Cour Pénale Internationale

International Criminal Court

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No.: ICC-01/04-01/06
Date: **29 January 2007**

PRE-TRIAL CHAMBER I

Before: **Judge Claude Jorda, Presiding Judge**
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: **Mr Bruno Cathala**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF

THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public Redacted Version
with Annex I

Decision on the confirmation of charges

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PRE-TRIAL CHAMBER I of the International Criminal Court ("the Chamber" and "the Court" respectively), having held the confirmation hearing in the case of *The Prosecutor v. Thomas Lubanga Dyilo,*

HEREBY RENDERS THE FOLLOWING DECISION.

I. INTRODUCTION

A. Factual Background

1. The District of Ituri before 1 July 2002

1. Ituri is a district in the Orientale Province of the Democratic Republic of the Congo (the DRC). It is bordered by Uganda to the east and Sudan to the north. Its population is between 3.5 and 5.5 million people, of whom only about 100,000 live in Bunia, the district capital. Ituri's population consists of some 20 different ethnic groups, the largest being the Hemas, the Alurs, the Biras, the Lendus and their southern sub-group, the Ngitis.

2. Ituri is rich in natural resources, such as gold, oil, timber, coltan and diamonds. For example, the Mongwalu mine, which is located about forty-five kilometres north-west of Bunia, is the most important gold mine in the DRC and one of the most important in Central Africa.

3. The majority of the population of Ituri makes its living from agriculture, and the rest from trade, animal husbandry and fishing. Agriculture is the principal economic activity of the Lendus, while the Hemas are more active in livestock farming.

4. In the summer of 1999, tensions developed as a result of disputes over the allocation of land in Ituri and the appropriation of natural resources. During the second half of 2002, there was renewed violence in various parts of the district.

2. Thomas Lubanga Dyilo

5. Thomas Lubanga Dyilo was born in 1960 in Jiba (Djugu territory of Ituri, Orientale Province, DRC), and belongs to the Hema ethnic group. He studied at the University of Kisangani, where he obtained a degree in psychology. From 1986 to 1997, he allegedly headed an organisation called "Votura". From 1990 to 1994, he was also allegedly assistant at the CEPROMAD University. Throughout that period, he

also engaged in other income-generating activities, ranging from farming to gold trading.

6. On the evidence presented for the purpose of the confirmation hearing, it would appear that Thomas Lubanga Dyilo entered politics between late 1999 and early 2000. Soon thereafter, he was elected to the Ituri District Assembly.[1]

7. On 15 September 2000, the statutes of the *Union des Patriots Congolais* (UPC) were signed by Thomas Lubanga Dyilo, as the first signatory, and several other persons who subsequently held leadership positions within the party and its armed military wing, the *Forces Patriotiques pour la Libération du Congo* (FPLC). In August 2002, the UPC took control of Bunia.[2]

8. In early September 2002, the UPC was renamed *Union des Patriotes Congolais/Réconciliation et Paix* (UPC/RP) and Thomas Lubanga Dyilo appointed its President. A few days later, in Bunia, Thomas Lubanga Dyilo signed the decree appointing the members of the first UPC/RP executive for the Ituri District. At the same time, a second decree officially established the FPLC. Immediately after the establishment of the FPLC, Thomas Lubanga Dyilo became its Commander-in-Chief.

3. Prosecution allegations against Thomas Lubanga Dyilo

9. In the "Document Containing the Charges, Article 61(3)(a),"[3] filed on 28 August 2006, the Prosecution charges Thomas Lubanga Dyilo under articles 8(2)(e)(vii) and 25(3)(a) of the Statute with the war crimes of conscripting and enlisting children under the age of fifteen years into an armed group (in this case, the FPLC, military wing of the UPC since September 2002)[4] and using them to participate

[1] Curriculum Vitae of Thomas Lubanga, DRC-OTP-0092-0378.
[2] DRC-OTP-0091-0047, Statement of [REDACTED], DRC-OTP-0105-0109, para. 137 and DRC-OTP-0105-0148, para. 342.
[3] ICC-01/04-01/06-356-Conf-Anx2.
[4] Ibid., para. 14.

actively in hostilities.[5] The Prosecution submits that "the crimes occurred in the context of an armed conflict not of an international character."[6]

10. The Prosecution asserts that even prior to the founding of the FPLC, the UPC actively recruited children under the age of fifteen years in significant numbers and subjected them to military training in its military training camp in Sota, amongst other places.[7]

11. The Prosecution further submits that, after its founding and until the end of 2003, the FPLC continued to systematically enlist and conscript children under the age of fifteen years in large numbers in order to provide them with military training, and use them subsequently to participate actively in hostilities,[8] including as bodyguards for senior FPLC military commanders.[9] The FPLC military training camps included camps in Centrale, Mandro, Rwampara, Irumu and Bule.[10]

12. The Prosecution submits that Thomas Lubanga Dyilo is criminally responsible for the crimes listed in the Document Containing the Charges as a co-perpetrator, jointly with other FPLC officers and UPC members and supporters.[11]

B. Major procedural steps

13. On 5 July 2004, the Presidency of the Court assigned the Situation in the Democratic Republic of the Congo to the Chamber.[12]

14. On 16 September 2004, Judge Claude Jorda was declared Presiding Judge of the Chamber.[13]

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[5] Ibid., para. 27.
[6] Ibid., para. 7.
[7] Ibid., para. 26.
[8] Ibid., para. 27.
[9] Ibid., para. 40.
[10] Ibid., para. 34.
[11] Ibid., paras. 20 and 23.
[12] ICC-01/04-1.
[13] ICC-01/04-2.

15. On 12 January 2006, the Prosecution filed the application requesting the issuance of a warrant of arrest against Thomas Lubanga Dyilo.[14]

16. On 10 February 2006, the Chamber issued a warrant of arrest against Thomas Lubanga Dyilo.[15] A request for his arrest and surrender was then transmitted to the Democratic Republic of the Congo on 24 February 2006.[16] On 16 and 17 March, Thomas Lubanga Dyilo was arrested in the Democratic Republic of the Congo, surrendered to the Court and transferred to the Court's detention centre in The Hague.

17. On 20 March 2006, Thomas Lubanga Dyilo made his first appearance before the Chamber at a hearing during which the Chamber satisfied itself that he had been informed of the crimes which he is alleged to have committed and of his rights. At that hearing, the Chamber announced that the confirmation hearing would be held on 27 June 2006.

18. On 22 March 2006, the Chamber designated Judge Sylvia Steiner as Single Judge responsible for exercising the functions of the Chamber in the instant case, including those functions provided for in rule 121(2)(b) of the *Rules of Procedure and Evidence* ("the Rules").[17] On 15 and 19 May 2006, the Single Judge rendered two decisions on the system of disclosure and the establishment of a timetable.[18]

19. On 28 July and 20 October 2006, the Chamber granted the status of victims authorised to participate in the case of *The Prosecutor v. Thomas Lubanga Dyilo* to Applicants a/0001/06, a/0002/06, a/0003/06 and a/0105/06.[19] According to the decision, the status of victim within the meaning of rule 85 of the Rules is subject to the

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[14] ICC-01/04-98-US-Exp.
[15] ICC-01/04-01/06-2-US-tEN. The warrant of arrest and related documents were unsealed on 17 March (ICC-01/04-01/06-37).
[16] ICC-01/04-01/06-9-US.
[17] ICC-01/04-01/06-51-tEN.
[18] ICC-01/04-01/06-102.
[19] ICC-01/04-01/06-228-tEN; ICC-01/04-01/06-205-Conf-Exp-tEN; ICC-01/04-01/06-601-tEN.

existence of a direct causal link between the harm suffered by the applicant and the charges brought against Thomas Lubanga Dyilo.

20. In the Document Containing the Charges, filed on 28 August 2006, the Prosecution submits that between 1 July 2002 and 31 December 2003, Thomas Lubanga Dyilo, as a co-perpetrator, conscripted and enlisted children under the age of fifteen years and used them to participate actively in hostilities.[20]

21. On 22 September 2006, the Chamber rendered a decision on the arrangements for the participation of victims at the confirmation hearing.[21]

22. On 3 October 2006, the Chamber rejected the challenge to the Court's jurisdiction made by the Defence under article 19(2)(a) of the Statute.[22] In a decision rendered on 14 December 2006, the Appeals Chamber upheld the impugned decision.[23]

23. On 2 August,[24] 15 and 20 September[25] and 4 October 2006,[26] the Chamber rendered four decisions on applications concerning redactions and summary evidence filed by the Prosecution pursuant to rule 81 of the Rules.

24. On 5 October 2006, the Chamber designated Judge Claude Jorda as Single Judge in the case of *The Prosecutor v. Thomas Lubanga Dyilo* responsible for exercising, amongst other functions, the functions provided for in rule 122(1) of the Rules until the end of the confirmation hearing.

25. On 18 October 2006, Single Judge Claude Jorda rejected the application for interim release submitted by the Defence for Thomas Lubanga Dyilo.[27]

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[20] Crime punishable under article 8(2)(b)(xxvi) of the Statute; mode of liability provided for in article 25(3)(a) of the Statute.
[21] ICC-01/04-01/06-462-tEN.
[22] ICC-01/04-01/06-512.
[23] ICC-01/04-01/06-772.
[24] ICC-01/04-01/06-235.
[25] ICC-01/04-01/06-437; ICC-01/04-01/06-455.
[26] ICC-01/04-01/06-515-Conf-Exp.

26. On 19 and 20 October 2006, the Chamber rendered two decisions authorising the Prosecutor to call a staff member of the United Nations Organization to testify before the Chamber at the confirmation hearing. It also authorised an observer from the United Nations to attend the hearing.

27. On 20 October 2006 also, the Prosecution addressed its final List of Evidence to the Chamber under rule 121(3) of the Rules.[28] On 2 and 7 November 2006, the Defence filed its List of Evidence.[29]

28. At the hearing of 26 October 2006, the Prosecution informed the Chamber of its intention to proof the witness whom it intended to call to testify at the confirmation hearing.

29. On 8 November 2006, the Chamber rendered a decision on the proofing of witnesses before they testify before the Court[30] in which it ordered the Victims and Witnesses Unit to familiarise the witness with the Court, to explain to her how proceedings are conducted before the Court, with particular reference to the confirmation hearing, and to discuss with the witness matters relating to her protection. The Chamber also ordered the Prosecution not to proof the witness and to refrain from all contact with her outside the courtroom from the moment she made the solemn undertaking provided for in rule 66 of the Rules.

30. The confirmation hearing in this case was held from 9 to 28 November 2006 in accordance with the terms set on 7 November 2006 pursuant to rule 122(1) of the Rules.[31]

31. Following the hearing, on 1 and 4 December 2006, the Representatives of the Victims filed written observations on points of fact and law discussed at the

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[27] ICC-01/04-01/06-586-tEN.
[28] The Prosecution had filed a first List of Evidence on 28 August 2006 (ICC-01/04-01/06-595-Conf-Exp-Anx7). It filed an Amended List of Evidence on 20 October 2006 (ICC-01/04-01/06-595-Conf-Exp-Anx1).
[29] ICC-01/04-01/06-644; ICC-01/04-01/06-673.
[30] ICC-01/04-01/06-679.
[31] ICC-01/04-01/06-678.

hearing.[32] The Prosecution's observations addressing matters that were discussed at the confirmation hearing were filed on 4 December 2006.[33] On 6 December 2006, the Defence filed its brief on points of fact and law discussed at the hearing.[34]

32. On 14 December 2006, the Appeals Chamber reversed[35] the decisions of 15 and 20 September 2006 on the redactions made by the Prosecution under rule 81 of the Rules.[36] The Appeals Chamber held that the Pre-Trial Chamber's decision lacked sufficient reasoning authorising the redactions for the purpose of protecting further investigations under rule 81(2) of the Rules or to protect the identity of victims, where necessary, under rule 81(4) of the Rules. The Appeals Chamber held that this error materially affected the Impugned Decision in that it could not be established, on the basis of the reasoning that was provided, how the Pre-Trial Chamber had arrived at its decision.[37]

[32] ICC-01/04-01/06-745-tEN; ICC-01/04-01/06-750-tEN.
[33] ICC-01/04-01/06-749; ICC-01/04-01/06-749-Anx; ICC-01/04-01/06-755-Conf; ICC-01/04-01/06-755-Conf-Anx.
[34] ICC-01/04-01/06-763-tEN; ICC-01/04-01/06-764; ICC-01/04-01/06-758-Conf; ICC-01/04-01/06-759-Conf-tEN.
[35] ICC-01/04-01/06-773; ICC-01/04-01/06-774.
[36] ICC-01/04-01/06-437; ICC-01/04-01/06-455.
[37] ICC-01/04-01/06-773, para. 53.

II. PRELIMINARY EVIDENTIARY MATTERS

A. The standard under article 61(7) of the Statute

33. Pursuant to article 61(7) of the Statute:

> The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:
>
> a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;
>
> b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
>
> c) Adjourn the hearing and request the Prosecutor to consider:
>
> i) Providing further evidence or conducting further investigation with respect to a particular charge; or
>
> ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

34. The Prosecution considers that in construing the "substantial grounds to believe" standard under article 61(7) of the Statute, the object and purpose of the confirmation hearing must be taken into account. It submits that the purpose of the confirmation hearing is to ensure that the evidence is sufficient to justify committal for trial, adding that the presentation of summaries as provided for in article 61(5) of the Statute supports this viewpoint. The Prosecution goes on to say that the standard prescribed by article 61(7) comes close to the standard defined as "...a credible case which would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge."[38]

35. In her written observations, the Legal Representative of Victim a/0105/06 considers that while the bench may, for the purpose of the warrant of arrest, base their decision solely on the perception that the Prosecutor has of his case, with

[38] ICC-01/04-01/06-748-Conf, paras. 8-13, quoting from *The Prosecutor v. Dario Kordić*, Case No. IT-95-14-I, Decision of 10 November 1995, p. 3.

respect to the confirmation of the charges, the Chamber must establish that "serious presumptions" exist.[39]

36. Approaching this from the perspective of the conviction of an accused, the Defence considers that the evidence presented by the Prosecution must be sufficient to reasonably sustain a conviction.[40]

37. In the opinion of the Chamber, the purpose of the confirmation hearing is limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought.[41] This mechanism is designed to protect the rights of the Defence against wrongful and wholly unfounded charges.

38. To define the concept of "substantial grounds to believe", the Chamber relies on internationally recognised human rights jurisprudence. In this regard, in its judgement of 7 July 1987 in *Soering v. United Kingdom*, the European Court of Human Rights (ECHR) defined this standard as meaning that "substantial grounds have been shown for believing."[42] In a joint partially dissenting opinion appended to the judgement in *Mamatkulov and Askarov v. Turkey*, Judges Bratza, Bonello and Hedigan considered that "substantial grounds to believe" should be defined as "strong grounds for believing."[43] Moreover, in that case, the Grand Chamber of the ECHR assessed the material placed before it as a whole.[44]

39. Accordingly, the Chamber considers that for the Prosecution to meet its evidentiary burden, it must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations. Furthermore, the "substantial

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[39] ICC-01/04-01/06-745-tEN, paras. 5-10.
[40] ICC-01/04-01/06-764, paras. 37-41.
[41] United Nations High Commission for Human Rights, *Report of the Committee against Torture*, United Nations Document, A/53/44, Annex IX, para. 6.
[42] European Court of Human Rights, *Soering v. the United Kingdom*, Judgement of 7 July 1989, Application No. 14038/88.
[43] European Court of Human Rights, Grand Chamber, *Mamatkulov and Askarov v. Turkey*, Judgement of 4 February 2005, Applications Nos. 46827/99 and 46951/99.
[44] See also European Court of Human Rights, *Chahal v. the United Kingdom*, Judgement of 15 November 1996, Application No. 22141/93, para. 97.

grounds to believe" standard must enable all the evidence admitted for the purpose of the confirmation hearing to be assessed as a whole. After an exacting scrutiny of all the evidence, the Chamber will determine whether it is thoroughly satisfied that the Prosecution's allegations are sufficiently strong to commit Thomas Lubanga Dyilo for trial. In this regard, the Chamber will consider the various witness statements in the context of the remaining evidence admitted for the purpose of the confirmation hearing, without however referencing all of them in this decision.

B. Matters relating to the admissibility of evidence and its probative value

1. Preliminary observations

40. The Chamber recalls that, in accordance with the *Decision on the schedule and conduct of the confirmation hearing*, rendered on 7 November 2006:[45]

> any item included in the Prosecution Additional List of Evidence filed on 20 October 2006 shall be admitted into evidence for the purpose of the confirmation hearing, unless it is expressly ruled inadmissible by the Chamber upon a challenge by any of the participants at the hearing; and
>
> any item included in the Defence List of Evidence filed on 2 November 2006 and the Defence Additional List of Evidence filed on 7 November 2006 shall be admitted into evidence for the purpose of the confirmation hearing, unless it is expressly ruled inadmissible by the Chamber upon a challenge by any of the participants at the hearing;

41. In addition, in its oral decision of 10 November 2006, rendered pursuant to rule 122(3) of the Rules, the Chamber considered that:

> - Firstly, the Defence challenged the admissibility of all evidence included in the List of Evidence of the Prosecutor of 20 October 2006, for which redactions were authorised and, in particular, documents containing redactions concerning the sources of information of the Prosecutor, as well as the summaries.
> - Secondly, the Chamber notes that the first appeal was authorised in a decision of 28 September 2006, and the second on 4 October 2006. The Chamber also notes that the Defence did not request suspensive effect for these two decisions. Consequently, the two decisions of the Pre-Trial Chamber are still applicable […] subject to the same reservations that I expressed a while ago.
>
> Therefore, parties must be able to present their evidence during the confirmation hearing. However, the Chamber would like to inform the participants that the matter of the admissibility of evidence must be attached to the decision on the merits. In this regard, the Chamber would like to reassure the parties that if the

[45] ICC-01/04-01/06-678.

> Appeals Chamber goes against these decisions in whole or in part, the evidence that is affected by such decision will be automatically declared inadmissible.[46]

2. *Judgements of the Appeals Chamber on the first and second decisions on the Prosecution requests for redactions under rule 81*

a. Items included in the List of Evidence filed by the Prosecution on 20 October 2006 which are affected by the First Judgement on Appeal

42. In the *Judgment on the appeal of Mr Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"* ("the First Judgement on Appeal"), rendered by the Appeals Chamber on 14 December 2006, under the heading "Appropriate Relief", the Appeals Chamber stated:

> The Appeals Chamber has found that the Impugned Decision lacked sufficient reasoning in relation to the finding of the Pre-Trial Chamber that the identities of the witnesses covered by the Impugned Decision should not be disclosed to the defence. The Appeals Chamber considers that this error materially affects the Impugned Decision because it cannot be established, on the basis of the reasoning that was provided, how the Pre-Trial Chamber reached its decision. For that reason, it is appropriate to reverse the Impugned Decision. As the reversal of the Impugned Decision on the basis of the first ground of appeal does not entail a conclusive determination by the Appeals Chamber that the Pre-Trial Chamber could not have authorised the non-disclosure of the identities of the relevant witnesses to the defence in the present case, the Pre-Trial Chamber is directed to decide anew upon the applications that gave rise to the Impugned Decisions, having regard to the findings of the present judgement.[47]

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[46] ICC-01-04-01-06-T-32-EN[10Nov2006Edited], p. 30, lines 1-24.

[47] ICC-01/04-01/06-773, para. 53. Furthermore, the Appeals Chamber also pointed out that the Impugned Decision failed to properly address three of the most important considerations for an authorisation of non-disclosure of the identity of a witness pursuant to rule 81(4) of the *Rules of Procedure and Evidence*: the endangerment of the witness or of members of his or her family that the disclosure of the identity of the witness may cause; the need to take protective measures; and why the Pre-Trial Chamber considered that these measures would not be prejudicial to, or inconsistent with, the rights of the Defence and the requirements of a fair and impartial trial (last sentence of article 68(1) of the Statute). The Appeals Chamber added that with respect to the endangerment of witnesses or members of their families, the reasoning of the Pre-Trial Chamber did not provide any indication as to why the Pre-Trial Chamber expected that the security of witnesses or their families may be endangered if the witnesses' identities were disclosed to the appellant. Furthermore, according to the Appeals Chamber, the Pre-Trial Chamber did not indicate which of the facts before it led the Pre-Trial Chamber to reach such a conclusion. In relation to the need not to disclose the identities of the witnesses, the Appeals Chamber noted that the Pre-Trial Chamber only stated that the security situation in some parts of the Democratic Republic of the Congo had an impact on the availability and feasibility of protective measures, without clarifying the factors which it considered relevant for the

43. As a result, the First Judgement on Appeal reverses the Impugned Decision which authorised the Prosecution not to disclose to the Defence the identities of the following witnesses: DRC-OTP-WWWW-0003; DRC-OTP-WWWW-0004; DRC-OTP-WWWW-0016; DRC-OTP-WWWW-021; DRC-OTP-WWWW-0024; DRC-OTP-WWWW-0026; DRC-OTP-WWWW-0027; DRC-OTP-WWWW-0030; DRC-OTP-WWWW-0032; DRC-OTP-WWWW-0034; DRC-OTP-WWWW-0035; DRC-OTP-WWWW-0037; DRC-OTP-WWWW-0038; DRC-OTP-WWWW-0040; DRC-OTP-WWWW-0041; and DRC-OTP-WWWW-0044.

44. Consequently, the Chamber considers that the First Judgement on Appeal affects the following items included in the List of Evidence filed by the Prosecution on 20 October 2006: (i) the summaries of the statements, transcripts of interviews and Prosecution investigators' notes and reports of the interviews of the above-referenced witnesses; and (ii) any related document and video included in Annexes 1 to 9, 12 to 15, 18 to 21 of the "Amended Provision of summary evidence to the Pre-Trial Chamber"("the Third Prosecution Application"), filed by the Prosecution on 4 October 2006,[48] (with the exception of those previously disclosed to the Defence in unredacted form).

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protection of the witnesses. Finally, the Appeals Chamber considered that the appellant had no knowledge of the facts relied upon by the Pre-Trial Chamber for its decision and how the Chamber had applied rule 81(4) of the Rules to the facts of the case. (Ibid., para. 21).

[48] According to Annex 22 of the Third Prosecution Application, this includes the following items:

i) Summary of the statement and transcript of the interview of Witness DRC-OTP-WWWW-0003 and the following related documents: DRC-OTP-0029-0255 to 0256; DRC-OTP-0029-0253 to DRC-OTP-0029-0251 to 0252; DRC-OTP-0029-0246 to 0250; DRC-OTP-0029-0258; DRC-OTP-0029-0257; DRC-OTP-0024-0137; DRC-OTP-0024-0138; and DRC-OTP-0024-0122;

ii) Summary of the Statement of Witness DRC-OTP-WWWW-0004 and the following redacted documents: DRC-OTP-0037-0284; DRC-OTP-0041-0044; DRC-OTP-0041-0045; DRC-OTP-0041-0049; DRC-OTP-0041-0050; DRC-OTP-0041-0052; DRC-OTP-0041-0054; DRC-OTP-0041-0056; DRC-OTP-0041-0058; DRC-OTP-0041-0060; DRC-OTP-0041-0061; DRC-OTP-0041-0062; DRC-OTP-0041-0063; DRC-OTP-0041-0064; DRC-OTP-0041-0070; DRC-OTP-0041-0076; DRC-OTP-0041-0097; DRC-OTP-0041-0098; DRC-OTP-0041-0099; DRC-OTP-0041-0100; DRC-OTP-0041-0101; DRC-OTP-0041-0104; DRC-OTP-0041-0107; DRC-OTP-0041-0109; DRC-OTP-0041-0110; DRC-OTP-0041-0111; DRC-OTP-0041-0113; DRC-OTP-0041-0114; DRC-OTP-0041-0116; DRC-OTP-0041-0117; DRC-OTP-0041-0121; DRC-OTP-0041-0123; DRC-OTP-0041-0124; DRC-OTP-0041-0125; DRC-OTP-0041-0127; DRC-OTP-0041-0128; DRC-OTP-0041-0129; DRC-OTP-0041-0131; DRC-OTP-0041-0132; DRC-OTP-0041-0133; DRC-OTP-0041-0134; DRC-OTP-0041-0135; DRC-OTP-0041-0136; DRC-OTP-0041-0137; DRC-OTP-0041-0138; DRC-OTP-0041-0139; DRC-

OTP-0041-0140; DRC-OTP-0041-0141; DRC-OTP-0041-0145; DRC-OTP-0041-0147; DRC-OTP-0041-0148; DRC-OTP-0041-0152; DRC-OTP-0041-0153; DRC-OTP-0041-0154; DRC-OTP-0041-0155; DRC-OTP-0041-0156; DRC-OTP-0041-0158; DRC-OTP-0041-0160; DRC-OTP-0041-0162; DRC-OTP-0041-0164; DRC-OTP-0041-0168; DRC-OTP-0041-0174; DRC-OTP-0041-0176; DRC-OTP-0041-0186; DRC-OTP-0041-0187; DRC-OTP-0041-0191; DRC-OTP-0041-0196; DRC-OTP-0041-0204; DRC-OTP-0041-0206; DRC-OTP-0041-0207; and DRC-OTP-0041-0210 to DRC-OTP-0041-0266;

iii) Summary of the Statement of Witness DRC-OTP-WWWW-0016 and the following related documents: DRC-OTP-0126-0471 to 0472; DRC-OTP-0126-0473 to 0474; and DRC-OTP-0126-0475 to 0476;

iv) Summary of the Statement of Witness DRC-OTP-WWWW-0021 and the following related documents: DRC-OTP-0113-0054; DRC-OTP-0113-0060; DRC-OTP-0113-0055; DRC-OTP-0113-0057; DRC-OTP-0118-0043; DRC-OTP-0118-0020; DRC-OTP-0118-0003; DRC-OTP-0029-0274; DRC-OTP-0102-0071; DRC-OTP-0029-0275; DRC-OTP-0014-0254; DRC-OTP-0014-0471; DRC-OTP-0118-0063; DRC-OTP-0113-0052; DRC-OTP-0132-0398; DRC-OTP-0132-0399; DRC-OTP-0132-0400; DRC-OTP-0132-0401; DRC-OTP-0132-0402; DRC-OTP-0113-0070; DRC-OTP-0132-0403; DRC-OTP-0132-0404; DRC-OTP-0132-0405; and DRC-OTP-0132-0406;

v) Summary of the Statement of Witness DRC-OTP-WWWW-0024 and the related document: DRC-OTP-0029-0274;

vi) Summary of the Statement of Witness DRC-OTP-WWWW-0026 and the following related documents: DRC-OTP-0109-0104 to 0107; DRC-OTP-0014-0378 to 0379; DRC-OTP-0090-0407; DRC-OTP-0109-0100; DRC-OTP-0109-0101; DRC-OTP-0109-0102; DRC-OTP-0109-0002; DRC-OTP-0109-0003 to 0004; DRC-OTP-0109-0005 to 0006; DRC-OTP-0109-0007; DRC-OTP-0109-0008 to 0009; DRC-OTP-0109-0010; DRC-OTP-0109-0011; DRC-OTP-0109-0012; DRC-OTP-0109-0013; DRC-OTP-0109-0015; DRC-OTP-0109-0016; DRC-OTP-0109-0017; DRC-OTP-0109-0018; DRC-OTP-0109-0019; DRC-OTP-0109-0020; DRC-OTP-0109-0021; DRC-OTP-0109-0022; DRC-OTP-0109-0023; DRC-OTP-0109-0024; DRC-OTP-0109-0025; DRC-OTP-0109-0026 to 0027; DRC-OTP-0109-0028; DRC-OTP-0109-0029; DRC-OTP-0109-0030 to 0031; DRC-OTP-0109-0032 to 0033; DRC-OTP-0109-0034; DRC-OTP-0109-0035; DRC-OTP-0109-0036; DRC-OTP-0109-0037 to 0038; DRC-OTP-0109-0039; DRC-OTP-0109-0040; DRC-OTP-0109-0041 to 0043; DRC-OTP-0109-0044 to 0045; DRC-OTP-0109-0046; DRC-OTP-0109-0047; DRC-OTP-0109-0048; DRC-OTP-0109-0049 to 0050; DRC-OTP-0109-0051 to 0052; DRC-OTP-0109-0053 to 0054; DRC-OTP-0109-0055; DRC-OTP-0109-0056 to 0057; DRC-OTP-0109-0058; DRC-OTP-0109-0059; DRC-OTP-0109-0060; DRC-OTP-0109-0061; and DRC-OTP-0109-0062 to 0063;

vii) Summary of the Statement of Witness DRC-OTP-WWWW-0027 and the following related documents: DRC-OTP-0096-0070; DRC-OTP-0096-0068 to 0069; DRC-OTP-0096-0071; and DRC-OTP-0096-0072;

viii) Summary of the Statement of Witness DRC-OTP-WWWW-0030 and the following related documents and videos: DRC-OTP-0120-0293; DRC-OTP-0120-0295; DRC-OTP-0127-0058; DRC-OTP-0127-0060; DRC-OTP-0127-0064; DRC-OTP-0151-0621; DRC-OTP-0151-0640; DRC-OTP-0151-0645 (including Annex IV: DRC-OTP-0151-0651); DRC-OTP-0127-0053; DRC-OTP-0120-0294; DRC-OTP-0120-0296; DRC-OTP-0127-0057; DRC-OTP-0127-0059; DRC-OTP-0127-0054; DRC-OTP-0127-0061; DRC-OTP-0127-0055; DRC-OTP-0127-0063; DRC-OTP-0127-0056; and DRC-OTP-0127-0065;

ix) Summary of the OTP investigator's report of the interview of Witness DRC-OTP-WWWW-0032;

x) Summary of the Statement of Witness DRC-OTP-WWWW-0034 and the following related documents: DRC-OTP-0017-0182, 0183 and 0184; and DRC-OTP-0017-0011;

xi) Summary of the transcript of the interview of Witness DRC-OTP-WWWW-0035 by the Prosecution;

xii) Summary of the transcript of the interview of Witness DRC-OTP-WWWW-0037 by the Prosecution;

45. However, the Chamber considers that, for the reasons listed below, the First Judgement on Appeal has no effect on the findings set out in the Impugned Decision in respect of witnesses [REDACTED]:

a. With respect to witness [REDACTED], his identity was subsequently disclosed to the Defence upon his admission into the Witness Protection Programme run by the Victims and Witnesses Unit and, accordingly, his two statements were disclosed to the Defence in unredacted form pursuant to rule 81(4) of the Rules.[49]

b. With respect to witnesses [REDACTED], the Single Judge decided to declare inadmissible for the purpose of the confirmation hearing:

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xiii) Summary of the transcript of the interview of Witness DRC-OTP-WWWW-0038 by the Prosecution and the following related documents: DRC-OTP-0147-0333 to 0334; DRC-OTP-0072-0473 to 0478; and DRC-OTP-0072-0471;

xiv) Summary of the Statement of Witness DRC-OTP-WWWW-0040 and the following related documents: DRC-OTP-0017-0033; DRC-OTP-0014-0254; DRC-OTP-0037-0253; DRC-OTP-0037-0294; DRC-OTP-0014-0140; DRC-OTP-0029-0275; DRC-OTP-0014-0186; DRC-OTP-0148-0350; DRC-OTP-0148-0363; DRC-OTP-0148-0365; DRC-OTP-0148-0369; DRC-OTP-0148-0370; DRC-OTP-0148-0373; DRC-OTP-0148-0376; DRC-OTP-0148-0377; DRC-OTP-0148-0379; DRC-OTP-0091-0778; DRC-OTP-0091-0039; DRC-OTP-0089-0483; DRC-OTP-0148-0380; DRC-OTP-0148-0346; DRC-OTP-0148-0361; DRC-OTP-0089-0069; DRC-OTP-0091-0016; and DRC-OTP-0014-0191;

xv) Summary of the Statement of Witness DRC-OTP-WWWW-0041 and the following related documents: DRC-OTP-0147-0320 to 0331; DRC-OTP-0147-0302 to 0319; DRC-OTP-0147-0301; DRC-OTP-0147-0218 to 0223; DRC-OTP-0147-0205 to 0207; DRC-OTP-0127-0148 to 0149; DRC-OTP-0127-0131 to 0137; DRC-OTP-0127-0129; DRC-OTP-0127-0126 to 0127; DRC-OTP-0127-0110 to 0113; DRC-OTP-0127-0121 to 0124; DRC-OTP-0147-0212 to 0216; DRC-OTP-0127-0118 to 0119; DRC-OTP-0147-0201 to 0202; DRC-OTP-0147-0204; DRC-OTP-0147-0208 to 0210; DRC-OTP-0147-0229; DRC-OTP-0147-0298 to 0299; DRC-OTP-0147-0297; DRC-OTP-0147-0296; DRC-OTP-0147-0295; DRC-OTP-0147-0294; DRC-OTP-0147-0293; DRC-OTP-0147-0292; DRC-OTP-0147-0290 to 0291; DRC-OTP-0147-0289; DRC-OTP-0147-0283 to 0288; DRC-OTP-0147-0240 to 0282; DRC-OTP-0147-0231; DRC-OTP-0147-0198; DRC-OTP-0147-0197; DRC-OTP-0147-0199; DRC-OTP-0147-0195; DRC-OTP-0127-0151; DRC-OTP-0127-0146; DRC-OTP-0127-0116; DRC-OTP-0127-0115; DRC-OTP-0147-0232 to 0239; DRC-OTP-0147-0217; DRC-OTP-0147-0056 to 0194; DRC-OTP-0147-0041 to 0044; DRC-OTP-0127-0144; DRC-OTP-0134-0121 (begins at 0094); DRC-OTP-0147-0225 to 0227; and DRC-OTP-0147-0300;

xvi) Summary of the Statement of Witness DRC-OTP-WWWW-0044 and the following related documents: DRC-OTP-0066-0084; DRC-OTP-0066-0093; DRC-OTP-0066-0112 to DRC-OTP-0066-0129; DRC-OTP-0037-0007.

