 23 to page 19, line 2 (D-0037).

<sup>3092</sup> EVD-D01-01098 at page 2. [Unofficial translation.] Original: "*Je sais qu'il y a des troupes indépendantes, mais il faut que cela cesse immédiatement.*"

<sup>3093</sup> EVD-D01-01098.

of autonomous forces rather than a properly structured army under a commander-in-chief, as indicated by the continuous stream of defections by the main FPLC commanders, along with their troops.<sup>3094</sup> For instance, P-0055 testified that a few days before 6 March 2003, Jérôme Kakwavu left the UPC and founded his own movement, the FAPC.<sup>3095</sup> P-0055 also indicated that at about this time, commanders Munyalizi, Tchaligonza and Kasangaki left the UPC and the latter two established a separate movement, PUSIC, under the leadership of Chief Kahwa.<sup>3096</sup> The defence submits the additional defection by the Chief of Staff, Floribert Kisembo, and his troops in December 2003 reveals the autonomy and independent authority of the military leaders, thereby demonstrating the accused's lack of a central role in the FPLC's military structure, which was headed by Floribert Kisembo.<sup>3097</sup>

1168. However, during an interview Thomas Lubanga gave at his residence in Bunia in early June 2003,<sup>3098</sup> he said the situation in Bunia was relatively calm following the arrival of the UPC army.<sup>3099</sup> Mr Lubanga explained he was the President of the UPC and he described the FPLC army as trained, equipped, well organised and experienced.<sup>3100</sup> He distinguished the FPLC from other armed groups, suggesting that it is not a "militia", but an army built on political objectives.<sup>3101</sup> Thomas Lubanga referred to the UPC's absence from

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<sup>3094</sup> ICC-01/04-01/06-2773-Red-tENG, para. 815.

<sup>3095</sup> T-178-Red2-ENG, page 18, line 22 to page 19, line 1 and page 19, line 16 to page 20, line 5.

<sup>3096</sup> T-178-Red2-ENG, page 63, line 17 to page 64, line 8.

<sup>3097</sup> ICC-01/04-01/06-2773-Red-tENG, paras 816 and 817, referring to EVD-D01-01092, a letter on official UPC/FPLC letterhead dated 9 December 2003 referring to an attempted coup by Commander Kisembo and Daniel Litsha and recognising Thomas Lubanga as the President.

<sup>3098</sup> EVD-OTP-00584; T-130-Red2-ENG, page 36, line 18 and page 39, lines 5 – 10 and lines 22 – 23.

<sup>3099</sup> EVD-OTP-00584, starting at 00:58:38. Interpretation in T-130-Red2-ENG, page 42, line 20 to page 43, line 3.

<sup>3100</sup> Interpretation in T-130-Red2-ENG, page 43, line 25 to page 44, line 11.

<sup>3101</sup> Interpretation in T-130-Red2-ENG, page 44, lines 6 – 11.

Bunia for a few months between 6 March and 12 June,<sup>3102</sup> and he asserted the Ugandans had created a “confusing situation” in Ituri by distributing arms and creating divisions amongst the people, in order to justify their continued presence in the region.<sup>3103</sup> He said the Ugandans had armed child soldiers who had previously been demobilised during the UPC’s absence between March and June.<sup>3104</sup>

1169. Although the March 2003 conflict with the Ugandans and the defections of some of the commanders in the FPLC appear to have had an adverse effect on the FPLC, there is no suggestion that it collapsed. A number of official documents, including the demobilisation order of 1 June 2003, and the evidence about a variety of meetings demonstrate that the UPC/FPLC continued to function after March 2003. Additionally, taking into account the statements of the accused in the interview just referred to, the Chamber is persuaded that he exercised substantive authority as President and Commander-in-Chief. Overall, the accused was more than the UPC/FPLC’s figurehead: he was the organisation’s active President and he had ultimate control, including as regards military matters. The accused was involved in planning military operations and he played a key role in providing logistical support, including weapons, ammunition, food, uniforms, military rations and other supplies for the FPLC troops. Furthermore, Mr Lubanga appointed his co-perpetrators to the different positions they held within the political and military structure of the UPC/FPLC. The evidence demonstrates that the UPC/FPLC had a clear hierarchy with lines of reporting and communication. This issue is described in greater detail below. In summary, the accused was the ultimate

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<sup>3102</sup> Interpretation in T-130-Red2-ENG, page 48, lines 22 – 23.

<sup>3103</sup> Interpretation in T-130-Red2-ENG, page 48, lines 5 – 13.

<sup>3104</sup> Interpretation in T-130-Red2-ENG, page 48, lines 14 – 24.

authority in that political-military structure.

*(2) Other staff in the UPC*

1170. The Chamber heard other evidence on the general hierarchy and structures within the UPC/FPLC, as well as the functions exercised by some of its staff.

1171. P-0041 gave evidence concerning the organisation of the UPC/FPLC in September 2002, highlighting its political and military wings. There was a governor and various territorial administrators, and the President appointed the individuals who were responsible for the military.<sup>3105</sup> P-0041 suggested that the administration in Ituri was comparable to the government of a country, and the national secretary for each domain was not only superior to the provincial governor but worked directly with the office of the UPC President.<sup>3106</sup> P-0041 expressed the view that the President was uppermost in the hierarchy, followed by the secretary general, the ministers or national secretaries, the governor and the various other officials who controlled the territory.<sup>3107</sup> It follows from this testimony that the President was able exercise authority over all those in the administration.

1172. In 2002 and 2003, General Floribert Kisembo was the Chief of Staff,<sup>3108</sup> and he served under Thomas Lubanga, the President of the

<sup>3105</sup> T-125-Red2-ENG, page 27, lines 5 – 8.

<sup>3106</sup> T-125-Red2-ENG, page 26, lines 2 – 9.

<sup>3107</sup> T-125-Red2-ENG, page 26, lines 13 – 17.

<sup>3108</sup> T-154-Red2-ENG, page 21, lines 11 – 12 and 21 – 23 (P-0017 gave evidence on the staff hierarchies for the time he was in the UPC/FPLC, which was from early 2002 to August 2003, T-154-Red2-ENG, page 16, lines 18 – 20 and page 17, lines 11 – 15); T-175-CONF-ENG, page 17, lines 14 – 17 (P-0055); T-168-Red2-ENG, page 46, lines 6 – 8 (P-0012); T-125-Red2-ENG, page 27, line 8 (P-0041); T-188-CONF-ENG, page 95, lines 7 – 8 and 11 – 13 (P-0016); T-113-Red2-ENG, page 32, lines 1 – 5 (P-0038).

UPC/FPLC.<sup>3109</sup> Bosco Ntaganda was the Deputy Chief of Staff with responsibility for military operations;<sup>3110</sup> Chief Kahwa was the Minister of Defence (but only at the outset);<sup>3111</sup> Professor Dhetchuvi was the Minister of Foreign Affairs;<sup>3112</sup> and Adèle Lotsove, Minister of Economy and Finance.<sup>3113</sup> Richard Lonema was the National Secretary of Economy, Commerce and Industry; John Tinanzabo, the National Secretary for Pacification and Reconciliation; and Djokaba Lambi Longa became the Assistant National Secretary of the Interior.<sup>3114</sup> Daniel Litsha became the First Secretary of the UPC/FPLC, a post that was initially referred to as the Secretary General of the UPC when the list of the executive was issued.<sup>3115</sup> Rafiki Saba worked with the staff at the main staff headquarters.<sup>3116</sup>

1173. The Chief of Staff in the UPC/ FPLC had two deputies: one was in charge of the administration and logistics and the other controlled intelligence, including operations.<sup>3117</sup> The latter was Bosco Ntaganda,<sup>3118</sup> who witnesses confirmed was inferior in rank to

<sup>3109</sup> T-154-Red2-ENG, page 24, lines 14 – 19 (P-0017); T-175-CONF-ENG, page 20, lines 3 – 4 and page 22, lines 12 – 23 (P-0055).

<sup>3110</sup> T-175-CONF-ENG, page 17, lines 14 – 17 (P-0055); P-0041 stated that Bosco Ntaganda was Floribert Kisembo's "assistant"; T-125-Red2-ENG, page 27, lines 8 - 9 (P-0041); T-113-Red2-ENG, page 32, lines 1 – 5 (P-0038); T-349-ENG, page 9, lines 5 – 7 and page 21, lines 13 – 15 (D-0037); T-168-Red2-ENG page 46, lines 6 - 7 (P-0012).

<sup>3111</sup> T-168-Red2-ENG, page 46, line 3 (P-0012); T-113-Red2-ENG, page 32, lines 1 – 5 and page 37, lines 7 – 8 (P-0038); EVD-OTP-00721, T-126-Red2-ENG, page 27, line 11 to page 28, line 1 (P-0041). The decree includes the title "Assistant National Secretary" rather than Minister.

<sup>3112</sup> T-168-Red2-ENG, page 46, lines 10 – 12 (P-0012); EVD-OTP-00721, T-126-Red2-ENG, page 27, lines 11 – 12 and page 27, line 21 to page 31, line 25 (P-0041). The decree includes the title "National Secretary" rather than Minister.

<sup>3113</sup> T-168-Red2-ENG, page 46, lines 13 – 14 (P-0012); EVD-OTP-00721.

<sup>3114</sup> EVD-OTP-00721; T-126-Red2-ENG, page 27, line 11 to page 28, line 1 (P-0041).

<sup>3115</sup> T-184-Red2-ENG, page 52, lines 2 – 6 (P-0014).

<sup>3116</sup> T-175-Red2-ENG, page 17, lines 19 – 22 (P-0055).

<sup>3117</sup> T-175-Red2-ENG, page 17, lines 14 – 17 (P-0055); P-0041 stated that Bosco Ntaganda was Floribert Kisembo's "assistant"; T-125-Red2-ENG, page 27, lines 8 - 9 (P-0041) and T-113-Red2-ENG, page 32, lines 1 – 5 (P-0038). T-188-Red2-ENG, page 95, lines 1 – 13 and T-189-Red2-ENG, page 76, lines 9 – 18 (P-0016).

<sup>3118</sup> T-175-CONF-ENG, page 17, lines 14 – 17 (P-0055); T-113-Red2-ENG, page 32, lines 1 – 5 (P-0038); T-349-ENG, page 9, lines 5 – 7 and page 21, lines 13 – 15 (D-0037); T-168-Red2-ENG page 46, lines 5 - 7 (P-0012).

Floribert Kisembo.<sup>3119</sup>

1174. Floribert Kisembo exercised authority over those at G1, G2, G3, G4 and G5 levels within the FPLC.<sup>3120</sup> The Chamber heard evidence that Luhala Mbala was the G1 responsible for staff management and the administration of the FPLC.<sup>3121</sup> Commander Idris Bobale, later replaced by Ali Mbuyi, was the G2 in charge of intelligence, surveillance and security.<sup>3122</sup> It was suggested that the G2 was responsible for training children in military intelligence.<sup>3123</sup> Floribert Kisembo appointed John Hoyeti as the G3, with responsibility for areas such as organisation, instruction and operations.<sup>3124</sup> P-0017 and P-0038 testified that Bosco Ntaganda was a G3,<sup>3125</sup> but given the strength of the evidence that he was the head of operations and in charge of the G3s, the Chamber has disregarded this contention. The G4, Papy Maki,<sup>3126</sup> was responsible for food and logistics.<sup>3127</sup> Eric Mbabazi, as G5, was concerned with relations between soldiers and civilians, and morale issues,<sup>3128</sup> and P-0038 referred to a further G5 by the name of Lobho.<sup>3129</sup> D-0037 gave evidence that these men, as heads

<sup>3119</sup> T-160-Red2-ENG, page 44, lines 2 – 5 (P-0017); T-178-CONF-ENG, page 47, line 6 to page 48, line 2 and T-175-CONF-ENG, page 18, line 5 to page 19, line 22 and page 21, line 13 to page 22, line 1 (P-0055), also referring to the flowchart of the army EVD-OTP-00452.

<sup>3120</sup> T-154-Red2-ENG, page 21, lines 11 – 13 (P-0017); T-188-Red2-ENG, page 95, lines 4 – 12 (P-0016); T-113-Red2-ENG, page 32, lines 8 – 9 (P-0038).

<sup>3121</sup> T-189-CONF-ENG, page 80, lines 2 – 6 (P-0016) and T-113-Red2-ENG, page 32, line 19 (P-0038).

<sup>3122</sup> T-154-Red2-ENG, page 24, lines 3 and 10 (P-0017, referring to “Ali”); T-189-Red2-ENG, page 5, line 22 to page 6, line 1 and page 8, lines 11 – 14 (P-0016); T-181-CONF-ENG, page 96, lines 7 – 9, page 97, line 25 to page 98, line 2 and page 98, lines 7 – 9 (P-0014).

<sup>3123</sup> T-184-Red-ENG, page 24, line 24 to page 25, line 1 (P-0014).

<sup>3124</sup> See for example transcript reference in ICC-01/04-01/06-2748-Conf, para. 240.

<sup>3125</sup> T-113-Red2-ENG, page 32, lines 15 – 16 and page 33, lines 4 – 5 (P-0038) T-154-Red2-ENG, page 24, lines 3 – 4 (P-0017).

<sup>3126</sup> T-189-Red2-ENG, page 80, lines 12 - 13 (P-0016).

<sup>3127</sup> T-113-Red2-ENG, page 32, line 9 and 16 – 17 (P-0038); T-154-Red2-ENG, page 24, lines 11 – 12 and T-158-Red2-ENG, page 34, line 9 (P-0017).

<sup>3128</sup> T-154-Red2-ENG, page 24, lines 4, 12 – 13 (P-0017); T-189-Red2-ENG, page 77, lines 11 – 19 (P-0016) and T-175-Red2-ENG page 17, lines 17 – 19 (P-0055, stating that the staff included an individual with the name of Mr Eric).

<sup>3129</sup> T-113-Red2-ENG, page 32, lines 10, 17 – 18.



of divisions, were ultimately responsible to the Chief of Staff, Commander Kisembo.<sup>3130</sup>

1175. As mentioned above, P-0055 suggested the Chief of Staff and his Deputy were responsible for the structure of the army, by establishing the sectors and brigades and deploying the troops.<sup>3131</sup> P-0017 testified that the brigades came under the army staff,<sup>3132</sup> and the brigade commanders were answerable to the sector commanders.<sup>3133</sup> P-0038 indicated the generals, including the brigade generals, had overall responsibility for the army.<sup>3134</sup> P-0055 provided details on the way the FPLC was organised, including information on sectors, brigades and battalions, with the help of various diagrams.<sup>3135</sup> Two witnesses who were UPC/FPLC soldiers further described the structure within the UPC/FPLC.<sup>3136</sup>

1176. The evidence demonstrates the UPC/FPLC was a well-structured organisation, with the accused and some of his alleged co-perpetrators discharging significant functions. The accused was clearly able to exercise authority over all those within the UPC/FPLC.

### *(3) Lines of reporting within the FPLC hierarchy*

1177. In order to establish whether the accused played an essential role in accordance with the common plan, the Chamber has examined whether reporting mechanisms were in place to ensure that he was fully informed of developments and was in a position to issue

<sup>3130</sup> T-349-ENG, page 22, line 23 to page 23, line 1.

<sup>3131</sup> T-175-Red2-ENG, page 30, lines 21 – 25, page 33, lines 7 – 10.

<sup>3132</sup> T-154-Red2-ENG, page 21, lines 13 – 16.

<sup>3133</sup> T-154-Red2-ENG, page 21, lines 14 – 15.

<sup>3134</sup> T-113-Red2-ENG, page 33, lines 14 – 16.

<sup>3135</sup> EVD-OTP-00452; EVD-OTP-00453; EVD-OTP-00454.

<sup>3136</sup> T-154-Red2-ENG, page 16, line 22 to page 17, line 15, page 21, lines 10 – 20, and page 34, line 7 to page 35, line 4 and a hand-drawn diagram of the army structures, EVD-OTP-00396 (P-0017); T-113-Red2-ENG, page 34, lines 4 – 8 and page 35, lines 1 – 8 (P-0038).

instructions that were communicated at an appropriate level within the FPLC hierarchy.

1178. P-0041 suggested, as set out above, that the governors reported to the national secretaries, who in turn reported to the Presidency.<sup>3137</sup> Floribert Kisembo and Bosco Ntaganda reported to the President and the Minister of Defence,<sup>3138</sup> and P-0016 said that if there was a problem with information, Bosco Ntaganda was in a position to provide information to the Minister of Defence, for onward transmission to the President.<sup>3139</sup> However, for problems with operations, Mr Ntaganda went directly to the President, as he alone could make a decision.<sup>3140</sup>

1179. Although there were some discrepancies in his evidence as to whether the reports were delivered on a daily or monthly basis,<sup>3141</sup> P-0055 testified that given his position within the UPC/FPLC,<sup>3142</sup> he provided information to President Lubanga on the military situation through the latter's secretary or office.<sup>3143</sup> P-0055's reports were based on the material he received from members of his staff.<sup>3144</sup> There were a number of reports that Mr Lubanga asked for personally,<sup>3145</sup> for instance about an incident in which several civilians had been murdered by UPC/FPLC troops.<sup>3146</sup> P-0055 also recalled personally handing over a second report to Mr Lubanga concerning a military

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<sup>3137</sup> T-125-Red2-ENG, page 26, line 22 to page 27, line 2, T-124-CONF-ENG, page 69, lines 13 – 25, page 71, line 21 to page 72, line 4, and page 74, lines 5 – 7 (P-0041); EVD-OTP-00384.

<sup>3138</sup> T-175-Red2-ENG, page 22, lines 17 – 20 (P-0055); T-189-Red2-ENG, page 5, lines 5 – 16 and T-189-Red2-ENG, page 6, lines 4 – 7 (P-0016).

<sup>3139</sup> T-189-Red2-ENG, page 7, lines 13 – 15.

<sup>3140</sup> T-189-Red2-ENG, page 7, lines 17 – 20 (P-0016).

<sup>3141</sup> See T-175-CONF-ENG, page 7, lines 12 – 14 as compared with T-175-CONF-ENG, page 14, lines 16 – 17 and page 15, lines 15 – 21 (P-0055).

<sup>3142</sup> T-175-CONF, page 17, line 16 to page 18, line 3.

<sup>3143</sup> T-175-Red2-ENG, page 7, lines 2 – 14 and page 14, line 22 to page 15, line 4.

<sup>3144</sup> T-175-Red2-ENG, page 15, line 23 to page 16, line 4.

<sup>3145</sup> T-175-Red2-ENG, page 7, lines 14 – 16 (P-0055).

<sup>3146</sup> T-175-CONF-ENG, page 8, lines 3 – 17 (P-0055).

confrontation in Bunia.<sup>3147</sup> In addition, P-0055 submitted reports to the Chief of Staff.<sup>3148</sup>

1180. P-0016 testified it was necessary for those at G-level to submit reports to the Chief of Staff, who then prepared his own report for his immediate superior on the basis of this information.<sup>3149</sup> P-0016 stated that the commander at Mandro, who attended at the training centre, communicated with Bosco Ntaganda and the Commander-In-Chief.<sup>3150</sup> D-0037 further indicated that Bosco Ntaganda, as Chief of Operations and Deputy Chief of Staff, was aware of the reports from the brigades and battalions in the field.<sup>3151</sup>

1181. P-0038 gave evidence that Floribert Kisembo issued orders to the brigade commanders, which were passed to the battalion and company commanders, who in turn transmitted them so that they reached the platoon commanders.<sup>3152</sup> Therefore, within the military, orders came down through the hierarchy.<sup>3153</sup>

1182. The prosecution also relies on various documents to show that Thomas Lubanga regularly received information on both important and trivial matters, and he issued orders.<sup>3154</sup> It submits that the G2, Idris Bobale, submitted reports and requests directly to the accused, as demonstrated by a request for the reopening of a training centre, dated December 2002.<sup>3155</sup> However, the Chamber has not attributed any weight to this latter document as it does not bear a particular date in

<sup>3147</sup> T-175-CONF-ENG, page 8, lines 6 – 8.

<sup>3148</sup> T-178-CONF-ENG, page 48, lines 18 – 20 and T-175-Red2-ENG, page 16, lines 5 – 9.

<sup>3149</sup> T-189-Red2-ENG, page 83, line 19 to page 84, line 4.

<sup>3150</sup> T-189-Red2-ENG, page 43, lines 5 – 19.

<sup>3151</sup> T-349-ENG, page 30, line 20 to page 31, line 5.

<sup>3152</sup> T-113-Red2-ENG, page 46, lines 1 – 19.

<sup>3153</sup> T-113-Red2-ENG, page 46, line 5.

<sup>3154</sup> ICC-01/04-01/06-2748-Red, paras 270 – 275.

<sup>3155</sup> ICC-01/04-01/06-2748-Red, para. 274; EVD-OTP-00666.

December 2002 or a document number, and it is not signed or stamped.

1183. The prosecution further submits that “[e]ven sector commanders, a level below main staff officers at Bunia, ensured that the accused was informed of key developments related to critical military operations, such as the takeover of Mongbwalu and the establishment of youth committees in the town”.<sup>3156</sup> In support, the prosecution refers to a decision of 27 December 2002, signed by a commander and a representative of the UPC/FPLC, which is copied to the President of the UPC/FPLC.<sup>3157</sup> In this document, appointments are made to different posts, including to the youth committees, in the city of Mongbwalu that had been liberated on 24 December 2002.<sup>3158</sup>

1184. In a presidential letter of 10 December 2002, the accused gave Floribert Kisembo instructions relating to the recovery of military equipment from the civilian population and he requested reports on this issue.<sup>3159</sup> In addition, a document dated 11 August 2003 from the President’s Cabinet office, that concerns the re-structuring of the FPLC military units in the interior, was copied to Thomas Lubanga.<sup>3160</sup> However, the defence submits it lacks probative value,<sup>3161</sup> and the Chamber notes that although it is printed on paper bearing the official UPC letterhead and a stamp, it is unsigned and a line has been drawn through it. On this basis, it has not been relied on by the Chamber.

1185. An order dated 22 October 2003 addressed to all the FPLC Brigade Commanders and signed by the Chief of Staff, which relates to

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<sup>3156</sup> ICC-01/04-01/06-2748-Red, para. 274.

<sup>3157</sup> EVD-OTP-00710.

<sup>3158</sup> EVD-OTP-00710.

<sup>3159</sup> EVD-OTP-00712.

<sup>3160</sup> EVD-OTP-00497.

<sup>3161</sup> ICC-01/04-01/06-2773-Red-tENG-Anx2, page 9.

the recovery of public assets, was copied to the accused.<sup>3162</sup> Even though it is dated shortly after the period of the charges, the Chamber considers it gives an indication as to the kind of information that was brought to the attention of Thomas Lubanga in his capacity as President of the UPC/FPLC.

1186. The prosecution also refers to the demobilisation orders, which will be addressed in detail below, and it suggests that despite their alleged deceptive purpose, they reflect the military authority of the accused.<sup>3163</sup>

1187. A document informing the accused of the appropriation of a motorbike by an FPLC soldier, dated 16 December 2002,<sup>3164</sup> supports the prosecution's suggestion that trivial information as well as essential matters relating to military operations and the FPLC structure were reported to the accused.<sup>3165</sup>

1188. A monthly report sent by the G5, Eric Mbabazi,<sup>3166</sup> provides a comprehensive survey of the military situation facing, and the difficulties encountered by, the FPLC. The defence submits that it contradicts the claim that the accused was closely informed about the FPLC's activities, because it was addressed to the Chief of Staff alone.<sup>3167</sup> This argument is unpersuasive, because P-0055 and P-0016 testified that Bosco Ntaganda and Floribert Kisembo reported to the accused,<sup>3168</sup> and the fact that it was addressed to the Chief of Staff, Mr

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<sup>3162</sup> EVD-OTP-00725.

<sup>3163</sup> ICC-01/04-01/06-2748-Red, para. 272.

<sup>3164</sup> ICC-01/04-01/06-2748-Red, para. 275; EVD-OTP-00510.

<sup>3165</sup> ICC-01/04-01/06-2748-Red, para. 275.

<sup>3166</sup> EVD-OTP-00457.

<sup>3167</sup> ICC-01/04-01/06-2773-Red-tENG, para. 807.

<sup>3168</sup> T-175-Red2-ENG, page 22, lines 19 – 23 (P-0055); T-189-Red2-ENG, page 5, lines 5 – 16 and page 6, lines 4 – 7 (P-0016).

Kisembo, who was the official head of the G-level staff,<sup>3169</sup> is consistent with the UPC/FPLC structures as described to the Chamber.

1189. When setting out the circumstances of his appointment, P-0016 indicated there was a list setting out the various positions in the FPLC that bore the signature of the Chief of Staff, Floribert Kisembo, which must have been sent to the Office of the President, Thomas Lubanga, since everything that happened within the military was reported to him.<sup>3170</sup> P-0016 initially indicated that the President as Commander-in-Chief should have been informed about any military matters,<sup>3171</sup> asserting that “[i]f an army is well-structured, then that’s how things are done”.<sup>3172</sup> However, as underlined by the defence,<sup>3173</sup> P-0016 also stated that the UPC/FPLC was not a “real” army, as they were not properly trained.<sup>3174</sup> In particular, the witness asserted that whereas he had received training for nine months as a soldier in the Congolese national armed forces,<sup>3175</sup> the FPLC companies and platoons were trained “within a week” or were not trained at all.<sup>3176</sup> On this basis, the witness indicated that the President was not told everything, or informed about all the operations.<sup>3177</sup> He therefore appeared to suggest that although reporting mechanisms were in place, they were not always implemented. Notwithstanding this evidence, given the testimony of other witnesses that there was a hierarchy and a regular flow of information, and the documentary evidence identified by the

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<sup>3169</sup> T-154-Red2-ENG, page 21, lines 12 – 13 (P-0017), T-188-Red2-ENG, page 95, lines 4 – 5 and 11 – 12 (P-0016), T-113-Red2-ENG, page 32, lines 8 – 9 (P-0038) and T-349-ENG, page 22, line 23 to page 23, line 1 (D-0037).

<sup>3170</sup> T-189-Red2-ENG, page 62, line 8 to page 64, line 5.

<sup>3171</sup> T-189-Red2-ENG, page 64, lines 3 – 5 and 10 – 15 and lines 19 – 20.

<sup>3172</sup> T-189-Red2-ENG, page 84, lines 17 – 18.

<sup>3173</sup> ICC-01/04-01/06-2773-Red-tENG, para. 812.

<sup>3174</sup> T-189-Red2-ENG, page 84, lines 17 – 19.

<sup>3175</sup> T-189-Red2-ENG, page 41, lines 8 – 10.

<sup>3176</sup> T-189-Red2-ENG, page 84, lines 19 – 22.

<sup>3177</sup> T-189-Red2-ENG, page 84, lines 22 – 24.

prosecution, the Chamber is unpersuaded by P-0016 that there was a lack of effective reporting.

1190. In light of the totality of this evidence, the Chamber is persuaded that structured and efficient reporting mechanisms were in place to ensure that the accused was informed of all significant developments within the FPLC. He was, therefore, in a position to give relevant instructions, which were distributed, as needed, down through the FPLC hierarchy.

#### *(4) Means of communication*

1191. Turning to the question of whether the necessary technical requirements were in place in order for information and instructions to be communicated within the FPLC hierarchy, P-0055 testified that the main members of staff had a “call” radio for long distances, and they otherwise used Motorolas.<sup>3178</sup> P-0055 also referred to the “manpack, [...] a type of radio for communicating over long distances”,<sup>3179</sup> which was used at the brigade level.<sup>3180</sup> P-0055 recalled an instance in which Thomas Lubanga had personally called him using a Motorola.<sup>3181</sup>

1192. P-0016 corroborated P-0055’s evidence that within the FPLC, in addition to the standard Motorolas<sup>3182</sup> they used F-13 devices, which were large Motorolas, referred to as “phonies”.<sup>3183</sup> Bosco Ntaganda, Floribert Kisembo, Thomas Lubanga<sup>3184</sup> and other individuals in Aru had these devices, which had special frequency ranges and antennae

<sup>3178</sup> T-175-Red2-ENG, page 24, lines 15 – 18 and page 25, line 23 to page 26, line 5.

<sup>3179</sup> T-175-Red2-ENG, page 31, line 17 to page 32, line 14 and page 45, lines 10 – 12.

<sup>3180</sup> T-175-Red2-ENG, page 49, line 1.

<sup>3181</sup> T-175-CONF-ENG, page 26, lines 8 – 19.

<sup>3182</sup> T-190-Red2-ENG, page 18, lines 9 – 11 (P-0016), T-175-Red2, page 44, lines 15 – 18 (P-0055).