[49] See "Prosecution Application pursuant to Rules 81(2) and 81(4)", filed on 5 October 2006, ICC-01/04-01/06-518-Conf, paras. 10-12 and Annexes 1 and 2; and *Decision on the Prosecution Application of 5 October 2006*, rendered by the Single Judge on 5 October 2006, ICC-01/04-01/06-524, pp. 6 and 7.

- their statements and the transcripts of the Prosecution interviews regardless of their format;[50] and

- the documents listed in Annexes 10 and 17 of document ICC-01/04-01/06-513, on which the Prosecution intended to rely at the confirmation hearing solely in relation to the statements and transcripts of the interviews of the said witnesses.

c. With respect to witnesses [REDACTED], their identities, statements and the transcript of their interviews were subsequently disclosed to the Defence in unredacted form pursuant to rule 81(4) of the Rules at the request of Counsel for the Defence,[51] who subsequently included them in the List of Evidence he filed on 7 November 2006.[52]

b. Items included in the List of Evidence filed by the Prosecution on 20 October 2006 which are affected by the Second Judgement on Appeal

46. In the *Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"* ("the Second Judgement on Appeal"), rendered by the Appeals Chamber on 14 December 2006, under the heading "Appropriate Relief", the Appeals Chamber stated:

> In the present case, because the Appeals Chamber has determined that the Impugned Decision lacked sufficient reasoning in relation to the authorisation of disclosure of witness statements and other documents with redactions pursuant to rule 81 (2) of the *Rules of Procedure and Evidence*, it is appropriate to reverse the Impugned Decision to the extent that it authorised the disclosure of witness statements and other documents to the defence with redactions. The Pre-Trial Chamber should consider the matter anew and provide sufficient reasons for its

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[50] See *Decision concerning the Prosecution Proposed Summary Evidence*, rendered on 4 October 2006 by the Single Judge, ICC-01/04-01/06-515-Conf-Exp, pp. 9 and 10

[51] See *Decision on the Defence Request for Order to Disclose Exculpatory Materials*, rendered on 2 November 2006 by the Single Judge, ICC-01/04-01/06-647-Conf., p. 7; and the *Corrigendum to the Decision on the Prosecution Application pursuant to rule 81(2) of 3 November 2006*, ICC-01/04-01/06-658-Conf, issued on 3 November 2006 by the Single Judge, pp. 3 and 4.

[52] See "Submission of list of additional items to be added to the Defence List of Evidence", filed on 7 November 2006 by the Defence, ICC-01/04-01/06-673-Conf-AnxA.

> decision. The Appeals Chamber considers that it is appropriate to reverse all authorisations of disclosure with redactions even though the first ground of appeal related only to the factual reasoning for rulings pursuant to rule 81 (2) of the *Rules of Procedure and Evidence* because the Impugned Decision did not clearly indicate under which provision the redactions were authorised, nor did the Pre-Trial Chamber identify in the Decision Granting Leave to Appeal which parts of its disposition in the Impugned Decision it considered to be affected by the first ground of appeal.[53]

47. The Second Judgement on Appeal reverses the Impugned Decision which authorised the Prosecution to disclose redacted versions to the Defence. Accordingly, it affects the following items included in the Amended List of Evidence filed by the Prosecution on 20 October 2006:

a. the redacted versions of the statements, transcripts and investigator's notes and reports of the interviews of Witnesses DRC-OTP-WWWW-0002; DRC-OTP-WWWW-0019; DRC-OTP-WWWW-0020; DRC-OTP-WWWW-0022; DRC-OTP-WWWW-0025; DRC-OTP-WWWW-0033, DRC-OTP-WWWW-0039; and DRC-OTP-WWWW-0043;

b. the documents and videos relating to the redacted versions of the statements, transcripts and investigator's notes and reports of the interviews with the said witnesses which are included in any of the following annexes: 1, 2, 4, 5, 6 and 8 of document ICC-01/04-01/06-341-Conf-Exp; Annexes 1 and 4 of document ICC-01/04-01/06-347-Conf-Exp; Annex 5 of document ICC-01/04-01/06-358-Conf-Exp; Annex 6 of document ICC-01/04-01/06-381-Conf-Exp; Annexes 1, 2, 4, 5, 6, 8, 11 and 14 of

[53] ICC-01/04-01/06-774. According to the Appeals Chamber, the reasoning in the Impugned Decision is insufficient because it is not clear from the reasoning what facts, in the evaluation of the Pre-Trial Chamber, justified the authorisation of the requested redactions. The Appeals Chamber considered that to a large extent, the Pre-Trial Chamber had limited itself only to reciting the substance of the provisions concerning authorisations of disclosure with redactions without providing any information as to how it had applied these provisions to the facts of the case. According to the Appeals Chamber, the Impugned Decision failed to set out expressly which redactions were being authorised under rule 81(2) of the Rules. The Appeals Chamber added that it was possible to surmise that certain redactions had been authorised under that provision, but nowhere is the factual and legal basis for those redactions explicitly considered together. Moreover, according to the Appeals Chamber, the Pre-Trial Chamber did not address, even in general terms, why the Chamber considered that the disclosure of the sources of the Prosecutor and any other matters in relation to which it authorised redactions could prejudice further investigations. Ibid., para. 32.

document ICC-01/04-01/06-392-Conf-Exp; Annex 2 of document ICC-01/04-01/06-395-Conf-Exp; Annexes 1, 2, 3, and 4 of document ICC-01/04-01/06-441-Conf-Exp; Annexes 1, 2, 3 and 4 of document ICC-01/04-01/06-446; and Annexes 1 and 2 of document ICC-01/04-01/06-451-Conf-Exp[54] (with the exception of those previously disclosed to the Defence in unredacted form);

c. several additional documents which are part of the annexes of Prosecution applications with reference numbers ICC-01/04-01/06-357-Conf-Exp, ICC-01/04-01/06-365-Conf-Exp, ICC-01/04-01/06-384-Conf-Exp and ICC-01/04-01-06-409-Conf-Exp.[55]

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[54] These documents include:

i) The redacted versions of the two Statements of Witness DRC-OTP-WWWW-0002 and the following related documents: DRC-OTP-0087-0207 to 0210 (video DRC-OTP-0080-0015, copy of video 0003); DRC-OTP-0087-0211 to 0212 (video DRC-OTP-0080-0016, copy of video 0004); DRC-OTP-0087-0213 to 0214 (video DRC-OTP-0080-0017, copy of video 0006); DRC-OTP-0087-0215 (video DRC-OTP-0080-0018, copy of video 0008); DRC-OTP-0087-0216 (video DRC-OTP-0080-0019, copy of video 0010); DRC-OTP-0087-0217 to 0218 (video DRC-OTP-0080-0020, copy of video 0011); DRC-OTP-0087-0219 (video DRC-OTP-0080-0022, copy of video 0014); DRC-OTP-0087-0221 to 0225 (video DRC-OTP-0081-0023, copy of video 0002); DRC-OTP-0087-0227 (video DRC-OTP-0081-0021, video of 0006); DRC-OTP-0087-0228 (video DRC-OTP-0081-0020, copy of video 0008); DRC-OTP-0087-0229 (video DRC-OTP-0081-0017, copy of video 0009); DRC-OTP-0087-0230 to 0232 (video DRC-OTP-0081-0022, copy of video 0011); DRC-OTP-0087-0233 (video DRC-OTP-0081-0018, copy of video 0012); DRC-OTP-0087-0235 (video DRC-OTP-0082-0022, copy of video 0003); DRC-OTP-0087-0236 (video DRC-OTP-0082-0023, copy of video 0004); DRC-OTP-0087-0245 (video DRC-OTP-0082-0032, copy of video 0020); DRC-OTP-0087-0255 (video DRC-OTP-0087-0013, copy of video 0012); DRC-OTP-0087-0256; (DRC-OTP-0087-0015, copy of video 0014); photo DRC-OTP-0087-0274; DRC-OTP-0087-0220 (video DRC-OTP-0080-0021, copy of video DRC-OTP-0080-0013); DRC-OTP-0087-0241 (video DRC-OTP-0082-0029, copy of video DRC-OTP-0082-0016).
ii) The Statement of Witness DRC-OTP-WWWW-0019 and the following related documents: photos DRC-OTP-0108-0155 to 0170.
iii) The Statement of Witness DRC-OTP-WWWW-0020 and the following related documents: photos DRC-OTP-0104-0039 to 0052.
iv) The Statement of Witness DRC-OTP-WWWW-0022 and the following related documents: photos DRC-OTP-0104-0039 to 0052; DRC-OTP-0077-0012.
v) The Statement of Witness DRC-OTP-WWWW-0025 and the following related document: DRC-OTP-0104-0121.
vi) The redacted version of the investigator's report of the interview of Witness DRC-OTP-WWWW-0033 and the following related document: DRC-OTP-0017-0182.
vii) The Statement of Witness DRC-OTP-WWWW-0039.
viii) The Statement of Witness DRC-OTP-WWWW-0043.

[55] These documents include:

ICC-01/04-01/06-409-Conf-Exp-Anx2, ICC-01/04-01/06-409-Conf-Exp-Anx4, ICC-01/04-01/06-409-Conf-Exp-Anx5, ICC-01/04-01/06-409-Conf-Exp-Anx6, ICC-01/04-01/06-409-Conf-Exp-

c. Items included in the List of Evidence filed by the Prosecution on 20 October 2006 which are not affected by the First and Second Judgements on Appeal

48. The Chamber considers that the First and Second Judgements on Appeal have no effect on the statements of witnesses [REDACTED], which were disclosed in full to the Defence in unredacted form.

49. The Chamber also considers that the First and Second Judgements on Appeal do not affect the statements of witnesses [REDACTED], which were redacted pursuant to rule 81(2) of the Rules, or any documents related thereto. In fact, these redactions were authorised by the Single Judge in her *Decision on the Prosecution Amended Application pursuant to Rule 81(2)*,[56] from which neither party has sought leave to appeal.

50. The Chamber further considers that the First and Second Judgements on Appeal do not affect the redacted statements of [REDACTED], Kristine Peduto and [REDACTED], the transcript of [REDACTED] interview and the related documents for the following reasons:

a. The two redacted statements of witness [REDACTED] were disclosed to the Defence only in redacted form pursuant to rule 81(2) of the Rules. In fact, these redactions were authorised by the Single Judge on 2 August 2006 in her *Decision on the Prosecution Amended Application pursuant to Rule*

Anx7, ICC-01/04-01/06-409-Conf-Exp-Anx8, ICC-01/04-01/06-409-Conf-Exp-Anx12, ICC-01/04-01/06-409-Conf-Exp-Anx26, ICC-01/04-01/06-409-Conf-Exp-Anx27, ICC-01/04-01/06-409-Conf-Exp-Anx28 and ICC-01/04-01/06-409-Conf-Exp-Anx29, ICC-01/04-01/06-409-Conf-Exp-Anx21, and ICC-01/04-01/06-409-Conf-Exp-Anx22, ICC-01/04-01/06-384-Conf-Exp-Anx1, ICC-01/04-01/06-384-Conf-Exp-Anx2, ICC-01/04-01/06-409-Conf-Exp-Anx9, and ICC-01/04-01/06-409-Conf-Exp-Anx23, ICC-01/04-01/06-384-Conf-Exp-Anx4, ICC-01/04-01/06-409-Conf-Exp-Anx16, ICC-01/04-01/06-409-Conf-Exp-Anx18, ICC-01/04-01/06-409-Conf-Exp-Anx19, ICC-01/04-01/06-409-Conf-Exp-Anx20, and ICC-01/04-01/06-409-Conf-Exp-Anx25, ICC-01/04-01/06-384-Conf-Exp-Anx3, ICC-01/04-01/06-384-Conf-Exp-Anx5, ICC-01/04-01/06-384-Conf-Exp-Anx6, ICC-01/04-01/06-409-Conf-Exp-Anx10, and ICC-01/04-01-06-409-Conf-Exp-Anx11.

[56] ICC-01/04-01/06-234-Conf-Exp.

81(2)[57] and in her 5 October 2006 *Decision on the Prosecution Application of 5 October 2006*.[58] Neither party has sought leave to appeal these decisions.

b. The redacted statement of witness Kristine Peduto and the related documents were disclosed to the Defence only in redacted form pursuant to rule 81(2) or rule 82(3) of the Rules. These redactions were authorised by the Single Judge in her decision of 10 October 2006.[59] Neither party has sought leave to appeal the decision.

c. The redacted statement of [REDACTED] and the redacted transcript of the interview of [REDACTED] were disclosed to the Defence only in redacted form pursuant to rule 81(2) of the Rules. These redactions were authorised by the Single Judge in her 2 August 2006 *Decision on the Prosecution Amended Application pursuant to Rule 81(2)*[60] and in her 3 November 2006 *Corrigendum to Decision on the Prosecution Application pursuant to Rule 81(2) of 3 November 2006*.[61] Neither party has sought leave to appeal these decisions.

51. In principle, the authorised redactions to the statements of [REDACTED], Kristine Peduto and [REDACTED] and to the transcript of the interview of [REDACTED] and related documents are not subject to the First and Second Judgements on Appeal.

52. The guiding principles set by the First and Second Judgements on Appeal should however be applied to some of these redactions for the following reasons:

a. the redactions were authorised by the Chamber after the Impugned Decisions were rendered;

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[57] Ibid.
[58] ICC-01/04-01/06-524.
[59] ICC-01/04-01/06-556-Conf-tEN.
[60] ICC-01/04-01/06-234.
[61] ICC-01/04-01/06-658-Conf-Corr.

b. the reasoning underlying the said redactions was some to extent linked to the reasons for the Impugned Decisions.

The application of these guiding principles is set out in Annex 1 of this decision.

53. In addition, the First and Second Judgements on Appeal direct the Chamber, almost three weeks after the confirmation hearing, to decide anew upon the numerous Prosecution Rule 81 applications. The Chamber holds the view that the requirement that proceedings be conducted expeditiously, which, as the Appeals Chamber has stated, constitutes an attribute of the right to a fair trial,[62] calls for a prior determination whether the "sufficient evidence to establish substantial grounds to believe" standard had been met having regard to evidence which had been admitted for the purpose of the confirmation hearing, but which was not affected by the Appeals Chamber judgements.

54. The Chamber will decide anew upon the numerous Prosecution Rule 81 applications which are affected by the First and Second Judgements on Appeal only if it is satisfied that the "sufficient evidence to establish substantial grounds to believe" standard cannot be met, bearing in mind that such a review will take several months to complete. In this regard, the Chamber considers that if in the future, the Prosecution filed dozens of Rule 81 applications concerning thousands of pages, it would be difficult for the Court to reconcile the application of the Appeals Chamber's guiding principles with the requirement that proceedings be conducted expeditiously.

55. The approach adopted by the Chamber not only enables compliance with the requirement that proceedings be conducted expeditiously but also ensures that no prejudice flows to the parties. With respect to the Prosecution, the fact that the evidence affected by the First and Second Judgements on Appeal is not taken into account at this stage has no bearing on its potential admissibility at trial. Nor, in the

[62] *Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, rendered on 13 July 2006, ICC-01/04-01/06-168.

view of the Chamber, is this approach prejudicial to the Defence, because the evidence affected is evidence on which the Prosecution intended to rely at the confirmation hearing.[63] Hence, as long as the Chamber takes into consideration only those parts of the evidence that the Defence has highlighted as being of a potentially exculpatory nature, no prejudice will flow to the Defence.

d. The special case of Witnesses DRC-OTP-WWWW-0033, DRC-OTP-WWWW-0035 and DRC-OTP-WWWW-0037

56. The Chamber recalls that in the *Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81*[64] and in the *Decision concerning the Prosecution Proposed Summary Evidence*,[65] it had ordered the Prosecution to inform certain witnesses that it intended to rely on their statements, or on the reports of their interviews, for the purpose of the hearing concerning the confirmation of the charges against Thomas Lubanga Dyilo. In a document filed on 17 November 2006,[66] the Prosecution informed the Chamber that it had so informed all witnesses, save for Witnesses DRC-OTP-WWWW-0033, DRC-OTP-WWWW-0035 and DRC-OTP-WWWW-0037, and that those three witnesses had not been informed in order to protect their personal security.

57. As the Chamber has already stated:

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[63] Except documents ICC-01/04-01/06-409-Conf-Exp-Anx1, ICC-01/04-01/06-409-Conf-Exp-Anx13, ICC-01/04-01/06-409-Conf-Exp-Anx14, ICC-01/04-01/06-409-Conf-Exp 17, ICC-01/04-01/06-Conf-Exp-Anx24, ICC-01/04-01/06-384-Conf-Exp-Anx12, ICC-01/04-01/06-384-Conf-Exp-Anx13 and ICC-01/04-01/06-384-Conf-Exp-Anx14. Regarding documents ICC-01/04-01/06-409-Conf-Exp1, ICC-01/04-01/06-409-Conf-Exp13, ICC-01/04-01/06-409-Conf-Exp-Anx14, ICC-01/04-01/06-409-Conf-Exp 17 and ICC-01/04-01/06-Conf-Exp-Anx24, the *Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81* expressly states that "none of the documents seems to have any potentially exculpatory information, and thus the proposed redactions to such documents do not affect any potentially exculpatory information" (pp. 14-15). Furthermore, regarding documents ICC-01/04-01/06-384-Conf-Exp-Anx12, ICC-01/04-01/06-384-Conf-Exp-Anx13 and ICC-01/04-01/06-384-Conf-Exp-Anx14, permission to redact allowed only the concealment of the handwritten initials of certain Prosecution witnesses, which were not part of the original document, in order to prevent the said witnesses from being identified.

[64] ICC-01/04-01/06-453-Conf-Exp.

[65] ICC-01/04-01/06-515-Conf-Exp.

[66] ICC-01/04-01/06-715-Conf-Exp.

> According to article 69(4) of the Statute, the Chamber may rule on the admissibility of the evidence on which the parties intend to rely at the confirmation hearing taking into account other factors in addition to relevance, probative value and prejudice to a fair trial or to a fair evaluation of the testimony of a witness; and that, in the view of the Chamber, in a scenario like the one described above, and considering the limited scope of the confirmation hearing, adequate protection of the witnesses on whom the parties intend to rely at the confirmation hearing is one of those additional factors.[67]

58. The Chamber recalls that article 68(1) of the Statute requires all organs of the Court to take, within the scope of their respective functions, appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of witnesses. Moreover, rule 86 of the Rules stipulates that the Chamber, in making any direction or order, and other organs of the Court, in performing their functions under the Statute or the Rules, shall take into account the needs of all witnesses in accordance with article 68 of the Statute.

59. In the view of the Chamber, the first and foremost measure required under article 68(1) of the Statute and rule 86 of the Rules is to inform each prospective witness of the fact that a party intends to rely on his or her statement, or the report or transcript of his or her interview for the purpose of the confirmation hearing in a specific case. Hence, if, as in the case before the Chamber, with respect to Witnesses DRC-OTP-WWWW-0033, DRC-OTP-WWWW-0035 and DRC-OTP-WWWW-0037, the information was not provided to the said witnesses in order to protect them appropriately, the Chamber considers that their statements and transcripts or reports of their interviews must be ruled inadmissible for the purpose of the confirmation hearing. Accordingly, the Chamber will in no case decide anew upon those parts of the Prosecution Rule 81 applications relating to these three witnesses.

3. Challenges by the parties relating to the admissibility and probative value of the evidence admitted for the purpose of the confirmation hearing

60. Immediately prior to and at the confirmation hearing, the Defence challenged the admissibility of a number of items included in the Prosecution List of Evidence or proposed by the Prosecution at the confirmation hearing. With respect to most of the

[67] ICC-01/04-01/06-437.

items, the Defence asserts, in the alternative, that, even if they were to be admitted, at best, only limited probative value could be attached to them.[68] Likewise, the Prosecution challenged the admissibility of some of the items included in the List of Evidence filed by the Defence on 2 November 2006 or items proposed by the Defence at the confirmation hearing.

61. Given the relationship that article 69(4) of the Statute establishes between issues relating to the admissibility of evidence and issues relating to its probative value, the Chamber will consider the parties' concerns with regard to both sets of issues in the same section.

a. Issues raised by the Defence

i) Items seized from [REDACTED]'s home

62. One of the main procedural issues in this case concerns the Prosecution's use of evidence alleged by the Defence to have been procured in violation of Congolese rules of procedure and internationally recognised human rights. At the confirmation hearing, the Prosecutor relied on evidence seized ("the Items Seized") from the home of [REDACTED]. On 2 November 2006, the Single Judge ordered the Prosecution to, *inter alia*, provide the Chamber with a comprehensive list of the Items Seized.[69] On 6

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[68] The items affected by the Defence requests are:

a. Any items which are part of the so-called "[REDACTED] documents";
b. Any items which are part of the materials seized by Uruguayan MONUC forces on 6 September 2003;
c. Any items proposed by the Prosecution as alternative evidence to items included among the "[REDACTED] Documents" or among the materials seized by Uruguayan MONUC forces on 6 September 2003;
d. Any items for which no information relating to the chain of custody and transmission has been provided by the Prosecution, including a number of documents, video excerpts and e-mails;
e. Any items or parts thereof containing anonymous hearsay evidence, including (a) the testimony of Kristine Peduto, (b) reports of non-governmental organisations, (c) press articles and media reports, and (d) redacted statements and summary evidence, if the identity of the witness has not been disclosed to the Defence;
f. Certificates concerning the six child soldiers whose cases are detailed in the Document Containing the Charges under the heading "Individual Cases".

[69] ICC-01/04-01/06-647. These instructions were reiterated at the confirmation hearing on 10 November 2006 (ICC-01-04-01-06-T-32-EN[10Nov2006Edited], p. 30, lines 18-22).

November 2006, the Prosecution filed the list of Items Seized[70] with the Chamber and, on 13 November 2006, it informed the Chamber that 71 of the documents in its List of Evidence were among the Items Seized.[71] In a request filed on 7 November 2006,[72] the Defence had asked that the Items Seized be excluded from the Prosecution List of Evidence ("the Defence Request"). According to the Defence, numerous items were allegedly seized from [REDACTED]'s home while he was being detained on the orders of the national authorities.

63. The search during which the items were seized was conducted by the Congolese authorities in the presence of an investigator from the Office of the Prosecutor (OTP). In a decision rendered subsequently, the [REDACTED] Court of Appeal stated, *inter alia*, that it would not take the Items Seized into consideration on the ground that the search and seizure had been conducted in breach of the Congolese Code of Procedure.[73]

64. The Prosecution objected to the Defence Request on the ground that it had no legal basis.[74] Furthermore, on 22 November 2006, the Prosecution indicated that, were the Chamber to rule that the Items Seized were inadmissible for the purpose of the confirmation hearing, a number of items on its List of Evidence could be substituted therefor and considered as supportive of its case.[75]

65. In their closing statements at the confirmation hearing, the Legal Representatives of Victims a/0001/06, a/0002/06 and a/0003/06 also objected to the Defence Request on the ground, *inter alia*, that the Defence cannot rely on the judgement of the [REDACTED] Court of Appeal because it had "no effect."[76]

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[70] ICC-01/04-01/06-659-Conf-Anx3.
[71] ICC-01/04-01/06-695-Conf.
[72] ICC-01/04-01/06-674.
[73] ICC-01/04-01/06-674-Anx2, p. 6.
[74] ICC-01-04-01-06-T-30-EN[9Nov2006Edited], p. 151, line 23 to p. 156, line 22; ICC-01/04-01/06-726-Conf.
[75] "Prosecution's Further Response to the Defence 'Request to exclude evidence obtained in violation of article 69 (7) of the Statute'", ICC-01/04-01/06-726-Conf.
[76] ICC-01-04-01-06-T-47-EN[28Nov2006Edited], p. 60, line 12 to p. 64, line 15.

66. On 24 November 2006, the Defence requested that the Prosecution's further response to the Defence request pursuant to article 69(7) of the Statute be ruled inadmissible or, in the alternative, that the Defence be granted leave to reply to it.[77]

67. First, the Chamber considers the Defence objection to be unfounded because the alternative items suggested by the Prosecution in its 22 November 2006 filing were already included in the Amended List of Evidence filed by the Prosecution on 20 October 2006, even if they were not used at the hearing. In this respect, the Chamber refers to its *Decision on the schedule and conduct of the confirmation hearing*[78] in which it held that unless it had expressly ruled an item inadmissible upon a challenge by any of the participants at the hearing, and provided that item was included in the Prosecution Amended List of Evidence, the Chamber may rely on it whether or not the Prosecution decides to present it at the confirmation hearing.

68. In addition, the Chamber notes that the Defence alternative request seeking leave to reply is moot in so far as the Defence had the opportunity to submit its observations both orally at the confirmation hearing and in writing in its brief filed on 6 December 2006.[79]

69. First, the Chamber observes that under article 21(1)(c) of the Statute, where articles 21(1)(a) and (b) do not apply, it shall apply general principles of law derived by the Court from national laws. Having said that, the Chamber considers that the Court is not bound by the decisions of national courts on evidentiary matters. Therefore, the mere fact that a Congolese court has ruled on the unlawfulness of the search and seizure conducted by the national authorities cannot be considered binding on the Court. This is clear from article 69(8) which states that "[w]hen

[77] "Request for Leave to Reply to Prosecution's Further Response", ICC-01/04-01/06-729.
[78] ICC-01/04-01/06-678.
[79] The Chamber notes that the Defence discussed this issue in its "Defence Brief on matters the Defence raised during the confirmation hearing-Legal Observations", filed on 7 December 2006, ICC-01/04-01/06-764, para. 51.

deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law."[80]

70. As the Defence Request is based on article 69(7) of the Rome Statute,[81] the Chamber must determine whether the evidence was obtained in violation of internationally recognised human rights.

71. According to the documents filed by the Defence, the search and seizure at [REDACTED]'s home was conducted by the Congolese authorities as part of national criminal proceedings brought against [REDACTED] for counterfeiting money.[82] No evidence has been brought to support the Defence allegation that "the search was motivated by discrimination on political or ethnic grounds"[83] or that "it is therefore not difficult to suspect that the local proceedings were merely a diversionary tactic, which were used to justify the provision of the materials in question to the Prosecution."[84]

72. However, in determining whether there has been a violation of internationally recognised human rights, it should be noted that, in its judgement on the unlawfulness of the search and seizure, the [REDACTED] Court relied for its finding on a single precedent which, in addition to being more than 20 years old, is based, not on international human rights treaties as claimed by Counsel for the Defence in the above-mentioned appeal,[85] but on a breach of article 33 of the Congolese Criminal

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[80] According to one commentator on the Rome Statute, "There is therefore a close link between paragraphs 7 and 8. Whereas a violation of internationally recognized human rights in principle qualifies as a ground for exclusion of evidence, a violation of national laws on evidence does not. The reason for that is that the Court should not be burdened with decisions on matters of purely national law." (BEHRENS, H.J., "The Trial Proceedings", in *The International Criminal Court: The Making of the Rome Statute*, The Hague, Kluwer Law International, 1999, p. 246).

[81] Under this provision, evidence obtained by means of a violation of the Statute or internationally recognised human rights is not admissible if a) the violation casts substantial doubt on the reliability of the evidence; or b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

[82] In Annex 1 of document ICC-01/04-01/06-726-Conf, filed by the Prosecution, it is stated that the search and seizure was conducted in the context of criminal proceedings for murder and torture.

[83] ICC-01/04-01/06-674, para. 22.

[84] ICC-01/04-01/06-674, para. 28.

[85] ICC-01/04-01/06-674-Anx2.

Procedure Code which provides that "[TRANSLATION] [H]ouse searches shall be conducted in the presence of the alleged perpetrator of the offence and the person in whose home or residence they are conducted, unless they are not present or refuse to attend." Accordingly, "[TRANSLATION] where the seizure of the disputed item was conducted in the absence of the person concerned who, being under arrest, was at all times available to the prosecuting authorities and could therefore have been taken at any time to the premises searched," such interference has been considered unlawful.

73. Thus, in order to determine whether there has been an illegality amounting to a violation of internationally recognised human rights or merely an infringement of domestic rules of procedure, guidance should be sought from international human rights jurisprudence.

74. The right to privacy is enshrined in Article 17 of the *International Covenant on Civil and Political Rights*, Article 8 of the *European Convention on Human Rights* and Article 11 of the *Inter-American Convention on Human Rights*. In addition to having ratified the various international human rights instruments, many African countries have also enshrined the right to privacy in their constitutions.[86]

75. According to these international instruments, the right to privacy and to protection against unlawful interference and infringement of privacy is a fundamental internationally recognised right. However, it cannot be viewed as an absolute right in so far as these same instruments provide indications of what may be considered as a "lawful" interference with the fundamental right to privacy.[87]

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[86] See article 31 of the Constitution of the Democratic Republic of the Congo, adopted on 18 February 2006. No search whatsoever may be authorised except as provided by law. It should also be noted that Congo ratified the *International Covenant on Civil and Political Rights* in 1983.

[87] In *Camenzind v. Switzerland*, for example, the ECHR decided that States "may consider it necessary to resort to measures such as searches of residential premises and seizures in order to obtain physical evidence of certain offences. The Court will assess whether the reasons adduced to justify such measures were relevant and sufficient and whether the aforementioned proportionality principle has been adhered to. […] the Court must consider the particular circumstances of each case in order to determine whether, in the concrete case, the interference in question was proportionate to the aim pursued." (Judgement of 16 December 1997, Application No. 21353/93, para. 45).

76. Accordingly, in considering the reasons advanced in support of the search and seizure conducted at [REDACTED]'s home, the Chamber recalls that at the time, criminal proceedings were being taken against [REDACTED] for counterfeiting money and, potentially, for murder and torture.[88] It appears that the process was initiated on the orders of a member of the Office of the State Prosecutor of the *Tribunal de Grande Instance* of Bunia in a bid to gather evidence for the purpose of the criminal proceedings. Since the judgement of the [REDACTED] Court contains no other indication, it appears that the order to conduct the search and seizure was given by the competent authority in order to gather evidence for the purpose of lawful criminal proceedings.

77. There is nothing in this case to indicate that the national authorities allegedly used force, threats or any other form of abuse to gain access to [REDACTED]'s home. In fact, the OTP investigator who attended the seizure pointed out in his statement that [REDACTED]'s wife was present at the time of the search and seizure and was present throughout the operation.[89] This statement is therefore consistent with the fact that there has been no complaint for improper interference by force.

78. As a result, the Chamber finds, as stated in the [REDACTED] Court's decision based solely on article 33 of the Congolese Criminal Procedure Code, that the unlawfulness of the search and seizure conducted in [REDACTED]'s absence was a breach of a procedural rule, but cannot be considered so serious as to amount to a violation of internationally recognised human rights.

79. The Chamber will now determine whether the search and seizure conducted at [REDACTED]'s home adhered to the principle of proportionality. Recent ECHR judgements confirm that proportionality is one of the requirements for lawful interference with the right to privacy. In *Miailhe*, for example, the ECHR observed that "[t]he seizures made on the applicants' premises were wholesale and, above all,

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[88] This is what appears to emerge from the Statement of [REDACTED] – see Annex 1 of document ICC-01/04-01/06-726-Conf, para. 8.

[89] ICC-01/04-01/06-726-Conf-Anx1, para. 11.

indiscriminate, to such an extent that the customs considered several thousand documents to be of no relevance to their inquiries and returned them to the applicants."[90] For this reason, it found that the principle of proportionality had not been adhered to and that, as a result, the right to privacy had been infringed and that the coercive action was unlawful.

80. The Chamber considers that in the instant case, it is clear from the list of documents and items seized by the Congolese authorities and handed over to the Prosecution's investigator that hundreds of documents were confiscated, including correspondence, photographs, invitations, legislation, reports, diaries and "personal information".[91] There is no means of determining the relevance, if any, of the documents and items seized from [REDACTED]'s home to the Congolese authorities. However, the information before the Chamber suggests that the Prosecution seemed just as interested, perhaps even more interested, in the items in question[92] and it appears that the Prosecution's presence influenced the conduct of the search and seizure.

81. Accordingly, the Chamber finds that the search and the seizure of hundreds of documents and items pertaining to the Situation in the DRC, conducted in order to gather evidence for the purpose of domestic criminal proceedings infringed the principle of proportionality sanctioned by the ECHR, first, because the interference did not appear to be proportionate to the objective sought by the national authorities and secondly, because of the indiscriminate nature of the search and seizure involving hundreds of items.[93]

82. Accordingly, although all violations of procedural rules do not necessarily result in a violation of internationally recognised human rights, in this case, the Chamber finds that, in light of ECHR jurisprudence, the infringement of the principle

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[90] *Miailhe v. France*, Judgement of 25 February 1993, Application No. 12661/87, para. 39.
[91] ICC-01/04-01/06-659-Conf-Anx 3.
[92] Statement of [REDACTED], ICC-01/04-01/06-726-Conf-Anx1, para. 11.
[93] The Chamber notes that only 70 of the hundreds of Items Seized were included in the Prosecution Amended List of Evidence.

of proportionality can be characterised as a violation of internationally recognised human rights.

83. Having found that the Items Seized were obtained without regard to the principle of proportionality and in violation of internationally recognised human rights, the Chamber must now determine whether such a violation can justify the exclusion of the Items Seized.

84. The Chamber observes that article 69(7) of the Statute rejects the notion that evidence procured in violation of internationally recognised human rights should be automatically excluded. Consequently, the judges have the discretion to seek an appropriate balance between the Statute's fundamental values in each concrete case.[94]

85. The first limb of the alternative embodied in article 69(7)(a) of the Statute deals with the impact of the unlawful method used to gather evidence on the reliability of such evidence, because "some forms of illegality or violations of human rights create the danger that the evidence, such as a confession obtained from a person during interrogation, may not be truthful or reliable as it may have been proffered as a result of the duress arising from the circumstances of the violation."[95] However, in the present case, the Chamber holds the view that the infringement of the principle of proportionality did not affect the reliability of the evidence seized from [REDACTED]'s home on the ground that had the search and seizure been conducted

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[94] According to some commentators, "some delegations wanted to exclude evidence obtained by means of a violation of human rights, but this formulation was regarded as too broad." The drafters of the Statute opted for a narrower formula, under which the Court "will have to distinguish between minor infringements of procedural safeguards and heavier violations". Consequently, "violations of specific national rules on the conduct of an interrogation or the like were not matters upon which the Court should base a decision on exclusion." (BEHRENS H-J., "The Trial Proceedings ", in *The international Criminal Court*, *The Making of the Rome Statute*, The Hague, Kluwer Law international, 1999, p. 246). Paragraph 7, on the other hand, "specifically stipulates specific predicate events regarding the manner of collection of the evidence and detrimental effects on the trial process which, if they are found to exist, justify exclusion. Nevertheless, the determination of the existence of those predicate events or effects necessitates the exercise of evaluation and, thereby, discretion by the Court." Piragoff, Donald K, in *Commentary on the Rome Statute of the International Criminal Court*. Otto Triffterer (ed.), Nomos Verlagsgesellschaft/Baden-Baden, 1999, p. 914).

[95] Ibid., p. 914, para. 76. See also DELMAS-MARTY, M., SPENCER, J.R., *European Criminal Procedures*, Cambridge University Press, 2002, p. 607.

in full adherence to the principle of proportionality, the content of the Items Seized would not have been different.

86. The second limb of the alternative embodied in article 69(7)(b) of the Statute does not pertain to the reliability of the evidence seized; rather, it concerns the adverse effect that the admission of such evidence could have on the integrity of the proceedings. The Chamber recalls that in the fight against impunity, it must ensure an appropriate balance between the rights of the accused and the need to respond to victims' and the international community's expectations. According to a comparative study of various European legal systems, the issue of the admissibility of illegally obtained evidence raises contradictory and complex matters of principle.[96] Although no consensus has emerged on this issue in international human rights jurisprudence, the majority view is that only a serious human rights violation can lead to the exclusion of evidence.[97]

87. Regarding the rules applicable before the international criminal tribunals and their jurisprudence, the generally accepted solution "is to provide for the exclusion of evidence by judges only in cases in which very serious breaches have occurred, leading to substantial unreliability of the evidence presented."[98]

88. In *The Prosecutor v. Radoslav Brđanin*,[99] the International Criminal Tribunal for the former Yugoslavia (ICTY) undertook the same analysis that the Chamber is

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[96] Ibid., pp. 603-610.

[97] The ECHR found that the assessment of evidence falls essentially under national legislation. In *Schenk v. Switzerland*, it decided that it "cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence […] may be admissible", and held that it had to ascertain only whether the trial as a whole was fair (Judgement of 12 July 1988, Application No. 10862/84, para. 46). See also *Saunders v. United Kingdom*, Judgement of 17 December 1996, Application No. 19187/91; *Khan v. United Kingdom*, Judgement of 12 May 2000, Application No. 35394/97; and *Van Mechelen and others v. The Netherlands*, Judgement of 23 April 1997, Application No. 21363/93. This reasoning was also followed by the Inter-American Court of Human Rights in the *Ivcher Bronstein* case, Judgement, 6 February 2001. In the same vein, see the *Castillo Páez*, *Loayza Tamayo* and *Paniagua* cases.

[98] ZAPPALA, S., *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003, p. 149: "The approach adopted so far has been to admit any evidence that may have probative value, unless the admission of such evidence is outweighed by the need to ensure a fair trial."

[99] *The Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, *Decision on the Defence "Objection to Intercept Evidence"*, 3 October 2003.

undertaking in the present case, taking into consideration the views of legal commentators, comparative law and the jurisprudence of human rights courts.[100] Relying on the precedent established in *The Prosecutor v. Delalić*,[101] the ICTY Trial Chamber recalled that "it would constitute a dangerous obstacle to the administration of justice if evidence which is relevant and of probative value could not be admitted merely because of a minor breach of procedural rules which the Trial Chamber is not bound to apply."[102] Having determined that the evidence at issue was relevant to the case, the *Brđanin* Trial Chamber admitted the evidence.

89. Accordingly, the Chamber endorses the human rights and ICTY jurisprudence which focuses on the balance to be achieved between the seriousness of the violation and the fairness of the trial as a whole.

90. Hence, for the purpose of the confirmation hearing, the Chamber decides to admit the Items Seized into evidence. Moreover, the Chamber recalls the limited scope of this hearing, bearing in mind that the admission of evidence at this stage is without prejudice to the Trial Chamber's exercise of its functions and powers to make a final determination as to the admissibility and probative value of the Items Seized from [REDACTED]'s home.

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[100] The point was made that "admitting illegally obtained intercepts into evidence does not, in and of itself, necessarily amount to seriously damaging the integrity of the proceedings." (Ibid., para. 61).

[101] *The Prosecutor v. Delalić et al.*, Case No. IT-96-21, *Decision on the Motion of the Prosecution for the Admissibility of Evidence*, 19 January 1998.

[102] *The Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, *Decision on the Defence "Objection to Intercept Evidence"*, 3 October 2003, paras. 63-67. See also the decision rendered orally by Judge May on 2 February 2000 in *The Prosecutor v. Kordić and Cerkez*, Case No. IT-95-14/2-T, p. 13694 of the transcript of the hearings in which he finds that "even if the illegality was established […] [w]e have come to the conclusion that […] evidence obtained by eavesdropping on an enemy's telephone calls during the course of a war is certainly not within the conduct which is referred to in Rule 95. It's not antithetical to and certainly would not seriously damage the integrity of the proceedings."

ii) Items seized by Uruguayan MONUC forces on 6 September 2003

91. The Defence requests that the evidence originally seized by Uruguayan MONUC forces on 6 September 2003 and included in the Prosecution List of Evidence be excluded.[103]

92. The Prosecution assured the Chamber that none of the evidence included in its Amended List of Evidence was originally seized by Uruguayan MONUC forces on 6 September 2003.

93. The Defence has not provided sufficient evidence to lead to the conclusion that the Prosecution List of Evidence includes evidence that was seized by Uruguayan MONUC forces.[104]

94. Consequently, the Chamber is not bound to consider whether the items originally seized by Uruguayan MONUC forces on 6 September 2003 are admissible under article 69(7) of the Statute for the purpose of the confirmation hearing.

iii) Evidence on the chain of custody and transmission for which the Prosecution has not provided any information

95. The Defence has requested the Chamber not to admit any item in the Prosecution List of Evidence for which no information pertaining to the chain of transmission has been provided.[105] In the view of the Defence, the Prosecution's lack of diligence in this regard casts doubt on the authenticity of these items. If the items are nevertheless admitted, the Defence requests that they be corroborated by other evidence before the "reasonable grounds to believe" test can be considered to have been satisfied.[106] In this regard, the Defence submits that the Chamber should attach

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[103] See ICC-01/04-01/06-718-Conf-Anx1; ICC-01/04-01/06-723-Conf-Anx; see also ICC-01-04-01-06-T-41-EN[22NovEdited], p. 8, line 19 to p. 10, line 25.

[105] "Defence Brief on matters the Defence raised during the confirmation hearing-Legal Observations", ICC-01/04-01/06-764, para. 52; ICC-01-04-01-06-T-41-EN[22Nov2006Edited], p. 11, lines 8-12.
[106] ICC-01-01-01-06-T-41-EN[22Nov2006Edited], pp. 11-13.

relatively little probative value to any document or video excerpt[107] whose authenticity has not been confirmed by a witness.[108]

96. The Chamber notes that under article 69(4), it has the power to rule on the admissibility of any evidence and the probative value thereof. Moreover, nothing in the Statute or the Rules expressly states that the absence of information about the chain of custody and transmission affects the admissibility or probative value of Prosecution evidence.

97. Under the framework established by the Statute and the Rules, the Chamber notes that, at the stage of the confirmation hearing, the scope of which is limited to determining whether or not a person should be committed for trial, it is necessary to assume that the material included in the parties' Lists of Evidence is authentic. Thus, unless a party provides information which can reasonably cast doubt on the authenticity of certain items presented by the opposing party, such items must be considered authentic in the context of the confirmation hearing. This is without prejudice to the probative value that could be attached to such evidence in the overall assessment of the evidence admitted for the purpose of this confirmation hearing.

98. The Chamber notes that in this case, the Defence did nothing more than raise a general objection to the admissibility of all Prosecution evidence for which no information pertaining to the chain of custody and transmission had been provided, without addressing specific items or providing the reasons for its objection.[109] Accordingly, the Chamber considers that the Defence has not sufficiently substantiated its request that some Prosecution evidence be excluded or, in the alternative, that lesser probative value be attached to it.

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[107] The Defence points out that no source or date is provided for 10 out of 18 video items.
[108] ICC-01-04-01-06-T-41-EN[22Nov2006Edited], p. 40, line 9 to p. 41, line 15.
[109] ICC-01/04-01/06-758-Conf., para. 52; ICC-01-04-01-06-T-41-EN[22Nov2006Edited], p. 11, lines 8-11.

iv) Anonymous hearsay evidence and accessibility to the sources of information contained in certain items of evidence

99. The Defence submits that it is unable to have access to the sources which provided the information contained in a number of items included in the Prosecution List of Evidence such as: i) the redacted versions of witness statements, transcripts of interviews, notes and reports of witness interviews prepared by OTP investigators; ii) summaries of evidence; iii) certain parts of Kristine Peduto's testimony; iv) reports by non-governmental organisations; v) e-mails; and vi) press articles. In the view of the Defence, these items are anonymous hearsay, and it is impossible for the Defence to ascertain the truthfulness and authenticity of the information therein contained. Accordingly, it requests that the Chamber rule this evidence inadmissible or, in the alternative, that only limited probative value be attached to it.[110]

100. Under article 69(4) of the Statute, the Chamber has the discretion to rule on the 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."

101. The Chamber also notes that there is nothing in the Statute or the Rules which expressly provides that evidence which can be considered hearsay from anonymous sources is inadmissible *per se*. In addition, the Appeals Chamber has accepted that, for the purpose of the confirmation hearing, it is possible to use certain items of evidence which may contain anonymous hearsay, such as redacted versions of witness statements.[111]

102. Furthermore, ECHR jurisprudence evinces that the European Convention does not preclude reliance at the investigation stage of criminal proceedings on sources such as anonymous informants. Nevertheless, the ECHR specifies that the subsequent use of anonymous statements as sufficient evidence to found a conviction

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[110] "Defence Brief on matters the Defence raised during the confirmation hearing - Legal Observations", ICC-01/04-01/06-758-Conf., para. 49; ICC-01-04-01-06-T-41-EN[22Nov2006Edited], p. 31, lines 19-25.

[111] ICC-01/04-01/06-774.

is a different matter in that it can be irreconcilable with Article 6 of the European Convention, particularly if the conviction is based to a decisive extent on anonymous statements.[112]

103. Accordingly, the Chamber considers that objections pertaining to the use of anonymous hearsay evidence do not go to the admissibility of the evidence, but only to its probative value.

104. In its *Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81*, the Chamber held, in this respect:

> that, without prior adequate disclosure to Thomas Lubanga Dyilo, the Prosecution cannot rely on those parts of the documents, witness statements and transcripts of witness interviews for which redactions are authorised in the present decision; and that the probative value of the unredacted parts of the said documents, witness statements and transcripts of witness interviews may be diminished as a result of the redactions proposed by the Prosecution and authorised by the Chamber.[113]

105. Moreover, in the *Decision concerning the Prosecution Proposed Summary of Evidence*, the Chamber held that:

> in relation to the summary evidence on which the Prosecution is authorised to rely at the confirmation hearing in the present decision, the Prosecution cannot at the confirmation hearing rely on any information which does not appear in the summary evidence, such as the identity, position and other identifying features of the relevant Prosecution witnesses; that, moreover, summary evidence – as opposed to redacted versions of witness statements, transcripts of witness interviews and investigators' notes and reports of witness interviews – is drafted by the Prosecution; and that these factors shall necessarily have an impact on the probative value of the summary evidence authorised in the present decision.[114]

106. Regarding Kristine Peduto's testimony, NGO reports, e-mails and press articles which contain anonymous hearsay evidence, the Chamber will determine their probative value in light of other evidence which was also admitted for the purpose of the confirmation hearing. However, mindful of the difficulties that such evidence may present to the Defence in relation to the possibility of ascertaining its

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[112] *Kostovski v. The Netherlands*, Judgement of 20 November 1989, Application No. 11454/85, para. 44.
[113] ICC-01/04-01/06-455, p. 10.
[114] ICC-01/04-01/06-517, p. 4.

truthfulness and authenticity, the Chamber decides that, as a general rule, it will use such anonymous hearsay evidence only to corroborate other evidence.

v) Attestations relating to the six child soldiers whose cases are detailed in the Document Containing the Charges

107. The Defence takes issue with the admissibility and relevance of the attestations of birth introduced by the Prosecution to prove the age of witnesses [REDACTED].[115] According to the Defence, these attestations are inadmissible and are invalid under Congolese law, given that under Law No. 2181/010 of 1 August 1987, the age of a person can be determined only on the basis of his or her record of birth.[116]

108. The Defence also refers to the legal solution used where a person has never had a record of birth. In this respect, the Defence acknowledges that:

> a somewhat parallel practice has developed in the Democratic Republic of the Congo whereby anyone who does not possess a record of birth may obtain an attestation of birth from the civil status registrar of their place of residence. […] However, an attestation is merely a confirmation of a fact or an obligation by a third party on the basis of statements made to that third party. Unlike a record of birth, an attestation of birth has no legal status and cannot be set up against third parties.[117]

109. The Prosecution does not dispute the fact that these "certificates do not fully comply with Congolese law,"[118] but maintains that these attestations of birth are of some probative value since they were issued by the Congolese authorities.[119]

110. The Chamber recalls that under article 69(4) of the Statute, it has the discretion to rule on the admissibility and probative value of any item included in the parties' Lists of Evidence, in accordance with internationally recognised human rights as provided for in article 21(3) of the Statute.

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[115] DRC-OTP-0132-0010, DRC-OTP-0132-0011, DRC-OTP-0132-0012, DRC-OTP-0132-0013, DRC-OTP-0132-0014, DRC-OTP-0132-0015.
[116] ICC-01/04-01/06-759-Conf-tEN.
[117] Ibid., para. 16
[118] ICC-01-04-01-06-T-46-CONF-EN[27Nov2006Edited], p. 38, lines 14-15.
[119] Ibid., lines 16-17.

111. The Chamber considers that for the purpose of ruling on the admissibility and probative value of evidence pertaining to a person's civil status, it must pay particular attention to the context in which the evidence was gathered, particularly in light of the fact that in some countries, civil status records, such as attestations of birth, marriage certificates or death certificates may not be available.

112. In this respect, in its decision on reparations in *Aloeboetoe et al. v. Suriname*, the Inter-American Court of Human Rights (IACHR) noted that marriages and births are not always registered and in those cases where they are registered, sufficient data is not provided to fully document the relationship between persons.[120]

113. More recently, in dealing with the identification of victims who were to receive reparations, the IACHR held that the latter would be recognised if they showed a record of birth, proof of residence, a marriage certificate or any other document issued by an authority and mentioning one of the victims.[121]

114. This jurisprudence reflects the approach that while birth certificates issued by the competent authorities in accordance with domestic legislation are the best means of proving a person's age, they do not constitute the sole means of providing such proof. In the view of the Chamber, this is because a more flexible approach for determining the admissibility and probative value of such evidence is the only approach which is consistent with the requirement to fully respect the specificities of the cultures and customs of the world's different peoples.

115. Accordingly, in light of the particular situation of witnesses [REDACTED], and because their attestations of birth were issued by the civil status registrar of the

[120] Inter-American Court of Human Rights, *Aloeboetoe et al. v. Suriname*, Decision on reparations, 10 September 1993, paras. 63 and 64.
[121] Inter-American Court of Human Rights, *Plan de Sánchez Massacre v. Guatemala*, Decision on reparations, 19 November 2004, para. 63.

town of Bunia,[122] the Chamber considers that these attestations must be admitted as evidence for the purpose of the confirmation hearing.

116. In addition, the Chamber considers that the probative value of these attestations must be determined as part of the assessment of the totality of the evidence admitted for the purpose of the confirmation hearing.

117. In this regard, the Chamber notes that the attestations of birth of [REDACTED] showing that they were under the age of fifteen years when the events referred to in their statements occurred, are corroborated by other evidence such as the children's own statements.

vi) Defence challenge to the credibility of children's evidence and Kristine Peduto's entire testimony

118. Relying on several grounds,[123] the Defence challenged the credibility and reliability of the statements made by children and Kristine Peduto's entire testimony, on which the Prosecution relied to substantiate the charges against Thomas Lubanga Dyilo.

119. The Chamber takes note of all the Defence challenges concerning children's statements and Kristine Peduto's testimony. However, the Chamber observes that a large number of these challenges actually proceed from matters of a peripheral nature which do not really go to the substance of the children's and Kristine Peduto's statements.[124]

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[122] In many countries, including the DRC, a document issued by the competent national authorities is presumed reliable and the burden of proving that it is false or that its contents are inaccurate is on the party making such an allegation.

[123] See ICC-01/04-01/06-759-Conf-tEN. See also ICC-01/04-01/06-T-42-CONF-EN[22Nov2006Edited], p. 2, line 12 to p. 64, line 19.

[124] The Chamber is not satisfied that the statements of these child witnesses, for example, are not credible specifically because they "provided names of commanders who were either no longer alive or could not have been physically present at the time, or gave accounts of implausible trips within Ituri, "heroic" actions, and described non-existent insignia corresponding to FPLC ranks and events which, by simple mathematical calculation, are impossible." (para. 8, ICC-01/04-01/06-759-Conf-tEN). Similarly, in relation to Kristine Peduto, the Chamber holds the view that the examples given at pages 14 to 29 of document ICC-01/04-01/06-759-Conf-tEN by the Defence, pertaining to "serious

120. Furthermore, the Chamber recalls that in a previous decision, it held that "in application of article 69(4) of the Statute, "the Chamber 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 Evidence and Procedure*."[125]

121. In exercising its discretion and in accordance with the jurisprudence of the ICTR,[126] the Chamber declares that it will attach a higher probative value to those parts of the children's and Kristine Peduto's evidence which have been corroborated, as is apparent from several sections of this decision.

122. However, the Chamber wishes to emphasise that, according to the jurisprudence of the ICTY, less probative value is not necessarily attached to parts of a witness statement that have not been specifically corroborated, and which do not vary from the statement as a whole.[127]

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contradictions, chronic uncertainty, severe memory lapses, serious mistakes, as well as an alarming lack of knowledge of her working environment and the general background in Ituri", do not necessarily affect the truthfulness of her testimony as a whole.

[125] See ICC-01/04-01/06-690.

[126] In *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1, Trial Judgement, 21 May 1999, it is stated at para. 80 that "[d]oubts about a testimony can be removed with the corroboration of other testimonies. However, corroboration of evidence is not a legal requirement to accept a testimony."

[127] See *The Prosecutor v. Delalić et al.*, Case No. IT-96-21, Trial Judgement, 16 November 1998, paras. 594-597: "As a general principle, the Trial Chamber has attached probative value to the testimony of each witness and exhibit according to its relevance and credibility. The Trial Chamber notes that, pursuant to Rule 89 of the Rules, it is not bound by any national rules of evidence and as such, has been guided by the foregoing principles with a view to a fair determination of the issues before it. In particular, the Trial Chamber notes the finding in the *Tadić* Judgment that corroboration of evidence is not a customary rule of international law, and as such should not be ordinarily required by the International Tribunal. […] The Trial Chamber has considered the oral testimony before it in the light of these considerations. Accordingly, inconsistencies or inaccuracies between the prior statements and oral testimony of a witness, or between different witnesses, are relevant factors in judging weight but need not be, of themselves, a basis to find the whole of a witness' testimony unreliable. The Trial Chamber has attached probative value to testimony primarily on the basis of the oral testimony given in the courtroom, as opposed to prior statements, where the demeanour of the relevant witnesses could be observed first hand by the Trial Chamber and placed in the context of all the other evidence before it."

vii) Items not included in the Prosecution List of Evidence

123. The Defence objects to the admission of four reports presented by the Prosecution at the hearing of 27 November 2006 on the meaning of the term "hema gegere."[128]

124. It also objects to the admission of an expert report presented before the *Cour d'appel de Paris* and introduced by the Prosecution at the hearing of 27 November 2006. Amongst other things, the report concerns the place where an e-mail account was created and from which were sent five messages introduced into evidence by the Defence.[129]

125. Although the above-mentioned reports were tendered by the Prosecution after the expiration of the time limit prescribed by rule 121(5) of the Rules, the Chamber considers that it is empowered, under articles 69(3) and (4) of the Statute, to admit evidence presented out of the said time limit, if: i) such evidence is necessary to rule on the merits of the issues considered at the confirmation hearing; ii) the Prosecution could not have foreseen the need to present the said evidence nor could it have presented it within the time limit prescribed by rule 121(5) of the Rules; and iii) the Defence had the opportunity to challenge the additional evidence presented. In this case, the Chamber finds that these three conditions have been satisfied, and therefore decides to admit the said reports into evidence.

viii) The probative value of some of the evidence disclosed to the Defence

126. At the confirmation hearing, the Defence raised certain objections to the admissibility and probative value of the witness statements included in the Prosecution List of Evidence and disclosed to the Defence in unredacted form.[130]

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[128] ICC-01-04-01-06-T-45-EN[27Nov2006Edited], p. 17, line 8 to p. 20, line 7.
[129] ICC-01-04-01-06-T-45-EN[27Nov2006Edited], p. 41-44. The relevant items presented by the Defence are documents EVD-D01-0002, EVD-D01-0003, EVD-D01-0004, EVD-D01-0005 and EVD-D01-0006.
[130] ICC-01-04-01-06-T-41-EN[22Nov2006Edited], p. 4, lines 21-23.

127. First, the Defence points out that nowhere in these statements taken by an OTP investigator is it mentioned that the witness took an oath. The Defence submits that before the international tribunals, a representative of the Registry is present when a deposition is taken.[131] The ICTY practice to which the Defence refers and, in particular, rule 92*bis* of its *Rules of Procedure and Evidence* (on the admission of written statements and transcripts in lieu of oral testimony), applies to the trial phase. Accordingly, the Chamber finds that it is not applicable in the context of a confirmation hearing.

128. Secondly, the Defence argues that the mere presentation of a statement or written deposition does not entitle the opposing party to conduct a cross-examination, thus diminishing the probative value of the testimony.[132] In this regard, the Chamber recalls that under article 61(5) of the Statute, the Prosecution "may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial." Moreover, there is nothing in the Statute and the Rules to indicate that statements, transcripts of interviews or summaries of evidence must be considered as having a lower probative value.

129. Finally, the Defence submits that the probative value of the evidence for which the Chamber authorised redactions is seriously diminished.[133] In this respect, the Chamber refers to its *Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81*, as quoted in the section on anonymous hearsay evidence.

130. Accordingly, the Chamber dismisses the Defence objections concerning the admissibility and probative value of some of the witness statements disclosed to it.