<sup>3183</sup> T-190-Red2-ENG, page 17, line 24 to page 18, line 4 (P-0016),

<sup>3184</sup> T-190-Red2-ENG, page 24, lines 4 – 14 (P-0016).

for long-range communication.<sup>3185</sup>

1193. Video evidence introduced in the course of P-0030's testimony depicts Mr Tinanzabo, at the time the National Secretary for Pacification,<sup>3186</sup> holding a Motorola radio during the accused's visit to the Rwampara camp, on 12 February 2003.<sup>3187</sup> Similarly, FPLC Commander Liganda had a radio in his hand<sup>3188</sup> during a meeting of UPC and Lendu representatives near the city of Lipri.<sup>3189</sup>

1194. P-0016 stated that the communications included, for example, morning security updates between the units, or distributing other news.<sup>3190</sup> P-0016 testified that during operations, phonies and Motorolas were used in the field and orders were given in this way.<sup>3191</sup> The Chief Operator responsible for communications controlled the phonies from Bosco Ntaganda's residence, and the messages that were sent and received were recorded in personal logbooks.<sup>3192</sup> The Chief of Staff, Floribert Kisembo, had his own personal logbook, as did other high-ranking UPC/FPLC officers.<sup>3193</sup> P-0038's evidence on the use of Motorolas and phonies was that during battles the higher commanders and those at the headquarters were aware of the details of what was occurring, enabling them to issue orders.<sup>3194</sup> Some of the higher commanders, such as General Kisembo, had a satellite

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<sup>3185</sup> T-190-Red2-ENG, page 18, lines 6 – 16 (P-0016).

<sup>3186</sup> T-128-Red2-ENG, page 34, lines 9 – 13.

<sup>3187</sup> EVD-OTP-00570 at 2:45 and T-128-Red2-ENG, page 34, lines 7 – 16 and page 37, lines 2 – 6 (P-0030).

<sup>3188</sup> EVD-OTP-00572 at 00:03:27.

<sup>3189</sup> T-128-Red2-ENG, page 60, line 12 to page 61, line 7 and page 66, lines 22 – 24 (P-0030).

<sup>3190</sup> T-190-Red2-ENG, page 22, lines 4 – 15.

<sup>3191</sup> T-190-Red2-ENG, page 22, lines 7 – 22.

<sup>3192</sup> T-190-Red2-ENG, page 22, line 23 to page 25, line 17 (P-0016) and T-175-CONF-ENG, page 32, lines 8 – 14, page 46, lines 1 – 3 and 18 – 22, page 48, lines 14 – 19 and page 49, lines 2 – 4 (P-0055).

<sup>3193</sup> T-175-CONF-ENG, page 48, lines 10 – 19 (P-0055).

<sup>3194</sup> T-113-Red2-ENG, page 46, line 10 to page 48, line 1.



telephone known as a Thuraya.<sup>3195</sup>

1195. Although P-0017 at one stage gave evidence “with certainty” that he was unaware of anyone communicating with President Lubanga,<sup>3196</sup> there were occasions when he was at the General Staff (supervising the guard because heavy weapons were installed at the house of the Chief of Staff, Floribert Kisembo),<sup>3197</sup> and he was told by Mr Kisembo’s bodyguards that the Chief of Staff sometimes talked to Thomas Lubanga.<sup>3198</sup> According to P-0017, Mr Kisembo alone had a phone,<sup>3199</sup> and he said that the survival of the soldiers was dependent on the Chief of Staff’s ability to communicate.<sup>3200</sup> The witness asked Floribert Kisembo’s bodyguards what was discussed when the Chief of Staff was talking.<sup>3201</sup> Sometimes the bodyguards did not know but on other occasions they said he was speaking to Thomas Lubanga.<sup>3202</sup> However, the soldiers were unaware of the details of their discussions.<sup>3203</sup>

1196. Evidence was provided on the call signs assigned to each individual when the phonies or manpacks were used,<sup>3204</sup> including Thomas Lubanga, whose sign was “No. 1”,<sup>3205</sup> Floribert Kisembo,<sup>3206</sup> Bosco Ntaganda<sup>3207</sup> and Mr Rafiki.<sup>3208</sup> P-0055 recognized one of the logbooks for recording messages sent by the phonies, and he

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<sup>3195</sup> T-113-Red2-ENG, page 46, line 25 to page 47, line 1 (P-0038) and T-158-Red2-ENG, page 27, lines 17 – 20 (P-0017).

<sup>3196</sup> T-158-Red2-ENG, page 27, lines 23 – 24.

<sup>3197</sup> T-158-Red2-ENG, page 28, lines 7 – 8.

<sup>3198</sup> T-158-Red2-ENG, page 28, lines 8 – 11.

<sup>3199</sup> T-158-Red2-ENG, page 35, line 1.

<sup>3200</sup> T-158-Red2-ENG, page 34, line 24 to page 35, line 1.

<sup>3201</sup> T-158-Red2-ENG, page 35, lines 2 – 3 (P-0017).

<sup>3202</sup> T-158-Red2-ENG, page 35, lines 3 – 4 and 7 – 8 (P-0017).

<sup>3203</sup> T-158-Red2-ENG, page 35, lines 4 – 5 (P-0017).

<sup>3204</sup> T-175-Red2-ENG, page 24, lines 21 – 25 (P-0055).

<sup>3205</sup> T-175-Red2-ENG, page 25, lines 18 – 19 (P-0055).

<sup>3206</sup> T-175-Red2-ENG, page 25, lines 16 – 17 (P-0055) Call sign: “Zulu Mike”.

<sup>3207</sup> T-175-Red2-ENG, page 25, lines 14 – 15 (P-0055) Call sign: “Tango Romeo”.

<sup>3208</sup> T-175-Red2-ENG, page 25, lines 20 – 22 (P-0055) Call sign: “Romeo Kilo”.

commented on a message about a military operation in Mongbwalu that allegedly included information on an injured child who was one of the troops.<sup>3209</sup> He indicated there were messages that referred to Thomas Lubanga by his call sign “No. 1” and he recalled an occasion when the accused provided information by telephone about an incident addressed in one of the messages.<sup>3210</sup> The defence suggests the logbook<sup>3211</sup> clearly shows that the instructions concerning the military units and operations came from the Staff or other commanders within the FPLC rather than the accused.<sup>3212</sup> Although the Chamber does not accept the entirety of the prosecution’s suggestion – that the logbook confirms the accused was in control<sup>3213</sup> – it nonetheless demonstrates that the phonies were one of the means of communication, including for the accused. It follows that the Chamber rejects the defence suggestion that the logbook demonstrates the accused did not issue instructions.

1197. Based on the evidence above, the Chamber is satisfied that the UPC/FPLC had the technical means required to ensure that information and instructions could be effectively communicated via the established hierarchy between the accused and other FPLC staff.

#### *(5) Meetings*

1198. The Chamber heard evidence about meetings within the organisation that provided insight into the extent of the accused’s involvement in the decision-making processes of the FPLC.

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<sup>3209</sup> T-176-Red2-ENG, page 70, line 15 to page 78, line 17.

<sup>3210</sup> T-177-CONF-ENG, page 8, line 1 to page 11, line 25.

<sup>3211</sup> EVD-OTP-00409.

<sup>3212</sup> ICC-01/04-01/06-2773-Red-tENG, para. 806.

<sup>3213</sup> ICC-01/04-01/06-2778-Red, para. 22.

1199. P-0014 testified that he was told that Thomas Lubanga often held military meetings with Floribert Kisembo, Richard Lonema, other officers, and, at the outset, Chief Kahwa.<sup>3214</sup>

1200. P-0016 gave evidence that although the meetings held by President Lubanga at his residence did not involve all the main staff,<sup>3215</sup> very often the Chiefs of Staff were included.<sup>3216</sup> Therefore, the meetings usually had selected attendees,<sup>3217</sup> and the President invited staff from the military headquarters to his office for this purpose.<sup>3218</sup> The witness indicated the senior officers, particularly the two Chiefs of Staff, Bosco Ntaganda and Floribert Kisembo, were “in the habit of going to the president’s residence”.<sup>3219</sup> P-0016 said it was like Bosco Ntaganda’s home and that he came and went as he pleased.<sup>3220</sup>

1201. P-0041 also referred to the meetings of the officers when decisions about “military secrets” were made, which he suggested were chaired by the President or his delegate, such as the Chief of Staff.<sup>3221</sup> The defence correctly notes that P-0041 stated that he did not participate during these meetings because he was not a military officer.<sup>3222</sup> However, given the evidence of P-0014 and P-0016, the Chamber is persuaded that the accused convened meetings with the military staff, even in the absence of eyewitness evidence that he presided over them.

1202. P-0055 stated that given the continuous fighting in Bunia, it was

<sup>3214</sup> T-181-CONF-ENG, page 96, lines 10 – 14.

<sup>3215</sup> T-190-Red2-ENG, page 5, lines 17 – 21 and T-189-Red2-ENG page 84, lines 10 – 12.

<sup>3216</sup> T-190-Red2-ENG, page 5, lines 21 – 24.

<sup>3217</sup> T-189-Red2-ENG, page 84, lines 10- 12 (P-0016).

<sup>3218</sup> T-189-Red2-ENG, page 85, lines 2 – 9.

<sup>3219</sup> T-189-Red2-ENG, page 85, lines 8 – 17.

<sup>3220</sup> T-189-Red2-ENG, page 85, lines 16 – 17.

<sup>3221</sup> T-126-Red2-ENG, page 67, lines 11 – 24.

<sup>3222</sup> ICC-01/04-01/06-2786-Red-tENG, para. 34.

impossible to hold regular monthly meetings of the UPC general staff at their headquarters.<sup>3223</sup> Therefore, although P-0055 did not see the President at the meetings that included all the commanders,<sup>3224</sup> he testified that Mr Lubanga held meetings with Floribert Kisembo and Bosco Ntaganda.<sup>3225</sup>

1203. The Chamber heard evidence concerning a particular meeting during which Mr Lubanga reprimanded Bosco Ntaganda and Floribert Kisembo for an action that was undertaken without the accused being informed.<sup>3226</sup> The prosecution suggests that this event established that the military Chiefs understood the accused was in charge.<sup>3227</sup>

1204. Generally, meetings would be held when there were problems.<sup>3228</sup> For instance, Mr Lubanga convened and presided over a meeting during fighting between the UPDF and the UPC.<sup>3229</sup> P-0055 also gave evidence about the relatively frequent meetings between Mr Mafuta and Mr Lubanga, when the latter was advised on matters relating to the UPC.<sup>3230</sup> As regards the reliability of this evidence, the defence challenges P-0055's assertion that Mr Mafuta was a founding member, or indeed a member at all, of the UPC, and it highlights that P-0055, at one stage, said he never attended a meeting between Mr Mafuta and Thomas Lubanga and he was unaware of the subject of

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<sup>3223</sup> T-175-CONF-ENG, page 40, lines 7 – 13 (P-0055).

<sup>3224</sup> T-175-CONF-ENG, page 40, lines 18 – 21 (P-0055). The Chamber notes the dispute between the defence (ICC-01/04-01/06-2773-Red-tENG, para. 486 and ICC-01/04-01/06-2786-Red-tENG, para. 37) and the prosecution (ICC-01/04-01/06-2778-Conf, para. 24) but finds the evidence is clear since P-0055 stated that although he never saw the president taking part in a meeting with all of the commanders, “there were meetings where not all of the commanders attended where there were Rafiki [...] Kisembo, Bosco” and others. T-175-CONF-ENG, page 40, lines 20 – 23.

<sup>3225</sup> T-175-CONF-ENG, page 40, lines 20 – 23.

<sup>3226</sup> See the description of events and transcript reference in ICC-01/04-01/06-2748-Conf, para. 262 and footnote 728.

<sup>3227</sup> ICC-01/04-01/06-2748-Red, para. 262.

<sup>3228</sup> T-175-CONF-ENG, page 40, lines 7 – 13 and page 41, lines 23 – 24 (P-0055).

<sup>3229</sup> T-175-CONF-ENG, page 42, line 21 to page 43, line 5 (P-0055).

<sup>3230</sup> T-176-CONF-ENG, page 18, line 17 to page 21, line 17; T-174-Red-ENG, page 35, lines 19 – 21.

their discussions.<sup>3231</sup> As rehearsed above, all the relevant evidence demonstrates that Mr Mafuta played a significant role within the UPC, even if it is unclear at what point in time he took up the official position of special adviser to the President and military adviser to the UPC/FPLC. He was a signatory of the document constituting the UPC, dated 15 September 2000.<sup>3232</sup> In the course of his testimony, P-0055 indicated that Mr Lubanga and Mr Mafuta often spoke to each other in their mother tongue, which P-0055 does not understand, or they talked together in a separate room.<sup>3233</sup> However, if there were subjects that were of concern to the witness, he was able to participate in the discussions.<sup>3234</sup> It follows that even if P-0055 did not attend formal meetings with the accused and Mr Mafuta, he met with both of them in a more informal manner on numerous occasions. The Chamber is satisfied that P-0055's testimony on this issue is credible, given, *inter alia*, it is based on the witness's own first-hand knowledge.

1205. Mr Lubanga once called P-0055 to a meeting at his residence, so as to ask him about a military confrontation in which civilians were killed, and he ordered the removal of a commander.<sup>3235</sup>

1206. P-0017 testified that in June 2003 the Chief of Staff, Floribert Kisembo, frequently met with Mr Lubanga at his residence after the UPC/FPLC returned to Bunia.<sup>3236</sup> The witness was aware of this because he was part of the unit that protected the Chief of Staff, and escorted him to the residence.<sup>3237</sup> Sometimes the meetings lasted up to

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<sup>3231</sup> ICC-01/04-01/06-2773-Red-tENG, paras 501 – 503.

<sup>3232</sup> EVD-OTP-00517.

<sup>3233</sup> T-176-Red2-ENG, page 18, lines 7 – 9.

<sup>3234</sup> T-176-Red2-ENG, page 18, lines 3 – 11. See also T-176-CONF-ENG, page 17, lines 13 – 21.

<sup>3235</sup> T-175-CONF-ENG, page 8, line 20 to page 9, line 5.

<sup>3236</sup> T-158-Red2-ENG, page 40, line 1 to page 41, line 25.

<sup>3237</sup> T-158-Red2-ENG, page 42, lines 1 – 12 (P-0017).

an hour.<sup>3238</sup> P-0017 also stated that during the morning assemblies, which the accused did not attend,<sup>3239</sup> they received their orders for the day and the Chief of Staff reported what President Lubanga had said.<sup>3240</sup>

1207. P-0041 testified that the national secretaries also met with the President and Radio Candip disseminated the minutes or the outcome of these meetings.<sup>3241</sup> According to P-0041, given the extent to which the minutes were broadcast, the only inference to be drawn is that there were regular meetings, particularly in the period between 2 September 2002 and 6 March 2003.<sup>3242</sup> Until 6 March 2003, P-0041 did not attend because he had not been made national secretary,<sup>3243</sup> but he was present on a few occasions once his position changed.<sup>3244</sup> The use of child soldiers was discussed in the President's office in Bunia, and the President read out a decree he had signed regarding their demobilisation, so that "we would not have difficulties with [...] human rights."<sup>3245</sup> The witness could not recall the exact date of this meeting, but indicated that it was after the return of the UPC to Bunia in around May 2003.<sup>3246</sup>

1208. P-0002 visited the Presidency almost every day up until March 2003.<sup>3247</sup> The UPC army guarded Thomas Lubanga's residence and office, located near the EPO School, in order to ensure his safety.<sup>3248</sup> P-0002 testified that executive meetings were sometimes held at the

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<sup>3238</sup> T-158-Red2-ENG, page 43, lines 1 – 3 (P-0017).

<sup>3239</sup> T-158-Red2-ENG, page 44, lines 5 – 10.

<sup>3240</sup> T-158-Red2-ENG, page 43, line 19 to page 44, line 10.

<sup>3241</sup> T-125-Red2-ENG, page 40, lines 21 – 23.

<sup>3242</sup> T-125-Red2-ENG, page 41, lines 8 – 16.

<sup>3243</sup> T-125-Red2-ENG, page 41, lines 17 – 22.

<sup>3244</sup> T-125-Red2-ENG, page 42, lines 2 – 9.

<sup>3245</sup> T-125-Red2-ENG, page 42, lines 12 – 24 (P-0041).

<sup>3246</sup> T-125-Red2-ENG, page 43, lines 1 – 3 (P-0041).

<sup>3247</sup> T-162-CONF-ENG, page 5, line 14 to page 10, line 19.

<sup>3248</sup> T-162-CONF-ENG, page 11, lines 10 – 16 (P-0002).

residence or in his office, and on occasion these meetings involved delegations from MONUC.<sup>3249</sup> Apart from MONUC personnel, the witness saw members of the UPC and soldiers visit the residence,<sup>3250</sup> including the Chief of Staff, General Kisémbó, the assistant Chief of Staff, General Bosco Ntaganda who was in charge of operations, the presidential staff and the army staff.<sup>3251</sup> P-0002 was unaware of what was discussed, as the meetings were held in private.<sup>3252</sup> D-0011 said he attended “executive committee meetings” at the Presidency on approximately two or three occasions.<sup>3253</sup>

1209. In addition, certain video footage shows the accused in the presence of some of his alleged co-perpetrators. P-0030 testified that Rafiki Saba and Floribert Kisémbó attended a presidential rally in Bunia on 11 January 2003 together with Thomas Lubanga following the latter’s return from Goma.<sup>3254</sup>

1210. P-0030 gave evidence about a video that was filmed on a single day in three different locations (Shari, Bunia and Katoto) sometime after the UPC had re-taken Bunia around May 2003.<sup>3255</sup> The video showed Thomas Lubanga in the company of Floribert Kisémbó and Rafiki Saba, all of whom the witness recognised.<sup>3256</sup> Similarly, P-0030 recognised Thomas Lubanga, Rafiki Saba and Bosco Ntaganda at a

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<sup>3249</sup> T-162-CONF-ENG, page 10, line 24 to page 11, line 2.

<sup>3250</sup> T-162-CONF-ENG, page 11, lines 7 – 11.

<sup>3251</sup> T-162-Red2-ENG, page 12, line 20 to page 13, line 7.

<sup>3252</sup> T-162-Red2-ENG, page 13, lines 13 – 20.

<sup>3253</sup> T-348-ENG, page 5, line 24 to page 6, line 2.

<sup>3254</sup> T-128-CONF-ENG, page 51, line 17 to page 55, line 15, EVD-OTP-00571 at 02:25:07 – 02:35:13.

<sup>3255</sup> The prosecution indicates that the date of the film is 1 June 2003, see ICC-01/04-01/06-2748-Conf-Anx2.

<sup>3256</sup> T-129-Red2-ENG, page 61, line 23 to page 78, line 16, EVD-OTP-00578 at 00:35:24, 00:36:50 and 01:23:58.

meeting between UPC/FPLC and military officers from Uganda<sup>3257</sup> held in Bunia on 23 January 2003.<sup>3258</sup> Thomas Lubanga, Floribert Kisembo and Rafiki Saba were included in a video of a public rally in Bunia on 3 June 2003, in which the accused thanked the UPC army for its involvement in previous events in Bunia.<sup>3259</sup> The defence suggests the video EVD-OTP-00579 fails to demonstrate that Mr Lubanga was personally involved in military recruitment.<sup>3260</sup>

1211. The video footage establishes that some of the co-perpetrators were in contact with each other, given it shows that Thomas Lubanga was accompanied by John Tinanzabo,<sup>3261</sup> Commander Kasangaki,<sup>3262</sup> Rafiki Saba<sup>3263</sup> and Bosco Ntaganda.<sup>3264</sup> In addition, there is footage of the accused,<sup>3265</sup> on 12 February 2003, visiting the Rwampara camp where he told the recruits that the commanders “are helping us carry out training, managing the army” and that he saw these commanders every day.<sup>3266</sup>

1212. On the basis of this evidence, the Chamber is satisfied the accused regularly met with members of his staff, including members of the military, and with at least some of his alleged co-perpetrators. On the basis of the other evidence discussed in the sections above, the Chamber is also persuaded that the accused played an active role in

<sup>3257</sup> T-129-CONF-ENG, page 13, line 23 to page 16, line 1 (commenting on 00:38:35; 00:38:40 and 00:38:47 of EVD-OTP-00573) and page 22, lines 11 – 16 (commenting on 02:10:26 of EVD-OTP-00573).

<sup>3258</sup> EVD-OTP-00573, T-129-Red2-ENG, page 17, lines 3 – 4.

<sup>3259</sup> T-129-CONF-ENG, page 79, line 13 to page 83, line 24; EVD-OTP-00579 between 02:37:53 and 02:51:24 (interpretation included in the transcript).

<sup>3260</sup> ICC-01/04-01/06-2773-Red-tENG-Anx2, page 10.

<sup>3261</sup> EVD-OTP-000570 at 00:02; T-128-Red2-ENG, page 34, lines 7 – 13 (P-0030).

<sup>3262</sup> EVD-OTP-000570 at 00:03:12; T-128-Red2-ENG, page 34, line 21 to page 35, line 16 (P-0030).

<sup>3263</sup> EVD-OTP-000570 at 00:01:51; T-128-Red2-ENG, page 33, line 24 to page 34, line 3 (P-0030).

<sup>3264</sup> EVD-OTP-000570 at 00:04:04; T-128-Red2-ENG, page 35, lines 15 – 18 (P-0030).

<sup>3265</sup> EVD-OTP-000570 at 00:00:24; T-128-Red2-ENG, page 33, lines 19 – 22 (P-0030).

<sup>3266</sup> EVD-OTP-000570; T-128-Red2-ENG, page 37, lines 2 – 23 (interpretation taken from the transcript).



making decisions and issuing instructions.

**(6) Conclusion**

1213. Thomas Lubanga was the President of the UPC/FPLC during the relevant period, and the evidence (witnesses P-0012, P-0016, P-0014, P-0041, P-0055, P-0017 and D-0011, as rehearsed above), as well as the video EVD-OTP-00584, demonstrates that he was the Commander-in-Chief of the army as well as its political leader. This is further supported by the documents the accused signed in his position as President and that reflect his role as head of the political and military hierarchy of the UPC/FPLC. EVD-OTP-00721, EVD-OTP-00734 and EVD-OTP-00687 clearly show that Mr Lubanga appointed key officials within the UPC/FPLC, in his position as the leader of the UPC/FPLC.

1214. The evidence of P-0041, P-0055, P-0038, P-0012, P-0017, P-0016 and D-0037 demonstrates that various individuals within the UPC/FPLC, including some of the co-perpetrators, were assigned to particular posts within the organisation. EVD-OTP-00721, a UPC decree signed by the accused and dated 3 September 2002 describes the accused as President of the UPC/FPLC, Floribert Kisembo as Chief of Staff, Bosco Ntaganda as the Deputy Chief of Staff with responsibility for military operations; Chief Kahwa as the Minister of Defence (but only at the outset); Professor Dhetchuvi was the Minister of Foreign Affairs; and Adèle Lotsove, as Minister of Economy and Finance. Richard Lonema was the National Secretary of Economy, Commerce and Industry; John Tinanzabo, the National Secretary for Pacification and Reconciliation; and Djokaba Lambi Longa became the Assistant National Secretary of the Interior. Daniel Litsha became the

First Secretary of the UPC/FPLC (a post that was initially referred to as the Secretary General of the UPC when the list of the executive was issued). Rafiki Saba worked with the staff at the main staff headquarters.

1215. The Chamber heard disputed and – in some instances – contradictory evidence from witnesses P-0012, P-0038, P-0016, P-0055, P-0017, D-0011 and D-0037 as to the extent to which the accused had day-to-day control over military affairs. However, whether or not he was involved in every detail of the military decisions within the UPC/FPLC is not determinative of the essential character of the role performed by the accused in accordance with the common plan. The evidence of P-0041, P-0055, P-0016 and P-0038 analysed above demonstrates that the accused was at the summit of the civil and military hierarchy, that he attended, even if he did not preside over, military meetings and he received reports on a regular basis. The documentary evidence, such as EVD-OTP-00710 and EVD-OTP-00725, which addressed FPLC military matters and were sent or copied to the accused, further shows that Mr Lubanga was consulted and received reports whenever a particular problem or issue arose. Document EVD-OTP-00510 demonstrates that Mr Lubanga was kept informed about even the most inconsequential issues.

1216. The evidence of witnesses P-0055, P-0016, P-0030 and P-0017 testified that UPC officials and staff, including the accused, used radios and satellite or mobile phones to communicate with each other. Furthermore, video footage (EVD-OTP-00570 and EVD-OTP-00572) shows UPC officials using the radios described to the Chamber. It has been established that the accused and his co-perpetrators possessed the technology that enabled them to communicate with each other and

that the accused could receive information and issue instructions by radio or telephone.

1217. The evidence of P-0014, P-0016, P-0041, P-0055, P-0017 and P-0002 establishes the accused held meetings of both a formal and informal nature with military personnel (including his co-perpetrators, Floribert Kisembo and Chief Kahwa) at his residence, and it has been demonstrated he made decisions on operations.

1218. Video footage EVD-OTP-00571 is of a rally in Bunia on 11 January 2003 attended by the accused and two of his co-perpetrators, Rafiki Saba and Floribert Kisembo. Video EVD-OTP-00573 shows the accused in company with Rafiki Saba and a third co-perpetrator, Bosco Ntaganda, on 23 January 2003. Therefore, there is clear evidence that the accused and his co-perpetrators met with each other and were otherwise in personal contact during the period of the charges. Furthermore, the demobilisation orders (analysed below), as well as other documentary evidence, demonstrate that Mr Lubanga issued orders that were communicated and followed within the UPC/FPLC.

1219. Military leaders dealing with forces on this scale will not be involved in all aspects of the decision-making process. The evidence demonstrates that there was a hierarchy within the army and a functioning structure that would have enabled an appropriate degree of delegation, certainly as regards routine operational decisions. This conclusion does not diminish the extent to which the accused was aware of what was happening within the armed forces or his overall responsibility for, or involvement in, their activities. Instead, it is an inevitable result of his position as the overall commander. The Chamber is persuaded beyond reasonable doubt that the evidence

demonstrates that Thomas Lubanga was the ultimate authority within the organisation and he was informed, on a substantive basis, as to the operations carried out by the FPLC officials, including his co-perpetrators Floribert Kisembo and Bosco Ntaganda.

1220. As mentioned above, the period of conflict between 6 March and June 2003, when the UPDF was in Bunia, and the defections of some of the commanders may have had an adverse effect on the structures within the UPC, but the Chamber is not persuaded that they led to a breakdown of the chain of command or significantly undermined the authority of the accused as the head of the organisation. According to P-0041, after the return of the UPC to Bunia in around May 2003, the accused held meetings and issued decrees, thus acting as President and Commander-in-Chief of the UPC/FPLC in exactly the same way as prior to the takeover of Bunia by the UPDF in March 2003.

1221. Thomas Lubanga has not been charged on the basis of acts undertaken by his subordinates solely on account of his position within the UPC/FPLC. It is necessary for the Chamber to address the questions as to whether, *inter alia*, he led the UPC/FPLC and whether he had knowledge of the crimes in determining whether his role under the common plan was essential.

1222. The evidence discussed above demonstrates, beyond reasonable doubt, that the accused's function within the hierarchy of the UPC/FPLC, along with his involvement in planning military operations and his key role in providing logistical support – including weapons, ammunition, food, uniforms, military rations and supplies for the FPLC troops – resulted in his role being essential within the

UPC/FPLC.

1223. The consequences of the implementation of the common plan, and the contribution of the accused thereto, are discussed in greater detail below.

**b) Thomas Lubanga's individual contribution to the conscription and enlistment of children under the age of 15 or using them to participate actively in hostilities**

1224. In order to determine whether the accused made an essential contribution to the common plan that resulted in the conscription, enlistment and use of children below the age of 15 between September 2002 and August 2003, the Chamber has considered the evidence in the case relating to his personal involvement in relation to these crimes.

***(1) Recruitment initiatives***

1225. Various witnesses gave evidence about Thomas Lubanga's involvement in recruiting soldiers.

1226. The prosecution relies on P-0055's evidence as regards recruitment by the cadres who were supposedly trained by the accused.<sup>3267</sup> This is challenged by the defence.<sup>3268</sup> At one point P-0055 stated the accused organised the training for the purposes of mobilisation (he did not suggest the accused conducted the training himself, as argued by the prosecution).<sup>3269</sup> P-0055 repeatedly emphasised he did not know how the training was conducted or by

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<sup>3267</sup> ICC-01/04-01/06-2748-Red, para. 289.

<sup>3268</sup> ICC-01/04-01/06-2773-Red-tENG, para. 836.

<sup>3269</sup> T-175-Red2-ENG, page 77, lines 5 – 19.

whom because the cadres had been trained by the time he joined the UPC.<sup>3270</sup> Given P-0055 conceded he did not have personal knowledge of these events, the Chamber has not relied on this assertion.

1227. However, there was further evidence from P-0055 that demonstrates Thomas Lubanga's personal involvement in the recruitment process.<sup>3271</sup> Taking into account the defence challenges to his evidence addressed above, the Chamber is persuaded that P-0055's testimony on this issue is credible and reliable.

1228. The prosecution highlights that Eric Mbabazi, the G5 within the UPC,<sup>3272</sup> was required to meet with the Chief of Staff and the accused to discuss recruitment, for which he was responsible.<sup>3273</sup> The defence argues that the role and conduct of the G5 does not establish an essential contribution by the accused, and it is suggested it shows that the enlistment, training and use of recruits occurred without the accused's personal participation because they fell solely within the ambit of the military authorities.<sup>3274</sup>

1229. The defence further suggests that the accused did not participate at any stage in the recruitment operations.<sup>3275</sup> It relies on D-0019 and P-0041's evidence to the effect that the armed individuals who were organised in September 2002 under the name the "FPLC" were recruited by dissident soldiers from the APC and Chief Kahwa, at a time when the accused could not have contributed to this operation,

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<sup>3270</sup> T-177-Red2-ENG, page 46, line 5 to page 47, line 5; T-177-Red2-ENG, page 47, line 18 to page 48, line 3.