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[131] ICC-01-04-01-06-T-41-EN[22Nov2006Edited], p. 20, line 7.
[132] ICC-01-04-01-06-T-41-EN[22Nov2006Edited], p. 18, lines 24-25 and p. 19, lines 1-3.
[133] ICC-01-04-01-06-T41-EN[22Nov2006Edited], pp. 17 and 18.

b. Issues raised by the Prosecution

i) Items included in the Defence List of Evidence filed on 2 November 2006

131. At the hearing of 27 November 2006, the Prosecution objected to certain pieces of evidence presented by the Defence at the confirmation hearing and numbered as follows: EVD-D01-00001, EVD-D01-00002, EVD-D01-00003, EVD-D01-00004, EVD-D01-00005 and EVD-D01-00006. The Defence stated that they are paper copies of e-mails sent by [REDACTED] between 19 July 2002 and 5 August 2002. The Prosecution disputes the authenticity of these e-mails and asks that the Chamber attach no probative value to them.[134]

132. The Chamber notes that the Prosecution does not object to the admissibility of these items for the purpose of the confirmation hearing, but only to their probative value. Consequently, the Chamber will determine their probative value on a case-by-case basis, if necessary.

ii) Items not included in the List of Evidence filed by the Defence on 2 November 2006

133. The Prosecution objects to the admission of the signed and dated version of [REDACTED]'s letter presented by the Defence on 27 November 2006.[135]

134. In addition, the Defence based its allegations concerning the probative value of child testimony on a study by the University of California, Berkley, entitled *Child Witnesses at the Special Court for Sierra Leone*. At the hearing of 22 November 2006,[136] the Chamber asked the Defence to provide the study, if it felt it was useful. The Defence then referred to it in its closing submissions.[137]

135. Although the above-mentioned reports and documents were tendered by the Defence after the expiration of the time limit prescribed by rule 121(6) of the Rules,

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[134] ICC-01-04-01-06-T-45-EN[27Nov2006Edited], p. 43, lines 23-25.
[135] ICC-01-04-01-06-T-46-CONF-EN[27Nov2006Edited], p. 4, line 7 to p. 6, line 24.
[136] ICC-01-04-01-06-T-42-CONF-EN[22Nov2006Edited].
[137] ICC-01/04-01-06-759-Conf-tEN, footnote 5.

the Chamber considers that it is empowered, under articles 69(3) and (4) of the Statute, to admit evidence presented by the Defence out of the said time limit, if: i) such evidence is necessary to rule on the merits of the issues considered at the confirmation hearing; ii) the Defence could not have foreseen the need to present the said evidence nor could it have presented it within the time limit prescribed by rule 121(6) of the Rules; and iii) the Prosecution had the opportunity to challenge the evidence so presented. In this case, the Chamber finds that these three conditions are satisfied in relation to [REDACTED]'s letter, and therefore decides to admit it.

136. Regarding the study by the University of California, Berkley, although the Defence offered to introduce it into the record of the case, it has yet to provide a copy thereof to the Chamber or the Prosecution. The Chamber therefore declares the study inadmissible for the purpose of the confirmation hearing.

iii) Issues relating to the Defence request to withdraw two statements from its List of Evidence

137. In its List of Additional Evidence filed on 7 November 2006, the Defence included statements and the transcript of the interviews of [REDACTED], statements on which it intended to rely at the confirmation hearing ("the Statements").[138]

138. On 24 November 2006, the Defence filed a "Defence notification of withdrawal of evidence", seeking leave from the Chamber to withdraw the Statements and requesting that the Registry be ordered to remove them from the eCourt system.[139]

139. On 27 November 2006, the Prosecution orally objected to the "Defence notification of withdrawal of evidence" arguing, *inter alia*, that only the Chamber had the prerogative to decide whether or not to use material introduced into evidence to

[138] ICC-01/04-01/06-673-Conf-Annex A
[139] ICC-01/04-01/06-728-Conf

ascertain the truth, regardless of whether the party who submitted it wants it to be withdrawn.[140]

140. First, the Chamber notes that nothing in the Statute or the Rules empowers parties to withdraw evidence included in their List of Evidence.

141. The Chamber is of the view that items and documents included in the Prosecution and the Defence Lists of Evidence and Lists of Additional Evidence cease to be separate pieces of evidence presented by the parties and become evidence on the record, which the Chamber may use to determine, pursuant to article 61(7) of the Statute, whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes which he or she is alleged to have committed.

142. In this respect, the Chamber considers that such a determination would be undermined if parties were able to withdraw evidence initially included in their List of Evidence, but which no longer met their expectations in light of the unfolding confirmation hearing.

143. The Chamber's position is consistent with its previous decisions on this matter, for instance, its *Decision on the Practices of Witness Familiarisation and Witness Proofing*, where it noted that "... witnesses to a crime are the property neither of the Prosecution nor of the Defence and […] should therefore not be considered as witnesses of either party, but as witnesses of the Court."[141]

144. The Chamber also bears in mind that the Prosecution had already sought to rely on the two statements concerned,[142] but that the Chamber had disallowed their inclusion in the Prosecution List of Evidence, in light of the Chamber's duty to protect witnesses under article 68 of the Rome Statute.[143] The Chamber recognises

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[140] ICC-01/04-01/06-T-45-EN[27Nov2006Edited], p. 4, line 11 to p. 8, line 7.
[141] ICC-01/04-01/06-679, *Decision on the Practices of Witness Familiarisation and Witness Proofing*, para. 26.
[142] See annexes 10 and 17 of ICC-01/04-01/06-513.
[143] ICC-01/04-01/06-515-Conf-Exp.

that the protective measures in respect of the Statements became pointless when the Defence gained access to the Statements and added them to its List of Evidence.

145. Accordingly, the Chamber dismisses the Defence request to withdraw the Statements.

III. PROCEDURAL MATTERS

A. Defence application regarding the form of the Document Containing the Charges

146. With regard to the document containing the charges and the list of evidence, rule 121(3) of the Rules states that:

> The Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.

147. Regulation 52 of the *Regulations of the Court* states that the document containing the charges referred to in article 61 shall include:

> (a) The full name of the person and any other relevant identifying information;
>
> (b) 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;
>
> (c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.

148. In an application dated 16 October 2006[144] and at the confirmation hearing, the Defence criticised the form of the Document Containing the Charges transmitted by the Prosecution. According to the Defence:

> Thomas Lubanga Dyilo has a right to be promptly informed of the nature and cause of the charge. The nature of the charge refers to the precise legal qualification of the offence, and the cause of the charge refers to the facts underlying it. In terms of the cause of the charge, the Prosecution must plead all material facts which, to the extent possible, should include the identity of the victims, the place and approximate date of the acts and the means by which the offences were committed.[145]

149. The various criticisms levelled at the Prosecution's Document Containing the Charges may be summarised as follows: i) factual or legal vagueness of certain paragraphs; and ii) articulation of useless facts for the purpose of buttressing the charges brought against Thomas Lubanga Dyilo.

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[144] ICC-01/04-01/06-573

[145] ICC-01-04-01-06-T44-EN[24Nov2006Edited], p. 64.

150. On the one hand, regarding the factual vagueness alleged by the Defence, the Chamber considers that the Document Containing the Charges submitted by the Prosecution meets the criteria set forth in regulation 52 of the *Regulations of the Court* and is indeed a "detailed" description of the charges against Thomas Lubanga Dyilo. In addition, the Chamber recalls that the Document Containing the Charges transmitted by the Prosecution is to be read in conjunction with the Prosecution List of Evidence. Thus, there is evidence relating to each paragraph of the Document Containing the Charges. Nevertheless, the Chamber notes that, for the proper administration of justice, it would sometimes have been advisable to provide greater specificity in the Prosecution List of Evidence.

151. On the other hand, the Defence takes issue with the Prosecution for not sufficiently articulating the points of law underpinning certain parts of its Document Containing the Charges. However, the Prosecution is under no obligation to articulate in the Document Containing the Charges its legal understanding of the various modes of liability and the alleged crimes. That the Prosecution was not inclined to overly articulate this point in the Document Containing the Charges is not prejudicial to the rights of the Defence, since the various crimes charged and the mode of liability contemplated are clearly articulated.[146]

152. Lastly, the Defence takes issue with the Prosecution for having included facts in the Document Containing the Charges which, as noted by the Defence, would not be relevant in the context of the confirmation or otherwise of the charges against Thomas Lubanga Dyilo and should therefore not have been included therein.[147] The Chamber holds the view that nothing prevents the Prosecution from mentioning any event which occurred before or during the commission of the acts or omission with

[146] See paragraphs 20-24 of the Document Containing the Charges.

[147] See, for example, the Defence challenge to paragraph 26 of the Document Containing the Charges, which states that "[p]rior to the foundation of the FPLC, and since 2001 at the latest, the UPC actively recruited children under the age of fifteen years in significant numbers and subjected them to military training in its military training camp in Sota, amongst other places".

which the suspect is charged, especially if that would be helpful in better understanding the context in which the conduct charged occurred.

153. On this last point, the Chamber can only regret that the Prosecution did not see fit to plead with greater specificity the context in which the crimes with which Thomas Lubanga Dyilo is charged occurred.

B. Matters relating to the disclosure process for potentially exculpatory evidence or evidence which could be material to the preparation of the Defence

154. The Defence alleges that the Prosecution did not disclose to it all exculpatory evidence or evidence material to its preparation. The Chamber recalls that, prior to the confirmation hearing, the Prosecution's obligation was solely to disclose to the Defence the bulk of potentially exculpatory evidence or evidence which could be material to the preparation of the Defence.[148] The Chamber held many status conferences to ensure that the disclosure process between the Prosecution and the Defence was properly conducted, and notes that the Prosecution repeatedly stated that it had fulfilled its obligations and had effectively disclosed to the Defence the bulk of potentially exculpatory evidence or evidence which could be material to the preparation of the Defence.[149] Moreover, nothing has been presented to contradict these submissions.

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[148] In this regard, see Decision ICC-01/04-01/06-102 or ICC-01/04-01/06-581-Conf-tEN.

[149] See, for example, the first day of the confirmation hearing: ICC-01/04-0/06-T-30-EN[9Nov2006Edited], p. 146, lines 4-13: "There are disclosure obligations of the Office of the Prosecutor under article 67(2), potentially exculpatory material. There are disclosure obligations pursuant to article 61(3)(b), incriminatory evidence for the purpose of the confirmation hearing and there's an obligation under rule 77 to provide for inspection of certain materials and the Office of the Prosecutor has fulfilled its disclosure obligations very much in line with respect to the order of the Single Judge. The Office of the Prosecutor went beyond its legal duties." or ICC-01/04-0/06-T-17-Conf-EN[5sept2006Edited], p. 40, lines 9-11. Regarding the disclosure process for materials which are potentially exculpatory or otherwise necessary for the preparation of the defence, see, for example, ICC-01/04-01/06-T-13-Conf-EN[24August2006Edited], p. 29, line 17 to p. 30, line 15, and the two annexes of document ICC-01/04-01/06-611-Conf filed by the Prosecution on 25 October 2006.

C. Defence request to exclude certain parts of the Prosecution's final observations

155. In a request filed on 4 December 2006,[150] the Defence asked the Chamber to order the Prosecution to re-file its written submissions after striking out certain paragraphs. According to the Defence, the Prosecution could not address the matters dealt with in those passages.

156. In this regard, the Chamber will limit itself to recalling its two previous decisions on the subject[151] and to stating that it will consider only issues that were discussed orally by the parties at the confirmation hearing.

D. Defence request for access to a report registered in the record of the Situation

157. On 18 December 2006, the Defence filed an urgent request seeking access to a report by the NGOs Human Rights Watch and Redress that was registered in the record of the Situation in the DRC on 30 June 2005.[152] The Defence stated that it required the report in order to respond to the document entitled "Submissions by Victims a/0001/06, a/0002/06 and a/0003/06 further to the Appeals Chamber's Decision of 12 December 2006."[153] The Defence had until 20 December 2006 to respond to those submissions.

158. While it did not object to the request, the Prosecution nevertheless requested that the Chamber seek the views of the above-mentioned NGOs prior to deciding whether to disclose their report to the Defence.[154]

159. The Chamber notes that the report was referred to in paragraph 101 of the *Decision on the Prosecution's Application for a Warrant of Arrest, Article 58*, rendered on

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[150] ICC-01/04-01/06-752

[151] ICC-01/04-01/06-678 and ICC-01/04-01/06-743-tEN

[152] ICC-01/04-01/06-779-Conf.

[153] The Defence indicated that the document was numbered ICC-01/04-01/06-776-Conf-tEN. Since the document was filed as confidential in proceedings before the Appeals Chamber, it should be noted that the Chamber has access only to the public redacted version numbered ICC-01/04-01/06-778-tEN.

[154] ICC-01/04-01/06-780-Conf.

20 February 2006,[155] and that reference is made to the same paragraph in the *Decision on the Application for the interim release of Thomas Lubanga Dyilo*, rendered on 18 October 2006.[156] The urgent nature of the request filed by the Defence on 18 December 2006 seeking to obtain the document prior to 20 December 2006 is therefore unwarranted.

160. The Chamber also recalls that in order to have access to a non-public document in the record of the Situation in the DRC, the Defence must: i) identify the specific document and ii) provide the reasons for requesting access to it.[157]

161. Without specifying that the victims had cited the report in their submissions, the Defence merely explained that the victims were alleging that certain threats had been made against the witnesses, but gave no details whatsoever about the substance of those allegations.

162. In the Chamber's opinion, the Defence has accordingly failed to sufficiently explain why that particular document would have enabled it to address the allegations made by the victims in their submissions before the Appeals Chamber.

163. The Chamber therefore rejects the urgent request filed by the Defence on 18 December 2006.

E. Jurisdiction of the Court and admissibility of the case of *The Prosecutor v. Thomas Lubanga Dyilo*

164. Article 19(1) of the Statute provides that:

> The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

165. The Chamber recalls that in its decisions of 10 February 2006 and 3 October 2006, it ruled that the instant case fell within the jurisdiction of the Court. It further

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[155] ICC-01/04-01/06-8-US-Corr (reclassified as public pursuant to Decision ICC-01/04-01/06-37).
[156] ICC-01/04-01/06-586-tEN.
[157] ICC-01/04-01/-06-103, p. 4.

recalls that in the decision of 10 February 2006, it ruled that the instant case was admissible pursuant to article 17 of the Statute.

166. The Chamber notes that in its Document Containing the Charges the Prosecution did not alter the temporal, geographic, material and personal jurisdictional criteria articulated in the warrant of arrest issued against Thomas Lubanga Dyilo. In addition, nothing new has been submitted to the Chamber in respect of jurisdiction and admissibility in the instant case.

IV. MATERIAL ELEMENTS OF THE CRIME

A. Existence and nature of the armed conflict in Ituri

1. *Analysis of the evidence relating to the existence and nature of the armed conflict*

a. From September 2000 to late August 2002

167. [REDACTED] since early 2003) and [REDACTED] stated that the UPC was created as a result of the July 2000 mutiny of Hema officers and soldiers in the *Armée du Peuple Congolais* [the military wing of the *Rassemblement Congolais pour la Démocratie/Kisangani* (RCD/K) led by Wamba dia Wamba, the then Governor of Ituri].[158] According to both of them as well as [REDACTED],[159] Thomas Lubanga Dyilo, Chief Kahwa Panga Mandro, Floribert Kisembo, Bosco Ntaganda and Tchaligonza all participated in the mutiny in one way or another.[160]

168. [REDACTED] explains that the UPC was created in complete secrecy on 15 September 2000 at Richard Lonema's home in order to counter the RCD/K-ML (*Rassemblement congolais pour la démocratie/Kisangani-Mouvement de libération*[161]) and that it was to receive military support from the July 2000 Hema mutineers.[162] According to [REDACTED], Thomas Lubanga Dyilo, who had been appointed UPC spokesman by reason of his political experience and contacts, was tasked with explaining the UPC's goals to the Ugandan authorities. However, once the leadership of the RCD/K became aware, Thomas Lubanga Dyilo was placed under house arrest in Uganda sometime in late 2000.[163]

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158 DRC-OTP-0105-0098, paras. 75 and 88 and DRC-OTP-0113-0081, paras. 46 and 48.

159 [REDACTED] was one of [REDACTED]'s bodyguards (Statement of [REDACTED], DRC-OTP-0127-0080, para. 45); he later became a [REDACTED] at the UPC [REDACTED] in Bunia, often [REDACTED] (DRC-OTP-0127-0090, paras. 99 and 100), and [REDACTED] (DRC-OTP-0127-0091 to DRC-OTP-0127-0098).

160 DRC-OTP-0105-0099, paras. 76-78; [REDACTED], paras. 50-53 and DRC-OTP-0127-0078, para. 30.

161 Statement of [REDACTED], DRC-OTP-0105-0098, para. 73.

162 [REDACTED], para. 57 and [REDACTED], paras. 58 and 59. See also the "*Acte Constitutif*" (Constitution) of the *Union des patriotes congolais*, made in Bunia on 15 September 2000, DRC-OTP-0089-0165.

163 [REDACTED], para. 60 and [REDACTED], para. 62.

169. According to [REDACTED][164] and [REDACTED],[165] while Thomas Lubanga Dyilo was detained in Uganda, the conflict between Wamba dia Wamba (President of the RCD/K) and his two deputies, Mbusa Nyambisi and John Tibasima, escalated and [REDACTED] had to flee from Bunia and take refuge in [REDACTED]. The Ugandan authorities then encouraged the creation of a platform called *Front pour la Liberation du Congo* (FLC), presided over by Jean-Pierre Bemba and bringing together Jean-Pierre Bemba's *Mouvement pour la Liberation du Congo* (MLC), Mbusa Nyambisi's RCD-K/ML and Roger Lumbala's RCD/National.[166]

170. [REDACTED] points out that Thomas Lubanga Dyilo did not officially announce the creation of the UPC until 9 January 2001, after the founding of the FLC which, under the auspices of the Ugandan authorities, brought together Jean Pierre Bemba's MLC and Mbusa Nyamwisi's RCD-K/ML.[167] In their statements, [REDACTED][168] and [REDACTED][169] also refer to the creation of the FLC and the appointment of Thomas Lubanga Dyilo as Vice-Minister of Youth and Sports in the FLC Government in Ituri, which lasted only a few months.

171. According to [REDACTED],[170] [REDACTED],[171] [REDACTED][172] and [REDACTED],[173] the mutiny ended when the insurgent officers were sent to the military training camp in Jinja (in Uganda) and the rest of the mutineers to the Kyakwanzi camp (also in Uganda). At the end of their military training, the mutineers formed the core of the Simba Battalion, which was deployed to the Équatoriale Province as part of the military wing of the FLC.[174]

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[164] DRC-OTP-0105-0101, para. 91.
[165] [REDACTED], para. 63.
[166] DRC-OTP-0105-0101, para. 91 and [REDACTED], para. 64.
[167] [REDACTED], paras. 63-65.
[168] [REDACTED], paras. 88 and 91.
[169] DRC-OTP-0066-0011, paras. 45 and 46 and DRC-OTP-0066-0012, paras. 47 and 48.
[170] [REDACTED].
[171] DRC-OTP-0127-0078, paras. 31-33.
[172] DRC-OTP-0105-0099, para. 79.
[173] [REDACTED], para. 53 and [REDACTED], para. 54.
[174] [REDACTED], para. 55; [REDACTED] and DRC-OTP-0127-0079, para. 34.

172. According to [REDACTED],[175] [REDACTED][176] and [REDACTED],[177] after the break-up of the FLC, its member parties regained their autonomy and, as early as November 2001 at least, Thomas Lubanga Dyilo was appointed Defence Minister of the RCD-K/ML Government in Ituri.

173. [REDACTED] explains how, after the break-up of the FLC in 2001, the Hema mutineers – around 350 men under the command of Floribert Kisembo – were redeployed to Bunia as part of the APC.[178] On their return to Bunia, problems arose between the Hema mutineers and the APC's Nande officers – problems which eventually led to the murder of Claude Kiza, APC Chief of Staff, in April 2002. Thomas Lubanga Dyilo, at the time Defence Minister, backed the Hema mutineers.[179]

174. According to [REDACTED][180] and [REDACTED],[181] these events led to a confrontation between Thomas Lubanga Dyilo and Mbusa Nyamwisi (President of the RCD/K-ML) and, subsequently, to a declaration on 17 April 2002 by which the UPC broke with the RCD/K-ML and effectively became a political-military movement. As explained by [REDACTED]:

> On 17 April 2002, the UPC's political inner circle issued an official statement announcing the effective transformation of the UPC into a political/military movement. […]The statement of 17 April 2002 was signed by the UPC's senior political officials, i.e. [REDACTED], LUBANGA and ten or so other people. […] At the time of its official formation on 17 April 2002, the UPC's army had men, weapons and ammunition at its disposal. LUBANGA was then the RCD-K/ML's minister for defence and the UPC's soldiers all came from the APC. When they joined the UPC, they brought with them their guns and ammunition. At that point, our primary objective was to oust the RCD-K/ML.[182]

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[175] DRC-OTP-0066-0012, paras. 49-51.
[176] [REDACTED], para. 68.
[177] DRC-OTP-0105-0102, para. 93.
[178] [REDACTED]. See also the Statement of [REDACTED], DRC-OTP-0127-0079, para. 35 and the Statement of [REDACTED], [REDACTED], paras. 95-100.
[179] [REDACTED].
[180] DRC-OTP-0105-0102, para. 95 to DRC-OTP-0105-0103, para. 101.
[181] [REDACTED], paras. 68-71.
[182] [REDACTED], paras. 69-70.

175. [REDACTED][183] and [REDACTED][184] describe the two meetings held in Uganda in April 2002 (Kasese) and June 2002 (Kampala) at the request of the Ugandan authorities and attended by a UPC delegation headed by Thomas Lubanga Dyilo and an RCD/K-ML delegation. According to both of them[185] as well as [REDACTED],[186] after the second meeting, Thomas Lubanga Dyilo and other members of the UPC delegation were arrested by the Ugandan authorities and sent to Kinshasa, where they were detained, first at the DEMIAP until August 2002, and subsequently at the Kinshasa Grand Hotel and the Hotel Lolo la Crevette.[187]

176. In [REDACTED] statement, [REDACTED] describes the military assistance (arms, ammunition and uniforms) received by the UPC from Rwanda via Chief Kahwa in June and July 2002.[188] With the recruits trained at the Mandro training camp, amongst others, by military instructors sent from Rwanda,[189] the UPC was able to attack the APC in Bunia. In this regard, [REDACTED] Bosco Ntaganda and Chief Kahwa concerning the receipt of arms and ammunition from Rwanda at the time.[190] In addition, regarding [REDACTED] stay [REDACTED] says that:

> As far as the military training was concerned, BOSCO was assisted by somebody called SAFARI who was a Rwandan soldier who came to visit the camp fairly often. I can remember the following military leaders being present in MANDRO: KYALIGONZA, KASANGAKI, KISEMBO, LOBHO Désiré, BAGONZA and Rwandans such as BESTO "BEBE", RAFIKI, MUGABO, Ali MBUYI and TIGER ONE. All these people would later have important positions within the UPC army when it seized control of BUNIA.[191]

177. [REDACTED][192] and [REDACTED][193] refer to the joint Ugandan People's Defence Forces (UPDF)-UPC attack against the APC in Bunia in early August 2002, as

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183 [REDACTED].
184 DRC-OTP-0105-0103 to DRC-OTP-0105-0104.
185 [REDACTED] and DRC-OTP-0105-0104.
186 DRC-OTP-0127-0084, para. 66.
187 Statement of [REDACTED], DRC-OTP-0105-0103 to DRC-OTP-0105-0104, para. 105; see also the Statement of [REDACTED], [REDACTED], para. 97.
188 DRC-OTP-0105-0104 to DRC-OTP-0105-0107.
189 DRC-OTP-0105-0105, paras. 115 and 116.
190 DRC-OTP-0127-0081, para. 51.
191 DRC-OTP-0127-0081, para. 50.
192 DRC-OTP-0066-0019 to DRC-OTP-0066-0024.
193 DRC-OTP-0105-0107 to DRC-OTP-0105-0109.

result of which the UPC took control of Bunia.[194] According to [REDACTED], the UPDF attacked the APC in Bunia because the APC had invited members of the *Forces Armées Congolaises*, including a certain Colonel Aguru, to Ituri.[195] [REDACTED] also mentions the UPDF attack in early August 2002 on the residence of Jean-Pierre Molondo Lopondo, RCD-K/ML Governor in Ituri, and the withdrawal of APC troops from Bunia.[196]

178. According to [REDACTED], at the time the UPDF and the UPC attacked Bunia – in early August 2002 – Thomas Lubanga Dyilo, although held in detention in Bunia, (i) was in direct contact with the UPC political and military leadership in Bunia, including Richard Lonema, Daniel Litscha and Floribert Kisembo, and (ii) approved their actions and encouraged them to continue.[197] Additionally, at the same time, Thomas Lubanga Dyilo was preparing the *Déclaration Politique du Front pour la Réconciliation et la Paix*, which was signed by all UPC members detained in Kinshasa at the time, and in which the *Front pour la Réconciliation et la Paix* (the name intended to replace "UPC") claimed to control of Bunia.[198]

179. However, [REDACTED] states that, while at the DEMIAP (*Détection militaire des activités anti-patrie*), Thomas Lubanga Dyilo and the other detainees [REDACTED] did not have the right to receive visits or to communicate with the outside world.[199] Also, [REDACTED] of the *Déclaration Politique du Front pour la Réconciliation et la Paix*, he explains that "[i]t was after we were informed that Bunia had been captured by our soldiers that [REDACTED] to draft the document. In the document, [REDACTED] the FRP had seized control of Bunia with the support of the APC

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[194] [REDACTED] refers to discussions with the Ugandan authorities on security matters and "organising UPDF/UPC patrols" (DRC-OTP-00066-026, para. 117). He points out that [REDACTED] informed that "UPC forces were taking up position behind the UPDF's positions." (DRC-OTP-0066-021).

[195] DRC-OTP-0066-0020, para. 92. Correspondence between the [REDACTED] addresses [REDACTED] also refers to the arrival in Ituri of a colonel from Kinshasa around mid-July and the military parade organised upon his arrival at the APC camp in Ndoromo. (See, in particular, DRC-D01-0001-0008).

[196] [REDACTED], lines 1161-1168 and [REDACTED].

[197] DRC-OTP-0066-0027, para. 120.

[198] Ibid.

[199][REDACTED], para. 96.

dissidents that had rallied to Thomas LUBANGA. [REDACTED] their action on behalf of our group led by LUBANGA."[200] [REDACTED] also explains that Thomas Lubanga Dyilo signed the declaration in his capacity as "coordinator" – and not as "president" – of the *Front pour la Réconciliation et la Paix* because "[REDACTED] ask him to sign it as the president because [REDACTED] needed the agreement of our followers."[201]

180. [REDACTED][202] and [REDACTED][203] explain how Thomas Lubanga Dyilo and the other UPC members detained in Kinshasa were freed at the end of August 2002 in exchange for the Congolese Minister Ntumba Luaba, who had been taken hostage in Bunia by Chief Kahwa and whose release the Ugandan authorities immediately undertook negotiations to secure.

b. From September 2002 to June 2003

181. [REDACTED] states that, upon their return to Bunia, they went to the Mandro Camp, where they agreed (i) to replace the name UPC with *Union des Patriotes Congolais/Réconciliation et Paix* (UPC/RP); (ii) to unanimously appoint Thomas Lubanga Dyilo President of the movement; and (iii) to designate the members of the first UPC/RP executive.[204] [REDACTED] adds that:

> Before the members of the executive were appointed, a consensus was reached that Thomas LUBANGA be appointed president of the movement. Although this move was not wholly consistent with our movement's constitution – in that an election ought really to have been held – everyone agreed that he be appointed.[205]

182. [REDACTED] also states that the first decree of the new UPC/RP executive in early September 2002 was prepared by Thomas Lubanga Dyilo "in conjunction with

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[200] [REDACTED], para. 104.
[201] [REDACTED], para. 105.
[202] [REDACTED], paras. 139-141.
[203] [REDACTED], para. 120 to [REDACTED], para. 125.
[204] [REDACTED], para. 126 to [REDACTED], para. 135. See also [REDACTED], para. 152 where [REDACTED] refers to the first UPC/RP decree promulgated in early September 2002 and states that the decree had been prepared by Thomas Lubanga in conjunction with the military people.
[205] [REDACTED], para. 128.

the military people" and that it dealt with the creation of the FPLC as the military wing of the UPC/RP.[206] He states that:

> the only persons in the executive that could have had a direct relationship with the FPLC soldiers were President Thomas LUBANGA and Chief KAHWA PANGA MANDRO, the deputy national secretary for defence. I am aware that the president was kept extremely busy by his political activities and so left it to KAHWA to manage the military side of things.

183. According to the testimonies of [REDACTED], as well as MONUC and Human Rights Watch (HRW) reports, there were several military operations allegedly involving the FPLC in Ituri between September 2002 and late 2002. The operations included the alleged attack by the APC and Ngiti fighters on Nyankunde in September 2002,[207] the alleged UPC attack on Mongbwalu in November 2002,[208] and the alleged UPC attack on Kilo in December 2002.[209]

184. [REDACTED] states that the UPC/RP executive was reshuffled on 11 December 2002; changes brought about included the elimination of the position of Deputy National Secretary for Defence (until then held by Chief Kahwa Panga Mandro) so that defence matters came within the remit of the Office of the President, and the replacement of former Ituri Governor Adèle Lotsove.[210]

185. [REDACTED] refers to the tensions among FPLC officers as a result of the disagreements between Thomas Lubanga Dyilo and Chief Kahwa Panga Mandro starting in early October 2002,[211] which led to the expulsion of Chief Kahwa Panga

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[206] [REDACTED], para. 152.
[207] MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0350, para. 52 to DRC-OTP-0129-0352, para. 61.
[208] Statement of [REDACTED], DRC-OTP-0126-0139, para. 68; MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0362, para. 101 to DRC-OTP-0129-0362, para. 102; Human Rights Watch, *Ituri: "Covered in Blood" Ethnically Targeted Violence in Northeastern DR Congo*, DRC-OTP-0163-0319; Statement of [REDACTED], DRC-OTP-0105-0115, para. 166.
[209] Human Rights Watch, *The Curse of Gold*, DRC-OTP-0163-0398; see also the Statement of [REDACTED], DRC-OTP-0105-0119, para. 185.
[210] [REDACTED], [REDACTED], paras. 135 and 136, [REDACTED], para. 137 and [REDACTED], para. 153.
[211] [REDACTED], lines 2421-2447.