<sup>3271</sup> T-176-CONF-ENG, page 21, line 24 to page 23, line 18.

<sup>3272</sup> T-154-Red2-ENG, page 24, lines 4 and 12 – 13 (P-0017); T-189-Red2-ENG, page 77, lines 11 – 19 (P-0016); T-175-Red2-ENG, page 17, lines 14 – 18 (P-0055). The latter only stated that the staff included an individual with the name of "Mr Eric".

<sup>3273</sup> ICC-01/04-01/06-2748-Red, para. 289.

<sup>3274</sup> ICC-01/04-01/06-2773-Red-tENG, paras 840 and 849.

<sup>3275</sup> ICC-01/04-01/06-2773-Red-tENG, paras 833 – 837.

and that there was no systematic recruitment from 2 September 2002.<sup>3276</sup> The evidence of P-0055 is cited as support for the contention that the enlistment of young people occurred mainly at the instigation of the commanders, along with P-0016's account that a recruitment policy had not been instituted.<sup>3277</sup>

1230. P-0016 testified that recruitment was theoretically conducted by the G5 but instead the recruits arrived voluntarily.<sup>3278</sup> He stated that while he was in the FPLC, he never saw the G5 conducting recruitment and he did not see any recruits being brought to the camp in vehicles.<sup>3279</sup> As mentioned above,<sup>3280</sup> the Chamber does not to accept this evidence and it has concluded that campaigns directed at raising awareness were conducted by the UPC/FPLC during the relevant timeframe.

1231. P-0046 gave evidence about an incident in which Thomas Lubanga was allegedly involved in abducting a former child soldier. Paragraph 88 of the final report of MONUC on its special investigations in March and April 2003,<sup>3281</sup> contains an excerpt of the account of the 14 year old child who had been allegedly captured on a road in Mongbwalu by President Lubanga and six other UPC members, in February 2003.<sup>3282</sup> P-0046 did not investigate this account,<sup>3283</sup> which was given to her by a child during a special mission in Bunia in March.<sup>3284</sup> When questioned about this event, P-0046 stated

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<sup>3276</sup> ICC-01/04-01/06-2773-Red-tENG, paras 834 and 837.

<sup>3277</sup> ICC-01/04-01/06-2773-Red-tENG, para. 838.

<sup>3278</sup> T-189-Red2-ENG, page 81, lines 6 – 25. His evidence as to whether or not the G3 was also theoretically involved is unclear.

<sup>3279</sup> T-189-Red2-ENG, page 81, lines 20 – 25 (P-0016).

<sup>3280</sup> See para. 911.

<sup>3281</sup> EVD-OTP-00480 at DRC-OTP-0152-0309; T-208-Red2-ENG, page 31, lines 5 – 11 (P-0046).

<sup>3282</sup> EVD-OTP-00480 at DRC-OTP-0152-0309; T-208-Red2-ENG, page 31, lines 12 – 18 (P-0046).

<sup>3283</sup> T-208-Red2-ENG, page 31, line 22 to page 32, line 1 (P-0046).

<sup>3284</sup> T-208-Red2-ENG, page 32, lines 1 – 5.

that the perpetrators of the abductions were not her main concern: “[i]n that context, what was important for us was to find solutions for those children”, and that it was not the purpose of the documentation for it to be used in a court of justice.<sup>3285</sup> The child’s account appeared to P-0046 “as being perfectly credible”.<sup>3286</sup> It was suggested to P-0046 that Thomas Lubanga was not in Mongbwalu during February 2003, to which she responded that the statement given by the child “was not subject to a specific investigation” and she noted that the dates given by the children were not always accurate.<sup>3287</sup> P-0046 was unable to say where Thomas Lubanga was in February 2003.<sup>3288</sup> The Chamber is persuaded that P-0046 gave a reliable account of this incident. However, due to the lack of age verification, or any description of the child’s behaviour or appearance supporting the conclusion that the child was under the age of 15, the Chamber has not relied on this evidence to establish that Thomas Lubanga personally recruited children under the age of 15.

1232. In addition, in the context of questioning about the visit of the accused to a training camp in February 2003, when it was suggested to D-0011 (the private secretary of Thomas Lubanga) by the prosecution that the UPC would not have demobilised troops in February 2003 because he would have needed as many troops as possible, D-0011 agreed this was “quite logical” and “right”, and that “[i]f there are a lot of attacks on the outskirts of the town and the power that is established feels threatened, it’s quite normal that one would want to

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<sup>3285</sup> T-208-Red2-ENG, page 32, lines 5 – 13.

<sup>3286</sup> T-208-Red2-ENG, page 32, line 20 to page 33, line 1.

<sup>3287</sup> T-208-Red2-ENG, page 33, lines 16 – 24.

<sup>3288</sup> T-208-Red2-ENG, page 33, line 25 to page 34, line 2.



mobilise troops in order to face up to the situation.”<sup>3289</sup>

1233. With respect to the defence argument that recruitment took place at a time when the accused could not contribute, the Chamber accepts that the militia that was originally comprised of soldiers who had been recruited by Chief Kahwa and others at Mandro in due course became the FPLC. However, the Chamber rejects the defence argument that the evidence of P-0041, D-0019 and P-0055 demonstrates that recruitment into the FPLC was only undertaken before Thomas Lubanga became the President of the UPC/RP and that it was solely the responsibility of individual commanders. Significant evidence in the case has proved that systematic recruitment into the armed wing of the UPC/RP, the FPLC, continued after September 2002.<sup>3290</sup> P-0016’s evidence on this issue was evasive, and, in the context of his account, it is irrelevant for the purposes of Article 8(2)(e)(vii) of the Statute whether or not recruits joined voluntarily if they were under the age of 15.

1234. Based on the evidence of P-0055 and the account of P-0046 concerning the child abducted in Mongbwalu, the Chamber is persuaded Thomas Lubanga was actively involved in the exercise of finding recruits. The Chamber cannot determine, however, whether he was directly and personally involved in recruitment relating to individual children below the age of 15. That said, it is sure that Thomas Lubanga was informed about these activities, for example as a result of his meetings with the G5 responsible for recruitment.<sup>3291</sup> The evidence establishes that he not only condoned the recruitment policy,

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<sup>3289</sup> T-347-ENG, page 61, line 4 to page 62, line 3.

<sup>3290</sup> See paras 770-774, 777-785 and 911.

<sup>3291</sup> T-175-Red2-ENG, page 76, lines 19 – 25.

but he also played an active part in its implementation, and he approved the recruitment of children below the age of 15. The statement of his personal secretary, D-0011 that in February 2003 the accused would have had an interest in mobilising troops, rather than demobilising them, supports the conclusion that the accused was informed about, and actively influenced, the decisions on recruitment.

1235. The defence suggests that as soon as the accused became the head of the UPC/RP, he ordered an unequivocal ban on the enlistment of minors.<sup>3292</sup> The implementation of this order is discussed in greater detail below.

### *(2) Troops and camps*

1236. The Chamber heard evidence to the effect that the accused personally visited UPC training camps in Mandro, the EPO camp near Bunia, the headquarters and Rwampara. During these visits he addressed the recruits and gave morale-boosting speeches.<sup>3293</sup> The Chamber is satisfied beyond reasonable doubt that at least during the Rwampara visit the accused saw and addressed children under the age of 15 years.

1237. P-0014 was told by two closely involved individuals in September or October 2002 that at some point after September 2002 Mr Lubanga went to the training camp at Mandro to attend the celebrations when the recruits completed their training.<sup>3294</sup> P-0038 testified that he was present when President Thomas Lubanga visited the camp with Chief Kahwa, the Chief of Staff, Floribert Kisembo, and

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<sup>3292</sup> ICC-01/04-01/06-2773-Red-tENG, para. 834.

<sup>3293</sup> Save for at the EPO camp in Bunia, as further set out below.

<sup>3294</sup> T-182-CONF-ENG, page 19, lines 11 – 15.

Bosco Ntaganda, on the accused's return from Kinshasa.<sup>3295</sup> The defence challenges P-0038's evidence about Thomas Lubanga's visit to the training camp at Mandro.<sup>3296</sup> Focussing on Thomas Lubanga's visit to the training camp, the defence submits that P-0038 gave an inconsistent account as to when it occurred.<sup>3297</sup> At one stage P-0038 maintained this took place whilst he was working as a trainer at the camp prior to April 2002,<sup>3298</sup> but later he stated it followed the accused's return to Bunia on his release from detention in Kinshasa after August 2002.<sup>3299</sup> In the judgment of the Chamber the different accounts from the witness as to the date of the visit are irreconcilable and although many aspects of the witness's account concerning this event are credible, the confusion as to when it occurred means it is unsafe for the Court to rely on P-0038's account of this event. The Chamber is persuaded that the accused visited the Mandro training camp in September or October 2002, based on the evidence given by P-0014 and in light of the role of the individuals who informed P-0014 about the visit of the accused.

1238. P-0016 testified that at some point after he left the camp at Mandro,<sup>3300</sup> President Lubanga spoke to the troops at the staff headquarters, in order to boost their morale and to encourage them to work together.<sup>3301</sup> As discussed above, this must have been around September 2002.<sup>3302</sup> P-0016 said this visit by the accused and his Chief of Staff (which lasted about 30 minutes) was to establish how his main

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<sup>3295</sup> T-113-Red2-ENG, page 42, lines 8 – 13 and page 43, lines 9 – 11.

<sup>3296</sup> ICC-01/04-01/06-2773-Red-tENG, paras 828 and 465 – 471.

<sup>3297</sup> ICC-01/04-10/06-2773-Red-tENG, paras 467 – 471.

<sup>3298</sup> T-114-Red2-ENG, page 40, line 23 to page 41, line 9 and page 43, line 20 to page 44, line 3.

<sup>3299</sup> T-114-CONF-ENG, page 44, line 18 to page 46, line 8.

<sup>3300</sup> T-190-Red2-ENG, page 17, lines 5 – 9.

<sup>3301</sup> T-190-Red2-ENG, page 13, lines 11 – 15 and page 13, line 24 to page 14, line 22.

<sup>3302</sup> See para. 790.

staff and the forces were functioning.<sup>3303</sup> The accused did not say or do a great deal to boost their morale, but instead he asked the troops to be calm, suggesting that they wanted peace and they were going to “remake our country”.<sup>3304</sup> P-0016 testified that adults and children were present at the parade because “it’s not as if you would chase the children away” when the President arrived.<sup>3305</sup> He indicated the children were between 13 and 17 years of age.<sup>3306</sup>

1239. P-0017 gave evidence about a visit to the EPO camp in Bunia by the Chief of Staff and President Lubanga around November 2002.<sup>3307</sup> P-0017 had been amongst the 107 soldiers sent to Rwanda for training and on their return to Ituri the Chief of Staff, Floribert Kisembo, met them and they were brought to the EPO camp in Bunia.<sup>3308</sup> P-0017 recalled that when they were asked to assemble, they saw the Chief of Staff and Thomas Lubanga arrive.<sup>3309</sup> The accused was dressed in the camouflage uniform of the UPC/FPLC,<sup>3310</sup> and the Chief of Staff said they should show respect to the President in military tradition.<sup>3311</sup> The accused was not at the camp for any appreciable length of time and he did not speak with the troops when he inspected them.<sup>3312</sup> Indeed, the accused only remained at the camp for about 15 to 20 minutes.<sup>3313</sup>

1240. P-0017’s evidence is supported by the testimony of P-0038, who was one of the 107 soldiers sent to Rwanda for training between

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<sup>3303</sup> T-190-Red2-ENG, page 14, line 23 to page 15, line 18.

<sup>3304</sup> T-190-Red2-ENG, page 15, lines 5 – 9.

<sup>3305</sup> T-190-Red2-ENG, page 16, lines 10 – 15.

<sup>3306</sup> T-190-Red2-ENG, page 16, lines 17 – 19.

<sup>3307</sup> T-154-Red2-ENG, page 64, lines 20 – 23; page 66, line 25 to page 67, line 4; page 69, line 2 to page 70, line 1.

<sup>3308</sup> T-154-Red2-ENG, page 69, lines 2 – 21 (P-0017).

<sup>3309</sup> T-154-Red2-ENG, page 69, line 22 to page 70, line 1.

<sup>3310</sup> T-154-Red2-ENG, page 70, lines 21 – 22 (P-0017).

<sup>3311</sup> T-154-Red2-ENG, page 71, lines 3 – 5 (P-0017).

<sup>3312</sup> T-154-Red2-ENG, page 71, lines 6 – 8 and page 72, lines 1 – 5 (P-0017).

<sup>3313</sup> T-154-Red2-ENG, page 72, lines 6 – 8.

September and November 2002.<sup>3314</sup> P-0038 indicated that upon their return the Chief of Staff and other commanders met them at the airport in Bunia, and they were taken to Floribert Kisembo's residence in Bunia to rest.<sup>3315</sup> The following day they received a visit from Floribert Kisembo together with President Thomas Lubanga. The accused told the recruits that they were to be deployed in the field, and that they should obey orders and fight the enemy.<sup>3316</sup>

1241. The Chamber notes there is a slight discrepancy between the witnesses as to the location where the soldiers were brought: P-0017 said it was the EPO camp, whilst P-0038 referred to Floribert Kisembo's residence. However, on a map annotated by P-0017,<sup>3317</sup> Mr Kisembo's residence the EPO camp and the residence of the accused were very close to each other. The Chamber is persuaded that the 107 soldiers were brought to the EPO camp, near Floribert Kisembo's residence, and that the length of time given by P-0017 before the accused came to visit ("some time") does not contradict the evidence given by P-0038 that the accused visited the next day. It is therefore persuaded Thomas Lubanga visited the EPO camp around the end of November 2002. However, it is not possible to determine whether he saw recruits below the age of 15 whilst he was there.

1242. Finally, the Chamber is satisfied the accused visited the Rwampara training camp during the period of the charges. A video<sup>3318</sup> was introduced through P-0030 that shows a military rally and parade

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<sup>3314</sup> T-114-Red2-ENG, page 6, line 22 to page 7, line 4 (P-0038).

<sup>3315</sup> T-114-Red2-ENG, page 8, line 10 to page 9, line 11.

<sup>3316</sup> T-114-Red2-ENG, page 9, line 11 to page 10, line 14 (P-0038).

<sup>3317</sup> EVD-OTP-00407; T-157-Red2-ENG, page 64, lines 19 – 21 and page 65, line 10 to page 66, line 21.

<sup>3318</sup> EVD-OTP-00570.

attended by Thomas Lubanga on 12 February 2003,<sup>3319</sup> accompanied by John Tinanzabo, the Deputy Chief of Staff (Bosco Ntaganda), Rafiki Saba and other officers such as Commander Kasangaki.<sup>3320</sup> In the first excerpt, P-0030 identified Thomas Lubanga wearing military clothing.<sup>3321</sup> The second excerpt shows Thomas Lubanga, again at the training camp, in the presence of dozens of young people, some of whom are well below the age of 15.<sup>3322</sup> A young male who is well below the age of 15 is standing in the front of the group, wearing camouflage clothing (including a cap) and holding a rifle with the stock resting on his right wrist.<sup>3323</sup> P-0030 testified that those not wearing military uniforms were recruits in training to become soldiers.<sup>3324</sup> While at the camp, Mr Lubanga gave a speech to the recruits and other soldiers which included the following:<sup>3325</sup>

When I first arrived, when I was put in prison, I think there was a building here. The Ugandans arrested me. It's the second time I come here. I think many have heard the name; they listen to what is said about us on the radio. When you were still civilians, you saw us on television. I am Thomas Lubanga, the president of our party, the UPC. I believe this is the first time many of you see me. (Yes, yes, says the group). You are used to seeing our commanders; they are helping us carry out training, managing the army. I see them everyday. But we have a lot to do, a lot. And from time to time I am asked to go out, hold conferences and meet people; it is difficult for me to always be in touch with you; the chief of staff, commander Bosco should come and see you here. Is he coming here? (the group answers yes, yes). So if he doesn't come, he will be seen as an enemy but I think he cannot do that because he needs the troops. We have come to see you and encourage you. Why give you courage? Because the work we are doing, we are doing with you. The work you know, being enlisted in the army, trained, using weapons, is blessed. We have just sung about daily suffering, and it is this daily

<sup>3319</sup> T-128-Red2-ENG, page 37, lines 2 – 6 (P-0030).

<sup>3320</sup> T-128-Red2-ENG, page 31, lines 6 – 11 (P-0030).

<sup>3321</sup> T-128-Red2-ENG, page 33, lines 19 – 22; EVD-OTP-00570: 00:00:00 to 00:02:00 (T-128-Red2-ENG, page 25, line 16 to page 26, line 3) at time code 00:00:24.

<sup>3322</sup> EVD-OTP-00570: 00:00:00 to 00:38:05; T-128-Red2-ENG, page 33, line 6 to page 46, line 16 (P-0030).

<sup>3323</sup> EVD-OTP-00570 at time code 00:06:57.

<sup>3324</sup> T-128-Red2-ENG, page 31, lines 12 – 20.

<sup>3325</sup> T-128-Red2-ENG, page 36, lines 23 – 24, page 37, lines 8 – 23; page 38, line 17 to page 39, line 1, page 40, lines 5 – 11, and page 40, line 23 to page 41, line 17; the interpretation is taken from the court transcript from time code 00:09:07 to 00:26:10.

suffering that has made us decide to do what we are doing, correct?

[...] in view of the responsibility we have towards you, because I know we are united, aren't we? Well, we took an initiative and as soon as you finish your training and you're given your weapons, you have to go and ensure the safety and security of the population, and this is a very important task to carry out before God and humanity. You shouldn't take this work lightly. This type of work is of great importance. It can involve suffering whilst you are being trained. However, it's all to train your endurance and to ensure that you have the capacity. And if a member of the population sees you wearing a uniform, that they feel they can sleep tightly because somebody is guarding their safety. [...]

What we need to say is that we are all part of the Congolese people. That is our goal. It's that goal, that intention, that you must remember during your training. You have to keep that in mind while you are being trained. Keep that goal in mind. And then once you are deployed in the field, you must provide the security of our people, and that is extremely important for our people and before God. [...]

And be brave, be courageous, and when you put on your uniform tomorrow, let the people say that here we have the soldiers to provide for our security. We travelled the day before yesterday and we came back yesterday. This army is not an additional army or supplementary army; it's an essential army. Amongst you, some of you have studied. Those of you who will complete the training will have the opportunity to complete other training courses, and they will gain experience. Some of you will become generals; in fact, there are already generals amongst you. We need to have colonels and captains, and that we have a high-level army that we can present before our people. The job done by the army is something that gives value to all of us. We're all useful soldiers and we're part of this army, so that everyone considers himself as a valuable soldier. In keeping with the history of our country, you must keep in mind that you are a useful and valuable soldier, and that we must – we must do whatever we can so that you, indeed, be valuable soldiers. You must complete your training course and then afterwards you will be deployed in the field, in the interests of ourselves, in the interest of our country, and in the interest of our province and in the interests of our party.

1243. The defence does not dispute that the accused visited the Rwampara camp.<sup>3326</sup> P-0030, who was present, stated that the soldiers and recruits were of all ages (the youngest was nine years old).<sup>3327</sup>

1244. The Chamber is unpersuaded by the defence suggestion that there is a lack of evidence demonstrating that children below the age

<sup>3326</sup> ICC-01/04-01/06-2773-Red-tENG, para. 828.

<sup>3327</sup> T-128-Red2-ENG, page 48, lines 6 – 14.

of 15 were at the Rwampara camp.<sup>3328</sup> Earlier in this Judgment the Chamber addressed the defence contention that the video evidence is irrelevant for these purposes and decided it is admissible and reliable whenever the children filmed are obviously below the age of 15.<sup>3329</sup>

1245. As already indicated, the Chamber concludes that Thomas Lubanga visited the Rwampara camp in mid-February 2003 and saw and addressed recruits below the age of 15.

1246. The Chamber is satisfied the accused visited the troops and training camps during the period of the charges, in the circumstances described above.

***(3) The bodyguards of Thomas Lubanga and soldiers close to him***

1247. Deploying children under the age of 15 as bodyguards falls within the scope of Article 8(2)(e)(vii) since it constitutes the use of children to participate actively in hostilities.<sup>3330</sup> The Chamber examines below evidence concerning the soldiers who were responsible for ensuring the security of Thomas Lubanga.

1248. As already set out above, P-0055 gave evidence to the effect that there were children amongst the accused's bodyguards, and that the kadogos wore uniforms and carried weapons.<sup>3331</sup> He confirmed that the term "kadogos" refers to children between 13 and 16 years of age.<sup>3332</sup> This evidence is corroborated by P-0041 who testified that each commander, as well as the various UPC officials at all levels from the

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<sup>3328</sup> ICC-01/04-01/06-2786-Red-tENG, para. 48.

<sup>3329</sup> See para. 644.

<sup>3330</sup> See para. 628.

<sup>3331</sup> See para. 863; T-176-Red2-ENG, page 47, line 22 to page 48, line 13 and lines 23 – 24, page 49, lines 8 – 18, page 50, lines 2 – 6.

<sup>3332</sup> T-178-Red2-ENG, page 36, lines 12 – 16.



president through to the national secretaries, had bodyguards who were usually young people since “[they] were not taking adults”.<sup>3333</sup> P-0041 indicated that although most of the soldiers serving in the UPC were 22 years of age or older, there were also children in the 10 to 13 age bracket.<sup>3334</sup> P-0041 gave evidence that the President’s bodyguards were visible, having been positioned about 150 to 200 metres away from the witness’s place of work.<sup>3335</sup> Neither P-0055 nor P-0041 gave their ages, although P-0055 indicated that they included children (see above) and P-0041 stated that there were also “young persons” among them and that the children he saw serving as bodyguards to others were between 14 and 16 years old.<sup>3336</sup>

1249. Video excerpts were introduced through P-0030 that include some of the accused’s bodyguards. One sequence<sup>3337</sup> is of a presidential rally for Thomas Lubanga at the city stadium on the latter’s return from a trip to Goma.<sup>3338</sup> This event took place on 11 January 2003.<sup>3339</sup> A second sequence of the same event<sup>3340</sup> shows the moment when the President was about to enter the stadium.<sup>3341</sup> P-0030 identified the figure in blue or purple traditional dress as Thomas Lubanga.<sup>3342</sup> P-0030 testified that the accused spoke to the population about asking the UPDF, the Ugandan soldiers, to leave Ituri.<sup>3343</sup> The witness gave evidence about how the military personnel travelling in a

<sup>3333</sup> T-125-Red2-ENG, page 54, line 15 to page 55, line 22.

<sup>3334</sup> T-125-Red2-ENG, page 54, line 18 to page 55, line 8.

<sup>3335</sup> T-125-Red2-ENG, page 55, line 21 to page 56, line 1 (P-0041).

<sup>3336</sup> T-125-Red2-ENG, page 56, lines 2 – 19.

<sup>3337</sup> EVD-OTP-00571 from 02:21:25 to 02:23:00; T-128-Red2-ENG, page 49, line 25 to page 50, line 6 (P-0030).

<sup>3338</sup> T-128-Red2-ENG, page 51, lines 15 – 20 and page 53, lines 15 – 16 (P-0030).

<sup>3339</sup> T-128-Red2-ENG, page 55, lines 2 – 6 (P-0030).

<sup>3340</sup> EVD-OTP-00571 at 02:21:25 to 02:25:07; T-128-Red2-ENG, page 52, line 24 to page 55, line 2 (P-0030).

<sup>3341</sup> EVD-OTP-00571 at time code 02:22:37; T-128-Red2-ENG, page 52, line 24 to page 53, line 4 (P-0030).

<sup>3342</sup> EVD-OTP-00571 at time code 02:23:06; T-128-Red2-ENG, page 54, lines 8 – 10.

<sup>3343</sup> T-129-Red2-ENG, page 51, lines 17 – 18 and page 55, line 18 to page 56, line 4.

truck were the accused's bodyguards.<sup>3344</sup> One of them is standing up holding a rocket-propelled grenade-launcher, whilst the guard sitting third from the left is noticeably smaller than the others and is significantly below 15 years of age.<sup>3345</sup>

1250. In addition, P-0030 identified a young man with a shaved head wearing camouflage fatigues (standing next to a taller male in camouflage fatigues and a cap) as a member of the UPC.<sup>3346</sup> He is clearly carrying a rifle and he is obviously younger than the other males in military dress standing nearby. However, in the judgment of the Chamber it is not possible to determine whether he was below the age of 15 years.

1251. In the same excerpt P-0030 identified another soldier in the foreground (wearing camouflage clothing, including a cap, with a rifle across his right shoulder) as a member of the UPC/FPLC.<sup>3347</sup> From his appearance he was significantly below 15 years of age. P-0030 believed he was one of those maintaining security whilst Thomas Lubanga made his speech.<sup>3348</sup>

1252. In another video excerpt filmed on 23 January 2003, Mr Lubanga is seen returning to his residence after an event at the Hellenique Hotel.<sup>3349</sup> Two young men in camouflage clothing who are significantly below 15 years of age are sitting with taller, armed males in military

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<sup>3344</sup> EVD-OTP-00571 at time code 02:22:37 to 02:22:54; T-128-Red2-ENG, page 53, lines 11 – 25 (P-0030).

<sup>3345</sup> EVD-OTP-00571 at time code 02:22:52.

<sup>3346</sup> EVD-OTP-00571, at time code 02:44:18; T-128-Red2-ENG, page 56, lines 5 – 18 (P-0030).

<sup>3347</sup> EVD-OTP-00571, from time code 02:47:16 to 02:47:19; T-128-Red2-ENG, page 56, line 23 to page 57, line 5 (P-0030).

<sup>3348</sup> T-128-Red2-ENG, page 57, lines 6 – 19.

<sup>3349</sup> EVD-OTP-00574 from time code 00:32:40 to 00:35:44; T-129-Red2-ENG, page 26, line 19 to page 28, line 22 (P-0030).

clothing.<sup>3350</sup> P-0030, who was present throughout the day,<sup>3351</sup> identified them as members of the presidential guard.<sup>3352</sup>

1253. In a further video of events on 23 January 2003,<sup>3353</sup> a young man wearing camouflage clothing and a green hat is in a truck with other males wearing military clothing, whom the witness had previously identified as Thomas Lubanga's bodyguards.<sup>3354</sup> Although he is younger than the others around him, his eyes are partly shaded by his hat, and the Chamber was unable to determine whether he was below the age of 15.

1254. On 24 February 2003, a MONUC delegation visited President Lubanga's office.<sup>3355</sup> P-0030 gave evidence to the effect that during this visit he was outside "having fun with these young soldiers, these young kadogos, who were part of the protective forces" responsible for guarding the office of the President.<sup>3356</sup> The footage includes a bodyguard, playing with an insect, who is evidently under the age of 15.<sup>3357</sup>

1255. It is unclear whether the soldiers filmed in EVD-OTP-00585,<sup>3358</sup> who were guarding Thomas Lubanga at his residence, were younger than 15 years of age. The Chamber has not relied on this excerpt.

1256. However, in the same video, footage showing an English-

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<sup>3350</sup> EVD-OTP-00574 at time code 00:36:22; T-129-Red2-ENG, page 26, line 19 to page 28, line 22 (P-0030).

<sup>3351</sup> T-129-CONF-ENG, page 29, lines 17 – 20 (P-0030).

<sup>3352</sup> T-129-Red2-ENG, page 28, lines 19 – 25 (P-0030).

<sup>3353</sup> T-129-Red2-ENG, page 39, lines 12 – 17 (P-0030).

<sup>3354</sup> EVD-OTP-00575, at time code 00:35:04; P-0030 identified Thomas Lubanga's escort at T-129-Red2-ENG, page 37, lines 10 – 12 at time code 00:32:39.

<sup>3355</sup> EVD-OTP-00574 at 01:30:48; T-129-Red2-ENG, page 48, lines 1 – 7 and page 53, lines 16 – 20 (P-0030).

<sup>3356</sup> T-129-Red2-ENG, page 57, lines 14 – 25 (P-0030).

<sup>3357</sup> EVD-OTP-00574 at 01:49:02; T-129-Red-ENG, page 57, lines 13 – 20 (P-0030).

<sup>3358</sup> EVD-OTP-00585 at time code 00:09:09.

speaking journalist at a rally was also admitted into evidence.<sup>3359</sup> At least one of the young armed soldiers at the rally P-0030 identified as having taken place at Iga Barrière,<sup>3360</sup> and where Thomas Lubanga was present and addressed the crowd, is well below the age of 15 in appearance and in comparison with other soldiers.<sup>3361</sup> P-0030 confirmed that the soldiers in the sequence were from the UPC and although he could not recall the exact date of the event, he suggested it was when the UPC had regained control over Bunia.<sup>3362</sup>

1257. P-0030 testified that additional footage of the same day in Iga Barrière showed Thomas Lubanga addressing a crowd.<sup>3363</sup> A young male who is apparently responsible for maintaining security is filmed in the foreground wearing camouflage clothing and a green cap.<sup>3364</sup> P-0030 said he was from the UPC/FPLC.<sup>3365</sup> As mentioned above, P-0030 could not recall the exact date, but suggested this event occurred whilst the UPC was in power in Bunia.<sup>3366</sup> Although this individual appears to be below 15 years of age when he faces the camera,<sup>3367</sup> the Chamber is uncertain as to his exact age, and accordingly it has not relied on this excerpt as supporting the charges.

1258. P-0016 testified that there were children in the Presidential Guard.<sup>3368</sup> P-0016 explained why he was well placed to give this

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<sup>3359</sup> EVD-OTP-00585.

<sup>3360</sup> T-130-Red2-ENG, page 70, lines 17 – 18.

<sup>3361</sup> EVD-OTP-00585 from time code 00:40:08 onwards; T-130-Red2-ENG, page 70, lines 19 – 21.

<sup>3362</sup> T-130-Red2-ENG, page 70, line 25 to page 71, line 6.

<sup>3363</sup> T-130-Red2-ENG, page 73, lines 3 – 21 and page 70, lines 17 – 18.

<sup>3364</sup> EVD-OTP-00586 from time code 01:00:55 onwards; T-130-Red2-ENG page 72, lines 2 – 5.

<sup>3365</sup> T-130-Red2-ENG, page 79, line 21 to page 80, line 6 (P-0030).

<sup>3366</sup> T-130-Red2-ENG, page 70, line 17 to page 71, line 6 (P-0030). He confirmed that the footage showed the same scene as in the previous video excerpt EVD-OTP-00585; T-130-Red2-ENG, page 73, lines 3 – 21.

<sup>3367</sup> EVD-OTP-00586 at time code 01:01:02.

<sup>3368</sup> T-189-Red2-ENG, page 23, lines 23 – 25; T-189-CONF-ENG, page 29, lines 1 – 4.

evidence.<sup>3369</sup> The Presidential Guard was also known as the PPU.<sup>3370</sup> They were under the Commander-in-Chief, although “from the strictly military standpoint” they answered to the Chief of Staff.<sup>3371</sup> When the President travelled from his residence or office, he was accompanied by those members of the PPU who were on duty.<sup>3372</sup> The chief escort, who reported to the lead commander, compiled their roster, which was made available to the general staff.<sup>3373</sup> P-0016 gave inconsistent evidence as to the number of the guards he saw who were under the age of 15, but his evidence was that the youngest (of whom there were no more than four) were 13 to 14 years old.<sup>3374</sup> P-0016 said the uniforms of the PPU were the same as the rest of the FPLC and they all had weapons.<sup>3375</sup> The PPU also included female soldiers known as PMFs, some of whom were younger.<sup>3376</sup> On the basis of this evidence, the Chamber is persuaded there were at least a few children under the age of 15 within the PPU.

1259. P-0016 described a particular child soldier, who was about 13 years of age, as a “little one” who was “really too small”.<sup>3377</sup> P-0016 testified that whilst in the FPLC this child had served as a bodyguard with Bosco Ntaganda and Floribert Kisembo, and thereafter with the Presidency.<sup>3378</sup> P-0016 said that for the latter assignment, he needed to

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<sup>3369</sup> T-189-CONF-ENG, page 23, line 23 to page 24, line 2.

<sup>3370</sup> T-189-Red2-ENG, page 28, lines 19 – 20 and page 36, lines 9 – 15 (P-0016).

<sup>3371</sup> T-189-Red2-ENG, page 33, lines 16 – 20 (P-0016).

<sup>3372</sup> T-189-Red2-ENG, page 37, lines 14 – 23 (P-0016).

<sup>3373</sup> T-189-Red2-ENG, page 37, line 24 to page 39, lines 1- 3 (P-0016).

<sup>3374</sup> T-189-Red2-ENG, page 30, line 15 to page 31, line 19 and page 34, lines 13 – 22; page 35, line 22 to page 36, line 2 (P-0016).

<sup>3375</sup> T-189-Red2-ENG, page 32, line 24 to page 33, line 12.

<sup>3376</sup> T-189-Red2-ENG, page 33, line 24 to page 34, line 22 and page 35, line 22 to page 36, line 8 (P-0016).

<sup>3377</sup> T-189-Red2-ENG, page 16, lines 7 – 14.

<sup>3378</sup> T-189-Red2-ENG, page 32, lines 4 – 11.

be a member of the PPU.<sup>3379</sup>

1260. The defence relies on the evidence of D-0011 and D-0019 to support the claim that there were no children under the age of 15 amongst the soldiers assigned to guard the accused.<sup>3380</sup> D-0019 testified he did not notice any minors amongst them, and he said all the bodyguards of the accused he had met were adults.<sup>3381</sup> D-0011 gave evidence that between September 2002 and March 2003 he was by Thomas Lubanga's side effectively on a daily basis.<sup>3382</sup> During this period he was in contact every day with most of the soldiers, and his evidence was that the members of the presidential bodyguard were adults – he indicated there were no child soldiers in the entourage of the accused.<sup>3383</sup> D-0011 also said he was with Thomas Lubanga on a regular basis between May 2003 and the latter's departure for Kinshasa,<sup>3384</sup> and he had been in a position to notice that there were no minors amongst the accused's bodyguard during this period.<sup>3385</sup> D-0011 emphasised there were no children aged between 13 and 17 in the Presidential Guard or serving under the accused.<sup>3386</sup> Furthermore, he said he had not seen any child soldiers within the UPC between September 2002 and May 2003, and if there were any, they may have been deployed in the interior (meaning not in towns).<sup>3387</sup> However, given the wealth of contrary evidence in the case, including clear video evidence, the Chamber finds that D-0019's and D-0011's testimony on the absence of child soldiers amongst Thomas Lubanga's body guards

<sup>3379</sup> T-189-Red2-ENG, page 32, lines 19 – 23 (P-0016).

<sup>3380</sup> ICC-01/04-01/06-2773-Red-tENG, para. 847.

<sup>3381</sup> T-340-ENG, page 41, lines 12 – 19 and page 42, lines 16 – 19.

<sup>3382</sup> T-347-ENG, page 29, lines 19 – 22.

<sup>3383</sup> T-347-ENG, page 29, line 23 to page 30, line 3.

<sup>3384</sup> T-347-ENG, page 30, lines 4 – 7.

<sup>3385</sup> T-347-ENG, page 30, lines 8 – 11.

<sup>3386</sup> T-347-ENG, page 69, line 9 to page 70, line 3.

<sup>3387</sup> T-347-ENG, page 35, lines 20 – 24 and page 36, lines 9 – 13.

lacks credibility.

1261. The defence submits that the prosecution "concealed" exonerating testimony from a former bodyguard of the accused to the effect that there were no child soldiers under the age of 15 in the FPLC or within his Presidential Guard until a very late stage in the proceedings, by which point it was impossible for the defence to investigate and arrange for him to testify.<sup>3388</sup> In this individual's statement, he suggested that although there were 15 or 17 year old children at Thomas Lubanga's residence, he never saw 15-year old child soldiers in the UPC and he observed that Thomas Lubanga was opposed to recruiting child soldiers.<sup>3389</sup> Again, this statement lacks credibility given it is contradicted by a wealth of evidence that has been accepted by the Chamber.

1262. On the basis, in particular, of the video footage the Chamber is persuaded there were children below the age of 15 who were responsible for ensuring the security of the accused during public events. In addition, P-0016's evidence, which the Chamber accepts, was unequivocal as to the presence of approximately four children aged between 13 and 14 years within the PPU. P-0055 gave evidence that Thomas Lubanga's escorts included children and that he was accompanied by kadogos wearing uniforms and carrying arms, but he was not specific as to their ages. P-0041 similarly confirmed that there were children below the age of 15 amongst the bodyguards of various UPC officials, although he was less precise as to the age of the bodyguards of the accused. In light of the entirety of the evidence, the

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<sup>3388</sup> ICC-01/04-01/06-2773-Red-tENG, para. 848, referring to ICC-01/04-01/06-2657-Conf-tENG, paras 279 – 280 and EVD-D01-00773.

<sup>3389</sup> EVD-D01-00773, paras 67 and 68 at DRC-OTP-0233-0042 and 0043.

Chamber is satisfied that children below the age of 15 worked for Thomas Lubanga, and other UPC officials, as bodyguards.

**c) Conclusions and legal findings on the essential contribution of Thomas Lubanga**

1263. The prosecution submits the accused made an essential contribution to the common plan to take over Ituri using military means, including the use of children under 15, through his control over the FPLC and the directions he gave to recruit and use children under 15.<sup>3390</sup> It argues that the accused established the context for the recruitment and mobilisation of young people,<sup>3391</sup> and that by using children under the age of 15 in his bodyguard unit, as the head of the UPC/FPLC, he was setting an example for the means by which Ituri was to be conquered.<sup>3392</sup>

1264. The defence argues the accused could not have been involved in the establishment of the FPLC as an armed force in September 2002, and that the evidence of P-0016, P-0055 and D-0037 demonstrates that recruitment and training fell within the jurisdiction of the military authorities.<sup>3393</sup> The defence suggests that before and during the period of the charges it was the military leaders who determined and implemented the measures necessary to create an armed force, and the political leader of the UPC/FPLC was uninvolved with recruitment and military operations.<sup>3394</sup> The defence argues that the commanders, under the leadership of the Chief of Staff, had exclusive command of the units; the civilian authorities did not interfere in the execution of military operations; and the accused did not have a role as regards the

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<sup>3390</sup> ICC-01/04-01/06-2778-Red, para. 18.

<sup>3391</sup> ICC-01/04-01/06-2778-Red, para. 29.

<sup>3392</sup> ICC-01/04-01/06-2778-Red, para. 36.

<sup>3393</sup> ICC-01/04-01/06-2773-Red-tENG, paras 849 – 852.

<sup>3394</sup> ICC-01/04-01/06-2773-Red-tENG, paras 853 - 854.



army.<sup>3395</sup> It submits that Thomas Lubanga therefore did not make an essential contribution to the commission of the crimes with which he is charged.<sup>3396</sup>

1265. The defence also notes that the prosecution does not argue that the accused was personally involved in allocating recruits within the military units at the end of their training or in the detail of their deployment, functions which were handled by the commanders of the units acting on the orders of the Chief of Staff.<sup>3397</sup> In consequence, it is suggested by the defence that the accused did not make an essential contribution to the FPLC soldiers' active participation in hostilities.<sup>3398</sup>

1266. Although recruitment and training fell within the jurisdiction of the military authorities, the evidence has demonstrated that Thomas Lubanga was well-informed on military matters and he endorsed the recruitment initiatives. There is persuasive evidence of a conversation in which the accused acknowledged that he frequently tried to convince the population to provide food and to make young people available to join, and to train with, the UPC army.<sup>3399</sup> He visited training camps,<sup>3400</sup> where he encouraged the recruits (who included children under the age of 15), and he made speeches at public rallies, in order to motivate the population to support the war effort.<sup>3401</sup> Moreover, there is evidence that he gave orders on military affairs: for example, there is an account concerning soldiers who arrived in Aru on the accused's instruction, following telephone conversations with

<sup>3395</sup> ICC-01/04-01/06-2773-Red-tENG, paras 855 and 856.

<sup>3396</sup> ICC-01/04-01/06-2773-Red-tENG, para. 857.

<sup>3397</sup> ICC-01/04-01/06-2773-Red-tENG, para. 844.

<sup>3398</sup> ICC-01/04-01/06-2773-Red-tENG, para. 845.

<sup>3399</sup> See description of events in ICC-01/04-01/06-2748-Conf, para. 288 and transcript reference in footnote 783.

<sup>3400</sup> See paras 786, 790, 792, 1163, 1211, 1236-1246.

<sup>3401</sup> See, *e.g.*, EVD-OTP-00586; T-130-Red2-ENG, page 72, lines 2 – 9 and interpretation at page 73, line 6 to page 76, line 6.

Floribert Kisembo and Bosco Ntaganda. P-0055 also provided detailed evidence about an incident that occurred at a stage when there were tensions between the UPC/FPLC and the UPDF that demonstrates the accused gave instructions on military matters.<sup>3402</sup>

1267. The defence also argues the accused's visit to the Rwampara training camp and his speech to the recruits do not constitute an "essential contribution" because there is nothing to suggest the recruitment and training operations would have ended if this visit had not taken place.<sup>3403</sup> It is contended this event would not have influenced the recruitment operations conducted by the military leaders.<sup>3404</sup> In the judgment of the Chamber, the speech given by the accused during the Rwampara visit, when viewed along with the other evidence rehearsed above, establishes Thomas Lubanga's position of authority and his control over the other co-perpetrators, some of whom were present during the accused's speech (*e.g.* Bosco Ntaganda, John Tinanzabo and Rafiki Saba). The essential nature of his contribution to the common plan is not established by the discrete and undisputed fact that he visited the Rwampara camp, but instead it is founded on the entirety of the evidence relating to the contribution he made as the highest-ranking official within the UPC.

1268. The defence further alleges the accused's speech does not demonstrate unqualified approval of the conduct of the military leaders, because he did not direct thanks or praise at the leaders who were present.<sup>3405</sup>

1269. During his speech in Rwampara Mr Lubanga highlighted the

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<sup>3402</sup> T-178-CONF-ENG, page 28, line 21 to page 31, line 19.

<sup>3403</sup> ICC-01/04-01/06-2786-Red-tENG, para. 46.

<sup>3404</sup> ICC-01/04-01/06-2786-Red-tENG, para. 46.

<sup>3405</sup> ICC-01/04-01/06-2786-Red-tENG, para. 47.

need for armed troops and he referred to the role of the commanders as regards training and deployment. He encouraged those present, including children who were under the age of 15, to complete their training in order to become soldiers, and to receive their weapons so they would be able to fight. The lack of any thanks directed at the commanders is a peripheral issue. The central factor is that the accused supported the continued recruitment, training and deployment of soldiers of all ages. He said if his chief of staff did not visit a camp, he would consider him to be an enemy.<sup>3406</sup> This establishes the accused's authority over the other military leaders who were directly in charge of the military training provided to children under the age of 15 at the UPC's camps.

1270. The Chamber concludes beyond reasonable doubt that the accused, by virtue of his position as President and Commander-in-Chief from September 2002 onwards, was able to shape the policies of the UPC/FPLC and to direct the activities of his alleged co-perpetrators. The established reporting structures; the lines of communication within the UPC/FPLC; and the meetings and close contact between the accused and at least some of the alleged co-perpetrators, support the conclusion that he was kept fully informed throughout the relevant period and he issued instructions relating to the implementation of the common plan. Thomas Lubanga personally assisted in the military affairs of the UPC/FPLC in a variety of ways. He was involved in planning military operations and he exercised a key role in providing logistical support, by ensuring weapons, ammunition, food, uniforms and military rations and other supplies were available for the troops. The fact that other alleged co-

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<sup>3406</sup> EVD-OTP-00570, interpretation at 128-Red2-ENG, page 37, lines 16 – 19.

perpetrators, such as Floribert Kisembo and Bosco Ntaganda, were more involved with the day-to-day recruitment and training of soldiers,<sup>3407</sup> including those under the age of 15, does not undermine the conclusion that Mr Lubanga's role was essential to the implementation of the common plan. In addition, the accused and other commanders were protected by guards, some of whom were below 15. As set out above, the use of children as bodyguards for the commanders amounts to their use to participate actively in hostilities. The role of the accused within the UPC/FPLC and the hierarchical relationship with the other co-perpetrators, viewed in combination with the activities he carried out personally in support of the common plan, as demonstrated by the rallies and visits to recruits and troops, lead to the conclusion that the implementation of the common plan would not have been possible without his contribution.

1271. Viewed in its entirety, the evidence demonstrates that the accused and his alleged co-perpetrators, including particularly Floribert Kisembo, Chief Kahwa and Bosco Ntaganda, worked together and each of them made an essential contribution to the common plan that resulted in the enlistment, conscription and use of children under the age of 15 to participate actively in hostilities.

1272. In light of the evidence above, the Chamber is persuaded beyond reasonable doubt that the accused made an essential contribution to the common plan for the purposes of Article 25(3)(a).

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<sup>3407</sup> For example, T-179-Red2-ENG, page 63, lines 1 – 3 (P-0014); T-125-Red2-ENG, page 52, lines 6 – 7 (P-0041); T-189-Red2-ENG, page 17, lines 15 – 20 (P-0016); T-189-Red2-ENG, page 29, lines 16 – 25, page 30, line 24 to page 31, lines 4 and 19 and page 35, line 25 to page 36, line 2 (P-0016).

### 3. MENTAL ELEMENT

#### a) Intent and knowledge

1273. Pursuant to Article 30, the prosecution has the obligation of establishing that Thomas Lubanga committed the crimes of conscripting, enlisting and using children below the age of 15 to participate actively in hostilities, with the necessary intent and knowledge.

1274. It is necessary, therefore, for the prosecution to establish that Thomas Lubanga intended to participate in implementing the common plan, and, additionally, that he was aware that the conscription, enlistment or use of children below the age of 15 “will occur in the ordinary course of events”<sup>3408</sup> as a result of the implementation of the common plan.<sup>3409</sup> The Chamber needs to be satisfied the accused knew that the children were under the age of 15 years and, additionally, he was aware that he was providing an essential contribution to the implementation of the common plan. Finally, it is for the prosecution to establish the accused was aware of the existence and the factual circumstances that established the existence of an armed conflict.

1275. The prosecution argues that the accused (1) established the circumstances that led to the recruitment of children under 15 in the ordinary course of events, and (2) knew this would occur, or was aware there was a substantial likelihood that the crimes would

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<sup>3408</sup> See Article 30(2)(b) and (3).

<sup>3409</sup> The Chamber notes the defence arguments that the prosecution relied on a degree of probability rather than certainty that the crime would be committed on account of the common plan. As the Chamber has determined the legal basis on which it has examined the evidence, it will not discuss these arguments in any detail. (See ICC-01/04-01/06-2773-Red-tENG, paras 869 - 871).

occur.<sup>3410</sup> It submits the evidence demonstrates the accused had intent and knowledge within the terms of Article 30.<sup>3411</sup>

1276. The defence argues the alleged crimes were not a virtually certain consequence of creating the armed force and thereafter using it in the armed conflict.<sup>3412</sup> Equally, the defence suggests the prosecution has not established that voluntary enlistment in the FPLC by children under the age of 15 was the virtually certain consequence of the various recruitment activities.<sup>3413</sup> It is argued that although it was difficult to verify the ages of recruits, a policy requiring age verification was in place and was implemented, thereby considerably reducing the risk that children under the age of 15 would be enlisted.<sup>3414</sup> Any deliberate enlistment of children under the age of 15 by the military authorities was, therefore, in violation of this prohibition.<sup>3415</sup> The defence further argues the prosecution has not established how the essential contribution ascribed to the accused inevitably resulted in the conscription or use of children under the age of 15 to participate actively in hostilities.<sup>3416</sup> The defence contends there is no evidence to suggest that the accused was personally involved, or had knowledge of, any forcible recruitment of children under the age of 15 into the FPLC or their use to participate actively in hostilities.<sup>3417</sup> Finally, the Chamber is reminded the accused has not been prosecuted on the basis of superior responsibility, and it is suggested it has not been established that he condoned or participated in the crimes with

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<sup>3410</sup> ICC-01/04-01/06-2778-Red, para. 40.

<sup>3411</sup> ITT-01/04-01/06-2778-Red, para. 41.

<sup>3412</sup> ICC-01/04-01/06-2773-Red-tENG, para. 872.

<sup>3413</sup> ICC-01/04-01/06-2773-Red-tENG, paras 873 – 879.

<sup>3414</sup> ICC-01/04-01/06-2773-Red-tENG, paras 876 – 878.

<sup>3415</sup> ICC-01/04-01/06-2773-Red-tENG, paras 876 – 877.

<sup>3416</sup> ICC-01/04-01/06-2773-Red-tENG, paras 881 – 883.

<sup>3417</sup> ICC-01/04-01/06-2773-Red-tENG, paras 884 – 888.

which he is charged.<sup>3418</sup>

1277. The evidence presented to the Chamber establishes that the accused said he frequently tried to convince the population to provide food and to make youngsters available in order to join, and to train with, the army of the UPC/FPLC.<sup>3419</sup> Thomas Lubanga was in close contact with Mr Mafuta,<sup>3420</sup> who is said to have played an important role in recruiting children and advising the accused on policy.<sup>3421</sup> The accused frequently saw or was in contact with the senior UPC staff, many of whom were significantly involved in conscripting, enlisting, using and training of child soldiers, including Floribert Kisembo,<sup>3422</sup> Bosco Ntaganda,<sup>3423</sup> and Chief Kahwa.<sup>3424</sup> Moreover, numerous witnesses gave evidence that all the armed groups in Ituri and elsewhere used child soldiers.<sup>3425</sup> In a conversation with P-0046, Thomas Lubanga referred to children who had joined the UPC/FPLC because they were orphans and needed protection,<sup>3426</sup> thereby accepting there were children within the UPC/FPLC. Thomas Lubanga used child soldiers below the age of 15 as his bodyguards within the PPU;<sup>3427</sup> he gave speeches and attended rallies where UPC/FPLC soldiers below the age of 15 were present;<sup>3428</sup> and given the extent of the contact between the accused and senior members of the FPLC, the Chamber concludes that he was aware that children under the age of

<sup>3418</sup> ICC-01/04-01/06-2773-Red-tENG, paras 886 and 889.

<sup>3419</sup> See description of the conversation as set out in ICC-01/04-01/06-2748-Conf, para. 288 and transcript reference in footnote 783 of that document.

<sup>3420</sup> T-174-Red2-ENG, page 35, lines 6 – 21 (P-0055).

<sup>3421</sup> T-174-Red2-ENG, page 32, lines 8 – 11 and page 34, lines 1 – 12 (P-0055).

<sup>3422</sup> See paras 1154, 1199-1203, 1206, 1208-1210, 1212, 1217-1218.

<sup>3423</sup> See paras 1200, 1202-1203, 1208, 1210-1212, 1218.

<sup>3424</sup> See paras 1154, 1199, 1217.

<sup>3425</sup> T-158-Red2-ENG, page 61, lines 1 – 11 (P-0017); T-168-Red-ENG, page 76, line 18 (P-0012).

<sup>3426</sup> T-206-ENG, page 54, lines 13 – 16 (P-0046); EVD-OTP-00494, T-39-FR, page 83, line 23 to page 84, line 18 (T-39-ENG, page 103, line 5 to page 104, line 2).

<sup>3427</sup> See paras 864, 1247-1262.

<sup>3428</sup> See paras 790, 792, 860-861, 1236, 1242-1245, 1249-1251, 1256-1257.

15 formed part of their personal escorts.<sup>3429</sup>

1278. The accused visited UPC/FPLC training camps, and specifically at the Rwampara camp he gave a morale-boosting speech to recruits who included young children below the age of 15.<sup>3430</sup> The Chamber is of the view that the video footage of this event provides compelling evidence on Thomas Lubanga's level of knowledge, which is directly relevant to the mental element of the charges. It is unnecessary to reiterate in this section what the accused, accompanied by some of his co-perpetrators, said at the UPC/FPLC training camp in Rwampara on 12 February 2003.<sup>3431</sup> Irrespective of whether or not there was a policy of verifying the ages of the recruits, it has been established that the accused was aware that the FPLC was recruiting and using child soldiers who were clearly below the age of 15 and he condoned, and he took steps to implement, this policy, along with his co-perpetrators.

1279. The Chamber is persuaded the evidence discussed in the sections above demonstrates that the accused had intent and knowledge with respect to the crimes with which he is charged. In reaching this conclusion, the Chamber has additionally considered the evidence and the arguments submitted by the parties concerning demobilisation as discussed below.

### ***(1) Demobilisation***

1280. The prosecution suggests that the demobilisation orders issued by the accused were a "sham" and that during the period when the

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<sup>3429</sup> See paras 1277, 1348; See, *e.g.*, T-113-Red2-ENG, page 36, line 24 to page 37, line 5 (P-0038); T-125-Red2-ENG, page 54, line 20 to page 55, line 8 and page 55, lines 12 – 20 (P-0041).

<sup>3430</sup> See paras 792, 1211, 1242-1245.

<sup>3431</sup> T-128-Red2-ENG, page 36, lines 23 – 24, page 37, lines 8 – 23; page 38, line 17 to page 39, line 1, page 40, lines 5 – 11, and page 40, line 23 to page 41, line 17; the interpretation is taken from the court transcript from time code 00:09:07 to 00:26:10.



accused was supposedly demobilising children under the age of 18, he failed to question their use as bodyguards or soldiers on the occasions when he saw them. It is argued the evidence has demonstrated that he condoned the continued recruiting and using child soldiers.<sup>3432</sup> The prosecution alleges the demobilisation orders were issued by the accused in response to pressure from the media and the international community.<sup>3433</sup>

1281. This is challenged by the defence,<sup>3434</sup> and it argues the accused was opposed to the recruitment of minors throughout the relevant period, and he took appropriate steps to end this practice and to ensure that children were demobilised.<sup>3435</sup> The defence submits that this undermines the suggested mental element, as follows:

From all these observations it is clear that at no time did the Accused approve, accept or tolerate the enlistment of children under the age of 15 years and, *a fortiori*, their forced enlistment or active participation in hostilities. On the contrary, the trial has shown that each time he found himself in a position to exert his authority, the Accused formally prohibited practices of this nature and ordered the necessary measures to end them. It follows that the mental element required by article 30 for the commission of the crimes charged cannot be established against the Accused.<sup>3436</sup>

1282. D-0011 and D-0019 each gave extensive evidence on issues relating to the accused's knowledge and intent, including the issue of demobilisation. As discussed above, their account of Thomas Lubanga's approach to child soldiers, particularly within the UPC/FPLC, is generally lacking in credibility.<sup>3437</sup> Although the Chamber has not relied on their views as to the nature and purpose of the demobilisation orders, it has nonetheless accepted their accounts

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<sup>3432</sup> ICC-01/04-01/06-2748-Red, paras 20, 307 – 348.

<sup>3433</sup> ICC-01/04-01/06-2748-Red, paras 308 – 309, 342 – 344.

<sup>3434</sup> ICC-01/04-01/06-2773-Red-tENG, paras 955 – 957.

<sup>3435</sup> ICC-01/04-01/06-2773-Red-tENG, paras 834, 890 – 957.

<sup>3436</sup> ICC-01/04-01/06-2773-Red-tENG, para. 957.

<sup>3437</sup> See paras 784-785, 866-869.

concerning the relevant prevailing circumstances, to the extent that this was supported by other credible evidence.

**(a) MONUC and NGOs**

1283. Representatives of certain NGOs and MONUC discussed the use and demobilisation of child soldiers with representatives of the UPC/FPLC. P-0041 became aware there was an issue concerning child soldiers within the organisation when he worked in a particular section of the executive between September 2002 and mid-2003.<sup>3438</sup> This issue was raised during the weekly discussions he had with a handful of MONUC officers.<sup>3439</sup> In particular, after September 2002, members of the UPC were told they should not use children as soldiers or make them engage in particular forms of work.<sup>3440</sup> P-0012 testified that MONUC or other organisations raised demobilisation issues with the armed groups after March or April 2003.<sup>3441</sup> He stated that although during the earlier meetings other topics were addressed, by the end of August or beginning of September 2003 demobilisation and social reintegration programmes were being discussed.<sup>3442</sup> P-0012 indicated that even though by that time MONUC had become aware that children were within the armed groups, they were unable to demobilise due to a lack of any sufficient assistance.<sup>3443</sup> However, P-0012 further indicated that during meetings in March and April 2003, the various organisations told the representatives of the armed groups that the use of child soldiers was a serious problem.<sup>3444</sup> It is, however, unclear from P-0012's evidence whether the UPC was formally

<sup>3438</sup> T-124-CONF-ENG, page 69, line 13 to page 70, line 3.

<sup>3439</sup> T-125-Red2-ENG, page 47, lines 6 – 14.

<sup>3440</sup> T-125-Red2-ENG, page 48, lines 2 – 7 (P-0041).

<sup>3441</sup> T-168-Red2-ENG, page 81, line 24 to page 82, line 2.

<sup>3442</sup> T-168-Red2-ENG, page 82, line 3 to page 83, line 6.

<sup>3443</sup> T-168-Red2-ENG, page 82, lines 10 – 18.