Mandro from the FPLC in early December 2002.[212] According to [REDACTED],[213] [REDACTED], and [REDACTED],[214] Chief Kahwa then proceeded to establish PUSIC before the end of 2002. [REDACTED] states that a number of FPLC members joined PUSIC which, according to the testimony of Kristine Peduto, was said to be in control of the Mandro sector.[215] Regarding the founding of PUSIC, [REDACTED] points out that:

> That is how come KAHWA went to talk with KABILA in December 2002 about establishing a new Hema group to destabilise and weaken the UPC. KABILA gave him US$250,000 to start up his new party. With the money, KABILA wanted to create a coalition that could bring together the Alurs, Hemas and Lendus in order to destabilise LUBANGA.[216]

186. According to [REDACTED], General Jérôme was the FPLC commander of the North-East Sector in the final months of 2002,[217] until he proclaimed his independence from the UPC/RP and FPLC in January 2003.[218] He then founded the *Forces Armées du Peuple Congolais* (FAPC), which a number of FPLC members joined and which controlled the Aru Mahagi sector.[219] According to [REDACTED], both the FAPC and PUSIC were founded with the backing of the Ugandan authorities.[220]

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[212] See "*Décret n° 016/UPC/RP/CAB/PRESS/2002 du mois de Décembre 2002 portant déposition d'un secrétaire national adjoint et son exclusion du mouvement*" (DRC-OTP-0089-0057), signed by Thomas Lubanga Dyilo in Bunia on 2 December 2002, whereby Chief Kahwa, who was Deputy National Secretary for Defence at the time, was relieved of his duties and expelled from the UPC/RP.
[213] DRC-OTP-0105-0120 to DRC-OTP-0105-0123, para. 198.
[214] [REDACTED], lines 1332 and 1333 and [REDACTED], lines 421-427.
[215] ICC-01-04-01-06-T-39-EN[21Nov2006Edited], p. 55, lines 1-25 and p. 56, lines 1-10.
[216] DRC-OTP-0105-0121, para. 194.
[217] [REDACTED], lines 1930-1933.
[218] [REDACTED], lines 434 and 435.
[219] [REDACTED], lines 437-444. See also MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0370, paras. 133-135.
[220] [REDACTED], lines 1707-1719.

187. [REDACTED] states that other political-military movements were established in December 2002 or January 2003, including the *Front National Intégrationniste* (FNI) and the *Forces Populaires pour la Démocratie au Congo* (FPDC).[221] According to [REDACTED]:

> The movements had been officially set up while [REDACTED]. The movements were created in KAMPALA with the backing of the Ugandan authorities. [REDACTED] that the PUSIC was led by Chief KAHWA but [REDACTED] the names of the other movements' leaders [REDACTED] in order to found what was to be the FIPI.[222]

188. [REDACTED] adds that in late January/early February 2003, PUSIC, the FNI and the FPDC founded the *Front pour l'Intégration et la Paix en Ituri* (FIPI).[223] The following day, the Ugandan President, Yoweri Museveni, received the presidents of PUSIC (Chief Kahwa), the FNI (Floribert Nbagu) and the FPDC (Thomas Unencan).[224] A few days later, they were also received by DRC President Joseph Kabila first, in Dar es Salaam, then in Kinshasa.[225] According to [REDACTED]:

> Despite the good intentions behind the creation of the FIPI, the movement did not last very long. As I have already explained, the FIPI was created because that was what Presidents MUSEVENI and KABILA wanted. Its creation was meant not only to try and force LUBANGA's hand into taking part in the IPC but also to divide the Hema community by pitting the Northern and Southern Hemas against one another. One of the reasons that the coalition did not survive for very long was the fact that the groups making up the coalition failed to agree on appointing a single president and two vice-presidents.[226]

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[221] DRC-OTP-0105-0121, paras. 196 and 197.
[222] DRC-OTP-0105-0121, para. 196.
[223] DRC-OTP-0105-0126, paras. 222 and 223.
[224] DRC-OTP-0105-0126, para. 223.
[225] DRC-OTP-0105-0127, paras. 227-229.
[226] DRC-OTP-0105-0129, para. 237.

189. [REDACTED] two sets of reasons why Uganda which, until then, had been supplying the UPC/RP and the FPLC with arms after training them and working closely with them,[227] changed its approach and ended up chosing to attack the FPLC forces in Bunia on 6 March 2003 along with the FNI:

a. from August 2002 to March 2003, Floribert Kisembo attempted to organise the Congolese, but the area was under total Ugandan control,[228] and problems with Uganda surfaced when he attempted to reorganise the army;[229]

b. Thomas Lubanga Dyilo had created an alliance with the *Rassemblement Congolais pour la Democratie – Goma*[230] which, according to the UN report, had very close ties with Rwanda.[231]

190. On this point, [REDACTED] stresses that relations between the UPC and Rwanda came to the fore again starting in late 2002.[232] Again, according to [REDACTED][233] and as mentioned by [REDACTED] in [REDACTED] statement,[234] Thomas Lubanga Dyilo was particularly close to Rafiki Saba and Bosco Ntaganda, who were Rwandan-speaking Tutsis from North Kivu. [REDACTED] also states that "Kisembo confirmed [REDACTED] that Bosco [Ntaganda] received his orders as much from Kigali as from Lubanga,"[235] and maintains that:

> LUBANGA apparently had absolute power within the UPC, but it was not necessarily he who made all the decisions. From [REDACTED] with former members and senior officials of the UPC, [REDACTED] that some of the UPC policy and strategy decisions were made with the agreement of the Rwandan

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[227] [REDACTED].
[228] [REDACTED], lines 1661-1665.
[229] [REDACTED], line 1850 to [REDACTED], line 1869.
[230] [REDACTED], lines 1882-1888, [REDACTED], lines 1889-1894 and [REDACTED], lines 686 and 687.
[231] MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0338, para. 18 and DRC-OTP-0129-0343, para. 29.
[232] [REDACTED], para. 115.
[233] [REDACTED].
[234] DRC-OTP-0105-0111, para. 144.
[235] DRC-OTP-0105-118, para. 177.

> government and the SAVOs. For instance, LUBANGA did not have the authority to dismiss NTAGANDA without Kigali or the SAVO family agreeing.[236]

191. According to [REDACTED],[237] [REDACTED],[238] Kristine Peduto[239] and MONUC,[240] fighting between the UPC and the UPDF forces, which were backed by the FNI, reportedly caused the UPC to pull out of the town of Bunia on 6 March 2003.

192. [REDACTED] explains [REDACTED] from Bunia on 6 March 2003 "because we were chased by the Ugandans."[241] Speaking of what happened after the joint UPDF-FNI attack on the UPC/RP and the FPLC in Bunia on 6 March 2003 he states: "[…] [REDACTED] scattered … […] [REDACTED] left with some soldiers and went into the bush [REDACTED] safety […] [REDACTED] 12 May 2003 […]".[242] Thus, when Kristine Peduto visited the Rwampara military training camp in mid-March 2003, she was accompanied by General Kale, who was a member of the UPDF, and his second-in-command, Commander Felix.[243]

193. Also, the Luanda Agreement had been signed in September 2002 by the governments of Uganda and the Democratic Republic of the Congo.[244] The agreement, including its amendments signed in February 2003 in Dar es Salaam, provided, *inter alia*, for a political pacification process in Ituri and the establishment of an Ituri Pacification Commission (IPC). According to [REDACTED], who reportedly held the position of [REDACTED],[245] all the armed groups in Ituri, except the UPC, were members of the IPC.[246] However, [REDACTED] states that the UPC,

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[236] DRC-OTP-0105-0112, para. 150.
[237] [REDACTED], para. 177.
[238] DRC-OTP-0105-0129, para. 240, DRC-OTP-0105-0132 and DRC-OTP-0105-0133, para. 257.
[239] ICC-01-04-01-06-T-38-EN[20Nov2006Edited], p. 140, lines 18-20.
[240] MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0355 and DRC-OTP-0129-0356, para. 73.
[241] [REDACTED].
[242] [REDACTED], lines 488-491.
[243] ICC-01-04-01-06-T-39-EN[21Nov2006Edited], pp. 30-35.
[244] Statement of [REDACTED], [REDACTED], para. 168.
[245] DRC-OTP-0105-0136, para. 272.
[246] DRC-OTP-0105-0135, para. 271.

for its part, established a *Comité Vérité, Paix et Réconciliation* (CVRP) by Presidential Decree No. 006/UPC/RP/CAB/PRES/2002 of 3 September 2002,[247] adding that:

> Peace commissions had been set up in lots of villages in Ituri, and particularly in Djugu territory, either in order to prevent likely attacks or as a result of attacks and acts of violence that had occurred in the area. I would say, though, that the peace commissions were more like war commissions, because they also oversaw the local defence militias that had set up in the villages.[248]

194. Finally, these peace commissions were dissolved by Order No. 002/RDC/UPC/SNPR/JTZ/2003 of 10 January 2003, issued by Jean de Dieu Tinanzabo Zeremani.[249] The work of the CVRP was subsequently suspended following the takeover of Bunia by the UPDF in March 2003.[250]

195. According to a *Note Synoptique sur l'état de la procédure – dossier Ituri*, signed on 10 August 2005 by Brigadier General Joseph Ponde Isambwa,[251] [REDACTED][252] and MONUC,[253] the UPDF withdrew from Bunia on 6 May 2003, and the UPC/RP and FPLC then launched an attack on Bunia, taking control of the town.

196. According to [REDACTED] as well as MONUC reports, in addition to the operations carried out in Bunia in March and May 2003, a number of other operations in which the FLPC was reportedly involved were reportedly carried out in Ituri during the first half of 2003. These included the alleged UPC attack on Nyangaraye in January 2003,[254] the alleged FNI attack on Bogoro in February 2003,[255] the alleged

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[247] [REDACTED], para. 172. See also "*Discours d'ouverture solennelle des travaux du comité vérité, réconciliation et pacification (CVRP) par son excellence Monsieur le Président de l'UPC/RP, M. Thomas Lubanga*", of 13 November, 2003 (DRC-OTP-0037-0332) together with the "*Discours de son excellence Monsieur le Secrétaire National à la Pacification et réconciliation à l'occasion de l'installation officielle du Comité Vérité, Paix et Réconciliation*" signed by Jean de Dieu Tinanzabo Zeremani (DRC-OTP-0093-0137).

[248] [REDACTED], para. 173.

[249] [REDACTED], para. 172.

[250] [REDACTED], para. 177.

[251] See *Note synoptique sur état de la procédure-dossier Ituri*, Ref. RMP No. 0120.0121 and 0122/NBT/2005 (DRC-OTP-0118-0432).

[252] DRC-OTP-0105-0142, para. 302 and DRC-OTP-0105-0148, para. 342.

[253] MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0357, para. 77 to DRC-OTP-0129-0358, para. 83.

[254] MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0354, para. 68.

UPC attack on Lipri and the surrounding areas in February 2003,[256] the alleged FNI/FRPI attack on Mandro in March 2003,[257] and the alleged FNI attack on Katoto in June 2003.[258]

c. From June 2003 to late December 2003

197. As early as 23 April 2003, a contingent of Uruguayan guards began deploying in Bunia, notably with the task of guaranteeing a presence at the Bunia airfield and protecting United Nations personnel and facilities, and IPC meeting places in Bunia.[259] On 30 May 2003, the United Nations Security Council adopted resolution 1484 (2003) authorising the deployment of an interim multinational emergency force in Bunia until 1 September 2003, to ensure the security and protection of civilians. On 5 June 2003, the Council of the European Union authorised Operation ARTEMIS, in accordance with the mandate under Security Council resolution 1484 (2003). Operation ARTEMIS began on 12 June 2003 under a French commander, General Neveux.[260] According to MONUC's Secretary-General's fourteenth report, the armed conflict in Ituri continued despite the deployment.[261] From June 2003 to December 2003, the UPC, PUSIC and the FNI, amongst others, were engaged in conflict.[262]

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[255] MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0353, paras. 64 and 65 (DRC-OTP-0074-0433). See also *La violence au-delà du clivage ethnique*, para. 1, DRC-OTP-0043-0005 and the Statement of [REDACTED], DRC-OTP-0105-0132, para. 254 and 257.

[256] MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0354, para. 68. See also the Statements of [REDACTED] (DRC-OTP-0114-0023, para. 40), [REDACTED] (DRC-OTP-0108-0072, para. 39) and [REDACTED] (DRC-OTP-0108-0131, para. 43).

[257] Statement of [REDACTED], DRC-OTP-0105-0132, para. 254. See also *La violence au-delà du clivage ethnique*, DRC-OTP-0043-0005 and DRC-OTP-0043-0006, para. 2 and the MONUC *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0355, para. 72.

[258] MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0359, para. 88. See also the Statement of [REDACTED], DRC-OTP-0114-0024, para. 44.

[259] UN, *Second Special Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, 27 May 2003, DRC-OTP-0163-0005.

[260] MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0394.

[261] *Fourteenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, DRC-OTP-0130-0409, para. 2.

[262] According to a Human Rights Watch report (DRC-OTP-0163-0406), the FNI is a predominantly Lendu armed movement, created in late 2002. The movement was led by Floribert Njabu Ngabu and, according to the International Crisis Group, it was backed by Uganda (DRC-OTP-0003-0438). According to the MONUC report, the movement appeared to have a well-structured military

198. According to [REDACTED], PUSIC was founded towards the end of 2002 and was led by Chief Kahwa until the end of 2003.[263] He adds that PUSIC, a political-military movement opposed to the UPC, consisting mostly of Southern Hemas,[264] was backed by Uganda, which supplied it with arms.[265] [REDACTED] states that from June to December 2003, amongst other areas, PUSIC allegedly controlled Tchomia and Kasenyi,[266] two towns close to Lake Albert, the opposite shore of which is in Uganda.

199. Although Thomas Lubanga Dyilo was placed under house arrest in Kinshasa by the authorities of the Democratic Republic of the Congo from 13 August 2003 to the end of 2003,[267] he was one of the first signatories of the *Projet de société* presented on 15 November 2003 by the UPC/RP in Bunia.[268] Also, according to [REDACTED],[269] [REDACTED][270] and [REDACTED],[271] the conflict which opposed Thomas Lubanga Dyilo in October and November 2003 to Daniel Litsha (National Secretary for Special Matters in the Office of the President), Victor Ngona Kabarole (National Secretary for relations with MONUC and the bodies established under the IPC) and Floribert Kisembo (FPLC Chief of General Staff) led to the signing of a political declaration by Daniel Litsha, Victor Ngona Kabarole and Floribert Kisembo, amongst others, on 3 December 2003, and to the suspension of these persons from their official positions

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hierarchy (see DRC-OTP-0129-0354, para. 66) and launched many attacks on Ituri between June 2003 and December 2003.

[263] Statement of [REDACTED]: DRC-OTP-0105-0085, para. 187; MONUC Special Report, DRC-OTP-0129-0380.

[264] Statement of [REDACTED]: DRC-OTP-0105-0123, para. 205; MONUC Special Report, DRC-OTP-0129-0380; HRW Report, DRC-OTP-0074-0648;

[265] Statement of [REDACTED]: DRC-OTP-0105-0085, para. 202; MONUC Special Report on Ituri, DRC-OTP-0129-0243, para. 28

[266] Statement of [REDACTED]: DRC-OTP-0105-0085, para. 236; Amnesty International report: DRC-OTP-0163-0242.

[267] See ICC-01/04-01/06-348-Conf-tEN. See also the Defence allegations (ICC-01-04-01-06-T-32-EN[10Nov2006Edited], p. 51, line 17 to p. 52, line 1) and the fact that the Prosecution did not appear to refute the point and itself stated that Thomas Lubanga Dyilo was indeed residing in Kinshasa in November and December 2003 (in this regard, see ICC-01-04-01-06-T-34-EN[14Nov2006Corr], p. 19, lines 11-13).

[268] DRC-D01-0001-0032 to DRC-D01-0001-0043, see, in particular, DRC-D01-0001-0043.

[269] [REDACTED].

[270] DRC-OTP-0105-0118, paras. 178-181.

[271] [REDACTED], para. 198.

within the UPC/RP and the FPLC by a decree signed by Thomas Lubanga Dyilo in Kinshasa on 8 December 2003.[272]

2. The characterisation of the armed conflict

200. In his Document Containing the Charges, the Prosecutor considers that the alleged crimes were committed in the context of a conflict not of an international character.[273] The Defence contends however that consideration should be given to the fact that during the relevant period, the Ituri region was under the control of Uganda, Rwanda or MONUC. In the view of the Defence, the involvement of foreign elements, such as the UPDF, could internationalise the armed conflict in Ituri.[274] Furthermore, in her closing statement at the confirmation hearing, the Representative of Victim a/0105/06 asserted that the involvement of Uganda and Rwanda in the Congolese conflict, including in Ituri, was a matter of common knowledge. She added, however, that the characterisation of the armed conflict had to be done on a case-by-case basis. In her opinion, regardless of the type of armed conflict, the Statute offers exactly the same protection, adding that the UPC had set up a quasi-state structure which could be described as a "national armed force".[275]

201. According to articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute and the Elements of the Crimes in question, conscripting or enlisting children under the age of fifteen years and using them to participate actively in hostilities entails criminal responsibility, if

> [t]he conduct took place in the context of and was associated with an international armed conflict; or the conduct took place in the context of and was associated with an armed conflict not of an international character.

202. Under article 61(7)(c)(ii) of the Statute, the Chamber is required to adjourn the hearing and request the Prosecutor to consider amending the charges if it finds that

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[272] *Décret n° 08bis/UPC/RP/CAB/PRES/2003 du 8 décembre 2003 portant suspension de certain cadres politiques et militaires de l'Union des patriotes congolais pour la réconciliation et la paix*, signed in Kinshasa by Thomas Lubanga Dyilo (DRC-OTP-0132-0238).
[273] ICC-01/04-01/06-356-Conf-Anx1, para. 7.
[274] ICC-01/04-01/06-758-Conf, paras. 8 and 13.
[275] ICC-01/04-01/06-T-47-EN[28Nov2006Edited], pp. 45 to 51.

the evidence before it appears to establish that a crime other than those detailed in the Document Containing the Charges has been committed.

203. The purpose of this provision is to prevent the Chamber from committing a person for trial for crimes which would be materially different from those set out in the Document Containing the Charges and for which the Defence would not have had the opportunity to submit observations at the confirmation hearing.

204. In this case, the Chamber concurs with the Representative of Victim a/105/06, that the protection afforded by the Statute against enlisting, conscripting and active participation in hostilities of children under the age of fifteen years is similar in scope, regardless of the characterisation of the armed conflict. Thus, as will be discussed below, articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute criminalise the same conduct, whether it is committed in the context of a conflict of an international character or in the context of a conflict not of an international character. Consequently, the Chamber considers that it is not necessary to adjourn the hearing and request the Prosecutor to amend the charges.

a. From July 2002 to June 2003: Existence of an armed conflict of an international character

205. The Chamber observes that neither the Statute nor the Elements of Crimes provide a definition of an international armed conflict for the purposes of article 8(2)(b). Only footnote 34 of the Elements of Crimes states that the term "international armed conflict" includes military occupation. Accordingly, the Chamber finds that, pursuant to article 21(1)(b) of the Statute, and with due regard to article 21(3) of the Statute, it is useful to rely on the applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.

206. Common Article 2 of the Geneva Conventions, which is applicable to international armed conflicts, provides that:

> In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

207. The Commentary on the Geneva Conventions states that any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims.[276]

208. In addition, the Chamber observes that the Appeals Chamber of the ICTY adopts the same interpretation of the expression "international armed conflict".[277]

209. The Chamber considers an armed conflict to be international in character 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).[278]

210. Regarding the second alternative, the ICTY Appeals Chamber has specified the circumstances under which armed forces can be considered to be acting on behalf of a foreign State, thus lending the armed conflict an international character. In *Tadić*, the Appeals Chamber set out the constituent elements of the "overall control" exercised by a foreign State on such armed forces:

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[276] International Committee of the Red Cross, *Commentary to the IV Geneva Convention relative to the treatment of prisoners of war*, ICRC, p. 26.
[277] *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Appeal Judgement, 15 July 1999, para. 84.
[278] Ibid., para. 84.

> [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). […] The control required by international law may be deemed to exist when a State […] *has a role in organising, co-ordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group.[279]

211. The Chamber holds the view that where a State does *not intervene directly* on the territory of another State through its own troops, the overall control test will be used to determine whether armed forces are acting on behalf of the first State. The test will be met where the first State has a role in organising, co-ordinating or planning the military actions of the military group, in addition to financing, training and equipping the group or providing operational support to it.

212. The Chamber notes that in the judgement rendered on 19 December 2005 in the case of the *Democratic Republic of the Congo v. Uganda*, the International Court of Justice (ICJ) observed that, under customary international law, as reflected in Article 42 of the *Hague Regulations* of 1907, 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.[280]

213. In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention is an occupying Power, the ICJ held that it would need to "satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government."[281]

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[279] Ibid., para. 137; see also *The Prosecutor v. Dario Kordić and Mario Cerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 299.

[280] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgement, 19 December 2005, I.C.J. Reports 2005, p. 59, para. 172; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, I.C.J. Reports 2004, p. 167, para. 78, and p. 172, para. 89.

[281] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgement, 19 December 2005, I.C.J. Reports 2005, p. 59, para. 173.

214. In the opinion of the ICJ, the fact that General Kazini, commander of the Ugandan forces in the DRC, appointed Adèle Lotsove as Governor of the new province of Kibali-Ituri in June 1999 is clear evidence of the fact that Uganda established and exercised authority in Ituri as an occupying Power.[282]

215. The ICJ considered "that there is also persuasive evidence that the UPDF incited ethnic conflicts and took no action to prevent such conflicts in Ituri district."[283] In this regard, the ICJ relied, amongst other documents, on a report by MONUC on events in Ituri between January 2002 and December 2003 which states that "Ugandan army commanders already present in Ituri, instead of trying to calm the situation, preferred to benefit from the situation and support alternately one side or the other according to their political and financial interests."[284]

216. The ICJ considered that the conduct of the UPDF as a whole is clearly attributable to Uganda, being the conduct of a State organ, and that "the conduct of any organ of a State must be regarded as an act of that State."[285]

217. The ICJ finds in its disposition "that the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention"[286] and that it can be considered as an occupying Power.

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[282] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgement, 19 December 2005, I.C.J. Reports 2005, p. 59, para. 175.
[283] Ibid., p. 68, para. 209.
[284] MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0334 to DRC-OTP-0129-0335, para. 6.
[285] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, I.C.J. Reports 1999 (I), p. 87, para. 62. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgement, 19 December 2005, I.C.J. Reports 2005, p. 69, para. 213.
[286] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgement, 19 December 2005, I.C.J. Reports 2005, p. 101, para. 345.

218. The Chamber further notes that in his statement, [REDACTED] refers to the [REDACTED] military training [REDACTED].[287] [REDACTED] also refers to the taking hostage of Thomas Lubanga by Chief Kahwa and to the fact that the Ugandan authorities immediately initiated steps to secure his release.[288] Similarly, in his statement, [REDACTED] refers to discussions with the Ugandan authorities regarding security matters and the "organis[ation of] UPDF/UPC patrols."[289] He states that [REDACTED] "UPC forces were taking up position behind the UPDF's positions".[290]

219. In addition, the Chamber recalls that [REDACTED] states that from August 2002 to March 2003, [REDACTED] the Congolese, but that the area was under total Ugandan control.[291] Indeed, he adds that the Ugandans supplied them with arms after training them and [REDACTED] with the Ugandans when [REDACTED]. According to him, it was [REDACTED] restructure the army of the Congolese that problems arose with Uganda which led to the UPDF attack on Bunia on 6 March 2003.[292]

220. 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.

221. Similarly, some of the evidence admitted for the purpose of the confirmation hearing bears on the role of Rwanda in the conflict in Ituri after 1 July 2002, and indicates that Rwanda backed the UPC and was particularly involved within the

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[287] [REDACTED], see also the transcript of the interview of [REDACTED].
[288] [REDACTED].
[289] DRC-OTP-0066-026, para. 117.
[290] DRC-OTP-0066-021, para. 97.
[291] [REDACTED].
[292] [REDACTED] and [REDACTED].

UPC. It would seem that Rwanda was supplying not only ammunition and arms to the UPC, but also soldiers.[293] The evidence admitted for the purpose of the confirmation hearing also includes indications that Rwanda was advising the UPC.[294] There is also substantial evidence before the Chamber to the effect that Uganda stopped backing the UPC as a result of the UPC's alliance with Rwanda.[295]

222. In this regard, [REDACTED] presents a diagram summarising the "chain of command […], or at least […] the power games played out in the relations that the UPC's main players had with the Hema community and the UPC's main ally, Rwanda."[296] The diagram indicates that orders were issued directly from Rwanda through its President and the Hema community. The witness states that [REDACTED] understanding of the UPC chain of command is based exclusively on the explanations [REDACTED].

223. In addition, the Chamber observes that according to the same [REDACTED], "Bosco [Ntaganda] had more of a hold over the UPC's Rwandan-speaking militiamen. [REDACTED] confirmed to [REDACTED] that Bosco [Ntaganda] received his orders as much from Kigali as from Lubanga."[297] From his statement, it would also seem that during the fighting in Bunia in March 2003, Floribert Kisembo himself "received contradictory orders from his two masters: on the one hand he had gotten orders from Thomas LUBANGA, and on the other hand he had gotten orders from Kigali."[298]

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[293] [REDACTED].
[294] International Crisis Group, *Africa Report, Congo Crisis: Military Intervention in Ituri*, DRC-OTP-0003-0437, p. 8; MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0343, para. 29; Human Rights Watch, *The Curse of Gold*, DRC-OTP-0163-0368, p. 2; Human Rights Watch, *Ituri: Covered in Blood*, DRC-OTP-0163-0304, p. 11; JOHNSON, D., *Shifting Sands: Oil Exploration in the Rift Valley and the Congo Conflict*, DRC-OTP-0043-0016.
[295] JOHNSON, D., *Shifting Sands: Oil Exploration in the Rift Valley and the Congo Conflict*, DRC-OTP-0043-0036, p. 23.
[296] Statement of [REDACTED] (DRC-OTP-0105-0085). According to [REDACTED] statements, this witness [REDACTED] (DRC-OTP-0105-0116 and DRC-OTP-0105-0117).
[297] DRC-OTP-0105-118, para. 177.
[298] DRC-OTP-0105-133, para. 259.

224. [REDACTED] also refers to military assistance from Rwanda, which supplied ammunition and arms and sent instructors to Mandro Camp.[299]

225. In addition, the Chamber recalls that [REDACTED] points out in [REDACTED] testimony that relations between the UPC and Rwanda would come to the fore again starting in late 2002.[300]

226. However, in light of the paucity of evidence before it, the Chamber is not in a position to find that there is sufficient evidence to establish substantial grounds to believe that Rwanda played a role that can be described as direct or indirect intervention in the armed conflict in Ituri.

b. From 2 June 2003 to December 2003: Existence of an armed conflict not of an international character involving the UPC

227. The Document Containing the Charges, filed by the Prosecution on 28 August 2006, states that Thomas Lubanga Dyilo committed war crimes under article 8(2)(e)(vii) of the Statute between July 2002 and December 2003. It is therefore necessary to review the events that occurred between 2 June 2003 and late December 2003.

228. Article 8(2)(e)(vii) of the Statute deals with "other serious violations of the laws and customs applicable in armed conflicts not of an international character."

229. Article 8(2)(f) of the Statute defines "conflicts not of an international character" for the purposes of article 8(2)(e) of the Statute, and provides that:

> 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.

[299] DRC-OTP-0105-105 and DRC-OTP-00105-106.
[300] [REDACTED].

230. In addition, the introduction to the chapter of the Elements of Crimes dealing with this provision states that "[t]he 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."

231. In this connection, the Chamber notes that *Protocol Additional II to the Geneva Conventions* of 8 June 1977, which applies to non-international armed conflicts only, sets out criteria for distinguishing between non-international armed conflicts and situations of internal disturbances and tensions. According to its Article 1.1, Protocol Additional II applies to armed conflicts "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."

232. Thus, in addition to the requirement that the violence must be sustained and have reached a certain degree of intensity, Article 1.1 of Protocol Additional II provides that the 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 implementation of the Protocol; and ii) exercise such control over territory as to enable them to carry out sustained and concerted military operations.[301]

233. The ICTY Appeals Chamber has held that an armed conflict not of an international character exists whenever there is a resort to "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[302] This definition echoes the two criteria of Protocol

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[301] International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Sandoz, Swinarski and Zimmermann (eds), 1986, paras. 4463-4470.

[302] *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-AR75, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, para. 70.

Additional II, except that the ability to carry out sustained and concerted military operations is no longer linked to territorial control. It follows 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.

234. The Chamber notes that article 8(2)(f) of the Statute makes reference to "protracted armed conflict between […] [organized armed groups]". In the opinion of the Chamber, this focuses on the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time.

235. In the instant case, the Chamber finds that an armed conflict of a certain degree of intensity and extending from at least June 2003 to December 2003 existed on the territory of Ituri. In fact, many armed attacks were carried out during that period,[303] causing many victims.[304] In addition, at the time, the Security Council also adopted a resolution under Chapter VII of the Charter of the United Nations and was actively seized of this matter during the entire period in question.[305]

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

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

[305] See Security Council resolution S/RES/1493 of 28 July 2003: "*Deeply concerned* by the continuation of hostilities in the eastern part of the Democratic Republic of the Congo, particularly in North and South Kivu and in Ituri, and by the grave violations of human rights and of international humanitarian law that accompany them", the Security Council "[*a*]*uthorizes* MONUC to use all necessary means to fulfil its mandate in the Ituri district […] [*r*]*equests* the Secretary-General to deploy in the Ituri district, as soon as possible, the tactical brigade-size force […] by mid-August 2003" (DRC-OTP-0131-0161,

236. The Chamber also finds that there are substantial grounds to believe that between 2 June and late December 2003, the armed conflict in Ituri involved, *inter alia*, the UPC, PUSIC and the FNI;[306] that the UPC and the FNI fought over control of the gold-mining town of Mongbwalu;[307] that various attacks were carried out by the FNI in Ituri during this period;[308] 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;"[309] 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;[310] and, finally, that the UPC/FPLC armed forces controlled the towns of Iga Barrière and Nizi at the very least in December 2003.[311]

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preamble and paras. 26 and 27). See also the *Fourteenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, 17 November 2003, S/2003/1098: "Despite the historic advances made in the formation of the Transitional Government in Kinshasa, […] fighting and conflict continued in Ituri […]." (DRC-OTP-0130-0409, paras. 2 and 3).

[306] See various attacks carried out by the FNI mentioned in MONUC's *Special Report on the Events in Ituri, January 2002-December 2003*.