<sup>3444</sup> T-168-Red2-ENG, page 82, line 19 to page 83, line 6 (P-0012).

represented at some or all of these meetings.<sup>3445</sup>

1284. P-0046 gave evidence about a further MONUC meeting with the accused on 30 May 2003, at which the issue of child soldiers was addressed (see below), and representatives of the UPC at all levels – but in particular those who participated in the *Comité de Concertation des Groupes Armées*<sup>3446</sup> (“CCGA”) – were reminded repeatedly of their obligations as regards child protection.<sup>3447</sup> P-0046 indicated that these issues, including forcible recruitment, were regularly raised.<sup>3448</sup>

1285. P-0116 testified that after he left Bunia in mid-2002, the organisation he worked for tried to contact Mr Lubanga about the recruitment (and re-recruitment) of children.<sup>3449</sup> Mr Lubanga refused to meet with this NGO.<sup>3450</sup> However, P-0116 stated that a meeting on demobilisation took place during the second half of 2002 between members of P-0116’s team and Didier Mandey, who P-0116 stated was the UPC/FPLC’s Minister of Defence and one of Mr Lubanga’s close aides.<sup>3451</sup> Mr Mandey informed the representatives of the organisation that their project was not to the advantage of children<sup>3452</sup> and given the NGO’s inability to care for the children, the UPC/FPLC should not be asked to be involved in their demobilisation or liberation.<sup>3453</sup>

1286. The defence challenges the reliability of P-0116’s evidence on the basis that the witness said Didier Mandey was the Minister of Defence.

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<sup>3445</sup> T-168-Red2-ENG, page 83, lines 7 – 25.

<sup>3446</sup> T-209-Red2-ENG, page 24, lines 20 – 23 (P-0046).

<sup>3447</sup> T-207-Red2-ENG, page 24, lines 8 – 12.

<sup>3448</sup> T-207-Red2-ENG, page 40, lines 2 – 15.

<sup>3449</sup> T-208-Red2-ENG, page 58, lines 3 – 4 and page 58, line 19 to page 59, line 4 (P-0116). The transcript first refers to the witness leaving in 2003 and then to him leaving Bunia in 2002. Based on the witness’s evidence, 2002 appears to be correct.

<sup>3450</sup> T-208-Red2-ENG, page 58, line 23 to page 59, line 4 (P-0116).

<sup>3451</sup> T-208-Red2-ENG, page 59, lines 5 – 12 and page 59, line 20 to page 60, line 2; T-209-Red2-ENG, page 68, line 15 to page 69, line 18.

<sup>3452</sup> T-208-Red2-ENG, page 59, lines 5 – 9.

<sup>3453</sup> T-208-Red2-ENG, page 59, lines 9 – 12.

It is suggested Chief Kahwa occupied the post of Deputy Minister for Defence of the UPC and was not replaced on his departure.<sup>3454</sup> The defence submits Mr Mandey was never a member of the UPC/FPLC executive and he was not mentioned by any other witness.<sup>3455</sup> Although the defence suggested to P-0116 that Mr Mandey was a member of the RCD-ML and was not involved with Mr Lubanga after March 2002, the witness did not change his evidence on this issue.<sup>3456</sup> However, given this account by P-0116 is not supported by any other witness, the Chamber has not relied on this particular aspect of his testimony.

1287. Nonetheless, there was other evidence to the effect that individuals working in the field of demobilisation were threatened by the UPC/FPLC. P-0024 testified that in October 2002 he did not consider that the UPC would willingly have cooperated with SOS Grands Lacs, because the activities of NGOs of this kind did not accord with the UPC's expansionist aims.<sup>3457</sup> P-0024 suggested the UPC did not support the activities of humanitarian workers and those involved in human rights because they had different aims from the UPC, given the latter "was out for enrolling children".<sup>3458</sup> P-0024 testified that around November 2002 his organisation had difficulties continuing with its work and many other humanitarian organisations experienced similar difficulties because the UPC's regime in Bunia was characterised by "general terror tactics".<sup>3459</sup> P-0024 recalled that the UN

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<sup>3454</sup> ICC-01/04-01/06-2773-Red-tENG, para. 614; To show that Chief Kahwa was not replaced the defence refers to EVD-OTP-00721, a UPC/FPLC decree of 11 December 2002 in which a new executive is appointed, but the Deputy Minister for Defence is no longer listed and Article 1 states that defence and security is the responsibility of the Presidency.

<sup>3455</sup> ICC-01/04-01/06-2773-Red-tENG, para. 614.

<sup>3456</sup> T-209-Red2-ENG, page 69, lines 19 – 23 (P-0116).

<sup>3457</sup> T-170-Red-ENG, page 57, lines 7 – 14.

<sup>3458</sup> T-170-Red-ENG, page 57, lines 22 – 24.

<sup>3459</sup> T-170-Red-ENG, page 68, lines 2 – 16, see also page 57, lines 14 – 22.

Office for the Coordination of Humanitarian Affairs and the Catholic Church were threatened, and the coordinator of humanitarian activities and one of the Catholic priests were declared *persona non grata* in Bunia.<sup>3460</sup> This evidence was corroborated by P-0046.<sup>3461</sup> The latter added that in 2002 several individuals belonging to humanitarian organisations were arrested by the administration of the UPC.<sup>3462</sup> P-0046 indicated that in March and May 2003, the NGOs and UN bodies in Bunia had to deal with attacks, and not only by the UPC.<sup>3463</sup> There were threats to staff in humanitarian organisations, and although these may not have been constant, they formed part of the general environment.<sup>3464</sup> P-0116 testified that he left Bunia in mid-2002 because the situation was no longer tolerable for humanitarian and child protection workers.<sup>3465</sup> The organisation he worked for had received covert threats and someone close to Mr Lubanga warned them they ought to be careful and leave.<sup>3466</sup> P-0116 said the organisation only received threats from Mr Lubanga's group,<sup>3467</sup> and he suggested this was because they were witnessing, and reporting on, the recruitment of children, and working to raise awareness on this issue. They were considered a nuisance because their activities were having an impact.<sup>3468</sup>

1288. In addition, D-0037 agreed there were complaints made by the United Nations and other international organisations in October or November 2002 and early 2003 regarding the recruitment of children

<sup>3460</sup> T-170-Red-ENG, page 57, lines 16 – 22 and page 67, line 8 to page 68, line 1.

<sup>3461</sup> T-206-Red2-ENG, page 53, lines 10 – 14 .

<sup>3462</sup> T-206-Red2-ENG, page 53, lines 8 – 10 (P-0046).

<sup>3463</sup> T-206-Red2-ENG, page 53, lines 14 – 16 (P-0046).

<sup>3464</sup> T-206-Red2-ENG, page 53, lines 17 – 21 (P-0046).

<sup>3465</sup> T-203-Red2-ENG, page 81, lines 9 – 13 (P-0116).

<sup>3466</sup> T-203-Red2-ENG, page 81, line 14 to page 82, line 9.

<sup>3467</sup> T-203-Red2-ENG, page 82, lines 10 – 17.

<sup>3468</sup> T-203-Red2-ENG, page 83, lines 7 – 20 (P-0116).

in the FPLC, which were received by his office within the UPC.<sup>3469</sup> In a departure from his earlier testimony, D-0037 indicated he had not been informed about the complaints against the UPC in May or June 2003<sup>3470</sup> and he only learnt about them in the letters that the President of the UPC sent to the commanders.<sup>3471</sup> D-0019 suggested that complaints by MONUC or from other members of the international community about the presence of children in the UPC army were discussed at executive committee meetings, and the UPC President considered it necessary to try and take action in order to protect the FPLC from such accusations.<sup>3472</sup> D-0011 also indicated Thomas Lubanga received complaints from the United Nations and other international organisations during October and November 2002, although he attempted to minimise their significance by suggesting that they were “attacks” of the sort that are usually made against any rebel movement.<sup>3473</sup>

1289. The defence rejects the suggestion that pressure was exerted on the FPLC in September and October 2002 because of the presence of children.<sup>3474</sup> It refers to a video excerpt introduced through P-0030 of a meeting between Mr Lubanga and a MONUC delegation on 24 February 2003, in support of the contention that meetings with MONUC occurred in February and the subject of child soldiers was not raised.<sup>3475</sup> It is further submitted that P-0012 confirmed that meetings with MONUC or other NGO that addressed the topic of

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<sup>3469</sup> T-349-ENG, page 64, lines 1 – 6.

<sup>3470</sup> T-350-Red2-ENG, page 2, lines 5 – 9.

<sup>3471</sup> T-350-Red2-ENG, page 2, lines 10 – 15.

<sup>3472</sup> T-345-ENG, page 63, lines 9 – 23.

<sup>3473</sup> T-347-ENG, page 63, line 24 to page 64, line 10 (D-0011).

<sup>3474</sup> ICC-01/04-01/06-2773-Red-tENG, para. 899.

<sup>3475</sup> ICC-01/04-01/06-2773-Red-tENG, para. 899; EVD-OTP-00577; P-0030 confirmed that the meeting took place on 24 February 2003, T-129-CONF-ENG, page 53, lines 16 – 20.

child soldiers were held in late August or early September 2003.<sup>3476</sup>

1290. On the basis of the evidence discussed above, the Chamber is persuaded that by May 2003 at the latest Thomas Lubanga was fully aware of the prohibition on child recruitment and was aware of the concerns of outside bodies as to the recruitment and use of child soldiers, and that this issue was repeatedly raised regardless of the precise nature or context of their meetings. Moreover, the evidence demonstrates the UPC/FPLC attempted to impede the work of the organisations which were involved with helping child soldiers during the period of the charges. On the basis of the testimony of D-0019, D-0037 and D-0011, the Chamber is satisfied that complaints about the use of child soldiers were levelled at the UPC/FPLC by late 2002 and early 2003, and it accepts D-0019's evidence that these complaints were discussed at meetings.

1291. Other aspects of the involvement of international and national organisations in demobilisation are discussed below.

**(b) Demobilisation instructions of 21 and 30  
October 2002 (EVD-OTP-00696 and EVD-D01-  
01096)**

1292. P-0055 was shown a document entitled "*Enrôlement des enfants soldats*" signed on 21 October 2002, which appears to originate from the cabinet of the President.<sup>3477</sup> The letter is written on UPC/FPLC letterhead and is signed by Thomas Lubanga.<sup>3478</sup> It notes that contrary to the UPC ideology, the practice had developed of recruiting children

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<sup>3476</sup> ICC-01/04-01/06-2773-Red-tENG, para. 899, referring to T-168-CONF-FRA, page 84, lines 10 – 24.

<sup>3477</sup> T-176-Red2-ENG, page 57, line 23 to page 58, line 12 (P-0055); EVD-OTP-00696 (previously EVD-OTP-00047).

<sup>3478</sup> EVD-OTP-00696.

of both sexes into the armed forces and the revolutionary armies.<sup>3479</sup> As regards the armed branch of the UPC army (the FPLC) the letter purports to prohibit this practice, which it is said goes against the UPC's prior initiatives concerning the demobilisation of child soldiers with the NGO SOS Grand-Lacs.<sup>3480</sup> P-0055 indicated he had not been informed of the document and was not on the list of addressees,<sup>3481</sup> and he had been unaware of its existence.<sup>3482</sup> P-0055 stated he had not received any order to demobilise child soldiers, and he was not conscious of any instruction to this effect.<sup>3483</sup>

1293. D-0011 was also shown this letter of 21 October 2002,<sup>3484</sup> and he indicated it was his draft and he "proposed it to the president for signature, on his recommendation" in October 2002.<sup>3485</sup> According to D-0011, the President sought in this letter to remind the Chief of Staff of the FPLC that the ideology of any army that he commands should include avoiding the enrolment of minors,<sup>3486</sup> by which Thomas Lubanga meant "any individual below the age of 18."<sup>3487</sup> According to D-0011, other military groups tended to enrol individuals of all ages, and since the UPC was establishing a military wing<sup>3488</sup> Thomas Lubanga wished to indicate to the chiefs of staff "that children were not to be enlisted in this army."<sup>3489</sup> D-0011 said "that was a rationale in which Thomas Lubanga has always moved. Since he started in this

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<sup>3479</sup> EVD-OTP-00696. The original refers to "[...] une pratique d'enrôlement des mineurs de deux sexes au sein des forces combattantes et dans certaines armées à caractère révolutionnaire [...]".

<sup>3480</sup> EVD-OTP-00696.

<sup>3481</sup> T-176-Red2-ENG, page 60, lines 10 – 11.

<sup>3482</sup> T-176-Red2-ENG, page 61, lines 1 – 2.

<sup>3483</sup> T-178-Red2-ENG, page 44, line 21 to page 45, line 8 (P-0055).

<sup>3484</sup> T-346-ENG, page 78, lines 8 – 9; EVD-OTP-00696 (previously EVD-OTP-00047).

<sup>3485</sup> T-346-ENG, page 78, lines 8 – 22.

<sup>3486</sup> T-346-ENG, page 78, lines 22 – 25.

<sup>3487</sup> T-346-ENG, page 78, line 25 to page 79, line 1.

<sup>3488</sup> The English transcript erroneously refers to the APC (T-346-ENG, page 79, line 13), but the French transcript correctly refers to the FPLC (T-346-FRA, page 68, line 13).

<sup>3489</sup> T-346-ENG, page 79, lines 10 – 19.



field, he's never wanted children to be enrolled in armies, [...]."<sup>3490</sup>

1294. The prosecution questioned D-0011 about the reference number "287" on the 21 October letter, which was higher than the reference numbers for documents dated November<sup>3491</sup> and December,<sup>3492</sup> and it was suggested that this violated the administrative regulations in the UPC.<sup>3493</sup> D-0011 replied that there was a register for numbering letters to the Presidency that came from the President's cabinet and there was a further register for documents sent directly by his private secretary.<sup>3494</sup> He explained that the apparent divergence between the reference numbers occurred because of the existence of these two separate registers (which used discrete systems for assigning numbers to documents),<sup>3495</sup> and because more documents were produced by the President via his private secretary than by the director of his cabinet.<sup>3496</sup> It was suggested to D-0011 that the document of 21 October 2002 was a false document, or a "smokescreen", that had been created deliberately to give a false impression.<sup>3497</sup> D-0011 maintained that the document was genuine and it had not been written after the event for this reason.<sup>3498</sup>

1295. Another order dated 30 October 2002 drafted on behalf of the Chief of Staff of the FPLC, Floribert Kisembo, instructs all the commanders of the various units of the FPLC to disarm children below

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<sup>3490</sup> T-346-ENG, page 79, lines 15 – 19.

<sup>3491</sup> EVD-OTP-00684 (previously EVD-OTP-00043) with reference number 146/UPC/RP/CAB/PRES/2002; T-347-ENG, page 71, line 18 to page 72, line 47.

<sup>3492</sup> EVD-OTP-00712 (previously EVD-OTP-00184) with reference number 179/UP/RP/CAB/PRES/2002; T-347-ENG, page 71, lines 10 – 25.

<sup>3493</sup> T-347-ENG, page 73, lines 2 – 4 and page 74, lines 11 – 13.

<sup>3494</sup> T-347-ENG, page 73, lines 5 – 9 and page 74, lines 14 – 18.

<sup>3495</sup> T-347-ENG, page 74, line 15 to page 75, line 6.

<sup>3496</sup> T-347-ENG, page 73, lines 22 – 25.

<sup>3497</sup> T-347-ENG, page 76, lines 8 – 11 and page 77, lines 4 – 7.

<sup>3498</sup> T-347-ENG, page 76, lines 12 – 24 and page 77, lines 8 – 13.

the age of 18, including those within the self-defence forces.<sup>3499</sup> The order is worded generally and does not specify that the commanders should disarm children in the FPLC<sup>3500</sup> and it does not refer to the previous demobilisation order of 21 October 2002. When asked about potential discrepancies in the numbering on this and a later document, D-0037 testified that the reference number of the letter was inappropriate within the context of military regulations and he suggested that given it was a time of war, there may have been problems in the filing – that documents had not been dealt with in the same way and the numbers had possibly “jumped”.<sup>3501</sup> D-0037 accepted there were irregularities in the signature and the stamp, but he did not give a clear explanation as to why the seal was that of the “chargé des opérations” if the document was drafted and signed on behalf of the Chief of Staff.<sup>3502</sup>

1296. D-0019 testified that the decree dated 21 October 2002 was published and read out on Candip radio station during a news broadcast.<sup>3503</sup> Although D-0019 was unsure about the precise date, he stated it was read out on the date of publication during October 2002, and that this was possibly around the middle of the month.<sup>3504</sup> He explained that in the absence of its own official newspaper, the UPC published documents in the national press and it used programmes on the *Radio Nationale et Télévision du Congo*.<sup>3505</sup>

1297. D-0019 denied that the October and other similar orders were

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<sup>3499</sup> EVD-D01-01096; T-349-ENG, page 11, lines 2 – 17 (D-0037).

<sup>3500</sup> EVD-D01-01096: “Dès à présent, vous devez désarmer endéans 2 (deux) semaines tous les enfants, c’est-à-dire moins de 18 ans. Et cela, même dans les forces d’auto-défense.”

<sup>3501</sup> T-349-ENG, page 46, line 21 to page 48, line 18.

<sup>3502</sup> T-349-ENG, page 43, line 11 to page 46, line 14.

<sup>3503</sup> T-345-ENG, page 60, lines 8 – 13 and page 64, line 6 to page 65, line 19.

<sup>3504</sup> T-345-ENG, page 64, lines 12 – 14 and page 64, line 22 to page 65, line 21.

<sup>3505</sup> T-345-ENG, page 64, lines 6 – 19.

sham documents, in the sense that it was not intended to put them into effect.<sup>3506</sup>

1298. D-0019 also testified that the UPC G5, Eric Mbabazi, spoke on the radio several times in order to make announcements about demobilisation and to raise awareness so as to prevent children from joining the army.<sup>3507</sup> D-0019 denied the suggestion that Eric Mbabazi was actively attempting to recruit more children into the FPLC or that he sent documents complaining about the lack of children and the difficulty in recruiting them into the FPLC.<sup>3508</sup>

1299. The Chamber accepts the account provided by D-0019 that the 21 October order was read out over the radio. A UN report admitted into evidence supports the suggestion that UPC documents were broadcast in this way as it contains in its annex a later order, as read out over the radio.<sup>3509</sup> However, given the wealth of evidence demonstrating that recruitment continued unabated in spite of the demobilisation orders, the Chamber rejects D-0019's evaluation of the nature and the underlying purpose of these orders.

1300. D-0037 similarly disagreed with the prosecution's assertion that the demobilisation letters were produced at the time solely to fend off complaints by the international community, together with the contention that it was never intended to implement the demobilisation measures.<sup>3510</sup> D-0037 stated that demobilisation started within the RCD-ML in 2001, and indeed individuals were brought from the

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<sup>3506</sup> T-345-ENG, page 64, lines 2 – 5.

<sup>3507</sup> T-345-ENG, page 69, line 24 – page 71, line 11.

<sup>3508</sup> T-345-ENG, page 71, line 16 to page 72, line 15.

<sup>3509</sup> EVD-OTP-00741 at DRC-OTP-0152-0248.

<sup>3510</sup> T-349-ENG, page 62, line 24 to page 63, line 25.

training centres and handed over to NGOs in 2000/2001.<sup>3511</sup> However, D-0037 also acknowledged he knew Eric Mbabazi, the G5, and that from October 2002 through into 2003 the latter was trying, *inter alia*, to rally young people to attend at the training centres.<sup>3512</sup> D-0037 stated he could not say whether Eric Mbabazi was “recruiting” children.<sup>3513</sup>

1301. The defence disputes the prosecution’s claim that the instructions of 21 and 30 October 2002 were only issued following protests from the international community and the NGOs, and it argues there is no evidence of pressure or protests regarding the presence of minors in the FPLC in the period immediately preceding the instructions.<sup>3514</sup> The defence further submits that the documents could not have been intended to mislead MONUC and the NGOs as they were designed for internal use only, and had not been made available to representatives of the international community or the NGOs by members of the UPC/FPLC.<sup>3515</sup> It is further suggested that the fundamental difference between the political documents and the demobilisation orders are that the former were public while the latter were confidential prior to their use at trial.<sup>3516</sup>

1302. The prosecution suggests the defence has conceded that the accused routinely drafted false documents.<sup>3517</sup> The defence argues that in relying on this alleged concession, the prosecution appears to accept that some of the documents it relied on to prove the existence of a

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<sup>3511</sup> T-349-ENG, page 63, lines 16 – 19.

<sup>3512</sup> T-349-ENG, page 64, lines 7 – 19.

<sup>3513</sup> T-349-ENG, page 64, lines 13 – 16.

<sup>3514</sup> ICC-01/04-01/06-2773-Red-tENG, paras 895 – 899.

<sup>3515</sup> ICC-01/04-01/06-2773-Red-tENG, para. 900.

<sup>3516</sup> ICC-01/04-01/06-2786-Red-tENG, paras 53 – 54.

<sup>3517</sup> ICC-01/04-01/06-2778-Red, para. 49.

common plan lack reliability.<sup>3518</sup>

1303. The Chamber accepts, contrary to the defence submissions, that the orders were made available to the public via the media. Whether or not the orders were a “sham”, and were issued in response to external pressure, is analysed below.

**(c) Request for report of 27 January 2003 (EVD-OTP-00697) and letter of 16 February 2003 (EVD-D01-01097)**

1304. A letter dated 27 January 2003, and signed by Thomas Lubanga, refers to the demobilisation order of 21 October 2002 and requests a detailed report on the demobilisation of children below the age of 18 within the FPLC from the Chief of Staff.<sup>3519</sup> P-0055 gave evidence that he had not seen this letter and he was unaware of it, although he had been in the UPC at that time.<sup>3520</sup> However, D-0037 indicated he saw the letter when it arrived in the office where he was working.<sup>3521</sup> D-0011 testified that he had drafted the letter following a request by the accused in order to generate a follow-up report from the Chief of Staff of the FPLC in relation to the order that had previously been issued.<sup>3522</sup>

1305. A report dated 16 February 2003 addressed to the general administrator of UPC security refers to the demobilisation instructions of 21 October 2002 and 27 January 2003 and states they had been correctly disseminated to all the major units. However, guidance was requested given the opposition from the self-defence forces to

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<sup>3518</sup> ICC-01/04-01/06-2786-Red-tENG, paras 53 – 54.

<sup>3519</sup> EVD-OTP-00697 (previously EVD-OTP-00050).

<sup>3520</sup> T-176-Red2-ENG, page 61, lines 10 – 25; T-178-CONF-ENG, page 42, lines 5 – 9 (the letter was the document under tab 2 in the binder) and page 44, line 21 to page 45, line 8.

<sup>3521</sup> T-349-ENG, page 11, line 20 to page 12, line 4.

<sup>3522</sup> T-347-ENG, page 10, lines 2 – 4 and page 10, line 16 to page 11, line 6.

demobilise and disarm the children in their groups.<sup>3523</sup> D-0037 testified he had drafted and signed the report on the orders of Bosco Ntaganda.<sup>3524</sup> He conceded that the report's reference number did not appear to be consistent with the military regulations,<sup>3525</sup> and it mistakenly did not contain the reference number given to the 21 October 2002 order.<sup>3526</sup>

1306. The prosecution argues the letter of 27 January 2003 is a sham because a genuine follow-up report would have been requested earlier than three months after the demobilisation order was issued in October.<sup>3527</sup> It suggests the letter supports the proposition that the October order was drafted later and backdated,<sup>3528</sup> and submits that, in any event, the follow up order was not implemented and recruitment continued.<sup>3529</sup> The prosecution draws attention to the fact that D-0037 could not explain why the 16 February 2003 report omits the reference number "287" that had allegedly been assigned to the 21 October 2002, and itself contains an erroneous reference number.<sup>3530</sup>

1307. The defence argues the two documents of 27 January and 16 February 2003 reflect the intention of the accused to demobilise children and they demonstrate that the instructions issued by Thomas Lubanga in this regard were transmitted to the relevant military authorities, which then proceeded to implement them.<sup>3531</sup> The defence notes the prosecution does not challenge the authenticity of the

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<sup>3523</sup> EVD-D01-01097; T-349-ENG, page 12, line 5 to page 13, line 24. As was discussed above, the Chamber found that D-0037's supported the finding that the village self-defence forces existed separately from the FPLC.

<sup>3524</sup> EVD-D01-01097; T-349-ENG, page 12, lines 8 – 12.

<sup>3525</sup> T-349-ENG, page 55, lines 13 – 23.

<sup>3526</sup> T-349-ENG, page 56, lines 2 – 25.

<sup>3527</sup> ICC-01/04-01/06-2748-Red, paras 333 – 334.

<sup>3528</sup> ICC-01/04-01/06-2748-Red, para. 333.

<sup>3529</sup> ICC-01/04-01/06-2748-Red, paras 335 – 339.

<sup>3530</sup> ICC-01/04-01/06-2748-Red, para. 330 .

<sup>3531</sup> ICC-01/04-01/06-2773-Red-tENG, paras 909 – 913.

documents and it reiterates its argument that they were not created to deceive the international community, given their content.<sup>3532</sup>

1308. The Chamber considers the documents of 23 January and 13 February 2003 below, within the context of the evidence in its entirety in order to establish whether they are of relevance, as advanced by the defence, to the mental element of the charges.

**(d) Letter of 12 February 2003 from the National Secretary for Education (EVD-OTP-00518)**

1309. As discussed above, a 12 February 2003 letter from the UPC/FPLC's National Secretary for Education, Adubango Biri, dated 12 February 2003 and addressed to the UPC/FPLC's G5 officer, refers to a demobilisation program for child soldiers aged 10 to 15 or 16 years that had been initiated in the name of the UPC and its President.<sup>3533</sup>

1310. The prosecution relies on this document to demonstrate that the accused was aware of the presence of children in the UPC/FPLC.<sup>3534</sup>

1311. The defence suggests the letter demonstrates that the decisions as to demobilisation were being implemented.<sup>3535</sup>

1312. The Chamber accepts that the letter may have been a response to previous demobilisation orders but the relevant question is whether children under 15 years of age formed part of the FPLC troops after September 2002. In the Chamber's estimation, this letter clearly demonstrates that children under 15 years of age were serving in the FPLC in February 2003.

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<sup>3532</sup> ICC-01/04-01/06-2773-Red-tENG, paras 914 – 915.

<sup>3533</sup> EVD-OTP-00518.

<sup>3534</sup> ICC-01/04-01/06-2748, paras 303 and 304.

<sup>3535</sup> ICC-01/04-01/06-2773-Red-tENG, paras 919 – 921.

**(e) Demobilisation decree of 1 June 2003 (EVD-  
OTP-00728)**

1313. P-0041 described a meeting he attended during which the demobilisation of child soldiers was discussed and the President read out a decree on the issue, dated 1 June 2003, which he had signed in order that they “would not have difficulties with [...] human rights.”<sup>3536</sup> P-0041 stated that the issue of child soldiers was on the agenda of the meeting because there was a problem with MONUC and human rights organisations and that the UPC “had to take a decision so that we would not have that problem within the UPC, and so it was that the child soldiers were demobilised.”<sup>3537</sup>

1314. The decree provides in Article 1 that any individual below the age of 18 years is demobilised forthwith from the FPLC.<sup>3538</sup> Pursuant to Article 2, a National Secretary and the Chief of Staff were charged with implementing the decree and this was effective from the date it was signed, 1 June 2003.<sup>3539</sup> It does not specifically address the position of child soldiers below the age of 15, and instead refers to “children” in the armed forces.<sup>3540</sup> P-0041 commented that although he had not been provided with the decree, “those concerned [had] most probably received the document”.<sup>3541</sup> He stated that, in principle, the document should have been transmitted by the president’s office to each of the national secretaries, but apparently that did not happen.<sup>3542</sup> D-0037 stated that he recognised the document, having seen it in the office of

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<sup>3536</sup> T-125-Red2-ENG, page 42, lines 11 – 17 and page 43, line 22 to page 44, line 19 (P-0041); EVD-OTP-00728 (previously EVD-OTP-00051).

<sup>3537</sup> T-125-Red2-ENG, page 43, lines 6 – 10 (P-0041).

<sup>3538</sup> EVD-OTP-00728.

<sup>3539</sup> EVD-OTP-00728.

<sup>3540</sup> EVD-OTP-00728.

<sup>3541</sup> T-126-Red2-ENG, page 39, lines 2 – 17.

<sup>3542</sup> T-125-Red2-ENG, page 43, line 22 to page 44, line 2.



the Chief of Staff.<sup>3543</sup>

1315. Since the wording of the decree is contained in an annex to a MONUC report dated 15 June 2003, as broadcasted by Radio Candip on 2 June 2003,<sup>3544</sup> the Chamber is satisfied the contents of the decree were published in the public domain.

1316. Following up on this decree, a document entitled “Memo number 014” dated 5 June 2003, addressed to all brigade commanders of the FPLC and signed by Commander Floribert Kisembo refers to the decree of 1 June 2003 and contains the following instructions:<sup>3545</sup>

In accordance with the spirit of decree number 1 bis/UPC/RP/Cab/Pres/2003 of the 1st of June, 2003, of the UPC/RP President, FPLC Commander-in-Chief, you are requested to demobilise all people among our ranks under the age of 18 according to the regular procedure.

1317. Turning to the circumstances in which the 1 June 2003 decree was issued, during the period when the UPC sought to take control of the town of Bunia, a MONUC representative often visited the UPC/FPLC staff headquarters, where the kadogo unit was stationed (indeed, it was present during his visits).<sup>3546</sup> P-0017 gave evidence that the children in the kadogo unit, prior to their disarmament, were dressed in military uniforms and carried weapons.<sup>3547</sup> However, according to P-0017, the major problem for the UPC/FPLC during this period lay with the media, who were perceived by the UPC as a

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<sup>3543</sup> T-349-ENG, page 17, lines 13 – 20.

<sup>3544</sup> EVD-OTP-00741 at DRC-OTP-0152-0248. The text as transcribed from the radio broadcast contains a slight variation to the extent that pursuant to Article 2 a National Inspector (rather than a National Secretary), and the Chief of Staff are responsible for the implementation.

<sup>3545</sup> EVD-OTP-00691 (previously EVD-OTP-00052); T-126-Red2-ENG, page 39, line 19 to page 40, line 23.

<sup>3546</sup> T-158-Red2-ENG, page 44, line 16 to page 47, line 3 (P-0017).

<sup>3547</sup> T-158-Red2-ENG, page 47, lines 6 – 9 and lines 20 – 25.

threat.<sup>3548</sup> The witness explained that:

[p]hotographs were being taken, especially where child soldiers were moving around with weapons. And sometimes they would try to focus on the area where heavy weapons were located, and this was disturbing. This was embarrassing, because this was going to take on a different dimension. A lot was already being said about child soldiers, that it is – was not a good thing. Almost everyone was aware of that at that time. As so that is why I say their presence was threatening, because they would pass by at any time. [...]<sup>3549</sup>

1318. At one point, a European foreign journalist was given special permission to interview a kadogo soldier in the UPC/FPLC.<sup>3550</sup> P-0017 stated that the child was no more than 13 years old, and for the interview he was given a red beret and he carried his weapon.<sup>3551</sup> The interview was eventually broadcast on television.<sup>3552</sup>

1319. P-0017 testified that the demobilisation order of June was issued within a week of this interview with the child soldier,<sup>3553</sup> and the witness suggested the decision to disarm child soldiers was influenced by this attention on the part of the media.<sup>3554</sup> The Chamber accepts this contention.

1320. Taking into account the evidence concerning the complaints received by the UPC, the evidence of P-0041 relating to meetings in which demobilisation was discussed as a means to avoid human rights problems within the UPC, the evidence of P-0017 on the visits by the MONUC representative and the attention of the media, the Chamber is persuaded the UPC was subjected to strong external pressure because child soldiers were within the FPLC and it is sure the demobilisation

<sup>3548</sup> T-158-Red2-ENG, page 48, lines 4 – 5 and page 51, line 18 to page 52, line 12.

<sup>3549</sup> T-158-Red2-ENG, page 51, line 23 to page 52, line 12.

<sup>3550</sup> T-158-Red2-ENG, page 48, lines 4 – 18 (P-0017).

<sup>3551</sup> T-158-Red2-ENG, page 48, line 11 to page 49, line 17.

<sup>3552</sup> T-158-Red2-ENG, page 49, line 9 (P-0017).

<sup>3553</sup> T-158-Red2-ENG, page 54, line 23 to page 55, line 2.

<sup>3554</sup> T-158-Red2-ENG, page 60, line 21 to page 61, line 11.

decree of 1 June 2003 was issued in response to this external pressure.

1321. However, the effective implementation of this order, as well as the other demobilisation instructions, has not been demonstrated, even on a *prima facie* basis. As analysed below, the evidence proves that child recruitment continued regardless of the external pressure and internal orders to demobilise.

**(f) Lack of demobilisation, continued recruitment and re-recruitment**

1322. Turning to the question of whether the demobilisation orders were implemented, according to P-0017, during a morning assembly at the UPC/FPLC staff headquarters, the Chief of Staff “talked about the fact that he was going to ask the commander in charge of the child soldiers to disarm them. They were not supposed to carry weapons or wear military uniforms.”<sup>3555</sup> Following this announcement, P-0017 stated “we were surprised”.<sup>3556</sup> However, having been disarmed, some of the children remained at the military headquarters because they were provided with meals, although they no longer carried weapons or wore military uniforms.<sup>3557</sup> In particular, children below the age of 15 – the youngest being about 12 years old<sup>3558</sup> – who had originally come from the kadogo unit in Mamedi remained at the headquarters even if they no longer had weapons or uniforms because they felt tied to the headquarters and the Chief of Staff.<sup>3559</sup> P-0017 suggested those child soldiers who joined at a later stage did not feel protected by the

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<sup>3555</sup> T-158-Red2-ENG, page 47, lines 9 – 19; see also page 52, lines 19 – 22 and page 53, lines 16 – 21.

<sup>3556</sup> T-158-Red2-ENG, page 47, lines 12 – 13 (P-0017).

<sup>3557</sup> T-158-Red2-ENG, page 47, lines 17 – 19 and page 52, lines 19 – 23 (P-0017).

<sup>3558</sup> T-158-Red2-ENG, page 22, line 23 to page 23, line 9 (P-0017).

<sup>3559</sup> T-158-Red2-ENG, page 47, lines 13 – 19; page 52, lines 22 – 23; page 54, lines 3 – 11 and lines 19 – 20 (P-0017).

general staff and ran away to other commanders.<sup>3560</sup> He stated he saw them once they had joined units in Mudzipela and Centrale because they were permitted to continue using their weapons provided they were out of sight of the Chief of Staff.<sup>3561</sup> When asked whether he was aware of children being disarmed on other occasions, P-0017 gave evidence that he only saw children from the UPC being disarmed in Bunia.<sup>3562</sup> In Kilo they were following their commanders to Mongbwalu, although he witnessed the departure of numerous child soldiers.<sup>3563</sup>

1323. Notwithstanding his evidence on the Chief of Staff initiating the disarmament of child soldiers in Bunia, P-0017 testified that only ten days later those who remained at the military headquarters were again provided with weapons when the Artemis force arrived.<sup>3564</sup> The kadogos who were available when the fighting began in Bunia were re-armed on the order of the Chief of Staff, Floribert Kisembo, to assist in the ongoing fighting.<sup>3565</sup> Although P-0017 initially stated that he thought Mr Lubanga was still in town when the order to re-arm the children was given, he thereafter confirmed an earlier statement in which he had indicated that the order to re-arm the children was given in the middle of battle and it did not come from Thomas Lubanga, who had already left the town.<sup>3566</sup> P-0017 suggested that a child who had been re-armed died in fighting during the course of the night

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<sup>3560</sup> T-158-Red2-ENG, page 54, lines 14 – 16.

<sup>3561</sup> T-158-Red2-ENG, page 47, lines 16 – 19.

<sup>3562</sup> T-158-Red2-ENG, page 60, lines 18 – 20 (P-0017).

<sup>3563</sup> T-158-Red2-ENG, page 60, lines 10 – 14 (P-0017).

<sup>3564</sup> T-158-Red2-ENG, page 53, line 22 to page 54, line 2, page 54, lines 19 – 21 and page 55, lines 4 – 7. D-0019 confirms that Artemis was deployed in June 2003, T-345-ENG, page 51, line 25 to page 52, line 5.

<sup>3565</sup> T-158-Red2-ENG, page 54, lines 19 – 21; page 55, lines 4 – 21; T-160-Red2-ENG, page 52, lines 20 – 25 (P-0017).

<sup>3566</sup> T-160-Red2-ENG, page 52, line 25 to page 53, line 2; page 55, line 2 – page 56, line 6 (P-0017).

before the Artemis contingent arrived.<sup>3567</sup> P-0017 further gave evidence that the Chief of Staff proclaimed himself as President of the UPC/FPLC on his return to Bunia following the arrival of Artemis and the ensuing battle.<sup>3568</sup>

1324. The defence appears to suggest that the accused was not responsible for re-arming the children because he had left the town and Floribert Kisembo “was trying to take control of the UPC”.<sup>3569</sup> However, there is no evidence to suggest that Mr Kisembo was in control or acted against the authority of the accused in the period following the incident with Artemis. His attempted take-over did not occur until December 2003,<sup>3570</sup> and the documentary evidence suggests that Floribert Kisembo acknowledged, at least in a formal sense, the authority of the accused as president as late as November 2003.<sup>3571</sup> In evidence that the Chamber accepts, P-0017 indicated that the UPC/FPLC’s response to the Artemis operation included deploying the children during the battle. Given the continued, essentially uncontested authority of the accused at this time, the return of weapons and uniforms to the child soldiers for this purpose is compelling evidence that their involvement was the result of the common plan, namely to use soldiers of any age to maintain control

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<sup>3567</sup> Earlier, P-0017 suggested that the children from the kadogo unit in Mamedi were grouped together to protect them and that although some were bodyguards to the Chief of Staff, the witness did not know about military tasks and said that they had no special responsibilities at that time. T-158-Red2-ENG, page 22, line 14 to page 25, line 22. At that time the kadogos had been brought back to the General Staff, which was in Mamedi. T-158-Red2-ENG, page 22, lines 17 – 22 and page 25, lines 23 – 24. The Chamber is persuaded that this earlier testimony does not contradict the evidence that they were re-armed and that at least one child died fighting in the night before Artemis arrived. T-158-Red2-ENG, page 46, lines 12 – 18 and page 56, lines 6 – 24.

<sup>3568</sup> T-160-Red2-ENG, page 56, lines 7 – 21 and page 57, lines 1 – 14.

<sup>3569</sup> ICC-01/04-01/06-2773-Red-tENG, para. 448.

<sup>3570</sup> EVD-D01-01092, a letter dated 9 December 2003 signed by the Interim President of the UPC/FPLC criticises the attempted coup by Commander Kisembo and confirms the presidency of Thomas Lubanga. It is a response to a political declaration of 3 December 2003.

<sup>3571</sup> In EVD-OTP-00683, a letter on the UPC/FPLC letterhead dated 1 November 2003, apparently bearing the stamp and signature of Floribert Kisembo himself, informs the accused of a reorganisation of the brigade commanders in the field.

over Bunia rather than representing a decision that had been taken by the Chief of Staff alone.

1325. The Chamber heard evidence that before demobilisation finally occurred in October and November 2003 (after the period of the charges),<sup>3572</sup> there had been “sham” demobilisation attempts by the UPC/FPLC.<sup>3573</sup> P-0024 gave evidence that two months after the UPC took control of Bunia, there were broadcasts by Radio Candip and on television in which the UPC/FPLC “pretended to demobilise certain children”.<sup>3574</sup> P-0024 said children had remained within the armed groups, and they were seen, for instance, acting as bodyguards in their pick-up vehicles.<sup>3575</sup> He suggested any demobilisation that occurred only concerned a limited number of children – he estimated no more than 20.<sup>3576</sup> P-0024 also gave evidence that after the purported demobilisation in October 2002, he saw armed children from the FPLC threatening members of the population.<sup>3577</sup> The defence suggests P-0024’s claim that the UPC/FPLC only pretended to demobilise children was simply his opinion and that he failed to provide further details.<sup>3578</sup> It is argued the witness was biased, and he attempted to minimise the significance and scope of the demobilisation measures which he accepted existed.<sup>3579</sup> The evidence of this witness is evaluated in the context of the other material on this issue.

1326. P-0046 gave similar evidence, namely that the UPC/FPLC

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<sup>3572</sup> T-207-Red2-ENG, page 28, lines 1 – 10 (P-0046).

<sup>3573</sup> T-170-Red-ENG, page 52, line 24 to page 53, line 15 (P-0024).

<sup>3574</sup> T-170-Red-ENG, page 52, lines 15 – 19.

<sup>3575</sup> T-170-Red-ENG, page 52, lines 19 – 23.

<sup>3576</sup> T-170-Red-ENG, page 53, lines 5 – 15.

<sup>3577</sup> T-170-Red-ENG, page 53, lines 16 – 21.

<sup>3578</sup> ICC-01/04-01/06-2773-Red-tENG, para. 591.

<sup>3579</sup> ICC-01/04-01/06-2786-Red-tENG, para. 58.

demobilisation efforts were not genuine,<sup>3580</sup> and that once the demobilisation instructions had been issued, the UPC/FPLC failed to cooperate, notwithstanding the meetings with MONUC representatives that were held several times a week.<sup>3581</sup> P-0046 indicated that during a meeting on 30 May 2003 at Thomas Lubanga's residence, "contrary to the reaction of other armed groups that I had met with previously, there was no indication on his part of any will to cooperate [...] if you will allow me to compare with the FAPC<sup>3582</sup> that I had met with in March, the RCD-ML, or other groups, the Mai Mai groups in the North Kivu who had publicly stated that they were willing to cooperate with child protection agencies from the United Nations, on 30 May, there was no sign of open-mindedness or any will to actually discuss the matter."<sup>3583</sup> During this meeting, P-0046 informed Thomas Lubanga that MONUC was trying to make a detailed record of the ongoing recruitment of children,<sup>3584</sup> including, in particular, by the UPC/FPLC.<sup>3585</sup> P-0046 showed certain documents to Mr Lubanga, including various international resolutions and other instruments concerning the protection of children,<sup>3586</sup> and they discussed the DRC's ratification of the Rome Statute.<sup>3587</sup>

1327. After the 30 May 2003 meeting between the MONUC delegation and Thomas Lubanga, and once the MONUC teams had been able to monitor the information that was publicly broadcasted, P-0046 was informed about a text, distributed by the Presidency of the UPC, which

<sup>3580</sup> EVD-OTP-00489, T-37-EN, page 106, line 22 to page 107, line 25; EVD-OTP-00491, T-39-EN, page 108, line 23 to page 109, line 15 (transcripts of testimony before the Pre-Trial Chamber).

<sup>3581</sup> EVD-OTP-00489, T-37-ENG, page 107, lines 10 – 25 (transcript of testimony before the Pre-Trial Chamber).

<sup>3582</sup> T-209-Red2-ENG, page 29, lines 3 – 11.

<sup>3583</sup> T-207-Red2-ENG, page 25, lines 8 – 18.

<sup>3584</sup> T-206-Red2-ENG, page 41, lines 9 – 12.

<sup>3585</sup> T-206-Red2-ENG, page 40, line 25 to page 41, line 6.

<sup>3586</sup> T-206-Red2-ENG, page 41, lines 7 – 9.

<sup>3587</sup> T-206-Red2-ENG, page 41, lines 13 – 19.

referred to the demobilisation of certain children.<sup>3588</sup> In the days following this announcement, P-0046 and others tried unsuccessfully to find the official text.<sup>3589</sup> However, two or three weeks later they were told by one of the child protection agencies that the latter had been contacted by a UPC commander about taking care of some of the children.<sup>3590</sup> P-0046 discovered that some of the children who left the UPC travelled to a particular transit centre, but repeated requests by MONUC and other child protection agencies for an official meeting with members of the UPC on this issue were ignored.<sup>3591</sup> P-0046 gave evidence about an incident in the fall of 2003 when she encountered a child she had previously met at the Rwampara camp in March 2003, who told her that the children she had interviewed at that time had not been demobilised or ordered to return to civilian life.<sup>3592</sup> Generally, the UPC continued to recruit children throughout the time the witness was responsible for Ituri.<sup>3593</sup> After having indicated that many children were released by the UPC in October and November 2003 (in contrast to June),<sup>3594</sup> P-0046 testified that some families asked the centres not to return the children who had been within the UPC to their homes because they were afraid they might be re-recruited.<sup>3595</sup>

1328. Supporting the evidence that recruitment continued, the weekly MONUC report of 15 June 2003 (mentioned above)<sup>3596</sup> included in an annex the content of the demobilisation decree as it was read out over the radio, and it contained a section on the continued recruitment of

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<sup>3588</sup> T-206-Red2-ENG, page 54, lines 21 – 25 (P-0046).

<sup>3589</sup> T-206-Red2-ENG, page 55, lines 1 – 3 (P-0046).

<sup>3590</sup> T-206-Red2-ENG, page 55, lines 4 – 10 (P-0046).

<sup>3591</sup> T-206-Red2-ENG, page 55, lines 11 – 15 (P-0046).

<sup>3592</sup> T-206-Red2-ENG, page 12, lines 7 – 24 (P-0046).

<sup>3593</sup> T-206-Red2-ENG, page 55, lines 16 – 18 (P-0046).

<sup>3594</sup> T-207-Red2-ENG, page 28, lines 1 – 10.

<sup>3595</sup> T-207-Red2-ENG, page 29, lines 10 – 16.

<sup>3596</sup> See paras 1299 and 1315.



children.<sup>3597</sup> The report referred in terms to children who were being recruited by the UPC.<sup>3598</sup> Although the ages of the children are not specified, the decree purportedly referred to all children below the age of 18.

1329. P-0024 did not recall that SOS Grands Lacs was involved in any demobilisation initiatives for children undertaken by the UPC – indeed, he did not recall any UPC initiatives of this kind.<sup>3599</sup> He indicated that at the time of the first letter, 21 October 2002, their work in Bunia was becoming difficult,<sup>3600</sup> and in November 2002 their activities were discontinued for security reasons,<sup>3601</sup> with the NGO losing many of the children within its care.<sup>3602</sup>

1330. P-0116 did not receive any information about a UPC demobilisation initiative in the period between September 2002 and October 2003,<sup>3603</sup> and he said he would have been aware of an event of this kind on account of his work.<sup>3604</sup> According to information P-0116 received, including from child protection workers operating in Bunia at the time, some of the NGOs approached the UPC “through purely bilateral relations” to ask it to release children, but appointments that were made were not kept.<sup>3605</sup> P-0116 gave evidence about a meeting with the child protection unit of MONUC and the donors of the World Bank that took place in March or April 2003 in Kinshasa to discuss demobilisation in the DRC, to which numerous armed groups were

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<sup>3597</sup> EVD-OTP-00741.

<sup>3598</sup> EVD-OTP-00741 at page DRC-OTP-0152-0246.

<sup>3599</sup> T-170-Red-ENG, page 54, lines 12 – 17.

<sup>3600</sup> T-170-Red-ENG, page 54, lines 15 – 23.

<sup>3601</sup> T-170-Red-ENG, page 54, line 18 to page 55, line 23 (P-0024).

<sup>3602</sup> T-170-Red-ENG, page 68, lines 2 – 9 (P-0024).

<sup>3603</sup> T-208-Red2-ENG, page 65, line 23 to page 66, line 7 and page 67, lines 9 – 7.

<sup>3604</sup> T-208-CONF-ENG, page 66, lines 7 – 11.

<sup>3605</sup> T-208-Red2-ENG, page 70, lines 2 – 8.

invited.<sup>3606</sup> However, although they wanted to establish contact with the UPC, the latter was not invited because it was considered too dangerous to approach, and, in any event, no one within the UPC was engaged with the issue of child demobilisation.<sup>3607</sup> Therefore, P-0116 suggested it was difficult for the international organisations to contact the UPC on this issue, and it was recognised that it was difficult to persuade the UPC to release children unconditionally.<sup>3608</sup> An initiative, forming part of the national DDR programme and open to all those concerned with the issue, including the armed groups, failed to receive the necessary commitment.<sup>3609</sup> Indeed, prior to October 2003, P-0116 was unaware of any formal commitment on the part of the UPC to release children within its ranks.<sup>3610</sup>

1331. In contrast, D-0037 drafted and signed minutes of a meeting he attended on 16 June 2003<sup>3611</sup> that had included, amongst others, Mr Rafiki and Bosco Ntaganda,<sup>3612</sup> in the course of which instructions were given to demobilise children and to hand them over to the NGOs.<sup>3613</sup> According to the minutes, during the course of this meeting, the question was raised as to how the demobilisation order of 1 June 2003 related to the FPLC, given it had seemingly banned the use of children at its inception.<sup>3614</sup> The following answer was given during the meeting:

[...] With regard to the few child soldiers seen around town, we need to work on them, as you did with the self-defence militias in the field. The decree is

<sup>3606</sup> T-208-CONF-ENG, page 67, lines 9 – 24.

<sup>3607</sup> T-208-Red2-ENG, page 67, line 24 to page 68, line 3.

<sup>3608</sup> T-208-Red2-ENG, page 68, lines 9 – 21.

<sup>3609</sup> T-208-Red2-ENG, page 70, lines 9 – 13.

<sup>3610</sup> T-208-CONF-ENG, page 70, lines 13 – 16 (P-0116).

<sup>3611</sup> EVD-D01-01098; T-349-ENG, page 17, line 21 to page 18, line 4 and page 19, lines 6 – 15 (D-0037).

<sup>3612</sup> EVD-D01-01098; T-349-ENG, page 18, line 23 to page 19, line 2 (D-0037).

<sup>3613</sup> EVD-D01-01098.

<sup>3614</sup> EVD-D01-01098.

for wide-ranging awareness-raising [...] As it stands, faced with evil we need to act for the benefit of society as a whole. This is the argument presented by the President, which we have adopted.<sup>3615</sup>

In order to establish the authenticity of the typed minutes of this meeting, the defence refers to particular unsigned, handwritten notes dated 16 June 2003 that, according to D-0019, appear to have been drafted by the Chief of Staff of the FPLC, Floribert Kisembo<sup>3616</sup> and which may be some form of preparatory notes.<sup>3617</sup> The two documents appear to relate to the same meeting, and the defence suggests they demonstrate that demobilising child soldiers was a priority for the FPLC; that the demobilisation policy extended to all minors bearing arms within each of the armed groups in Bunia and Ituri; and certain initiatives in this context had already been implemented.<sup>3618</sup>

1332. D-0011 gave evidence that the decree of 1 June 2003 was brought to the attention of the public via the press attaché of the Presidency when he spoke on the radio.<sup>3619</sup> The witness indicated that he was aware the decree had been implemented because it was normal practice to send the decrees to all the national secretaries, who ensured their provisions were put into effect.<sup>3620</sup> According to D-0011, the Chief of Staff had been ordered to disseminate the content of the decree.<sup>3621</sup> Additionally, D-0011 testified that Monsignor Nekoosa, the director of Caritas in Bunia, met with Thomas Lubanga and they discussed transferring the children in the army to Caritas so as to ensure their

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<sup>3615</sup> EVD-D01-01098, page DRC-D01-0003-5902. The translation is taken from the quote in ICC-01/04-01/06-2773-Red-tENG, para. 954.

<sup>3616</sup> EVD-OTP-00668; T-342-ENG, page 43, lines 10 – 21.

<sup>3617</sup> ICC-01/04-01/06-2773-Red-tENG, paras 949 – 951.

<sup>3618</sup> ICC-01/04-01/06-2773-Red-tENG, para. 955.

<sup>3619</sup> T-347-ENG, page 18, lines 17 – 2.

<sup>3620</sup> T-347-ENG, page 19, lines 12 – 22.

<sup>3621</sup> T-347-ENG, page 19, line 23 to page 20, line 2.

social re-integration.<sup>3622</sup> The defence relied on notes drafted by D-0011 in which this meeting is mentioned.<sup>3623</sup> D-0011 consistently maintained the demobilisation decree of 1 June 2003 had been effectively implemented, and he denied that children were re-armed by the FPLC/UPC.<sup>3624</sup> Given D-0011's general lack of credibility on the recruitment and use of child soldiers as discussed above, the Chamber has disregarded his testimony on the implementation of the demobilisation decree.

1333. Moreover, as described in detail earlier, Thomas Lubanga visited the Rwampara training camp in February 2003 – after the first demobilisation orders were issued – and he encouraged the recruits, some of whom were below the age of 15, including by telling them they would be armed and deployed after the completion of their training.<sup>3625</sup>

1334. The defence denies that Thomas Lubanga's visit to the Rwampara camp in February 2003 conflicts with his demobilisation orders and it is asserted that "his kindness towards these irreproachable young people" during his visit to Rwampara should be viewed in light of the firm instructions he gave in this context.<sup>3626</sup>

1335. It is to be noted P-0030 gave evidence to the effect that the youngest of the recruits must have been around nine.<sup>3627</sup> Indeed, the images in the video of 12 February 2003 show recruits well below the

<sup>3622</sup> T-347-ENG, page 20, lines 2 – 10.

<sup>3623</sup> ICC-01/04-01/06-2773-Red-tENG, para. 947, referring to EVD-D01-01094.

<sup>3624</sup> T-348-ENG, page 5, lines 5 – 23.

<sup>3625</sup> EVD-OTP-00570.

<sup>3626</sup> ICC-01/04-01/06-2773-Red-tENG, paras 916 – 917, with reference to the speech he gave: EVD-OTP-00570; T-128-Red2-ENG, page 36, lines 23 – 24, page 37, lines 8 – 23; page 38, line 17 to page 39, line 1, page 40, lines 5 – 11, and page 40, line 23 to page 41, line 17; the interpretation is taken from the court transcript from time code 00:09:07 to 00:26:10.

<sup>3627</sup> T-128-Red2-ENG, page 48, lines 11 – 14.

age of 15.<sup>3628</sup> Thomas Lubanga arrived in a military uniform, accompanied by soldiers, and he addressed and encouraged young recruits in their military training. He told them that as soon as they completed their training they would be given weapons and entrusted with the security and safety of the population.<sup>3629</sup> The accused also told them they would be useful soldiers, who were to be deployed in the field.<sup>3630</sup> The Chamber is of the view that the accused intended for those under the age of 15 who were present to be provided with military training before they were sent into combat, treating them identically to those over the age of 15. Even if the procedures for demobilisation were complex and lengthy, as described by P-0046,<sup>3631</sup> the behaviour of the accused was wholly incompatible with a genuine intention to avoid recruiting children into, or to demobilise children from, the FPLC.

1336. The defence also suggests that since most of the recruits present at the training centre were of an appropriate age to be soldiers, the speech he gave was “directed essentially at recruits old enough to be soldiers”.<sup>3632</sup> The Chamber is unable to accept this submission. The accused addressed all the recruits at the Rwampara camp on 12 February 2003 and there is no credible evidence to support the submission that he was only focussing on those above 15.

1337. D-0011 also gave evidence that in February 2003 there were a considerable number of attacks in the outskirts of Bunia, leading to the

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<sup>3628</sup> See paras 792, 1242-1245.

<sup>3629</sup> T-128-Red2-ENG, page 38, lines 19 – 20 (interpretation).

<sup>3630</sup> T-128-Red2-ENG, page 41, lines 12 – 17 (interpretation).

<sup>3631</sup> EVD-OTP-00494; T-39-ENG, page 102, line 20 to page 103, line 3 and page 109, lines 2 – 9 (transcript of testimony before the Pre-Trial Chamber).

<sup>3632</sup> ICC-01/04-01/06-2786-Red-tENG, paras 55 and 56.

need to mobilise (rather than demobilise) the troops.<sup>3633</sup> While the Chamber has not accepted a large part of D-0011's evidence (given his close relationship with the accused), this statement relates to the circumstances of the conflict rather than the issue of child soldiers, and it is supported by other evidence, accepted by the Chamber, on the issue of the various battles that were fought at that time. D-0011's confirmation of the need to mobilise at that time also throws light on the attitude of the accused towards the recruits he spoke to at the Rwampara camp on 12 February 2003, as shown in the video EVD-OTP-00570.

1338. In addition, P-0055, who had an important position in the FPLC hierarchy, gave evidence to the effect that he was unaware of any procedures for child soldier demobilisation within the UPC.<sup>3634</sup> He did not attend any UPC meetings, nor was he involved in conversations with Mr Lubanga, Floribert Kisembo, Rafiki Saba, Bosco Ntaganda or Eric Mbabazi, during which the subject of the demobilisation of children within the army was raised.<sup>3635</sup>

1339. The Chamber has considered video footage from 31 July 2004.<sup>3636</sup> One of the sequences, shown during P-0030's evidence, shows speeches given by several UPC members at the UPC/FPLC training camp in Katoto.<sup>3637</sup> Eloy Mafuta addressed the audience as follows:

Hello everybody. We're very pleased with the work being carried out by the youngsters here. You, you know that giving birth to children, well, if somebody cannot give birth to a child, cannot father a child, he'll be very sad. You can see the work that you, the fathers have already done. You can see

<sup>3633</sup> T-347-ENG, page 60, line 19 to page 63, line 6.

<sup>3634</sup> T-176-ENG, page 56, lines 1 – 10.

<sup>3635</sup> T-176-ENG, page 56, lines 11 – 13 and page 56, line 22 to page 57, line 10.

<sup>3636</sup> EVD-OTP-00582. The prosecution indicates the video was filmed on 31 July 2004, ICC-01/04-01/06-2748-Conf-Anx2, page 20, No. 61.

<sup>3637</sup> EVD-OTP-00582; T-130-Red2-ENG, page 11, line 8 to page 12, line 18.

the current situation concerning your children and we would like to thank them for the work they've carried out. You can see the fruit of their work. You must not tire. You must continue to work in the same way, because we can see the fruit of your work. And it's because of these children, it's thanks to these children that we are living here. We could not live here otherwise. Thanks to the work carried out by your children, we can live in peace here. The work carried out by the children here makes it possible for us to live and to continue to live here. My name is Eloy Mafuta. I'm the presidential advisor. I'm also military advisor to the UPC.<sup>3638</sup>

P-0030 confirmed that the speaker was Eloy Mafuta, the special advisor to the President and military advisor to the UPC.<sup>3639</sup>

1340. Later in the same video, Bosco Ntaganda, wearing a UPC/FPLC uniform, addressed the crowd:<sup>3640</sup>

[...] I'm talking to you as a civilian population and we're asking for your support for our military actions. We will continue our work until we are sure we have completed our mission. I'm very pleased because if you go to the equatorial region you will find your child who's a colonel, or in South Kivu or other parts of the Congo you will find your children who are there. They are working on the basis of what you, as parents, have handed down to them.<sup>3641</sup>

1341. He was followed by the Minister of Defence, Mr Mbuna:

The presidential advisor has spoken to you. He's also the military advisor. He said that we have borne children and these children have grown up. Among those children there are older children and younger children, and that is why the president wanted and authorised us to give them different ranks. These ranks, that's to show who are the superiors. I think that the ceremony has been in LARGU, Blukwa, and there was a lot of talk about that particular day. The president knew that we were going to come here and he asked us to pass on to the population and to the soldiers, to pass on his greetings. You have the greetings of the president.<sup>3642</sup>

1342. P-0030 again confirmed that the speaker was the Minister of Defence, Mr Mbuna, who was referring to Thomas Lubanga when he

<sup>3638</sup> EVD-OTP-00582 at 00:34:25, interpretation in Court: T-130-Red2-ENG, page 14, lines 3 – 17.