[307] See Human Rights Watch, *The Curse of Gold* (DRC-OTP-0163-0410): "After the Ugandan forces had left in May 2003, the UPC retook Mongbwalu on June 10, 2003. […] The UPC was able to hold the town for only forty-eight hours before being pushed back by the FNI combatants under the command of Mateso Ninga". See also the Statement of [REDACTED] (DRC-OTP-0126-0122), who, after recounting the capture of the town of Bunia in May 2003, stated that "[t]he next weeks were extremely frenetic. We initiated a campaign to retake the Lendu villages of Djugu and especially Mongbwalu under the orders of Commanders BOSCO, KISEMBO and SALUMU MULENDA." (DRC-OTP-0126-0139, para. 68). In the paragraphs that follow, the witness describes the UPC debacle, thus corroborating the Human Rights Watch report.

[308] See footnote 303.

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

[310] See Statement of [REDACTED] (DRC-OTP-0105-0085, paras. 178-180) as well as a note by Bosco Ntaganda dated 1 November 2003 (DRC-OTP-0014-0272), and the funeral oration allegedly read out following the death of a soldier on 31 October 2003 in Tchomia during an attack against PUSIC (DRC-OTP-0018-0172).

[311] MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*: "In December 2003, the Child Protection Section visited the Kilo-État and Iga Barrière/Nizi areas, where there are gold fields, the latter controlled by UPC militia and the former by FNI. In the UPC-controlled Iga Barrière area, the former headquarters of the Kilo Moto Mining Company, the Section staff saw that three quarters of a mine pit team were under 18 years of age, most being between 11 and 15. Sources at the site alleged that the children present in the mine were all active or former child soldiers." (DRC-OTP-0129-0377,

237. The Chamber finds that there are substantial grounds to believe that these three armed groups were in fact organised armed groups within the meaning of article 8(2)(f) of the Statute. Thus, it seems clear that the FNI was capable of carrying out large-scale military operations for a prolonged period of time.[312] In addition, none of the participants at the confirmation hearing appear to dispute the fact that these were indeed organised groups. The Defence itself stated that very soon after their creation, PUSIC and the FNI succeeded in gaining lasting control over territories previously controlled by the UPC/FPLC.[313]

B. Existence of the offence under articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute

238. The application of articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute is predicated upon a showing that the offence as such has been committed.

239. The relevant parts of article 8(2) read as follows:

> 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, namely, any of the following acts:
>
> […]
>
> (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities;
>
> […]
>
> (d) 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:

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para. 155). See also *Fifteenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*: "there have been some 20 separate attacks on the Mission, including on its aircraft and patrols in Kasenyi (16 January) and near Iga Barrière (19 and 20 January)." This report also states that a MONUC staff member was killed by a member of the UPC-L (DRC-OTP-0130-0462, para. 25).

[312] MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0329.

[313] ICC-01-04-01-06-T-43-FR[14Nov2006Corrigée], p. 43. "Well, the UPC controlled one part -- just one part of four of the territories of Ituri, and the territory of Djugu, Mahagi, Aru and Irumu. […] It should be added to that, to be completely precise here, that this situation was a situation which lasted [only] until November 2002, because from November 2002 the control of the government – [and of the] FPLC was very seriously diminished by the creation of the militia, which I've already spoken about. The first was PUSIC with Chief Kahwa, [then] the FPDC and the FNI, just to mention a few of them."

> […]
>
> (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities"

240. The Elements of Crimes pertaining to these two sub-paragraphs of article 8 read as follows, (the text between parentheses relates to armed conflicts not of an international character):

> 1. The perpetrator conscripted or enlisted one or more persons into the national armed forces (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.
> 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 international armed conflict (an armed conflict not of an international character).
> 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

241. The Chamber will first analyse those elements that are common to the crimes, whether committed in the context of a conflict of an international character or in the context of a conflict not of an international character. It will then turn its attention to the concepts of "national armed forces" and "armed force or group".

1. Enlisting or conscripting children under the age of fifteen years

242. The concept of children participating in armed conflicts emerged in international law in 1977 during the drafting of the Protocols Additional to the Geneva Conventions.

243. In this regard, the Chamber recalls that Article 77(2) of Protocol Additional I which applies to international armed conflicts, provides that:

> 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. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest.

Article 43(3) of Protocol Additional II, which applies to non-international armed conflicts, provides that:

> Children shall be provided with the care and aid they require, and in particular:
>
> (c) 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;

244. The term used in this article – recruitment – differs from those used in the Rome Statute – enlisting and conscripting. Whereas the preparatory work of the Protocols Additional appears to consider only the prohibition against forcible recruitment,[314] the commentary on Article 4(3)(c) of Protocol Additional II refers to "[t]he principle that children should not be recruited into the armed forces" and makes clear that this principle "also prohibits accepting voluntary enlistment."[315]

245. Numerous international instruments have since been adopted, prohibiting the recruitment of minors of a certain age.[316] A review of these international instruments and the two Protocols Additional to the Geneva Conventions shows that a distinction can be drawn as to the very nature of the recruitment, that is to say between forcible and voluntary recruitment.[317]

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[314] International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Sandoz, Swinarski and Zimmermann (eds), 1986, pp. 924 and 925, para. 3184.

[315] International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Sandoz, Swinarski and Zimmermann (eds), 1986, pp. 1391 to 1393, para. 4557.

[316] Article 38 of the *Convention on the Rights of the Child* (UN Document A/44/49 (1989)); Article 22 of the *African Charter on the Rights and Welfare of the Child* (CAB/LEG/24.9/49); Articles 2 and 3 of the *Optional Protocol to the Convention on the Rights of the Child*, on the involvement of children in armed conflict; article 3 of the *Worst Forms of Child Labour Convention* (C182), adopted by the International Labour Organisation.

[317] Reference is made to "compulsory recruitment" (Article 2 of the *Optional Protocol to the Convention on the Rights of the Child*) and "voluntary recruitment" (Article 3 of the *Optional Protocol to the Convention on the Rights of the Child*); this dichotomy is also reflected in the concluding observations of the Committee on the Rights of the Child: "children have been forcibly recruited" (Belize, UN Document CRC/C/15/Add.99), "voluntary or forced recruitment" (Mozambique, UN Document CRC/C/15/Add.172).

246. The Rome Statute prefers the terms "conscripting" and "enlisting"[318] to "recruitment". In light of the foregoing, the Chamber holds the view that "conscripting" and "enlisting" are two forms of recruitment, "conscripting" being forcible recruitment, while "enlisting" pertains more to voluntary recruitment. In this regard, the Chamber points out that this distinction was also made by Judge Robertson in his separate opinion appended to the judgement rendered by the Appeals Chamber of the Special Court for Sierra Leone[319] on 31 May 2004 in the case of *The Prosecutor v. Sam Hinga Norman.*[320]

247. It follows therefore that enlisting is a "voluntary" act, whilst conscripting is forcible recruitment. In other words, the child's consent is not a valid defence.

248. Finally, the Chamber considers that the crime of enlisting and conscripting is an offence of a continuing nature – referred to by some courts as a "continuous crime" and by others as a "permanent crime". The crime of enlisting or conscripting children under the age of fifteen years continues to be committed as long as the

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[318] The *Report of the Preparatory Committee on the establishment of an International Criminal Court* (A/CONF.183/2/Add.1) proposed the following alternatives to this article:
Option 1: forcing children under the age of fifteen years to take direct part in hostilities
Option 2: recruiting children under the age of fifteen years into armed forces or using them to participate actively in hostilities
Option 3: i) recruiting children under the age of fifteen years into armed forces or groups; or ii) allowing them to take part in hostilities.

[319] Article 4(c) of the *Statute of the Special Court for Sierra Leone* was adopted in light of the provisions of the Rome Statute. See Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General (S/2000/1234), which states as follows: "[t]he members suggest the following further adjustments of a technical or drafting nature to the Agreement […] to article 4(c) of the Statute of the Court, modifying it so as to conform it to the statement of the law existing in 1996 and as currently accepted by the international community".

[320] *The Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), *Decision on preliminary motion based on lack of jurisdiction (child recruitment)*, 31 May 2004. In his separate opinion, Judge Robertson emphasised that "this crime of child recruitment, as it was finally formulated in 4(c) of the Statute, may be committed in three quite different ways: a) by *conscripting* children (which implies compulsion, albeit in some cases through force of law); b) by *enlisting* them (which merely means accepting and enrolling them when they volunteer), or c) by *using* them to participate actively in hostilities (i.e. taking the more serious step, having conscripted or enlisted them, of putting their lives directly at risk in combat)."

children remain in the armed groups or forces and consequently ceases to be committed when these children leave the groups or reach age fifteen.[321]

a. Conscripting and enlisting children under the age of fifteen years by the UPC/FPLC between July 2002 and 2 June 2003

249. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that children under the age of fifteen years were enlisted and conscripted into the UPC/FPLC from July 2002 to 2 June 2003.

250. Indeed, the Chamber notes that some evidence admitted for the purpose of the confirmation hearing shows that, even prior to the founding of the FPLC, the UPC allegedly enlisted and conscripted children under the age of fifteen years.[322] The Chamber observes that after its founding in early September 2002, the FPLC continued to carry out this type of recruitment, that this was a systematic practice which was known to the Hema population and which targeted a large number of children.[323]

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[321] Moreover, as stated in the *Decision on the Prosecution's application for a warrant of arrest, Article 58*, each instance of individual enlistment or conscription into a national armed force or armed group or use to participate actively in hostilities of children under the age of fifteen constitutes a crime within the jurisdiction of the Court. However, the Chamber considers that it is advisable to treat 1) all instances of enlistment into a national armed force or armed group, 2) all instances of conscription into a national armed force or armed group, and 3) all instances of use to participate actively in hostilities of children under the age of fifteen years, as a continuous war crime (ICC-01/04-01/06-1-US-Exp-Corr., para. 105)

[322] MONUC, *Final Report of the MONUC Special Investigation Team on the Abuses Committed in Ituri from January to March 2003*, DRC-OTP-0152-0310, para. 91. See also Statement of [REDACTED] in which [REDACTED] mentions [REDACTED] forcible abduction by UPC militiamen in early 2002 (DRC-OTP-0132-0082, para. 20).

[323] Human Rights Watch, *Ituri: "Covered in Blood" Ethnically Targeted Violence in Northeastern DR Congo*, DRC-OTP-0163-0344, particularly the last paragraph on this page ("[y]et there are frequent reports of the forcible recruitment of children by the UPC. On November 8, 2002 at 8:00 a.m., the UPC reportedly entered the École Primaire of Mudzi Pela and forcibly rounded up the entire fifth grade, some forty children, for military service. A similar operation was carried out in Salongo where the UPC surrounded a neighbourhood and then abducted all the children they could find. At the end of November, a school director complained that half of his students had been lost and spoke openly against the forcible recruitment. The Mothers Forum of Ituri complained to UPC President Lubanga in late 2002 about the recruitment of children. The UPC opened a small demobilization centre, but, according to local people, this was a mere public relations gimmick; the recruitment of children continued.") MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*: "there can be no doubt that all of the armed groups have systematically recruited […] children – ranging from 7 to 17

251. On the evidence admitted for the purpose of the confirmation hearing, the Chamber finds that as part of this recruitment policy, many children under the age of fifteen years were allegedly forced to join the FPLC, that the FPLC allegedly forcibly recruited groups of children in several localities in Ituri such as the areas surrounding Bunia in August 2002,[324] in Sota at the beginning of 2003[325] and in Centrale.[326] Furthermore, on the evidence admitted for the purpose of the confirmation hearing, it also emerges that these forcible recruitments were allegedly carried out by FPLC commanders[327] and that Thomas Lubanga Dyilo himself allegedly participated on at least one occasion in the conscription of a group of children, some of whom were under the age of fifteen years.[328]

252. In addition, other children under the age of fifteen years "voluntarily" joined the ranks of the FPLC or were made available to the FPLC by their parents, in particular after calls for mobilisation directed at the Hema population; others joined out of a desire for revenge after the loss of a close relative allegedly killed by the militias fighting against the FPLC.[329] The FPLC allegedly accepted them, thus implementing an enlistment policy.[330]

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years old – throughout the district of Ituri" (DRC-OTP-0129-0373, para. 138) and "[r]ecruitment into all armed groups has been both "voluntary" and through abduction, often as the children were in the markets or in the streets where they were forced to get into trucks and taken away. UPC recruitment drives took place regularly throughout 2002 and early 2003" (DRC-OTP-0129-0373, para. 143). In this regard, see also Kristine Peduto's testimony: ICC-01-04-01-06-T-37-EN[15Nov2006Edited], p. 93, lines 3-8 and p. 94, lines 3-5. The individual cases presented at the confirmation hearing by the Prosecution corroborate this evidence, see Statements [REDACTED] (DRC-OTP-0108-0127, para. 21), [REDACTED](DRC-OTP-0126-0158, para. 22) and [REDACTED] (DRC-OTP-0126-0126, para. 24).

[324] Statement of [REDACTED], DRC-OTP-0126-0126, para. 23); Statement of [REDACTED], DRC-OTP-0127-0083, paras. 60 and 61.

[325] Statement [REDACTED](DRC-OTP-0108-0126, para. 19 and DRC-OTP-0108-0127, para. 21) and Statement [REDACTED](DRC-OTP-0108-0067, paras. 20 and 22).

[326] Statement [REDACTED], DRC-OTP-0126-0158, paras. 21 and 22.

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

[328] MONUC, *Histoires Individuelles-Bunia (Ituri) Enfants-Soldats* 26/03/2003 (DRC-OTP-0152-0277 and DRC-OTP-0152-0279).

[329] MONUC, *Final Report of the MONUC Special Investigation Team on the Abuses Committed in Ituri from January to March 2003*, "two minors reported public gatherings during which families were asked to provide human forces. In Bogoro, the Chef de Collectivité M. Mugeny and the Chef de groupement M. Benjamin were reported as having called on the population to send volunteers to the UPC"(DRC-OTP-0152-0310, para. 90), MONUC, *Histoires Individuelles-Bunia (Ituri) Enfants-Soldats* 26/03/2003 (DRC-OTP-

253. The Chamber holds the view that the evidence admitted for the purpose of the confirmation hearing is sufficient to establish that there are substantial grounds to believe that the recruitment policy established by the FPLC also affected minors under the age of fifteen years.[331]

b. Conscripting and enlisting children under the age of fifteen years by the FPLC between 2 June 2003 and late December 2003

254. The Chamber finds that there are substantial grounds to believe that children under the age of fifteen years were still present in the ranks of the FPLC between 2 June and late December 2003.

255. In this regard, by a decree dated 1 June 2003, Thomas Lubanga Dyilo, in his capacity as President of the UPC/RP, ordered the demobilisation from the FPLC of any individual under the age of eighteen years. He tasked the National Secretary for Follow-up and Monitoring and the FPLC Chief of General Staff with executing the

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0152-0277, para. 19); see also "DRC: MONUC denounces recruitment of child soldiers by Lubanga's UPC/RP" in which it is stated that "Radio Okapi, run by the UN Mission in the DRC (MONUC), reported that Lubanga had decreed that each family in the area under its control must contribute to the war effort by providing a cow, money, or a child for the UPC/RP's rebel militia." (DRC-OTP-0074-0003); see also Human Rights Watch, *Ituri: "Covered in Blood" Ethnically Targeted Violence in Northeastern DR Congo* (DRC-OTP-0163-0345); and also, Kristine Peduto in her testimony mentions instructions issued by Thomas Lubanga Dyilo to his officials to the effect "that recruitments [should take] place " (ICC-01-04-01-06-T-37-EN[15Nov2006Edited], p. 95, lines 9-10, p. 79, lines 1-25 and p. 96, line 1; see also ICC-01-04-01-06-T-39-EN[21Nov2006Edited], p. 81, lines 18-25 and p. 82, lines 1-13). Moreover, some children joined the UPC militia following the loss of family members or out of a desire for revenge, see Statement [REDACTED] (DRC-OTP-0114-0019, paras. 21 and 22), and the MONUC report, *Histoires Individuelles-Bunia (Ituri) Enfants-Soldats* 26/03/2003 (DRC-OTP-0152-0274, para. 3; DRC-OTP-0152-0275 to DRC-OTP-0152-0276, para. 7 and DRC-OTP-0152-0280, para. 26) and Kristine Peduto's testimony mentioning the different reasons motivating the children to join the armed groups (ICC-01-04-01-06-T-37-EN[15Nov2006Edited], p. 113, lines 7-25 and p. 114, lines 1-19).

330 MONUC, *Histoires Individuelles-Bunia (Ituri) Enfants-Soldats* 26/03/2003 (DRC-OTP-0152-0274, para. 3; DRC-OTP-0152-0275 to DRC-OTP-0152-0276, para. 7 and DRC-OTP-0152-0280, para. 26); Statement of [REDACTED] ([REDACTED], para. 184); see also the Human Rights Watch report, *Ituri: "Covered in Blood" Ethnically Targeted Violence in Northeastern DR Congo* (DRC-OTP-0163-0345).

331 Statement [REDACTED](DRC-OTP-0126-0158, para. 22) and [REDACTED] (DRC-OTP-0126-0126, para. 23); see also the Statement of [REDACTED]which states that "[h]aving seen a number of these children who were to be demobilised, I recall that some of them may have been ten years old or above" ([REDACTED], para. 187); this is corroborated by Kristine Peduto in her testimony (ICC-01/04-01/06-T-37-EN[15Nov2006Edited], pp. 23 and 24, in particular, lines 24 and 25, p. 100, lines 21-24) and the *Special Report on the Events in Ituri, January 2002-December 2003* (DRC-OTP-0129-0372, para. 138).

decree.[332] Thus, on 5 June 2003, the FPLC Chief of General Staff, Commander Floribert Kisembo, forwarded the order to several FPLC brigades requesting the demobilisation of any person under the age of eighteen within their ranks.[333] However, [REDACTED] on the extent to which the decree had been executed, [REDACTED], "this order has not been executed."[334]

256. When asked at the hearing about the 1 June 2003 Child Demobilization Decree, Kristine Peduto had this to say:

> I would refer to them as a masquerade, given that recruitment was going on in other parts of Ituri by UPC troops. Indeed, there was an official statement. Some children were instructed to approach the NGOs specialising in child protection but, at the same time, recruitment continued and the UPC never had only 70 child soldiers amongst its troops.
>
> Yes, the operation – I don't know – well, yes, perhaps a public relations operation, which was absolutely not sincere and which wasn't presented and which never was the first step towards cooperation. It could have been a first step towards a more general demobilisation and the protection organisations, be they MONUC, UNICEF or other organisations, if they had been better able to meet the needs of UPC, could have been contacted to work to meet the needs of the children in a sincere fashion, but this was never the case, and that is why this effort never struck me as being serious, not least given that representatives of the UPC were regularly at the MONUC several times a week – they knew us very well, they knew all of the organisations. The leaders of the UPC could have contacted us very simply, either directly or through the interim administration to request a working meeting. Such meetings were always postponed and never took place – never.[335]

257. Similarly, the MONUC report on events in Ituri between January 2002 and December 2003 states, at paragraphs 155 and 156:

> In December 2003, the Child Protection Section visited the Kilo-Etat and Iga Barrière/Nizi areas, where there are gold fields, the latter controlled by UPC militia and the former by FNI. In the UPC-controlled Iga-Barrière area, the former headquarters of the Kilo Moto Mining Company, the Section staff saw that three quarters of a mine pit team were under 18 years of age, most being between 11 and 15. Sources at the site alleged that the children present in the mine were all active or former child soldiers who worked on behalf of their UPC commanders. […]

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

[333] See transcript of interview with [REDACTED]: [REDACTED], line 385 to [REDACTED], line 484.

[334] [REDACTED], lines 512-513.

[335] ICC-01-04-01-06-T-37-EN[15Nov2006Edited], p. 107, lines 2-25. See also the Human Rights Watch report, *Ituri: "Covered in Blood" Ethnically Targeted Violence in Northeastern DR Congo* (DRC-OTP-0163-0344).

> Sixteen UPC commanders, without following procedures, reportedly released scores of children in November [2003], telling them to go to Bunia where they were led to believe that "a school for child soldiers" had been set up. Many of them turned up at MONUC offices or one of the Transit and Orientation Centres.[336]

258. Accordingly, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that from 2 June to late December 2003, in the context of an armed conflict not of an international character, the FPLC enlisted and conscripted children under the age of fifteen years into its armed group.

2. Active participation in hostilities

259. Regarding the involvement of children in armed conflicts, Article 77(2) of *Protocol Additional I to the Geneva Conventions*[337] states that:

> 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 […].

260. According to the commentary on Article 77(2) of *Protocol Additional I to the Geneva Conventions*, the intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict, and consequently they should not be required to perform services such as the gathering and transmission of military information, transportation of arms and ammunition or the provision of supplies.[338]

261. "Active participation" in hostilities means not only direct participation in hostilities, combat in other words, but also covers active participation in combat-

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[336] In addition, according to paragraph 142 of the *Fourteenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo* (DRC-OTP-0130-0409) "[f]ew new reports of recruitment have been received over the past few months. Nevertheless, current estimates suggest that there are still several thousand children – possibly around 6,000 – in UPC, FAPC, FNI, FRPI, FPDC and PUSIC, with many more attached to loosely-formed local defence forces or militia."

[337] See also Article I of the *Optional Protocol to the Convention on the Rights of the Child* which states that "States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities".

[338] International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Sandoz, Swinarski and Zimmermann (eds), 1986, p. 925, para. 3187.

related activities such as scouting, spying, sabotage and the use of children as decoys, couriers or at military check-points.[339]

262. In this respect, the Chamber considers that this article does not apply if the activity in question is clearly unrelated to hostilities. Accordingly, this article does not apply to food deliveries to an airbase or the use of domestic staff in married officers' quarters.

263. Nevertheless, the Chamber finds that articles 8(2)(b)(xxvi) and 8(2)(e)(vii) apply if children are used to guard military objectives, such as the military quarters of the various units of the parties to the conflict, or to safeguard the physical safety of military commanders (in particular, where children are used as bodyguards).[340] These activities are indeed related to hostilities in so far as i) the military commanders are in a position to take all the necessary decisions regarding the conduct of hostilities, ii) 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 whose aim is to attack such military objectives.

264. In view of these considerations, the Chamber finds that in the instant case there are substantial grounds to believe that the FPLC used children under the age of fifteen years to participate actively in hostilities.

265. Indeed, the Chamber notes that after their recruitment, children were allegedly taken to FPLC training camps in Centrale (12 km north of Bunia),[341] Mandro (15 km east of Bunia),[342] Rwampara (13 km south-west of Bunia),[343] Irumu (55 km

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

[340] International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Sandoz, Swinarski and Zimmermann (eds), 1986, p. 925, para. 3187 and p. 1404, para. 4557. See also the *Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the establishment of an International Criminal Court*, addendum 1, UN Doc. A/CONF.183/2/Add.1, p. 21

[341] Statements [REDACTED] (DRC-OTP-0126-0158, para. 23 and DRC-OTP-0126-0159, para. 24) and [REDACTED] (DRC-OTP-0108-0131, para. 42).

[342] Statement of [REDACTED], para. 115 "Chief KAHWA offered MANDRO as the UPC's first military training centre. With the site agreed upon, the Hema traditional chiefs sent their young people to

south-west of Bunia),[344] Bule (110 km north-east of Bunia),[345] Bogoro[346] and Sota,[347] amongst other places, where they allegedly received military training. The Chamber notes that evidence admitted for the purpose of the confirmation hearing indicates that, as a general rule, the children began military training the day following their arrival at the camp;[348] the military training could last up to two months;[349] much of the evidence shows that new recruits were trained in a systematic and organised fashion in that they were subjected to rigorous and strict discipline,[350] including lengthy and exhausting physical exercises which lasted all day, such as saluting,

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MANDRO to undergo military training." (DRC-OTP-0105-0105); in this respect, see also Human Rights Watch, *Ituri: "Covered in Blood" Ethnically Targeted Violence in Northeastern DR Congo* (DRC-OTP-0163-0344).

[343] Statement of [REDACTED] (DRC-OTP-0126-0126, para. 24); see also ICC-01-04-01-06-T-37-EN[15Nov2006Edited], p. 58, line 2 to p. 59, line 21) and see also video numbered DRC-OTP-0120-0293 featuring Thomas Lubanga Dyilo visiting the Rwampara Camp. With regard to this video, the Chamber would like to point out that:

1. Lubanga considers them as soldiers in his speech when he says: "Soldiers… Even those who have weapons… Even those who have pieces of wood… even those with empty… hands… " (video DRC-OTP-0120-0293, minute 08:10);
2. There is no difference in the conduct of the children and that of the uniformed soldiers. The children act and behave as soldiers and obey orders. (video DRC-OTP-0120-0293, minute 11:13);
3. There is no difference as far as the weapons are concerned: uniformed soldiers also have sticks. These sticks are used as genuine weapons, even in the military parade. (video DRC-OTP-0120-0293, minute 29:55 and 31:10). Lubanga states that "[w]e are making that effort. … For you to finish the training, for you to get a weapon […]". (video DRC-OTP-0120-0293, minute 14:50); and
4. There is no difference in terms of uniforms: children are among the uniformed soldiers, all of them are lined up in military formation. Ntaganda, who is introduced as the Chief of Staff, does not wear a uniform either. Sometimes uniforms were only handed out at the end of the training. (see DRC-OTP-0108-0070, para. 31).

[344] Statements [REDACTED] (DRC-OTP-0108-0127, para. 22) and [REDACTED] (DRC-OTP-0108-0068, paras. 22 and 23).

[345] MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0376, para. 153; see also the Statement [REDACTED], DRC-OTP-0114-0019, para. 23.

[346] MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0353, para. 64. MONUC, *Histoires Individuelles-Bunia (Ituri) Enfants-Soldats* 26/03/2003 (DRC-OTP-0152-0281, para. 28). See also the Statement [REDACTED] (DRC-OTP-0108-0131, para. 42).

[347] MONUC, *Report on Child Soldiers in Ituri*, DRC-OTP-0152-0255; See also [REDACTED], DRC-OTP-0105-0149, para. 348.

[348] Statements [REDACTED] (DRC-OTP-0108-0127, para. 24), [REDACTED](DRC-OTP-0108-0068 to DRC-OTP-0108-0069, para. 25) and [REDACTED](DRC-OTP-0126-0160, para. 27).

[349] Statements of [REDACTED] (DRC-OTP-0108-0070, para. 31), [REDACTED] (DRC-OTP-0126-0160, para. 29), and [REDACTED] (DRC-OTP-0132-0084, para. 25); see also MONUC, *Histoires Individuelles-Bunia (Ituri) Enfants-Soldats* 26/03/2003, (DRC-OTP-0152-0284, para. 32).

[350] Statement [REDACTED] (DRC-OTP-0126-0162, para. 35); ICC-01-04-01-06-T-37-EN [15Nov2006Edited], p. 69, line 8 to p. 71, line 11; MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0375.

marching, taking up positions and running,[351] as well as compelling them to sing aggressive military songs;[352] they were also trained in the use of firearms[353] and, at the end of their training, they often received a military uniform, a firearm and ammunition.[354]

266. The Chamber points out that it appears that upon completion of their military training, the children were deemed fit for combat[355] and that FPLC commanders then sent them to the front line to fight. The evidence admitted for the purpose of the confirmation hearing does show that children under the age of fifteen years participated actively in hostilities, specifically in Libi and Mbau in October 2002,[356] in Largu in early 2003,[357] in Lipri[358] and Bogoro[359] in February/March 2003 and in Bunia in May 2003;[360] that during the fighting, children under the age of fifteen years reportedly used their arms, that some of them reportedly had to kill,[361] and that many recruits, including minors under the age of fifteen years, lost their lives in combat.[362]

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[351] Statements [REDACTED](DRC-OTP-0108-0128, para. 28), [REDACTED](DRC-OTP-0108-0069, para. 26) and [REDACTED] (DRC-OTP-0126-0160, para. 27); see also the testimony of Kristine Peduto, ICC-01-04-01-06-T-37-EN[15Nov2006Edited], p. 64, line 25 to p. 65, line 4.

[352] See transcript of interview with [REDACTED], [REDACTED]; video recording, DRC-OTP-0120-0293 and Statement [REDACTED], DRC-OTP-0108-0128, para. 25.

[353] Statements of [REDACTED] (DRC-OTP-0108-0128, para. 24) and [REDACTED] (DRC-OTP-0126-0160 to DRC-OTP-0126-0161, para. 29).

[354] Statements [REDACTED] (DRC-OTP-0108-0129, para. 32), [REDACTED] (DRC-OTP-0108-0070, para. 31), [REDACTED] (DRC-OTP-0126-0131, para. 41), [REDACTED] (DRC-OTP-0126-0162 to DRC-OTP-0126-0163, para. 37) and [REDACTED] (DRC-OTP-0132-0084, para. 28); see also the testimony of Kristine Peduto, ICC-01-04-01-06-T-37-EN[15Nov2006Edited], p. 30, lines 12-22, p. 32, lines 10 to 19 and p. 45, line 24 to p. 46, line 8.

[355] Statements of [REDACTED] (DRC-OTP-0108-0073, para. 45) and [REDACTED] (DRC-OTP-0126-0129, para. 33).

[356] Statement of [REDACTED] (DRC-OTP-0126-0131 and, in particular, paras. 41, 45 and 46).

[357] Statement of [REDACTED] (DRC-OTP-0132-0089, see, in particular, paras. 49-54).

[358] Statements [REDACTED] (DRC-OTP-0108-0131 to DRC-OTP-0108-0132, paras. 43-45), [REDACTED] (DRC-OTP-0108-0072 to DRC-OTP-0108-0073, paras. 39-43), [REDACTED] (DRC-OTP-0126-0166, para. 51) and [REDACTED] (DRC-OTP-0114-0023, para. 41).

[359] Statement [REDACTED] (DRC-OTP-0108-0133, para. 51); MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0375, para. 149; see also ICC-01/04-01/06-T-37-EN[15Nov2006Edited] p. 65.

[360] Statement [REDACTED], (DRC-OTP-0132-0090, para. 55 to DRC-OTP-0132-0091, para. 56 and 57).

[361] Statement of [REDACTED] (DRC-OTP-0108-0073, para. 43).

[362] Statement [REDACTED] (DRC-OTP-0126-0166, para. 53).

267. In addition, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that children under the age of fifteen years were also used as bodyguards by the FPLC commanders[363] and that Thomas Lubanga Dyilo personally used them.[364] It appears that these children were then asked to safeguard the physical safety of FPLC commanders, even during military deployments, a practice which directly endangered their own personal safety.[365] These bodyguards, who included children under the age of fifteen years, were also responsible for protecting the general staff headquarters located in Bunia.[366]

3. Discrete elements in the two articles: "into the national armed forces" or "into armed forces or groups"

268. Under article 8(2)(b)(xxvi) of the Statute, conscripting or enlisting children under the age of fifteen years into national armed forces and using them to participate actively in hostilities constitutes a serious violation of the laws and customs applicable in international armed conflict, within the established framework of international law.