T-130-Red2-ENG, page 15, lines 2 – 9.

<sup>3640</sup> EVD-OTP-00582 at 00:47:09; T-130-Red2-ENG, page 16, lines 6 – 14.

<sup>3641</sup> EVD-OTP-00582 at 00:55:00; T-130-Red2-ENG, page 17, line 24 to page 18, line 5.

<sup>3642</sup> EVD-OTP-00582 at 00:58:58; T-130-Red2-ENG, page 19, line 20 to page 20, line 4.

said “the president”.<sup>3643</sup>

1343. In one scene a soldier wearing a uniform can be seen, who P-0030 confirms belongs to the FPLC of the UPC.<sup>3644</sup> He is below the age of 18, which is the age limit as determined in the Presidential decree of 1 June 2003.

1344. Although the video falls outside of the period of the charges, it gives a strong indication that the presidential decree of 1 June 2003 and the preceding demobilisation orders were not implemented. Young soldiers should have been demobilised, yet the speeches indicate that children below the age of 18 were still being targeted for recruitment and they remained within the ranks of the FPLC. Not only did Eloy Mafuta and Bosco Ntaganda speak of children, but Mr Mbuna also explicitly refers to younger and older children who are given different ranks, which excludes the possibility that the term children was meant to describe family ties rather than age.

1345. Given the Chamber’s conclusion that the self-defence forces were independent of the FPLC, and in light of the finding that the demobilisation orders were not genuinely implemented, it is unnecessary to discuss the position of the self-defence forces vis-à-vis demobilisation.<sup>3645</sup>

## (2) *Conclusion*

1346. On the basis of the evidence discussed above, the Chamber is persuaded that whether or not the demobilisation orders were implemented for some of the children under the age of 15, others were

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<sup>3643</sup> T-130-Red2-ENG, page 20, lines 6 – 10.

<sup>3644</sup> EVD-OTP-00582 at 00:46:18 to 00:46:23; T-130-Red2-ENG, page 15, lines 11 – 19.

<sup>3645</sup> See the defence submissions in ICC-01/04-01/06-2773-Red-tENG, paras 922 – 929.



simultaneously recruited, re-recruited and used by the FPLC throughout the timeframe of the charges. The demobilisation orders additionally prove that Mr Lubanga knew that the recruitment of children was prohibited and that children remained amongst the ranks of the UPC/FPLC in spite of the prohibition.

1347. Focusing on the mental element of the charges, the Chamber is of the view that Thomas Lubanga was fully aware that children under the age of 15 had been, and continued to be, enlisted and conscripted by the UPC/FPLC and used to participate actively in hostilities during the timeframe of the charges. This occurred, in the ordinary course of events, as a result of the implementation of the common plan – to ensure that the UPC/FPLC had an army strong enough to achieve its political and military aims.

1348. Within a functioning military hierarchy, it is necessary that orders are complied with. The defence has been imprecise as to whether the demobilisation order of 21 October 2002 and the decree of 1 June 2003 lead to the conclusion that the resulting crimes did not occur in the ordinary course of events, or whether it is only suggesting that the accused did not have the “intention” to commit the crimes. However, the lack of cooperation on the part of the UPC/FPLC with the NGOs working within the field of demobilisation and the threats directed at human rights workers who were involved with children’s rights tend to undermine the suggestion that demobilisation, as ordered by the President, was meant to be implemented. Instead, Thomas Lubanga used child soldiers below the age of 15 as his bodyguards within the PPU<sup>3646</sup> and he gave speeches and attended

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<sup>3646</sup> See paras 864, 1247-1262.

rallies where conscripted and enlisted children below the age of 15 were present.<sup>3647</sup> Mr Lubanga was aware that children under the age of 15 were within the personal escorts of other commanders.<sup>3648</sup> Moreover, the accused visited UPC/FPLC camps,<sup>3649</sup> and particularly at the Rwampara camp he gave a morale-boosting speech to recruits who included young children who were clearly below the age of 15. As already set out, the Chamber concludes that this video, filmed on 12 February 2003, contains compelling evidence as to Thomas Lubanga's awareness of, and his attitude towards, the enduring presence of children under the age of 15 in the UPC.

**b) Awareness of the factual circumstances that established the existence of a non-international armed conflict and the nexus between the commission of the crime and the armed conflict**

1349. On the basis of the evidence rehearsed above, the Chamber concludes beyond reasonable doubt that the accused was aware of the factual circumstances that established the existence of an armed conflict throughout the period of the charges.

1350. The accused and other members of the UPC/FPLC articulated the organisation's military aims.<sup>3650</sup> Child soldiers were recruited as a result of the implementation of a common plan in order to ensure the UPC/FPLC was able to implement its military aims, and the accused was aware that they were being recruited, trained and used in military operations.<sup>3651</sup> Hence, the Chamber finds beyond reasonable doubt that Thomas Lubanga was fully aware of the undoubted link between the

<sup>3647</sup> See paras 790, 792, 860-861, 1236, 1242-1245, 1249-1251, 1256-1257.

<sup>3648</sup> See paras 1277, 1348, and, *e.g.*, T-113-Red2-ENG, page 36, line 24 to page 37, line 5 (P-0038); T-125-Red2-ENG, page 54, line 20 to page 55, line 8 and page 55, lines 12 – 20 (P-0041).

<sup>3649</sup> See paras 790, 792, 1242-1245.

<sup>3650</sup> See paras 1047-1059, 1084-1136.

<sup>3651</sup> See paras 1277-1279, 1347-1348.

crimes of conscripting and enlisting children under the age of 15, and using them to participate actively in hostilities and the armed conflict or the factual circumstances that established the existence of the armed conflict.

#### 4. OVERALL CONCLUSIONS

1351. The accused and his co-perpetrators agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. This resulted, in the ordinary course of events, in the conscription and enlistment of boys and girls under the age of 15, and their use to participate actively in hostilities.

1352. As indicated in an earlier section of this Judgment, the Chamber has concluded that from late 2000 onwards, Thomas Lubanga acted with his co-perpetrators, who included Floribert Kisembo, Bosco Ntaganda, Chief Kahwa, and commanders Tchaligonza, Bagonza and Kasangaki. Mr Lubanga's involvement with the soldiers (including young children) who were sent to Uganda for training is of significance. Although these events fall outside the period covered by the charges and are outwith the temporal jurisdiction of the Court, they provide critical background evidence on the activities of this group, and they help establish the existence of the common plan before and throughout the period of the charges.

1353. As further background, the accused was in conflict with the RCD-ML from at least April 2002, and he led a group that sought to bring about political change in Ituri, including the removal of Mr Mbusa Nyamwisi and Governor Molondo Lomondo, if necessary by force. The accused remained in control by delegating his authority,

whilst he was detained in the summer of 2002 and he sent Chief Kahwa and Mr Beiza to Rwanda to obtain arms. During that period, Floribert Kisembo, Bosco Ntaganda and Chief Kahwa, three of the accused's principal alleged co-perpetrators, were generally responsible for recruitment and training, which included girls and boys under the age of 15.

1354. The accused and at least some of his co-perpetrators were involved in the takeover of Bunia in August 2002. Thomas Lubanga, as the highest authority within the UPC, appointed Chief Kahwa, Floribert Kisembo and Bosco Ntaganda to senior positions within the UPC/FPLC. The evidence has established that during this period, the leaders of the UPC/FPLC, including Chief Kahwa, and Bosco Ntaganda, and Hema elders such as Eloy Mafuta, were active in mobilisation and recruitment campaigns aimed at persuading Hema families to send their children to join the UPC/FPLC. Those children recruited before the formal creation of the FPLC were incorporated into that group, and a number of training camps were added to the original facility at Mandro. The Chamber has concluded that between 1 September 2002 and 13 August 2003, a significant number of high-ranking members of the UPC/FPLC and other personnel conducted a large-scale recruitment exercise directed at young people, including children under the age of 15, whether voluntarily or by coercion.

1355. The Chamber is satisfied beyond reasonable doubt that as a result of the implementation of the common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri, boys and girls under the age of 15 were conscripted and enlisted into the UPC/FPLC between 1 September 2002 and 13 August 2003. Similarly, the Chamber is satisfied beyond reasonable

doubt that the UPC/FPLC used children under the age of 15 to participate actively in hostilities, including during battles. They were also used, during the relevant period, as soldiers and as bodyguards for senior officials, including the accused.

1356. Thomas Lubanga was the President of the UPC/FPLC, and the evidence demonstrates that he was simultaneously the Commander-in-Chief of the army and its political leader. He exercised an overall coordinating role over the activities of the UPC/FPLC. He was informed, on a substantive and continuous basis, of the operations of the FPLC. He was involved in planning military operations, and he played a critical role in providing logistical support, including as regards weapons, ammunition, food, uniforms, military rations and other general supplies for the FPLC troops. He was closely involved in making decisions on recruitment policy and he actively supported recruitment initiatives, for instance by giving speeches to the local population and the recruits. In his speech at the Rwampara camp, he encouraged children, including those under the age of 15 years, to join the army and to provide security for the populace once deployed in the field following their military training. Furthermore, he personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC members of staff who were below the age of 15. The Chamber has concluded that these contributions by Thomas Lubanga, taken together, were essential to a common plan that resulted in the conscription and enlistment of girls and boys below the age of 15 into the UPC/FPLC and their use to actively participate in hostilities.

1357. The Chamber is satisfied beyond reasonable doubt, as set out above, that Thomas Lubanga acted with the intent and knowledge

necessary to establish the charges (the mental element required by Article 30). He was aware of the factual circumstances that established the existence of the armed conflict. Furthermore, he was aware of the nexus between those circumstances and his own conduct, which resulted in the enlistment, conscription and use of children below the age of 15 to participate actively in hostilities.

## XII. DISPOSITION

1358. For the foregoing reasons and on the basis of the evidence submitted and discussed before the Chamber at trial, and the entire proceedings, pursuant to Article 74(2) of the Statute, the Chamber finds Mr Thomas Lubanga Dyilo:

**GUILTY** of the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the Statute from early September 2002 to 13 August 2003.

1359. Pursuant to Regulation 55 of the Regulations of the Court, the Chamber modifies the legal characterisation of the facts to the extent that the armed conflict relevant to the charges was non-international in character from early September 2002 to 13 August 2003.

1360. At the request of the defence and in accordance with Article 76(2) of the Statute and Rule 143 of the Rules, the Chamber will hold a separate hearing on matters related to sentencing and reparations.

1361. The Chamber communicates to the Prosecutor, pursuant to Article 70 of the Statute and Rule 165 of the Rules, its findings that P-0143, P-0316 and P-0321 may have persuaded, encouraged, or assisted witnesses to give false evidence.

1362. The Majority of the Chamber withdraws the right of dual status witnesses P-0007, P-0008, P-0010, P-0011, P-0298 and P-0299 to participate in the proceedings as victims.

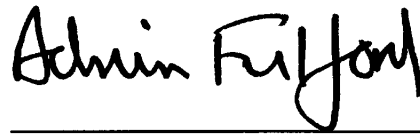
1363. The Chamber withdraws the right of victims a/0229/06,

a/0225/06, and a/0270/07 to participate in the proceedings.

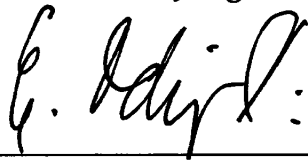
1364. Judges Fulford and Odio Benito append separate and dissenting opinions to this Judgment on particular discrete issues.



Done in both English and French, the English version being authoritative.



**Judge Adrian Fulford**



**Judge Elizabeth Odio Benito**



**Judge René Blattmann**

Dated this 14 March 2012

At The Hague, The Netherlands

**SEPARATE OPINION OF JUDGE ADRIAN FULFORD**

1. I write separately to explain my views on the scope of Article 25(3)(a) of the Statute, as regards an individual who is alleged to have committed a crime “jointly with another”.
  
2. I wish to make clear at the outset that I agree with my colleagues that the tests described in paragraphs 1013 and 1018 of the Judgment are to be applied at this stage of this case. Focussing on the requirements of Article 25(3)(a) of the Statute, with minor modifications to ensure compliance with the Statute, the test described at paragraph 1018 mirrors the approach of the Pre-Trial Chamber in the Decision on the Confirmation of Charges,<sup>1</sup> which established (certainly in this context) the principles of law on which the trial has been prosecuted and defended. No substantive warning has been given to the parties that the Chamber may apply a different test, and as a matter of fairness it would be wrong at this late stage to modify the legal framework of the case. In short, it would be unjust to the present accused to apply a different, and arguably lesser, test.
  
3. Generally, it is my view that the test laid down by the Pre-Trial Chamber is unsupported by the text of the Statute and it imposes an unnecessary and unfair burden on the prosecution.

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<sup>1</sup> ICC-01/04-01/06-803-tEN, paras 322-367.

The Pre-Trial Chamber's reading of Article 25(3)(a) of the Statute

4. In its decision on the confirmation of charges, the Pre-Trial Chamber held that under Article 25(3)(a) of the Statute, liability for committing a crime “jointly with another” attaches only to individuals who can be said to have control over the crime.<sup>2</sup> It adopted a five-part test for co-perpetrator liability under this theory, which, as just indicated, is directed at those who “have control over the commission of the offence”.<sup>3</sup> The five elements are:

- i. The “existence of an agreement or common plan between two or more persons”;<sup>4</sup>
- ii. The “co-ordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime”;<sup>5</sup>
- iii. “[T]he suspect [must] fulfil the subjective elements of the crime with which he or she is charged”;<sup>6</sup>
- iv. “[T]he suspect and the other co-perpetrators (a) must all be mutually aware of the risk that implementing their common plan may result in the realisation of the objective elements of the crime, and (b) must all mutually accept such a result by reconciling themselves with it or consenting to it”;<sup>7</sup> and

<sup>2</sup> ICC-01/04-01/06-803-tEN, paras 326 – 338.

<sup>3</sup> ICC-01/04-01/06-803-tEN, para. 332.

<sup>4</sup> ICC-01/04-01/06-803-tEN, para. 343.

<sup>5</sup> ICC-01/04-01/06-803-tEN, para. 346.

<sup>6</sup> ICC-01/04-01/06-803-tEN, para. 349.

<sup>7</sup> ICC-01/04-01/06-803-tEN, para. 361.

v. “[T]he suspect [must be aware] of the factual circumstances enabling him or her to jointly control the crime.”<sup>8</sup>

5. The Pre-Trial Chamber, in essence, provided two reasons for adopting the control of the crime<sup>9</sup> approach to co-perpetration. First, to “distinguish[] between principals and accessories”.<sup>10</sup> Second, to ensure that the liability of principals extends to individuals who, notwithstanding their absence from the scene of the crime, exercised control over its commission because they were in a position to decide whether and, if so, how the offence was to be committed.<sup>11</sup> I will first address the basis of this theory, and thereafter explain my approach to joint perpetration under Article 25(3)(a) of the Statute.

The control of the crime theory is unsupported by the text of the Statute

6. As set out above, the Pre-Trial Chamber’s adoption of the control of the crime theory was founded, in the first place, on the perceived necessity to establish a clear dividing line between the various forms of liability under Article 25(3)(a) – (d) of the Statute and, in particular, to distinguish between the liability of “accessories” under Article 25(3)(b) and that of “principals” under Article 25(3)(a) of the Statute.<sup>12</sup> I respectfully disagree with this view.

<sup>8</sup> ICC-01/04-01/06-803-tEN, para. 366.

<sup>9</sup> ICC-01/04-01/06-803-tEN, para. 322 *et seq.*

<sup>10</sup> ICC-01/04-01/06-803-tEN, paras 327, 330, 335, 338 and 340

<sup>11</sup> ICC-01/04-01/06-803-tEN, para. 330.

<sup>12</sup> ICC-01/04-01/06-803-tEN, paras 327 – 340.

7. In my judgment, the plain text of Article 25(3) defeats the argument that subsections (a) – (d) of Article 25(3) must be interpreted so as to avoid creating an overlap between them. Article 25(3)(a) establishes the concept of committing a crime through another, whilst Article 25(3)(b) focuses on ordering, soliciting and inducing the commission of the offence. These concepts, which appear in separate subsections, will often be indistinguishable in their application vis-à-vis a particular situation, and by creating a clear degree of crossover between the various modes of liability, Article 25(3) covers all eventualities. Put otherwise, in my judgment the plain language of Article 25(3) demonstrates that the possible modes of commission under Article 25(3)(a) – (d) of the Statute were not intended to be mutually exclusive.<sup>13</sup>
8. Some have suggested that Article 25(3) establishes a hierarchy of seriousness as regards the various forms of participation in a crime, with Article 25(3)(a) constituting the gravest example and Article 25(3)(d) the least serious.<sup>14</sup> I am unable to adopt this approach. In my judgment, there is no proper basis for concluding that ordering, soliciting or inducing a crime (Article 25(3)(b)) is a less serious form of commission than committing it “through another person” (Article 25(3)(a)), and these two concepts self-evidently overlap. Similarly, I am unable to accept that the

<sup>13</sup> By way of comparison, it is of note that the *ad hoc* Tribunals have held that the various modes of liability available under their statutes are not mutually exclusive. *See, e.g.*, ICTR, *The Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 483 (“the modes of responsibility under Article 6(1) of the Statute are not mutually exclusive”); ICTR, *The Prosecutor v. Nindabahizi*, Case No. ICTR-01-71-A, Appeals Chamber, Judgment, 16 January 2007, paras 122-123 (conviction for committing, instigating and aiding and abetting the same crime); ICTY, *The Prosecutor v. Dordević*, Case No. IT-05-87-1-T, Trial Chamber, Judgment, 23 February 2011, paras 2193-94 (conviction for participation in a joint criminal enterprise and for aiding and abetting).

<sup>14</sup> *See, e.g.*, Gerhard Werle, “Individual criminal responsibility in Article 25 ICC Statute”, 5 J. Int’l Crim. Justice 953, 957 (2007) (“Article 25(3)(a)-(d) establishes a value oriented hierarchy of participation in a crime under international law”).

criminality of accessories (Article 25(3)(c)) is greater than those who participate within a group (Article 25(3)(d)), particularly since many of history's most serious crimes occurred as the result of the coordinated action of groups of individuals, who jointly pursued a common goal.

9. I am also unpersuaded that it will assist the work of the Court to establish a hierarchy of seriousness that is dependent on creating rigorous distinctions between the modes of liability within Article 25(3) of the Statute. Whilst it might have been of assistance to "rank" the various modes of liability if, for instance, sentencing was strictly determined by the specific provision on which an individual's conviction is based, considerations of this kind do not apply at the ICC. Article 78 of the Statute and Rule 145 of the Rules of Procedure and Evidence, which govern the sentences that are to be imposed, provide that an individual's sentence is to be decided on the basis of "all the relevant factors", "including the gravity of the crime and the individual circumstances of the convicted person". Although the "degree of participation" is one of the factors listed in Rule 145(1)(c) of the Rules, these provisions overall do not narrowly determine the sentencing range by reference to the mode of liability under which the accused is convicted, and instead this is simply one of a number of relevant factors.
  
10. The control of the crime theory has its origins in the post-war German legal system, where particular domestic considerations – which do not exist at the ICC – have made it appropriate to apply this principle. In adopting this theory, the Pre-Trial Chamber focussed substantially on a

minority view from the *ad hoc* tribunals,<sup>15</sup> in that it cited the judgment of the ICTY Trial Chamber in the *Stakić* case when it held that the accused was responsible as a co-perpetrator<sup>16</sup> (the conviction on this basis was set aside on appeal)<sup>17</sup> and Judge Schomburg's separate opinion in the ICTR Appeals Chamber's judgment in the *Gacumbitsi* case.<sup>18</sup> In these two instances, the judges relied heavily on the scholarship of the German academic Claus Roxin as the primary authority for the control theory of co-perpetration,<sup>19</sup> and in the result, this approach was imported directly from the German legal system.<sup>20</sup> While Article 21(1)(c) of the Statute permits the Court to draw upon "general principles of law" derived from national legal systems, in my view before taking this step, a Chamber should undertake a careful assessment as to whether the policy considerations underlying the domestic legal doctrine are applicable at

<sup>15</sup> ICC-01/04-01/06-803-tEN, footnotes 418, 422 – 26, 432, 434, 436 and 442.

<sup>16</sup> ICTY, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Chamber, Judgment, 31 July 2003 ("*Stakić*").

<sup>17</sup> ICTY, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Appeals Chamber, Judgment, 22 March 2006, para. 62 and the Disposition at page 141.

<sup>18</sup> ICTR, *The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Chamber, Judgment: separate opinion of Judge Schomburg, 7 July 2006 ("*Gacumbitsi* Schomburg Opinion").

<sup>19</sup> *Stakić*, para. 440 (citing Roxin, C, Täterschaft und Tatherrschaft (Perpetration and control over the act), 6<sup>th</sup> Edition (1994); *Gacumbitsi* Schomburg Opinion, para. 17 (citing Roxin, C, Täterschaft und Tatherrschaft (Perpetration and control over the act), 7<sup>th</sup> Edition (2000)).

<sup>20</sup> I note in passing that although Professor Roxin's scholarship appears to form the basis for the control of the crime theory, the test adopted by the Pre-Trial Chamber differs in material respects from the theory as described by Professor Roxin. For example, Professor Roxin acknowledges that in practice, it is impossible to determine, after the crime has been committed, whether an accused's contribution was "essential" in the sense that its absence would have thwarted the commission of the crime. See Roxin, Claus, 'Täterschaft und Tatherrschaft (Perpetration and control over the act)', 6<sup>th</sup> Edition, Berlin, New York, 1994, page 283 (but see also page 280, where he confirms that each co-perpetrator must be able to obstruct or ensure the commission of the crime). Under Professor Roxin's approach, co-perpetrator liability would attach if the accused had "functional control" and the accused's contribution was of "substantial importance" ("*wesentlicher Bedeutung*") to the commission of the crime. *Ibid.*, pages 280 and 284. Professor Roxin argues that the term "substantial importance" in itself has no tangible content, but affords the judge the discretion to determine, on the facts of the case, whether the accused's contribution was such that it created a "functional dependency" between the perpetrators. *Ibid.*, page 284. In contrast, the Pre-Trial Chamber held that co-perpetrator liability should attach only if the accused's contribution was "essential" in the sense that the crime would have been frustrated absent the accused's contribution. See ICC-01/04-01/06-803-tEN, para. 347. Similarly, the *dolus eventualis* standard adopted by the Pre-Trial Chamber differs from the mental element proposed by Professor Roxin. Compare *ibid.*, paras 352-54 with Roxin, page 285.

this Court, and it should investigate the doctrine's compatibility with the Rome Statute framework. This applies regardless of whether the domestic and the ICC provisions mirror each other in their formulation. It would be dangerous to apply a national statutory interpretation simply because of similarities of language, given the overall context is likely to be significantly different.

11. This case demonstrates why a detailed assessment of this kind is necessary. Under the German legal system, the sentencing range is determined by the mode of liability under which an individual is convicted,<sup>21</sup> and it is therefore necessary to draw clear distinctions between principals on the one hand and accessories on the other. As set out above, these considerations do not apply at the ICC, where sentencing is not restricted in this way, and this example of the differences that exist is of significance in this context.

12. The second justification advanced by the Pre-Trial Chamber for adopting the control of the offence theory was to establish "principal" liability for individuals who, "in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed".<sup>22</sup> However, as developed below, in my judgment a plain reading of Article 25(3)(a) establishes the criminal liability of co-perpetrators who contribute to the commission of the crime notwithstanding their absence from the scene, and it is unnecessary to

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<sup>21</sup> See German Criminal Code (13 November 1998, as amended 2 October 2009), §§ 27(2) and 49(1). English translation available at [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#StGBengl\\_000P27](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGBengl_000P27).

<sup>22</sup> ICC-01/04-01/06-803-tEN, para. 330.



invoke the control of the crime theory in order to secure this result.<sup>23</sup> Therefore, individuals who are involved indirectly can be prosecuted as co-perpetrators without relying on this principle.

### Joint-perpetration under a plain text reading of Article 25(3)(a) of the Statute

13. As it seems to me, the Court's approach to this issue should be rooted in the plain text of the Statute. The Appeals Chamber has held that the Statute is to be applied in conformity with Article 31(1) of the Vienna Convention on the Law of Treaties,<sup>24</sup> which requires that the Statute's provisions are to be interpreted "in good faith in accordance with the[ir] ordinary meaning [ . . . ] in their context and in light of [the Statute's] object and purpose".<sup>25</sup> In line with these principles, I have sought to give the relevant terms their plain meaning, and it has been unnecessary to read in additional terms in order to give effect to the express words of the Statute.

14. In relevant part, Article 25(3) of the Statute provides:

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<sup>23</sup> *See infra*, para. 16.

<sup>24</sup> *See, e.g.*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 33; Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", 27 May 2008, ICC-01/04-01/07-522, paras 38 and 39; Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486, para. 40; Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence", 19 November 2010, ICC-01/05-01/08-1019, para. 49.

<sup>25</sup> Article 31(1), Vienna Convention on the Law of Treaties, 1155 United Nations Treaty Series 18232, signed on 23 May 1969 and entered into force on 27 January 1980.

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- a. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

15. When establishing joint perpetrator liability, the prosecution must prove that an individual committed the crime jointly with another. The latter words (“jointly with another”) clearly indicate the involvement of at least two people, whilst the expression “commits [...] jointly” denotes coordination between the individuals involved. This self-evidently necessitates a sufficient meeting of minds, by way of an agreement, common plan or joint understanding. In practice, this will not always be explicit or the result of long-term planning, and the existence of the joint venture may need to be inferred from the conduct of the co-perpetrators. Although the text of the Statute does not provide that the agreement, common plan or joint understanding must have an overarching criminal goal, the mental element of Article 30 of the Statute must be satisfied, and unless the Court’s legal framework has “otherwise provided”,<sup>26</sup> the joint perpetrators must, at a minimum, be aware that executing the agreement or plan will lead to the commission of a crime within the jurisdiction of the Court “in the ordinary course of events”.<sup>27</sup> I consider it is unhelpful to investigate whether the requirement of awareness (on the part of the accused) that a crime will be committed “in the ordinary course of events” is to be equated with a “possibility”, a “probability”, a “risk” or a “danger” (see paragraph 1012 of the Judgment). Put otherwise, the

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<sup>26</sup> Article 30(1) of the Statute.

<sup>27</sup> Article 30(2)(b) and 30(3) of the Statute.

Chamber's decision as to whether the accused was aware that something will happen in the ordinary course of events is not assisted by asking the question as to whether he was aware of the possibility, the probability, the risk or the danger that it would occur. The words are plain and readily understandable, and it is potentially confusing to reformulate or to interpret this test using other words. Finally, the verb "commits" requires a contribution to the commission of the crime. Nothing in the Statute requires that the contribution must involve direct, physical participation at the execution stage of the crime, and, instead, an absent perpetrator may be involved. Either way, the use of the word "commits" simply requires an operative link between the individual's contribution and the commission of the crime. Additionally as regards causation, the plain text of Article 25(3) does not require proof that the crime would *not* have been committed absent the accused's involvement (*viz.* that his role was essential).<sup>28</sup> Rather, the prosecution must simply demonstrate that the individual contributed to the crime by committing it with another or others.

16. To summarise, a plain text reading of Article 25(3)(a) establishes the following elements for co-perpetration:
- a. The involvement of at least two individuals.
  - b. Coordination between those who commit the offence, which may take the form of an agreement, common plan or joint understanding, express or implied, to commit a crime or to

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<sup>28</sup> *Cf.* ICC-01/04-01/06-803-tEN, paras 346-47.

undertake action that, in the ordinary course of events,<sup>29</sup> will lead to the commission of the crime.

- c. A contribution to the crime, which may be direct or indirect, provided either way there is a causal link between the individual's contribution and the crime.
- d. Intent and knowledge, as defined in Article 30 of the Statute, or as "otherwise provided" elsewhere in the Court's legal framework. I consider it would be unfair, at this stage of the proceedings, to approach the issue of the accused's knowledge on a lesser basis than "he knew" there were children under the age of 15 who were conscripted, enlisted or used (see paragraph 1015 of the Judgment).