269. This article of the Statute derives from Article 77 of *Protocol Additional I to the Geneva Conventions*, which deals with the protection of children during armed conflicts of an international character.

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[363] Statement [REDACTED]: "There were another three commanders based in the same camp: Commander Jean BOSCO, Commander David KISEMBO and another commander whose name I have forgotten. They always had bodyguards around them who accompanied them everywhere. The guards were in fact children aged 12 to 14", DRC-OTP-0126-0159, para. 26. See also the Statements [REDACTED] (DRC-OTP-0132-0087, para. 39), [REDACTED] (DRC-OTP-0108-0072, para. 40) and [REDACTED] (DRC-OTP-0108-0129, para. 33).

[364] Testimony of Kristine Peduto, ICC-01/04-01/06-T-37-EN[15Nov2006edited], p. 100, lines 3-24; see also cross-examination of Kristine Peduto, ICC-01/04-01/06-T-39-EN[21Nov2006edited] page 98, line 3, to p. 102, line 3. See also *infra* section on the existence of an agreement or common plan and more specifically the evidence regarding the use of bodyguards by the most senior FPLC commanders (Floribert Kisembo and Bosco Ntaganda).

[365] Statement [REDACTED] (DRC-OTP-0126-0159 and DRC-OTP-0126-0160, para. 26: "These children were supposed to ensure close protection to their commanders at all times either during peace or war, as well as carry their weapons and ammunition.").

[366] Testimony of Kristine Peduto, ICC-01/04-01/06-T-37-EN[15Nov2006Edited], p. 29, line 13 to p. 30, line 25); see also the cross-examination of Kristine Peduto, ICC-01/04-01/06-T-38-EN[20Nov2006corrected], page 88, line 8 to p. 90, line 12.

270. Pursuant to Article 77(2) of *Protocol Additional I to the Geneva Conventions*, "[t]he 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."

271. The Chamber considers that the expression "national armed forces" must first be defined. In this regard, Article 43 of *Protocol Additional I to the Geneva Conventions* of 12 August 1949 defines the armed forces of a Party to a conflict as consisting of all organised armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces must be subject to an internal disciplinary system which, *inter alia*, enforces compliance with the rules of international law applicable in armed conflict.

272. The Chamber notes that, in the context of a conflict of an international character, Protocol Additional I does not require that the armed forces be governmental forces. In this regard, the Chamber refers to the commentary on the Protocol, which states that "it is perfectly clear that the Protocol has extended its field of application to entities which are not States. […] If they conform to the requirements of the present article, liberation movements fighting against colonial domination […] and resistance movements representing a pre-existing subject of international law may be "Parties to the conflict" within the meaning of the Conventions and the Protocol. However, the authority which represents them must have certain characteristics of a government, at least in relation to its armed forces."[367]

273. The commentary on Article 43 of Protocol I states that the notion of "party to the conflict" is fairly wide, involving not only resistance movements representing a pre-existing subject of international law and governments in exile, but also those fighting for conflicts of "self-determination" or "national liberation".

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[367] International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Sandoz, Swinarski and Zimmermann (eds), 1986, p. 515, para. 1664 to p. 519, para. 1674.

274. Furthermore, the Chamber notes that Article 1 of the 1907 *Hague Regulations concerning the Laws and Customs of War*, which has become part of customary law,[368] also requires militia and volunteer corps that are not part of an army to fulfil the following conditions: be commanded by a person responsible for his subordinates; have a fixed distinctive emblem recognizable at a distance; carry arms openly; and conduct their operations in accordance with the laws and customs of war.

275. With regard to the term "national", which qualifies armed forces in the context of article 8(2)(b)(xxvi) of the Statute, the Chamber recalls that the context of international armed conflict is not restricted solely to the use of force between two states, but that it extends to certain situations in which parties to the conflict may be organised armed forces or groups. The issue raised here is whether the adjective "national" qualifying the term "armed forces" limits the scope of the application of this provision to "governmental" armed forces.

276. In this regard, Article 31 of the *Vienna Convention on the Law of Treaties*, entitled "General rule of interpretation", provides that:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> […]
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

277. Firstly, the ordinary meaning of the adjective "national" does not necessarily lead to an interpretation of the term as meaning governmental armed forces. In this regard, the Chamber notes that the Appeals Chamber of the ICTY defined the term "national"[369] within the meaning of Article 4(1) of the Fourth Geneva Convention for the purpose of determining who can be considered a "protected person" under the Convention.

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[368] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, I.C.J. Reports 2004.

[369] *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Appeal Judgement, 15 July 1999, paras. 164-166 and also *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, paras. 170-175.

278. On this point, the Appeals Chamber of the ICTY held in *Tadić* that "in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. […] In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test."[370]

279. In *The Prosecutor v. Delalić et al.*, the Appeals Chamber of the ICTY held that "Bosnian Serb victims should be regarded as protected persons for the purposes of Geneva Convention IV because they were arrested and detained mainly on the basis of their Serb identity and they were clearly regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict and as posing a threat to the Bosnian State."[371]

280. Accordingly, the Chamber observes that the Appeals Chamber of the ICTY has construed the term "national"[372] in Article 4(1) of the Fourth Geneva Convention as referring not solely to nationality as such, but also to the fact of belonging to the opposing party in an armed conflict.

281. Secondly, interpreting the term "national" to mean "governmental" can only undermine the object and purpose of the Statute of the Court, which is none other than to ensure that "the most serious crimes of concern to the international community as a whole" must no longer go unpunished.[373]

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[370] *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Appeal Judgement, 15 July 1999, para. 166.
[371] *The Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001, para. 98.
[372] See the English text of the *Fourth Geneva Convention relative to the protection of civilian persons in time of war*, 12 August 1949.
[373] Paragraph 4 of the Preamble of the Rome Statute of 17 July 1998 and articles 1 and 5 of the Rome Statute.

282. Thus, construing the term "national" to mean "governmental" might present the judge with a genuine paradox. Indeed, he or she might be led to consider that an alleged perpetrator can be held responsible if he or she belongs to a party to a conflict which is linked to a State (the armed forces of a State, such as the UPDF), but would escape prosecution if he or she belonged to a party to the same conflict described as an armed group (such as the FPLC).

283. Moreover, Article 32 of the *Vienna Convention on the Law of Treaties*, entitled "Supplementary means of interpretation" states that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> a) leaves the meaning ambiguous or obscure; or
>
> b) leads to a result which is manifestly absurd or unreasonable.

284. In fact, on the basis of basic humanitarian considerations and common sense, it would be absurd that Thomas Lubanga Dyilo could incur criminal responsibility for the crime of enlisting or conscripting children under the age of fifteen years only in the context of an internal armed conflict solely because the FPLC, as an armed force, could not be described as a "national armed force" within the meaning of article 8(2)(b)(xxvi) of the Statute. This would be tantamount to admitting that the perpetrator of such a crime could escape prosecution simply because his or her acts were committed in the context of an international armed conflict. The drafters of the Statute wanted to include under article 8 of the Statute a larger array of criminal conduct committed in the context of an international armed conflict.

285. Thus, the Chamber considers that, under article 8(2)(b)(xxvi) of the Statute, the term "the national armed forces" is not limited to the armed forces of a State.

C. Existence of a nexus between the armed conflict and the alleged crimes

286. A war crime is committed if there is a nexus between the criminal act in question and the armed conflict. As previously stated, the Elements of Crimes

require that the conduct in question took place in the context of and was associated with an armed conflict.

287. In this respect, the Chamber follows the approach of the jurisprudence of the ICTY,[374] which requires the conduct to have been closely related to the hostilities occurring in any part of the territories controlled by the parties to the conflict. The armed conflict need not be considered the ultimate reason for the conduct and the conduct need not have taken place in the midst of battle. Nonetheless, the armed conflict must play a substantial role in the perpetrator's decision, in his or her ability to commit the crime or in the manner in which the conduct was ultimately committed.

288. Having established the existence of an armed conflict, the Chamber observes that in order for a particular crime to qualify as a war crime within the meaning of articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute, at this stage, the Prosecution must establish that there are substantial grounds to believe that there is a sufficient and clear nexus between that crime and the conflict. In other words, it must be proved that there are substantial grounds to believe that the alleged crimes were closely related to the hostilities.[375]

289. On the evidence admitted for the purpose of the confirmation hearing, the Chamber considers that there are substantial grounds to believe that children under the age of fifteen years were enlisted and conscripted in order to undergo a short military training lasting less than two months during which they learnt how to use weapons, among other skills.[376] The purpose of the training seems to have been to use them to participate in hostilities alongside UPC militia members, specifically in Libi,

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[374] *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Appeal Judgement, 2 October 1995, para. 70 and also *The Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Trial Judgement, 1 September 2004, para. 123.

[375] *The Prosecutor v. Dario Kordić and Mario Cerkez*, Case No. IT-95-14/2-T, Trial Judgement, 26 February 2001, paras. 32 and 33.

[376] Statements of [REDACTED] (DRC-OTP-0126-0128, paras. 31-33) and [REDACTED] (DRC-OTP-0114-0019, para. 20), see also the video featuring Thomas Lubanga Dyilo visiting the Rwampara training camp on 12 February 2003 (specifically the transcript of the video, DRC-OTP-0120-0293, lines 129-333).

Mbau, Kpandroma[377], in Lipri in February 2003[378], in Largu in early 2003[379] and in Bunia in May 2003[380] and to "fight the Lendu enemies,"[381] often on the front line.

290. In this respect, the Chamber notes that in [REDACTED] statement, [REDACTED] points out that:

> However, after the Ugandan authorities agreed to military training for the Hemas, an extensive recruitment campaign got underway in BUNIA and the surrounding area. KAHWA [REDACTED] that he had informed the collectivity chiefs to send over as many young Hemas as possible. From what KAHWA said, [REDACTED] that about 750 militiamen – all Hemas – were trained at KYANKWANZI camp in Uganda." […] "Chief KAHWA offered MANDRO as the UPC's first military training centre. With the site agreed upon, the Hema traditional chiefs sent their young people to MANDRO to undergo military training."[382]

291. This is corroborated by Kristine Peduto's testimony[383] at the confirmation hearing, by a Human Rights Watch report dated July 2003[384] as well as by the video of Thomas Lubanga Dyilo's visit to the Rwampara training camp on 12 February 2003 in which he is seen encouraging new recruits to finish their training and to prepare for combat.

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[377] Statement of [REDACTED] (DRC-OTP-0126-0131, para. 41 and DRC-OTP-0126-0132, para. 44).
[378] Statement of [REDACTED] (DRC-OTP-0108-0064). The witness claims to have been enlisted in early 2003 in Sota (para. 20) and to have later been taken to the [REDACTED] military camp (para. 23) where he underwent military training during which Commander [REDACTED] allegedly told them: "our gun was our father and mother – our bullets our children – and that it would feed and clothe us" (para. 25) and that they would fight all the way to Kinshasa (para. 25). At the end of this training which lasted "almost two months" (para. 31) he was appointed escort to Commander [REDACTED] (para. 31) and in the course of his duties he was actively involved in the hostilities, in [REDACTED] in particular, "around February 2003" (para. 39). See also [REDACTED] DRC-OTP-0126-0154, para. 47.
[379] Statement [REDACTED] (DRC-OTP-0132-0089, para. 49 to DRC-OTP-0132-0090, para. 54).
[380] Statement [REDACTED] (DRC-OTP-0132-0090, para. 55 to 57).
[381] Statements [REDACTED] (DRC-OTP-0114-0018, para. 20) and [REDACTED] (DRC-OTP-0126-0165, para. 47).
[382] DRC-OTP-0105-0099, para. 79 and DRC-OTP-0105-0105, para. 115.
[383] ICC-04-01-01-06-T-37-EN[15Nov2006Edited], p. 94, line 25 to p. 96, line 15; see also ICC-04-01-01-06-T-39-EN[21Nov2006Edited], p. 81, line 18 to p. 82, line 13.
[384] Human Rights Watch, *Ituri: "Covered in Blood" Ethnically Targeted Violence in Northeastern DR Congo*, DRC-OTP-0163-0345.

292. The Chamber notes that there is ample evidence to the effect that children under the age of fifteen years reportedly remained in the service of FPLC commanders up until the end of December 2003.[385]

293. Accordingly, the Chamber considers that there are substantial grounds to believe that the conduct took place in the context of and was associated with an armed conflict in Ituri between July 2002 and late December 2003 and in which the UPC/RP and the FPLC were key players.

[385] Statement of [REDACTED] (DRC-OTP-0108-0074, para. 48), see also the *Fourteenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo* (DRC-OTP-0130-0409, para. 142) together with the *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0377, paras. 155 and 156.

V. THE PRINCIPLE OF LEGALITY AND MISTAKE OF LAW

294. At the confirmation hearing, the Defence argued that the principle of legality of sentences and crimes required the Chamber to make a threshold determination whether Thomas Lubanga Dyilo was aware of the existence of the crime of enlisting and conscripting children under the age of fifteen years and using them to participate actively in hostilities and whether he could foresee that the conduct in question was criminal in nature and could therefore entail his criminal responsibility.

295. The Defence maintains that Article 64 of the Fourth Geneva Convention must apply since the armed conflict was of an international character.[386] This article states that "[t]he penal laws of the occupied territory shall remain in force". According to the Defence, only legislation in force at the start of the occupation remains in force and any laws passed subsequently do not apply.

296. The Defence also argues that the Rome Statute entered into force in respect of Uganda only on 1 September 2002 and that Rwanda has not ratified it. The Defence submits that Article 65 of the Fourth Geneva Convention provides that if the occupying Power wishes to introduce new penal provisions, they shall not come into force before they have been brought to the knowledge of the inhabitants. The Defence notes that neither Uganda nor the DRC brought to the knowledge of the inhabitants of Ituri the fact that the Rome Statute had been ratified and that conscripting and enlisting child soldiers entailed individual criminal responsibility.[387] The Defence further alleges that the principle of foreseeability, which requires the Court to exercise its jurisdiction only over the most serious crimes of concern to the international community as a whole, must influence the contours of the meaning of conscription and enlistment.[388] In this regard, the Defence considers that the crime of enlisting is included neither in Protocols Additional I and II to the Geneva

[386] ICC-01/04-01/06-758-Conf, para. 8.
[387] ICC-01/04-01/06-758-Conf, para. 15.
[388] ICC-01/04-01/06-758-Conf, para. 26.

Conventions, nor in the *Optional Protocol to the Convention on the Rights of the Child*,[389] and therefore submits that the act of enlistment *simpliciter* does not correspond to any underlying conduct which Thomas Lubanga Dyilo could foreseeably have anticipated would entail his individual criminal responsibility.

297. The Prosecution submits that the principle of legality as defined in article 22 of the Statute is not infringed by the Document Containing the Charges that it presented. The Prosecution is of the view that article 32(2) of the Statute which specifies that a mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. Accordingly, the Prosecution considers that it is sufficient to establish that Thomas Lubanga Dyilo had knowledge of the constituent facts of the crimes with which he is charged.[390] The Prosecution also argues that the Defence submission that during the period covered by the charges, the rules of law criminalising the recruitment, enlistment and use of child soldiers in hostilities were neither foreseeable, accessible, nor defined with certainty for Thomas Lubanga Dyilo is factually incorrect.[391]

298. The Representatives of Victims a/0001/06 to a/0003/06 consider that the drafters of the Rome Statute did not intend to establish new crimes, but rather to structure the possibility of prosecuting those crimes which international custom already considered to be violations of humanitarian law. In support of their allegations, they quote the *Report of the Secretary-General of the United Nations on the Establishment of a Special Court for Sierra Leone*, which states that:

> The prohibition on the recruitment of children below the age of 15, a fundamental element of the protection of children, was for the first time established in the 1977 *Additional Protocol II to the Geneva Conventions*, article 4, paragraph 3(c), of which provides that children shall be provided with the care and aid they require, and that in particular: 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. A decade later, the prohibition on the recruitment of children below 15

[389] ICC-01/04-01/06-758-Conf, para. 26.
[390] ICC-01/04-01/06-748-Conf, para. 15.
[391] ICC-01/04-01/06-748-Conf, para. 19.

> into armed forces was established in article 38, paragraph 3, of the 1989 *Convention on the Rights of the Child*; and in 1998, the *Statute of the International Criminal Court* criminalised the prohibition and qualified it as a war crime. But while the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognized as a war crime entailing the individual criminal responsibility of the accused.[392]

299. In support of their position, the Representatives of Victims a/0001/06 to a/0003/06 refer to the judgement rendered by the Appeals Chamber of the Special Court for Sierra Leone in the case of *The Prosecutor v. Sam Hinga Norman,* which holds that it is established that:

> Child recruitment was criminalised before it was explicitly set out as a criminal prohibition in treaty law and certainly by November 1996, the starting point of the time frame relative to the indictment.[393]

300. The Representatives of Victims a/0001/06 to a/0003/06 consider that the issue of the principle of legality was resolved by the entry into force of the Rome Statute, article 22 of which clearly imposes criminal responsibility if the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.[394]

301. The Chamber considers that the Defence is not relying on the principle of legality, but on the possibility of excluding criminal responsibility on account of a mistake of the law in force.

302. Having regard to the principle of legality, the terms enlisting, conscripting and using children under the age of fifteen years to participate actively in hostilities are defined with sufficient particularity in articles 8(2)(b)(xxvi) and 8(2)(e)(vii), 22 to 24 and 77 of the Rome Statute and the Elements of Crimes, which entered into force on 1 July 2002, as entailing criminal responsibility and punishable as criminal offences.

303. Accordingly, there is no infringement of the principle of legality if the Chamber exercises its power to decide whether Thomas Lubanga Dyilo ought to be

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[392] *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, United Nations Document S/2000/915, 4 October 2000.
[393] *The Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), *Decision on preliminary motion based on lack of jurisdiction (child recruitment)*, 31 May 2004.
[394] ICC-01/04-01/06-750-tEN, para. 8.

committed for trial on the basis of written (*lex scripta*) pre-existing criminal norms approved by the States Parties to the Rome Statute (*lex praevia*), defining prohibited conduct and setting out the related sentence (*lex certa*), which cannot be interpreted by analogy *in malam partem* (*lex stricta*).[395]

304. The Defence argues that, at the time, Thomas Lubanga Dyilo was unaware that voluntarily or forcibly recruiting children under the age of fifteen years and using them to participate actively in hostilities entailed his criminal responsibility under the Statute.

305. The Chamber observes, however, that the scope of a mistake of law within the meaning of article 32(2) is relatively limited. Indeed, this article provides that "[a] mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility."

306. In addition, the Chamber considers that there is sufficient evidence before it to establish substantial grounds to believe that, at the time, Thomas Lubanga Dyilo was aware that voluntarily or forcibly recruiting children under the age of fifteen years and using them to participate actively in hostilities entailed his criminal responsibility under the Statute.

307. In reaching this finding, the Chamber notes, firstly, that the DRC ratified the Statute of the International Criminal Court on 11 April 2002, i.e. a few months before the period covered by the Prosecution charging document.

308. The Defence does not appear to challenge the fact that "child recruitment" is a violation of international humanitarian law. Nonetheless, the Chamber recalls that children under the age of fifteen years must be considered as protected persons within the meaning of the Geneva Conventions and the two Protocols Additional of 1977.[396] In this regard, Article 77(2) of Protocol Additional I states that "the Parties to

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[395] See AMBOS, K., "Nulla Poena Sine Lege" in International Criminal Law, in *Sentencing and Sanctioning in Supranational Criminal Law*, R. Haveman and O. Olusanya. (eds), pp. 17-22.
[396] See, in particular, articles 14, 24 and 51 of the Fourth Geneva Convention.

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".[397] In construing this article and, in particular, the term "recruiting", the Chamber relies on the Commentary on the Additional Protocols, according to which the principle of non-recruitment also prohibits accepting voluntary enlistment.[398]

309. In addition, the DRC ratified the Geneva Conventions of 1949 in 1961 and Protocol I in 1982. Uganda ratified the Geneva Conventions in 1964 and Protocols I and II in 1991.

310. The protection of children under international humanitarian law is also recognised under the 1989 *Convention on the Rights of the Child*.[399]

311. Moreover, in a decision dated 31 May 2004, the Appeals Chamber of the Special Court for Sierra Leone, after noting that most States prohibit the recruitment of children under the age of fifteen years and are parties to the Geneva Conventions and their Protocols Additional,[400] held that, prior to November 1996, the prohibition against child recruitment had already crystallized as a customary law norm.

312. In addition, the Chamber has given special consideration to the evidence indicating that, even prior to 1 July 2002, the date the Statute entered into force, the Hema and Lendu communities of Ituri were familiar with the Statute and the type of conduct which gives rise to criminal responsibility under the Statute. In this regard, the Chamber observes that the "*Protocole d'accord relatif à la résolution du conflit inter-*

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[397] See also article 4(3)(c) of the *Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts* (*Protocol II*).

[398] International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Sandoz, Swinarski and Zimmermann (eds), 1986, p. 1404, para. 4557.

[399] *Convention on the Rights of the Child* (U.N. Doc. A/44/49(1989)).

[400] *The Prosecutor v. Sam Hinga Norman, Decision on preliminary motion based on lack of jurisdiction (child recruitment)*, 31 May 2004, paras. 17-24.

ethnique Hema/Lendu en Province de l'Ituri"[401] expressly calls for governmental authorities to work with competent international courts with a view to bringing the alleged planners and instigators of the conflict before the International Criminal Court.[402]

313. In her testimony before the Chamber, Kristine Peduto explained that on 30 May 2003 she discussed child protection issues and matters relating to the ratification of the Rome Statute by the DRC with Thomas Lubanga Dyilo.[403]

314. Accordingly, the Chamber considers the following observations by the Representatives of Victims a/0001/06 to a/0003/06 to be relevant:

> [I]f many Congolese are still unaware of the existence of the International Criminal Court, the provisions of the Rome Statute and its ratification by the DRC, a substantial part of the population of Ituri closely followed the Statute's entry into force and it was greeted with relief, particularly by the many victims of war crimes. The Statute's entry into force could not have escaped the attention of Thomas Lubanga, who claims to be a politician and head of state, and who, because of his involvement in an armed conflict, was directly concerned.[404]

315. The Chamber also observes that article 32(2) of the Statute specifies that mistake of law shall only be a ground for excluding criminal responsibility if (i) it negates the mental element required by the crime or (ii) it falls within the scope of the "superior orders" or "prescription of law" defence under article 33 of the Statute.

316. As a result, absent a plea under article 33 of the Statute, the defence of mistake of law can succeed under article 32 of the Statute only if Thomas Lubanga Dyilo was unaware of a normative objective element of the crime as a result of not realising its social significance (its everyday meaning).[405] However, there is nothing in the

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[401] This memorandum of understanding was signed by the notables of the Hema North, Hema South, Lendu North and Lendu South communities of Ituri who met in Bunia between 14 and 17 of February 2001 under the auspices of Jean-Pierre Bemba (President of the *Front de libération du Congo* of which Thomas Lubanga Dyilo was the then Deputy National Secretary for Youth and Sport).

[402] DRC-D01-0001-0003, Section 3, item 5 .

[403] ICC-01/04-01/06-T-37-EN[15Nov2006Edited], p. 103, lines 9-10

[404] ICC-01/04-01/06-750-tEN, para. 11.

[405] ESER, A., "Mental Element – Mistake of Fact and Mistake of Law" in *The Rome Statute of the International Criminal Court: A Commentary*, Cassese, A./ Gaeta, P./Jones, J.R.W.D. (eds), Oxford University Press, 2002, p. 961.

evidence admitted for the purpose of the confirmation hearing to show that Thomas Lubanga Dyilo might have made any such mistake in the context in which the crimes were committed.

VI. CRIMINAL RESPONSIBILITY

A. Modes of liability

1. *Scope of the analysis*

317. Pursuant to regulation 52(c) of the *Regulations of the Court*, the Document Containing the Charges must include "a legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28."

318. Accordingly, in the Document Containing the Charges, the Prosecution charges Thomas Lubanga Dyilo with criminal responsibility under article 25(3)(a) of the Statute, which covers the notions of direct perpetration (commission of a crime in person), co-perpetration (commission of a crime jointly with another person) and indirect perpetration (commission of a crime through another person, regardless of whether that other person is criminally responsible).[406]

319. Furthermore, the Chamber observes that in the part of the Document Containing the Charges dealing with individual criminal responsibility, the

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[406] ICC-01/04-01/06-356-Conf-Anx1, p. 27. The Chamber also points out that in paragraph 12 ii) of the Submission of the Document Containing the Charges pursuant to article 61(3)(a) and of the List of Evidence pursuant to rule 121(3) (ICC-01/04-01/06-356), the Prosecution also refers to the mode of liability under article 25(3)(d) of the Statute by stating that:

> In the Document Containing the Charges, the Prosecution submits that Thomas LUBANGA DYILO is criminally responsible as a joint perpetrator pursuant to Article 25(3)(a). The Pre-Trial Chamber found, upon review of the Arrest Warrant Application - which relied on many of the same factual allegations as the Document Containing the Charges - that indirect co-perpetration was also potentially a viable theory of criminal responsibility. Based on the facts as detailed in the Document Containing the Charges, the Office of the Prosecutor believes that "common purpose" in terms of Article 25(3)(d) could properly be considered as a third applicable mode of criminal liability. The Prosecution requests that the Pre-Trial Chamber make findings that the legal requirements of these three modes of liability are either satisfied or not satisfied, based on its review of the materials submitted at the Confirmation Hearing. Such findings would promote efficiency by ensuring that in the event any of the three legal theories of criminal liability were later deemed infirm, through events not foreseen at this time, the Parties would not be obligated to return to the Pre-Trial Chamber to seek the confirmation of new charges based on the same evidentiary showing."

Prosecution charges Thomas Lubanga Dyilo only with individual criminal responsibility as a co-perpetrator within the meaning of article 25(3)(a) of the Statute. Likewise, in its closing brief, the Prosecution asserts that "[f]rom the beginning and continuing throughout the proceedings, the Prosecution has pleaded one form of individual criminal responsibility, namely co-perpetration pursuant to article 25(3)(a) of the Statute"[407] because it "best represents the criminal responsibility for crimes with which Thomas Lubanga Dyilo is charged."[408]

320. The Chamber recalls that in the decision concerning the issuance of a warrant of arrest, it distinguished between (i) the commission *strictu senso* of a crime by a person as an individual, jointly with another or through another person within the meaning of article 25(3)(a) of the Statute, and (ii) the responsibility of superiors under article 28 of the Statute and "any other forms of accessory, as opposed to principal, liability provided for in article 25(3) (b) to (d) of the Statute".[409]

321. Hence, if the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is criminally responsible as a co-perpetrator for the crimes listed in the Document Containing the Charges, for the purpose of the confirmation of the charges, the question as to whether it may also consider the other forms of accessory liability provided for in articles 25(3)(b) to (d) of the Statute or the alleged superior responsibility of Thomas Lubanga Dyilo under article 28 of the Statute becomes moot, even though these modes of liability have not been expressly pleaded in the Document Containing the Charges.[410]

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[407] ICC-01/04-01/06-748-Conf, para. 26.
[408] ICC-01/04-01/06-748-Conf, para. 27.
[409] ICC-01/04-01/06-8-US-Corr, para. 78.
[410] Paragraph 23 of the "Written submissions of the Legal Representative of Victim a/0105/06" (ICC-01/04-01/06-745-tEN, states: "Indeed, nothing would prevent the Pre-Trial Chamber, when making a determination as to whether there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo committed each of the crimes ascribed to him, from specifying the forms of responsibility. This option arises from the Chamber's inherent power to weigh the evidence tendered and make findings at its discretion, taking into account the threshold of proof". The same position is held in "Observations made at the confirmation hearing on behalf of Victims a/0001/06, a/0002/06 and a/0003/06", ICC-01/04-01/06-750-tEN, 4 December 2006, paras. 49-54. Nevertheless, the Defence points out at paragraphs 31 and 32 of its brief on matters of law that (i) the ICTY and ICTR appeal

2. The concept of co-perpetration as embodied in the Statute

322. The concept of co-perpetration embodied in article 25(3)(a) of the Statute requires analysis. The Prosecution is of the opinion that article 25(3)(a) of the Statute adopts a concept of co-perpetration based on the notion of control of the crime in the sense that a person can become a co-perpetrator of a crime only if he or she has "joint control" over the crime as a result of the "essential contribution" ascribed to him or her.[411]

323. The Prosecution acknowledges that the concept of co-perpetration pursuant to article 25(3)(a) of the Statute differs from that of co-perpetration based on the existence of a joint criminal enterprise or common purpose as reflected, in particular, in the jurisprudence of the ICTY.[412] In this regard, the Prosecution submits that it is important to take into consideration the fundamental differences between the *ad hoc* tribunals and the Court, because the latter operates under a Statute which not only sets out modes of criminal liability in great detail, but also deliberately avoids the broader definitions found in, for example, article 7(1) of the ICTY Statute.[413]

324. The Defence does not suggest any interpretation of the concept of co-perpetration, but it challenges the Prosecution's approach saying that it "goes beyond the clear terms of co-perpetration and indirect perpetration set out in the Statute, and

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judgements in the *Simić* and *Gacumbitsi* cases "have recently reversed convictions on the grounds that the mode of liability in question was pleaded in ambiguous or insufficient terms in the indictment and have emphasized that the need to plead with sufficient particularity is heightened with respect to novel forms of liability"; and that (ii) "in light of the fact that the Defence raised the issue of lack of notice prior to the confirmation hearing, the burden falls squarely on the Prosecution to prove that failure to plead the modes of liability with sufficient clarity and particularity has not materially impaired the preparation of the Defence."

[411] "Prosecution's Document addressing matters that were discussed at the confirmation hearing", ICC-01/04-01/06-748-Conf, paras. 38-41.

[412] "Prosecution's Document addressing matters that were discussed at the confirmation hearing", ICC-01/04-01/06-748-Conf, paras. 31 and 32.

[413] "Prosecution's Document addressing matters that were discussed at the confirmation hearing", ICC-01/04-01/06-748-Conf, paras. 30-33.

is not supported by either customary international law, or general principles of law derived from legal systems of the world."[414]

325. The Legal Representatives of Victims a/0001/06, a/0002/06, a/0003/06[415] and a/0105/06[416] argue that the concept of co-perpetration set out in article 25(3)(a) of the Statute pertains to the concept of joint criminal enterprise or common purpose doctrine, the essential component of which is the sharing of a common criminal plan or purpose as opposed to retaining control over the crime.