17. Not only is the above approach supported by the plain text of the Statute, it also provides a realistic basis for the Court to conduct its work. It avoids a hypothetical investigation as to how events might have unfolded without the accused's involvement (which is necessary under the "essential contribution" formulation) and it places appropriate emphasis on the accused's state of mind, once it is established that he or she contributed to the offence. It seems to me to be important to stress that an *ex post facto* assessment as to whether an individual made an essential contribution to war crimes, crimes against humanity or genocide will often be unrealistic and artificial. These crimes frequently involve a large number of perpetrators, including those who have controlling roles. It will largely be a matter of guesswork as to the real consequence for the particular crime if the accused is (hypothetically) removed from the

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<sup>29</sup> Article 30(2)(a) and 30(3) of the Statute. If the mental element for the crime charged is provided elsewhere than Article 30 of the Statute, the "ordinary course of events" standard is to be substituted with the crime's specific mental element.

equation, and most particularly it will not be easy to determine whether the offence would have been committed in any event.

18. For all of these reasons, I respectfully disagree with the approach to co-perpetrator liability on the part of the Pre-Trial Chamber and my judicial colleagues in Trial Chamber I.

### Applying the approach of the Pre-Trial Chamber

19. Notwithstanding the conclusions set out above, at this stage in the present case I am of the view that the Chamber ought to apply the tests in paragraphs 1013 and 1018 of the Judgment, which largely mirror the approach of the Pre-Trial Chamber, in the present context. The case has been conducted on the basis of the legal framework established by the Pre-Trial Chamber, which should not be significantly altered if that step would cause material prejudice.

20. One of the Trial Chamber's principal duties under the Statute is to ensure that the "trial is fair" and "is conducted with full respect for the rights of the accused".<sup>30</sup> Of particular relevance is the accused's right, under Article 67(1)(a) of the Statute, to be informed "in detail of the nature, cause and content of the charge[s]" against him. In my view, this requirement for notice means that the accused should not only be informed of the factual allegations against him, but he needs to be aware of the basic outline of the legal framework against which those facts will be

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<sup>30</sup> Article 64(2) of the Statute.

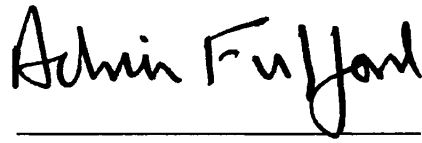
determined. This ensures that the accused knows, at all stages of the proceedings, what he is expected to meet. This is an essential prerequisite for a fair trial.<sup>31</sup>

21. Abandoning the control of the crime theory for the purposes of the Article 74 Decision would significantly modify the law governing the charges, at a stage when the evidence is closed and the parties have made their submissions. The alternative approach which I have described above arguably involves applying a “lesser” test. If at this stage in the proceedings (and without prior notice) the Chamber ruled that the prosecution only has to establish a contribution – as opposed to an “essential” contribution – the trial would be rendered unfair, in violation of Article 64(2) of the Statute. The accused is likely to have made a number of tactical decisions that, at least in part, have been informed by the legal requirements for a conviction. I am therefore in agreement with my colleagues that the tests described in paragraphs 1013 and 1018 of the Judgment are to be applied, notwithstanding my overall reservations as to the “control of the crime” theory.

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<sup>31</sup> See, e.g., ICTY, *The Prosecutor v Kupreskic et al.*, Case No. IT-95-16-T, Trial Chamber, Judgement, 14 January 2000, para. 725 (holding that the right to be informed “of the nature and cause of the charge[s]” requires that accused be “put in a position to know the legal ingredients of the offence charged”); *ibid.*, paras 720-48; European Court of Human Rights, *Case of Pelissier and Sassi v. France*, Application No. 25444/94, Judgment, 25 March 1999, para. 52 (holding that “in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterization that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair”).

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, reading "Adrian Fulford". The signature is written in a cursive style with a large initial 'A' and 'F'. Below the signature is a solid horizontal line.

**Judge Adrian Fulford**

Dated this 14 March 2012

At The Hague, The Netherlands

**SEPARATE AND DISSENTING OPINION OF JUDGE ODIO BENITO**

1. I agree with the final decision of the Trial Chamber as regards the individual criminal responsibility of Mr Lubanga Dyilo. However, I have a separate and dissenting opinion on three particular aspects of the Judgment. I hereby explain the reasons for my dissent.

**A. Legal definition of the crimes of enlistment, conscription and use of children under the age of 15 to actively participate in the hostilities**

2. I respectfully disagree with the conclusions of the Majority of the Chamber as regards the legal definition of the crimes of enlistment, conscription and use of children under the age of 15 to participate actively in the hostilities.

3. The Majority of the Trial Chamber stated, and I agree, that:

Addressing the three relevant acts, namely enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities, in each instance the conduct is not defined in the Statute, the Rules or the Elements of Crimes. Accordingly, the scope of the activities covered by Article 8(2)(e)(vii) of the Statute must be determined in accordance with Articles 21 and 22(2) of the Statute [...].<sup>1</sup>

4. However, the Majority of the Trial Chamber is failing to address two key elements: i) the concept of “national armed forces” within Article 8(2)(b)(xxvi) of the Rome Statute; and ii) the activities covered by Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute, namely those that should be included within the legal definition of enlistment, conscription and “use to participate actively in the hostilities”. Consequently, I consider that it is important to evaluate these two elements, which the Majority of the Trial Chamber has failed to address.

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<sup>1</sup> Judgment, para. 600.



5. A distinction must be made between: a) the legal definition of the crimes (in this case enlistment, conscription and use of children under the age of 15 to participate actively in the hostilities); and b) the evaluation of the evidence presented in this case within the limits of the facts and circumstances of the alleged crimes.
  
6. Article 8 of the Rome Statute includes as war crimes the enlistment, conscription and use of children under the age of 15 to participate actively in the hostilities. Since neither the Statute nor the Elements of Crimes define further these three criminal conducts, the Chamber is required to define them taking into consideration other applicable law.<sup>2</sup> Furthermore, pursuant to Article 21(3) of the Rome Statute, the Chamber is compelled to interpret and apply the law consistent with internationally recognised human rights.<sup>3</sup> The recruitment of children under the age of 15 is prohibited under the Rome Statute, international treaties<sup>4</sup> and international customary law.<sup>5</sup> All these sources of law seek to protect children under the age of 15 from the multiple and different risks which they are subject to in the context of any armed conflict, such as ill treatment, sexual violence and forced marriages. It would consequently be

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<sup>2</sup> See, for example, Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa, UNICEF, 1997; the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, adopted in February 2007; African Union Solemn Declaration Gender Equality, adopted in June 2006.

<sup>3</sup> Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 37.

<sup>4</sup> Article 38 of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990; Article 3, International Labour Organization (ILO), Convention 182, Worst Forms of Child Labour, adopted on 17 June 1999, Conference Session 87, entry into force on 19 November 2000; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entry into force 12 February 2002; Article 22, African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

<sup>5</sup> SCSL, Prosecutor v. Norman (CDF Case), Appeals Chamber Decision on the Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) of 31 May 2004, SCSL-2004-14-Art.72, paras 17-24.

contrary to the “object and purpose” of the Rome Statute,<sup>6</sup> contrary to international recognised human rights and discriminatory under Article 21(3), not to define the legal concepts of enlistment, conscription and use to participate actively in the hostilities, independently of the evaluation of the evidence tendered during trial or the scope of the charges brought against the accused.

7. Although the Rome Statute’s provisions are applied and interpreted in relation to specific charges brought against individuals, the Chamber must not disregard the interests that these provisions are meant to protect. In the present case, the statutory provisions are meant to protect the life and personal integrity of children under the age of 15. It would thus be impermissible for a Chamber to decline to enter a comprehensive legal definition of a crime and leave it open to a case-by-case analysis or to the limited scope of the charges brought against the accused. This would be a step backwards in the progressive development of international law.<sup>7</sup>
8. I deem that the Majority of the Chamber addresses only one purpose of the ICC trial proceedings: to decide on the guilt or innocence of an accused person. However, ICC trial proceedings should also attend to the harm suffered by the victims as a result of the crimes within the jurisdiction of the Court. It becomes irrelevant, therefore, if the prosecution submitted the charges as separate crimes or rightfully including them as embedded in the crimes of which Mr. Lubanga is accused. The harm suffered by

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<sup>6</sup> Article 31(1) of the Vienna Convention on the Law of the Treaties, adopted in Vienna on 23 May 1969, entry into force on 27 January 1980, United Nations, *Treaty Series*, vol. 1155, p. 331.

<sup>7</sup> Unlike the crimes of enlistment, conscription and use, which are not defined by the Statute or the Elements of Crimes, there are other crimes in the ICC provisions which are defined more in detail pursuant to international customary law. For example, the crime of rape, as defined in the Elements of Crimes, has a gender neutral definition which foresees rape not only of a female but also of a male victim. Likewise, the perpetrator could also be male or female. It would be incomprehensible for a Chamber to define rape in a restricted manner (for example in a gender-specific manner) simply because a case brought by the prosecution focuses strictly on the concept of rape committed by men against women.

victims is not only reserved for reparations proceedings, but should be a fundamental aspect of the Chamber's evaluation of the crimes committed.

### **The concept of "national armed forces" under Article 8(2)(b)(xxvi) of the Statute**

9. Article 8 of the Rome Statute treats the notion of the armed group in a slightly differentiated manner in depending on whether this was committed in the context of an international or a non-international armed conflict. Whereas (Article 8(2)(b)(xxvi) refers to "national armed forces" in the context of an international armed conflict, Article 8(2)(e)(vii) refers "armed forces or groups" in the context of a non-international armed conflict. Thus, a key question that needs to be addressed by the Chamber is whether the concept of "national armed forces" includes non-State actors such as the Union Patriotique Congolose (UPC/FPLC).

10. In light of the above, the Pre-Trial Chamber in the present case concluded that the concept of "national armed forces" is not limited to the armed forces of a State.<sup>8</sup>

11. The Majority of the Trial Chamber concluded as follows:

Given the Chamber's conclusion that the UPC was engaged in a non-international armed conflict throughout the period of the charges,<sup>9</sup> it is unnecessary to interpret or discuss Article 8(2)(b)(xxvi) of the Statute. Subject to one significant difference in wording (conscripted or enlistment of children into "national armed forces" (Article 8(2)(b)(xxvi) of the Statute) as opposed to "armed forces or groups" (Article 8(2)(e)(vii) of the Statute)), the elements of these two crimes are similar.<sup>10</sup> Therefore, the extent to which the crimes of conscription, enlistment and use of children below the age of 15 under Article 8(2)(b)(xxvi) of the Statute have previously been the subject of

<sup>8</sup> ICC-01/04-01/06-803-tEN, paras 268-285.

<sup>9</sup> See Section IX on the nature of the armed conflict.

<sup>10</sup> See wording of the respective elements of crime for Article 8(2)(b)(xxvi) and 8(2)(e)(vii). See also Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary* (2003), page 471; Roy S. Lee (eds.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (2001), page 206; William Schabas, *The International Criminal Court - A Commentary on the Rome Statute* (2010), page 252.

interpretation and consideration will be relevant to the Chamber's analysis of Article 8(2)(e)(vii) of the Statute [footnotes omitted].<sup>11</sup>

12. I respectfully disagree with the Majority of the Chamber. Although the Chamber has concluded that the crimes were committed in the context of a non-international armed conflict, this case has been argued by the parties and participants pursuant to the decision on the confirmation of the charges, which encompasses both Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the Statute. In fact, the defence has from start to finish argued that the armed conflict in question is an international armed conflict, and thus, it is foreseeable that this aspect could be the subject matter of an eventual appeal. Thus, the discussion on the concept of "national armed forces" is required as this is a live issue in the present case.

13. As I previously stated, the recruitment of children under the age of 15 is prohibited under international customary law, regardless of whether this was committed in the context of an international or non-international armed conflict and regardless of the nature of the armed group or force that recruited the child. It would be contrary to the "object and purpose" of the Rome Statute and contrary to internationally recognised human rights (and thus contrary to Article 21(3) of the Rome Statute) to exclude from the prohibition of child recruitment, and armed group, solely for the nature of its organization (State or non-state armed group).

14. Consequently, the concept of enlistment, conscription and use in both Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the Rome Statute should be understood as encompassing any type of armed group or force, regardless of the nature of the armed conflict in which it occurs.

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<sup>11</sup> Judgment, para. 568.

## **Towards a comprehensive legal definition of “use to participate actively in the hostilities”**

15. I respectfully disagree with the Majority’s decision that declines to enter a legal definition of the concept of “use to participate actively in the hostilities”, but instead leaves it to a case-by-case determination, which ultimately will be evidence-based and thus limited by the charges and evidence brought by the prosecution against the accused. Additionally, this case-by-case determination can produce a limited and potentially discriminatory assessment of the risks and harms suffered by the child. The Chamber has the responsibility to define the crimes based on the applicable law, and not limited to the charges brought by the prosecution against the accused.

16. Although the Majority of the Chamber recognises that sexual violence has been referred to in this case, it seems to confuse the factual allegations of this case with the legal concept of the crime, which are independent. By failing to deliberately include within the legal concept of “use to participate actively in the hostilities” the sexual violence and other ill-treatment suffered by girls and boys, the Majority of the Chamber is making this critical aspect of the crime invisible. Invisibility of sexual violence in the legal concept leads to discrimination against the victims of enlistment, conscription and use who systematically suffer from this crime as an intrinsic part of the involvement with the armed group.

17. I thus consider it necessary and a duty of the Chamber to include sexual violence within the legal concept of “use to participate actively in the hostilities”, regardless of the impediment of the Chamber to base its decision pursuant to Article 74(2) of the Statute.

18. It is also important to state that although I agree with the Majority when it concludes that the decisive factor, in deciding if an “indirect” role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target, it is crucial to determine that, regardless of the specific task carried out by that child, he or she can suffer harm inflicted by the armed group that recruited the child illegally (for example, for the purposes of supporting the combatants through the use of their bodies for sexual violence).
19. Children are protected from child recruitment not only because they can be at risk for being a potential target to the “enemy” but also because they will be at risk from their “own” armed group who has recruited them and will subject these children to brutal trainings, torture and ill-treatment, sexual violence and other activities and living conditions that are incompatible and in violation to these children’s fundamental rights. The risk for children who are enlisted, conscripted or used by an armed group inevitably also comes from within the same armed group.
20. Sexual violence committed against children in the armed groups causes irreparable harm and is a direct and inherent consequence to their involvement with the armed group. Sexual violence is an intrinsic element of the criminal conduct of “use to participate actively in the hostilities”. Girls who are used as sex slaves or “wives” of commanders or other members of the armed group provide essential support to the armed groups. Sexual assault in all its manifestations produces considerable damage and it demonstrates a failure in the protection of the life and integrity of its victim. There is additionally a gender-specific potential consequence of unwanted pregnancies for girls that often lead to maternal or infant’s deaths, disease, HIV, psychological traumatisation and social

isolation. It must be clarified, however, that although sexual violence is an element of the legal definition of the crimes of enlistment, conscription and use of children under the age of 15 to participate actively in hostilities, crimes of sexual violence are distinct and separate crimes that could have been evaluated separately by this Chamber if the Prosecutor would have presented charges against these criminal conducts.

21. In other words, sexual violence or enslavement are illegal acts and in this case a harm directly caused by the illegality of the war crime of enlisting, conscripting and the use of children under the age of 15 in support of the combatants. Sexual violence and enslavement are in the main crimes committed against girls and their illegal recruitment is often intended for that purpose (nevertheless they also often participate in direct combat.) If the war crimes considered in this case are directed at securing their physical and psychological well being, then we must recognize sexual violence as a failure to afford this protection and sexual violence as acts embedded in the enlisting, conscription and use of children under 15 in hostilities. It is discriminatory to exclude sexual violence which shows a clear gender differential impact from being a bodyguard or porter which is mainly a task given to young boys. The use of young girls and boys bodies by combatants within or outside the group is a war crime and as such encoded in the charges against the accused.

**B. Dual Status Victims/Witnesses**

22. I respectfully dissent with the manner in which the Majority of the Chamber dealt with witnesses who have the dual status of victims, when evaluating their status as victims participating in this case.

23. I agree with the evaluation the Chamber does as regards witnesses P-0007, P-0008, P-0010, P-0011 and P-0298,<sup>12</sup> particularly that the Chamber cannot rely on their testimony for the purposes of determining the individual criminal responsibility of the accused beyond reasonable doubt.

24. However, I respectfully disagree with the Majority of the Chamber when it concludes:

Witnesses P-0007, P-0008, P-0010, P-0011, and P-0298 were granted permission to participate in the proceedings as victims (see the Chamber's Decision of 15 December 2008), as the information submitted was sufficient to establish, on a *prima facie* basis, that they were victims under Rule 85 of the Rules. Given the Chamber's present conclusions as to the reliability and accuracy of these witnesses, it is necessary to withdraw their right to participate. Similarly, the father of P-0298, P-0299, was granted permission to participate on account of his son's role as a child soldier. The Chamber's conclusions as to the evidence of P-0298 render it equally necessary to withdraw his right to participate in his case. In general terms, if the Chamber, on investigation, concludes that its original *prima facie* evaluation was incorrect, it is necessary that it should amend any earlier order as to participation, to the extent necessary. It would be unsustainable to allow victims to continue participating if a more detailed understanding of the evidence has demonstrated that they no longer meet the relevant criteria [footnotes omitted].<sup>13</sup>

#### **Witnesses P-0007 and P-0008**

25. I deem that the contradictions and weaknesses of these two individuals as witnesses in the present trial should not affect their status as victims with right to participate in the trial proceedings. Although their accounts as witnesses were inconsistent for the Chamber to rely on them as evidence to determine the responsibility of the accused beyond reasonable doubt, I consider that these individuals could have well been recruited, albeit not in the exact circumstances described in their numerous accounts (witness statements, application forms and live testimony) and in at least one of the cases there was video evidence of one of the witnesses as a soldier.

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<sup>12</sup> See also P-0299, who is the father of P-0298.

<sup>13</sup> Judgment, para. 484.



**Witness P-0010**

26. I agree with the conclusions of the Trial Chamber that there is no doubt that at some stage this individual served as a soldier within the UPC. I also agree that the Chamber does not have evidence beyond reasonable doubt that this occurred when she was under 15 years of age, and thus her testimony in this regard is not to be relied on for the purposes of determining the individual criminal responsibility of the accused.

27. I nevertheless suggest that the contradictions and weaknesses of this witness, especially given the unreliability of establishing accurate birth dates in the Democratic Republic of Congo in the present trial, should not affect her status as victim with participatory status. There is incontestable evidence that she was recruited, although it is impossible to determine with absolute certainty her exact age at the time of recruitment. This witness was most probably under the age of 18, and thus a child at the time of her first meetings with the OTP investigators in 2005.<sup>14</sup> She additionally was a victim of sexual violence as a result of her recruitment.<sup>15</sup> This life experience of a young woman has to be taken into account, notwithstanding that these aspects of her testimony cannot be relied on for the purposes of an Article 74 decision. Her victim status, however, should remain unchanged.

**Witness P-0011**

28. I firmly believe that any contradictions and weaknesses of this witness in the present trial should not affect his status as victim with participatory status. Even though his accounts as a witness were inconsistent, and cannot be relied upon to convict the accused, I deem that he could have been recruited, albeit the contradictory evidence presented in this trial.

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<sup>14</sup> See para. 32 below.

<sup>15</sup> T-145-Red-ENG, page 29, lines 15 to 25 and page 30, line 25 to page 31, line 9.

**Witnesses P-0298 and P-0299**

29. I firmly believe that any contradictions and weaknesses of these two witnesses' testimonies in the present trial should not affect their status as victims with participatory status. Even though their accounts as witnesses could have been inconsistent, and cannot be relied upon to convict the accused, I truly believe that a real possibility exists that P-0298 was recruited, although not in the precise circumstances he stated in his testimony.

**Conclusions as regards witnesses P-0007, 0008, 0010, 0011, 0298 and 0299**

30. The Chamber called Ms Elisabeth Schauer as expert witness on the topic of children with trauma, particularly post-traumatic stress disorder. During her testimony, Ms Schauer stated that the trauma suffered by child soldiers has intellectual and cognitive consequences in the children's minds. Children who have suffered trauma have problems with their memory and may have learning difficulties, particularly as regards reading and writing comprehension.<sup>16</sup> She also affirmed that this trauma never goes away.<sup>17</sup> The expert further stated that although persons with post-traumatic stress disorder may recall events that occurred in the past, their ability to answer and remember these events will depend on the way questions are asked, and if they are asked chronologically. She literally stated "you probably have a hard time just wanting to know – jumping and wanting to know little details here and there."<sup>18</sup>

31. The Trial Chamber concluded in its Decision on victims' participation as follows:

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<sup>16</sup> T-166-ENG, page 27, line 20 to page 28, line 25.

<sup>17</sup> T-166-ENG, page 56, lines 7-9.

<sup>18</sup> T-166-ENG, page 56, lines 16-23.

[T]he trial Chamber will seek to achieve a balance between the need to establish an applicant's identity with certainty, on the one hand, and the applicant's personal circumstances, on the other. Bearing in mind the current situation in the Democratic Republic of Congo and the difficulties that applicants may often have in obtaining or producing copies of official identity documents, and the need in consequence of ensuring that victims are not unfairly deprived of an opportunity to participate for reasons beyond their control [...].<sup>19</sup>

32. These witnesses were subject to multiple interviews and strenuous examination and cross-examination, which took place on numerous occasions, during a period of time ranging from 2005 to 2009-2010. In all of these interviews and interrogatories they were asked to recall events that occurred between 2002 and 2003. Although there is doubt as to the exact age of these individuals at the time of the events, it has been proven that all of them were certainly children or adolescents at the time of their interviews with OTP investigators in 2005. Some of them could have also been under the age of 18 when they gave testimony in court in 2009-2010.<sup>20</sup> These witnesses (and anyone under those circumstances) could explicable and logically have difficulties in recollecting events since the time elapsed between the events (2002-2003), the first interviews with OTP investigators (2005) and the actual trial (2009-2010). In fact, with such elapses of time it would be suspicious if the accounts would remain perfectly alike and unchanged. Memory is faulty. This is more the case for children and adults having suffered any traumatic events.

<sup>19</sup> ICC-01/04-01/06-1119, para. 87.

<sup>20</sup> For witness P-0007, the evidence suggests that he was born between 1987 and 1990; see EVD-D01-01103 (birth certificate), EVD-OTP-00655 (*declaration sur la carte d'électeur*), ICC-1/04-01/06-2270-Conf-Exp-Anx1, page 3 (Application for Reparations before the Court), and T-148-Red2-ENG, page 18, lines 14-21. For witness P-0008, the evidence suggests that he was born between 1989 and 1991; see EVD-D01-00055 (birth certificate) and T-135-Red3-ENG, page 65, lines 12 – 20. For Witness P-0010, the evidence suggests that she was born between 1988 and 1989; see T-144-Red2-ENG, page 12, line 25 to page 13, line 3, T-145-CONF-ENG ET, page 47, lines 14 – 22, EVD-D01-01102 (birth certificate), and EVD-D01-00082 (individual case story). For witness P-0011, the evidence suggests that he was born in 1992; see T-138-Red2-ENG, page 54, lines 1 - 5 and T-139-CONF-ENG, page 57, line 17 to page 58, line 15. For witness P-0298, the evidence suggests that he was born between 1989 and 1991 (see T-123-CONF-ENG) and his legal representatives submit that he was 11 at the time of the events and 18 at the time of his court appearance (see ICC-01/04-01/06-2746-Red-tENG, para. 53).

33. The testimony of witness P-0046 further substantiates the difficulties and challenges presented in the present context. This witness stated:

[I]dentity cards and documents in the Congo are not very common. Very few people have official papers, in particular, children. <sup>21</sup>

34. For all the reasons above, although I agree with the Majority of the Trial Chamber that the testimonies of these young individuals should not be used for the purposes of determining the individual criminal responsibility of Mr Lubanga, their victims' status should remain unaffected.

35. Additionally and critically, it is unfair and discriminatory to impose upon individuals with dual status a higher evidentiary threshold (beyond reasonable doubt) as regards their victims' status, while all other victims participating in the proceedings have not been subject to thorough examination by the parties and the Chamber, as these young persons have been. When reparations are evaluated, it will be up to the Trial Chamber to determine the criteria utilised in determining their final status. Consequently, I consider they should maintain their status as victims for the remaining proceedings in this trial.

### **C. Evidentiary value of video evidence**

36. I respectfully disagree with the evidentiary value the Majority of the Chamber has given to some of the video footage introduced as evidence in this trial.

37. I agree with the conclusions of the Chamber that:

The evidence has established that during this period, the leaders of the UPC/FPLC, including Chief Kahwa, and Bosco Ntaganda, and Hema elders

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<sup>21</sup> T-206-ENG, page 9, lines 15-17.

such as Eloy Mafuta, were active in mobilisation and recruitment campaigns aimed at persuading Hema families to send their children to join the UPC/FPLC.<sup>22</sup>

38. However, I consider that the Majority of the Chamber should have relied on the video footage within EVD-OTP-00571 (02:21:20 to 03:04:57), which was introduced through witness P-0030, in order to support its conclusion. Witness P-0030 stated that this video was filmed at a rally in Goma on 11 January 2003, at which certain UPC officials, including the accused, Mr Kisémbó and Mr Rafiki, were present.<sup>23</sup> Mr Lubanga addressed an audience that included children clearly below the age of 15. The accused's speech concerned a meeting with the RCD-ML and the tensions between the UPC and the UPDF, but most importantly, the accused clearly considered it appropriate to include children under the age of 15 when he spoke publicly about military and other issues concerning the UPC.

39. The Majority of the Chamber should have also considered video footage within EVD-OTP-00585 (from 00:40:00) and EVD-OTP-00586 (from 00:40:18), which was introduced through the same witness P-0030. The witness testified that this event (a UPC rally) took place in Iga Barrière, just after the UPC retook Bunia. The witness identified several UPC child soldiers and Mr Lubanga.<sup>24</sup> The accused was wearing military clothing and he addressed an audience that included many children who were clearly under the age of 15.

40. In the course of his speech to those assembled, the accused states the following:

Let's try to avoid the massacres we saw committed by the government soldiers. I'm saying this because what are we going to base ourselves on?

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<sup>22</sup> Judgment, para. 1354.

<sup>23</sup> T-128-Red2-ENG, page 50, line 8 to page 58, line 11.

<sup>24</sup> T-130-Red2-ENG, page 70, line 1 to page 72, line 1.

Our neighbours do not like us. The president sends the military to exterminate people. Where are we going to go to seek refuge? We cannot wait for aid to arrive. We have to try and be smart and guarantee our own safety.

[...]

People can complain the situation is bad and that we need aid. We could receive aid, but -- or assistance, but as I already mentioned, here in Bunia we should bear in mind that the assistance -- that we rely on you for assistance. We rely on you for assistance. I want you to understand that. I think that if there hadn't been any massacres in Bunia and if we had waited for assistance from elsewhere

[...]

We must look for people who will help us; and whoever will, we should collaborate with to improve the situation. But that won't stop us from doing our work because they could come for two or three months. The work, the help, might be limited. We must be aware and work in the way I have always asked you to work. If, in view of our experience, we are able to forecast the future, even if we are able to do so, we can't be distracted.

[...]

We are going to continue our activities, meet from time to time, because I don't want us to meet in our offices. We need to do our work, the work that will help our future. So, my brothers, that's what will bring us joy. I know that your stomachs aren't full. I know. We have to share our joy and eat together because that will enable us to do our work. You will be asked to do some work. You should know this. But please work to help all the Congolese of Ituri. We're not fighting in the name of one ethnic group; we're fighting for people's security.

[...]

Many people heard that I was dead. That's what was announced on the radio. I would like us to be able to meet and enjoy the time together, for at least a few minutes, and ensure that those who remained help each other. And in that way we will be able to resist our enemies. I came here to

congratulate you for the work you have carried out here in Lopa. Clap, says somebody in the audience. Brothers, today, if before the massacres in Bunia we weren't able to go to Mahagi, well, people hid. And if we managed to save lives, it was all owing to your courage. And I spoke to your leaders on the phone and he said you continue to recruit people. We can together planify together. Thanks to your courage and the resistance -- your resistance, we have won.<sup>25</sup>

41. This video sequence demonstrates that the accused considered it appropriate to include children under the age of 15 when he spoke publicly about issues concerning the UPC, including recruitment.
42. These videos demonstrate that the UPC officials, and particularly Mr Lubanga, would address audiences of young children in which he would discuss the military purposes of the UPC. Such events demonstrate not only the existence of recruitment campaigns (which include also rallies such as the ones showed in these two videos), but also that the accused knew that recruitment of children under the age of 15 "will occur in the ordinary course of events" after such rallies took place since they targeted a very young audience.
43. It is relevant that the rallies shown in EVD-OTP-00571, EVD-OTP-00585 and EVD-OTP-00586 took place in the context of the wider recruitment campaigns, and it contributes to the evidence that the accused was involved, in activities that resulted, in the ordinary course of events, in the recruitment of children below the age of 15 in the ranks of the UPC/FPLC.

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<sup>25</sup> T-130-Red2-ENG, page 73, line 11 to page 75, line 24.

Done in both English and French, the English version being authoritative.



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**Judge Elizabeth Odio Benito**

Dated this 14 March 2012

At The Hague, The Netherlands