326. The Chamber is of the view that the concept of co-perpetration is originally rooted in the idea that when the sum of the co-ordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime.[417]

327. In this regard, the definitional criterion of the concept of co-perpetration is linked to the distinguishing criterion between principals and accessories to a crime where a criminal offence is committed by a plurality of persons.

328. The objective approach to such a distinction focuses on the realisation of one or more of the objective elements of the crime. From this perspective, only those who physically carry out one or more of the objective elements of the offence can be considered principals to the crime.

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[414] "Defence Brief on matters the Defence raised during the confirmation hearing – Legal Observations", ICC-01/04-01/06-758-Conf, para. 33. The Defence alleges that the concept of joint control over the crime was developed primarily by German theorists, in particular Claus Roxin, and that such theories "are very much predicated on notions of hierarchy and obedience, and were formulated to address the type of systematic criminality which existed in Germany during World War II (as exemplified in the *Eichmann* case) and during the communist regime in the GDR". ICC-01/04-01/06-758-Conf, para. 34.

[415] "Observations made during the confirmation hearing on behalf of Victims a/0001/06, a/0002/06 and a/0003/06", ICC-01/04-01/06-750-tEN, para. 39.

[416] "Written submissions of the Legal Representative of Victim a/0105/06", ICC-01/04-01/06-745-tEN, para. 16.

[417] AMBOS K., "Article 25: Individual Criminal Responsibility", in *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos, 1999, p. 479, margin No. 8.

329. The subjective approach – which is the approach adopted by the jurisprudence of the ICTY through the concept of joint criminal enterprise or the common purpose doctrine – moves the focus from the level of contribution to the commission of the offence as the distinguishing criterion between principals and accessories, and places it instead on the state of mind in which the contribution to the crime was made. As a result, only those who make their contribution with the shared intent to commit the offence can be considered principals to the crime, regardless of the level of their contribution to its commission.

330. The concept of control over the crime constitutes a third approach for distinguishing between principals and accessories which, contrary to the Defence claim, is applied in numerous legal systems.[418] The notion underpinning this third approach is that principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.

331. This approach involves an objective element, consisting of the appropriate factual circumstances for exercising control over the crime, and a subjective element, consisting of the awareness of such circumstances.

332. According to this approach, only those who have control over the commission of the offence – and are aware of having such control – may be principals because:

i. they physically carry out the objective elements of the offence (commission of the crime in person, or direct perpetration);

[418] *The Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Separate Opinion of Judge Schomburg, 7 July 2006, para. 16, footnote 30. See also FLETCHER G.P., *Rethinking Criminal Law*, New York, Oxford University Press, 2000, p. 639; WERLE G., *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2005, margin No. 354.

ii. they control the will of those who carry out the objective elements of the offence (commission of the crime through another person, or indirect perpetration); or

iii. they have, along with others, control over the offence by reason of the essential tasks assigned to them (commission of the crime jointly with others, or co-perpetration).

333. Article 25(3)(a) of the Statute does not take into account the objective criterion for distinguishing between principals and accessories because the notion of committing an offence through another person – particularly when the latter is not criminally responsible – cannot be reconciled with the idea of limiting the class of principals to those who physically carry out one or more of the objective elements of the offence.

334. Article 25(3)(a) of the Statute, read in conjunction with article 25(3)(d), also does not take into account the subjective criteria for distinguishing between principals and accessories. In this regard, the Chamber notes that, by moving away from the concept of co-perpetration embodied in article 25(3)(a), article 25(3)(d) defines the concept of (i) contribution to the commission or attempted commission of a crime by a group of persons acting with a common purpose, (ii) with the aim of furthering the criminal activity of the group or in the knowledge of the criminal purpose.

335. The Chamber considers that this latter concept – which is closely akin to the concept of joint criminal enterprise or the common purpose doctrine adopted by the jurisprudence of the ICTY – would have been the basis of the concept of co-perpetration within the meaning of article 25(3)(a), had the drafters of the Statute opted for a subjective approach for distinguishing between principals and accessories.

336. Moreover, the Chamber observes that the wording of article 25(3)(d) of the Statute begins with the words "[i]n any other way contributes to the commission or attempted commission of such a crime."

337. Hence, in the view of the Chamber, article 25(3)(d) of the Statute provides for a residual form of accessory liability which makes it possible to criminalise those contributions to a crime which cannot be characterised as ordering, soliciting, inducing, aiding, abetting or assisting within the meaning of article 25(3)(b) or article 25(3)(c) of the Statute, by reason of the state of mind in which the contributions were made.

338. Not having accepted the objective and subjective approaches for distinguishing between principals and accessories to a crime, the Chamber considers, as does the Prosecution and, unlike the jurisprudence of the *ad hoc* tribunals, that the Statute embraces the third approach, which is based on the concept of control over the crime.

339. In this regard, the Chamber notes that the most typical manifestation of the concept of control over the crime, which is the commission of a crime through another person, is expressly provided for in article 25(3)(a) of the Statute. In addition, the use of the phrase "regardless of whether that other person is criminally responsible" in article 25(3)(a) of the Statute militates in favour of the conclusion that this provision extends to the commission of a crime not only through an innocent agent (that is, through another person who is not criminally responsible), but also through another person who is fully criminally responsible.[419]

340. The Chamber considers that the concept of co-perpetration embodied in article 25(3)(a) of the Statute by the reference to the commission of a crime "jointly with […] another person" must cohere with the choice of the concept of control over the crime as a criterion for distinguishing between principals and accessories.

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[419] ESER A., "Individual Criminal Responsibility", in *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, Vol. I, p. 795.

341. Hence, as stated in its *Decision to Issue a Warrant of Arrest*,[420] the Chamber considers that the concept of co-perpetration embodied in article 25(3)(a) of the Statute coincides with that of joint control over the crime by reason of the essential nature of the various contributions to the commission of the crime.[421]

3. Elements of co-perpetration based on joint control over the crime

342. The concept of co-perpetration based on joint control over the crime is rooted in the principle of the division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner. Hence, although none of 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.[422]

a. Objective Elements

i) Existence of an agreement or common plan between two or more persons

343. In the view of the Chamber, the first objective requirement of co-perpetration based on joint control over the crime is the existence of an agreement or common plan between two or more persons.[423] Accordingly, participation in the commission of a crime without co-ordination with one's co-perpetrators falls outside the scope of co-perpetration within the meaning of article 25(3)(a) of the Statute.

344. The common plan must include an element of criminality, although it does not need to be specifically directed at the commission of a crime. It suffices:

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[420] "In the Chamber's view, there are reasonable grounds to believe that, given the alleged hierarchical relationship between Mr Thomas Lubanga Dyilo and the other members of the UPC and the FPLC, the concept of indirect perpetration which, along with that of co-perpetration based on joint control of the crime referred to in the Prosecution's Application, is provided for in article 25(3)(a) of the Statute, could be also applicable to Mr Thomas Lubanga Dyilo's alleged role in the commission of the crimes set out in the Prosecution's Application." ICC-01/04-01/06-1-US-Exp-Conf, para. 110.

[421] AMBOS K., "Article 25: Individual Criminal Responsibility", in *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos, 1999, p. 479, margin No. 8.

[422] *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, para. 440.

[423] In *Stakić*, the first objective requirement for co-perpetration is divided into two sub-criteria: i) a common goal and ii) an agreement or silent consent, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-31-T, Trial Judgement, 24 July 2003, paras. 470-477.

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.

345. Furthermore, the Chamber considers that the agreement need not be explicit and that its existence can be inferred from the subsequent concerted action of the co-perpetrators.

ii) Co-ordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime

346. The Chamber considers that the second objective requirement of co-perpetration based on joint control over the crime is the co-ordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime.[424]

347. 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.

348. The Chamber observes that, although some authors have linked the essential character of a task – and hence the ability to exercise joint control over the crime – to

[424] In *Stakić*, the second objective requirement for co-perpetration is divided into two sub-criteria: i) co-ordinated co-operation and ii) joint control over criminal conduct, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, paras. 478-491.

its performance at the execution stage of the crime,[425] the Statute does not contain any such restriction.

b. Subjective Elements

i) The suspect must fulfil the subjective elements of the crime in question

349. The Chamber considers that co-perpetration based on joint control over the crime requires above all that the suspect fulfil the subjective elements of the crime with which he or she is charged, including any requisite *dolus specialis* or ulterior intent for the type of crime involved.[426]

350. Article 30 of the Statute sets out the general subjective element for all crimes within the jurisdiction of the Court by specifying that "[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge",[427] that is:

i. if the person is "[aware] that a circumstance exists or a consequence will occur in the ordinary course of events";[428] and

[425] Roxin, C., *Täterschaft und Tatherrschaft*, Berlin, New York, Walter de Gruyter, Seventh Edition, 2000, pp. 294 and 299. According to Roxin, those who contribute only to the commission of a crime at the preparatory stage cannot be described as co-perpetrators even if they carry out tasks with a view to implementing the common plan. This point of view is shared by MIR PUIG, S., *Derecho Penal, Parte General*, Editorial Reppertor, Sixth Edition, 2000, p. 385; HERZEBERG, R.D., *Täterschaft und Teilnahme*, Heidelberg, Springer Berlin, 1977, pp. 65 ff; and KÖHLER, M., *Strafrecht Allgemeiner Teil*, Nomos, 1997, p. 518. However, many other authors do not share this point of view. See inter alia: MUÑOZ CONDE F., "*Dominio de la voluntad en virtud de aparatos organizados en organizaciones no desvinculadas del Derecho*", in *Revista Penal*, No. 6, 2000, p. 113; PÉREZ CEPEDA A., "*Criminalidad en la empresa: problemas de autoría y participación*", in *Revista Penal*, No. 9, 2002, p. 106 ff; JESCHECK/WEIGEND, *Strafrecht Allgemeiner Teil*, Springer, Fifth Edition, 1996, p. 680; KÜHL K., *Strafrecht Allgemeiner Teil*, Springer, Second Edition, 1997, p. 111; KINDHÄUSER U., *Strafgesetzbuch, Lehr-und Praxiskommentar*, 2002, para. 25, No. 38.

[426] *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, para. 495.

[427] Article 30(1) of the Statute.

[428] Article 30(3) of the Statute.

ii. if the person means to engage in the relevant conduct and means to cause the relevant consequence or is aware that it will occur in the ordinary course of events.[429]

351. The cumulative reference to "intent" and "knowledge" requires the existence of a volitional element on the part of the suspect. This volitional element encompasses, first and foremost, those situations in which the suspect (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).[430]

352. The above-mentioned volitional element also encompasses other forms of the concept of *dolus*[431] which have already been resorted to by the jurisprudence of the *ad hoc* tribunals,[432] that is:

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);[433] 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

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[429] Article 30(2) of the Statute.

[430] ESER, A., "Mental Elements–Mistakes of Fact and Law", in *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, Vol. I, pp. 899 and 900.

[431] PIRAGOFF, D.K., "Article 30: Mental Element", in *Commentary on the Rome Statute of the International Criminal Court*, Baden Baden, Nomos, 1999, p. 534; RODRIGUEZ-VILLASANTE y PIETRO, J. L., "*Los Principios Generales del Derecho Penal en el Estatuto de Roma*", in *Revista Española de Derecho Militar*, 2000, Vol. 75, p. 417.

[432] *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Appeal Judgement, 15 July 1999, paras. 219 and 220; *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, para. 587.

[433] ESER, A., "Mental Elements–Mistakes of Fact and Law", in *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, Vol. I, pp. 898 and 899.

(b) accepts such an outcome by reconciling himself or herself with it or consenting to it (also known as *dolus eventualis*).[434]

353. The Chamber considers that in the latter type of situation, two kinds of scenarios are distinguishable. Firstly, if the risk of bringing about the objective elements of the crime is substantial (that is, there is a likelihood that it "will occur in the ordinary course of events"),[435] the fact that the suspect accepts the idea of bringing about the objective elements of the crime can be inferred from:

i. the awareness by the suspect of the substantial likelihood that his or her actions or omissions would result in the realisation of the objective elements of the crime; and

ii. the decision by the suspect to carry out his or her actions or omissions despite such awareness.

354. Secondly, if the risk of bringing about the objective elements of the crime is low, the suspect must have clearly or expressly accepted the idea that such objective elements may result from his or her actions or omissions.[436]

355. Where the state of mind of the suspect falls short of accepting that the objective elements of the crime may result from his or her actions or omissions, such a state of mind cannot qualify as a truly intentional realisation of the objective elements,[437] and hence would not meet the "intent and knowledge" requirement embodied in article 30 of the Statute.[438]

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[434] According to *Stakić*, "[t]he technical definition of *dolus eventualis* is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he "reconciles himself" or "makes peace" with the likelihood of death." *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, para. 587.

[435] PIRAGOFF, D.K., "Article 30: Mental Element", in *Commentary on the Rome Statute of the International Criminal Court*, Baden Baden, Nomos, 1999, p. 534.

[436] According to *Stakić*, "[i]f the killing is committed with 'manifest indifference to the value of human life', even conduct of minimal risk can qualify as intentional homicide." *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, para. 587

[437] For instance, where the suspect is aware of the likelihood that the objective elements of the crime would occur as a result of his actions or omissions, and in spite of that, takes the risk in the belief that

356. As provided for in article 30(1) of the Statute, the general subjective element ("intent and knowledge") therein contemplated applies to any crime within the jurisdiction of the Court "[u]nless otherwise provided", that is, as long as the definition of the relevant crime does not expressly contain a different subjective element.

357. In this regard, the Chamber observes that the definitions of the war crimes of conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities set forth in article 8 of the Statute do not contain any subjective element. However, the Chamber notes that the third element listed in the Elements of Crimes for these specific crimes requires that, in relation to the age of the victims, "[t]he perpetrator knew or should have known that such person or persons were under the age of 15 years."

358. The "should have known" requirement set forth in the Elements of Crimes – which is to be distinguished from the "must have known" or constructive knowledge requirement – falls within the concept of negligence because it is met when the suspect:

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his or her expertise will suffice in preventing the realisation of the objective elements of the crime. This would be the case of a taxi driver taking the risk of driving at a very high speed on a local road, trusting that nothing would happen on account of his or her driving expertise.

[438] The concept of recklessness requires only that the perpetrator be aware of the existence of a risk that the objective elements of the crime may result from his or her actions or omissions, but does not require that he or she reconcile himself or herself with the result. In so far as recklessness does not require the suspect to reconcile himself or herself with the causation of the objective elements of the crime as a result of his or her actions or omissions, it is not part of the concept of intention. According to Fletcher, "Recklessness is a form of *culpa* – equivalent to what German scholars call 'conscious negligence'. The problem of distinguishing 'intention' and 'recklessness' arises because in both cases the actor is aware that his conduct might generate a specific result." FLETCHER, G.P., *Rethinking Criminal Law*, New York, Oxford University Press, 2000, p. 443. Hence, recklessness does not meet the "intent and knowledge" requirement embodied in article 30 of the Statute. The same conclusion is reached by ESER, A., "Mental Elements–Mistakes of Fact and Law", in *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, Vol. I, pp. 898-899, and PIRAGOFF, D.K., "Article 30: Mental Element", in *Commentary on the Rome Statute of the International Criminal Court*, Baden Baden, Nomos, 1999, p. 535. Negligence likewise does not meet the "intent and knowledge" requirement embodied in article 30 of the Statute.

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 because he or she did not act with due diligence in the relevant circumstances (one can only say that the suspect "should have known" if his or her lack of knowledge results from his or her failure to comply with his or her duty to act with due diligence).[439]

359. As a result, the "should have known" requirement as provided for in the Elements of Crimes in relation to articles 8(2)(b)(xxvi) and 8(2)(e)(vii) is an exception to the "intent and knowledge" requirement embodied in article 30 of the Statute. Accordingly, as provided for in article 30(1) of the Statute, it will apply in determining the age of the victims, whereas the general "intent and knowledge" requirement will apply to the other objective elements of the war crimes set forth in articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute, including the existence of an armed conflict and the nexus between the acts charged and the armed conflict.

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

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[439] In this regard, the Chamber takes into account the jurisprudence of the ICTY and ICTR, in which the conclusion was reached that the expression "had reason to know" is a stricter requirement than the "should have known" requirement because it does not criminalise the military superiors' lack of due diligence to comply with their duty to be informed of their subordinates' activities. According to the Appeals Chamber of the *ad hoc* tribunals, the "had reason to know" requirement embodied in article 7(3) of the ICTY Statute and article 6(3) of the ICTR Statute can be met only if military superiors have, at the very minimum, specific information available to them alerting them to the need to start an investigation. *The Prosecutor v. Zejnil Delalić et al*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001, para. 241; *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A, Appeal Judgement, 3 July 2002, para. 42; *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Appeal Judgement, 17 September 2003, para. 151; *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para. 62.

ii) The suspect and the other co-perpetrators must all be mutually aware and mutually accept that implementing their common plan may result in the realisation of the objective elements of the crime

361. The theory of co-perpetration based on joint control over the crime requires two additional subjective elements. The 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.[440]

362. The Chamber considers that it is precisely the co-perpetrators' mutual awareness and acceptance of this result which justifies (a) that the contributions made by the others may be attributed to each of them, including the suspect, and (b) that they be held criminally responsible as principals to the whole crime.

363. As we have seen above, two scenarios must be distinguished. Firstly, if there is a substantial risk of bringing about the objective elements of the crime (that is, if it is likely that "it will occur in the ordinary course of events"), the mutual acceptance by the suspect and the other co-perpetrators of the idea of bringing about the objective elements of the crime 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.

364. Secondly, if the risk of bringing about the objective elements of the crime is low, the suspect and the other co-perpetrators 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.

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[440] *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, para. 496.

365. Consequently, although, in principle, the war crime of enlisting or conscripting children under the age of fifteen years or using them to participate actively in hostilities requires only a showing that the suspect "should have known" that the victims were under the age of fifteen years, the Chamber considers that this subjective element is not applicable in the instant case. Indeed, the theory of 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 of the crime.[441]

iii) The suspect must be aware of the factual circumstances enabling him or her to jointly control the crime

366. The Chamber considers that the third and last subjective element of co-perpetration based on joint control of the crime is the awareness by the suspect of the factual circumstances enabling him or her to jointly control the crime.[442]

367. In the view of the Chamber, 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.

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[441] Had the Prosecution alleged, for instance, that Thomas Lubanga Dyilo committed the above-mentioned crimes himself – as opposed to jointly with others – the "should have known" requirement would have been applicable in relation to determining the age of the victims.

[442] In the *Stakić* Trial Judgement, the Trial Chamber referred to this element: "Dr. Stakić's awareness of the importance of his own role", *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, para. 497

B. Is there sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is criminally responsible as a co-perpetrator within the meaning of article 25(3)(a) of the Statute for the crimes with which he is charged?

1. Objective Elements

a. Existence of an agreement or common plan between two or more persons

368. Firstly, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that, from early September 2002 to the end of 2003, Thomas Lubanga Dyilo:

i. served as *de jure* President of the *Union des Patriotes Congolais pour la Reconciliation et la Paix* (UPC/RP);[443]

ii. appointed[444], dismissed[445] and expelled[446] UPC/RP National Secretaries; and

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[443] According to [REDACTED], in early September 2002, "[b]efore the members of the executive were appointed, a consensus was reached that Thomas LUBANGA be appointed president of the movement. Although this move was not wholly consistent with our movement's constitution – in that an election ought really to have been held – everyone agreed that he be appointed." ([REDACTED], para. 128). Thomas Lubanga Dyilo signed a number of decrees and declarations as UPC/RP President and specifically i) Decree No. 002/UPC/RP/CAB/PRES/2002, signed in Bunia on 3 September 2002; see the transcript of the interview with [REDACTED], DRC-D01-0002-0045, para. 135; (ii) Decree No. 013/UPC/RP/CAB/PRES/2002 of 30 October 2002, signed in Bunia on 30 October 2002 (DRC-D01-0001-0023 and DRC-D01-0001-0024); (iii) Decree No. 08bis/UPC/RP/CAB/PRESS/2003, signed in Kinshasa on 8 December 2003 (DRC-OTP-0132-0237); (iv) Official Declaration No. UPC-RP/02/2002 signed in Bunia on 14 September 2002 (DRC-D01-0001-0019 to DRC-D01-0001-0021); and (v) Official Declaration No. UPC-RP/03/2002, signed by Thomas Lubanga Dyilo in Bunia on 14 September 2002 (DRC-D01-0001-0022).

[444] See the transcript of the interview with [REDACTED], paras. 126-130. [REDACTED] describes the appointment of these members as follows: "Once the movement's name had been definitively adopted, [REDACTED] to work on the composition of our movement's first executive. […] The negotiations had already begun [REDACTED]. Some people had already put themselves forward as candidates: the president himself oversaw this. [REDACTED]. At the time, Thomas LUBANGA was not sure [REDACTED]. I believe that the UPC executive was promulgated by President LUBANGA's second official decree. Decrees are documents prepared by the office of the president that the president himself signs." ([REDACTED], paras. 127, 129 and 130).

[445] See the transcript of the interview [REDACTED], paras. 135 and 136. [REDACTED] explains why the reshuffle was carried out and, in [REDACTED] opinion, only Thomas Lubanga Dyilo knows why such senior members of the executive, like Adèle Lotsove for example, the former Governor of Ituri, were replaced ([REDACTED], paras. 135 and 136). See also Decree No. 08bis/UPC/RP/CAB/PRES/2003 (DRC-OTP-0132-0237) signed by Thomas Lubanga Dyilo in Kinshasa, on 8 December 2003, which

iii. had *de facto* ultimate control over the adoption and implementation of UPC/RP policies, and only received technical advice from the movement's National Secretaries.[447]

369. As for the months of July and August 2002, although [REDACTED] claims to have heard that Thomas Lubanga Dyilo was in direct contact with the UPC political and military leadership in Bunia in early August 2002, when UPDF and UPC forces attacked APC troops in Bunia,[448] [REDACTED]– states that:

a. [REDACTED] Thomas Lubanga Dyilo [REDACTED] communicate with the outside or to receive visits;[449]

b. it was after [REDACTED] learnt that the UPC had taken control of Bunia that [REDACTED] issued the *Déclaration Politique du Front pour la Réconciliation et la Paix*.[450]

370. Therefore, on the evidence admitted for the purpose of the confirmation hearing, there is insufficient evidence to establish substantial grounds to believe that before his release at the end of August 2002[451] and his appointment as President of

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suspended Daniel Litscha, Victor Ngona Kabarole and Floribert Kisembo, among others, from their duties.

[446] See, for example, Decree No. 016/UPC/RP/CAB/PRESS/2002 (DRC-OTP-0089-0057), signed by Thomas Lubanga Dyilo in Bunia, on 2 December 2002, in which Chief Kahwa who, at the time, was Deputy National Secretary for Defence, was expelled from the UPC/RP.

[447] According to [REDACTED], some UPC/RP politicians, in particular Daniel Litsha, were disappointed because Thomas Lubanga Dyilo did not follow the strategies agreed upon in their meetings ([REDACTED], lines 299-306). [REDACTED] states that according to [REDACTED], Lubanga took most of the decisions without consulting with the members of the UPC/RP executive and ran the UPC/RP like a dictator and was against any dialogue within the movement (DRC-OTP-0105-0111, paras. 144 and 145). Kristine Peduto testified that not only did the UPC recognise Lubanga as its leader, but the UPC was also widely perceived as being under his control (ICC-01-04-01-06-T-38-EN[20Nov2006Corrected], page 49, lines 5-9).

[448] Statement of [REDACTED], DRC-OTP-0105-0107, para. 126 and DRC-OTP-0105-0148, para. 342; MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, DRC-OTP-0129-0390.

[449] Statement of [REDACTED], para. 96.

[450] Statement of [REDACTED], para. 104.

[451] Statement of [REDACTED], [REDACTED], para. 120 to [REDACTED], para. 125; Statement of [REDACTED], DRC-OTP-0105-0110, paras. 139-141.

the UPC/RP in early September 2002,[452] Thomas Lubanga Dyilo had ultimate *de facto* control over the adoption and implementation of UPC/RP policies.

371. Regarding the period from 13 August 2003 to the end of 2003, although the DRC authorities claim to have detained Thomas Lubanga Dyilo on 13 August 2003 and kept him under house arrest in Kinshasa until the end of 2003,[453] it should be noted that:

a. Thomas Lubanga Dyilo is the first signatory of the "*Projet de Société*" issued by the UPC/RP in Bunia on 15 November 2003;[454]

b. there is evidence that it was the dispute between Thomas Lubanga Dyilo, on the one hand, and Daniel Litsha[455], Victor Ngona Kabarole[456] and Floribert Kisembo,[457] on the other hand, which led to their being suspended from their official duties by a decree signed by Thomas Lubanga Dyilo in Kinshasa on 8 December 2003.[458]

372. Having given special consideration to this evidence, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that, despite being under house arrest in Kinshasa at the time, Thomas Lubanga Dyilo continued, from 13 August 2003 to the end of 2003, to exercise *de facto* within the UPC/RP the powers that he had exercised since the beginning of September 2002.

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[452] Statement of [REDACTED], [REDACTED], paras. 126-130.

[453] See footnote 267. See also the Defence allegations (ICC-01-04-01-06-T-32-EN[10Nov2006Edited], p. 51, line 17 to p. 52, line 1), which were not refuted by the Prosecution, that Thomas Lubanga Dyilo was indeed living in Kinshasa in November and December 2003 at least: "as I said on 1 November 2003, it is a military report to Mr Thomas Lubanga Dyilo at the time, as we all know, residing in Kinshasa", ICC-01-04-01-06-T-34-EN[14Nov2006Corrected], p. 19, lines 9-13.

[454] *Projet de Société*, DRC-D01-0001-0032 ff; see, in particular, DRC-D01-0001-0043.

[455] UPC/RP National Secretary for Special Operations in the Office of the President.

[456] UPC/RP National Secretary for relations with MONUC and bodies established under the Ituri Pacification Commission.

[457] FPLC Chief of Staff.

[458] Transcript of the interview with [REDACTED], [REDACTED]; Statement of [REDACTED], DRC-OTP-0105-0118, paras. 178 to 181; Statement of [REDACTED], para. 198; Decree No. 08bis/UPC/RP/CAB/PRES/2003 of 8 December 2003, DRC-OTP-0132-0238.

373. There is also sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo was appointed FPLC Commander-in-Chief immediately after the creation of the FPLC as the military wing of the UPC/RP in early September 2002,[459] and that, from early September 2002 to the end of 2003, Thomas Lubanga Dyilo:

i. served in that position *de jure*;[460]

ii. was regularly briefed about the general situation in Ituri and, in particular, about FPLC military operations and the situation in the FPLC military training camps;[461] and

iii. *de facto* regularly performed the duties associated with the position of Commander-in-Chief of the FPLC, which he held *de jure*.[462]

374. However, the Chamber is of the view that the evidence admitted for the purpose of the confirmation hearing suggests that other officers in the FPLC General

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[459] Statement of [REDACTED], para. 128 and [REDACTED], paras. 152 and 153.

[460] Throughout his interview with the Prosecution, [REDACTED] refers to Thomas Lubanga Dyilo as the "Supreme Commander" (see, for example, [REDACTED], lines 1315 and 1316, [REDACTED], line 1324 and [REDACTED], lines 2548-2550). [REDACTED] together with the other members of [REDACTED] were appointed by Thomas Lubanga Dyilo ([REDACTED], lines 2294-2300). [REDACTED].

[461] [REDACTED] says that [REDACTED] often went to see Thomas Lubanga Dyilo, amongst other reasons, to discuss logistic and financial issues ([REDACTED], line 2366 to [REDACTED], line 2379 and DRC-[REDACTED], lines 2559-2573); Statement of [REDACTED] (DRC-OTP-0127-0084, para. 65 and DRC-OTP-0127-0087, para. 81). [REDACTED] also refers to the close ties between Thomas Lubanga Dyilo and Rafiki Saba and Bosco Ntaganda ([REDACTED], lines 109-112 and [REDACTED], lines 113-127). [REDACTED] explains that Daniel Litsha told him about the close ties between Thomas Lubanga Dyilo, Bosco Ntaganda and Rafiki Saba (DRC-OTP-0105-0111, para. 144). [REDACTED] states that Bosco Ntaganda used a Motorola to communicate with Thomas Lubanga, Chief Kahwa and Floribert Kisembo (DRC-OTP-0127-0082, para. 55). More specifically, [REDACTED] noted that Bosco Ntaganda was in regular contact with Thomas Lubanga. "I believe he would contact him at least once a day and brief him on the situation and how the training was going." (DRC-OTP-0127-0082, para. 56). [REDACTED] also describes the daily contact between Bosco Ntaganda and Rafiki Saba (DRC-OTP-0127-0091, para. 102).

[462] See, in particular, Decree DRC-OTP-0089-0057 and DRC-OTP-0089-0093

Staff and, in particular, Floribert Kisembo, could have ordered the launching of military operations without consulting Thomas Lubanga Dyilo.[463]

375. [REDACTED] himself refers to:

a. the divisions among FPLC military officers as a result of the conflict between Thomas Lubanga Dyilo and Chief Kahwa between September and early December 2002;[464]

b. the crisis within the FPLC following the departure in late January 2003 of Commander Jérôme, FPLC Commander for the North-East Sector at the time;[465] and

c. the fact that Thomas Lubanga Dyilo worked more with FPLC Deputy Chief of Staff, Bosco Ntaganda, and UPC Chief of Security, Rafiki Saba.[466]

376. Consequently, on the evidence admitted for the purpose of the confirmation hearing, there is sufficient evidence to establish substantial grounds to believe that, in the main, but not on a permanent basis, Thomas Lubanga Dyilo had the final say over the adoption of FPLC policies and the implementation by the FPLC of policies adopted either by the UPC/RP or the FPLC.

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[463] For example, [REDACTED] says that the launch of the military operations which he refers to in paragraph 124 of his statement was decided and planned by Floribert Kisembo, Bosco Ntaganda, Tchaligonza, Kasangaki, and Bagonza (DRC-OTP-0105-0107, paras. 123 and 124). He added: "I clearly remember KAHWA [REDACTED] most of the crimes committed by the UPC during attacks were KISEMBO's doing. [REDACTED] that KISEMBO decided on some attacks without even referring back to LUBANGA. KAHWA used the expression "hard-hearted" to describe KISEMBO. By that he meant that KISEMBO was merciless. [REDACTED] that KISEMBO's attitude came from having spent too much time with Bosco NTAGANDA. KYALIGONZA [REDACTED] that KISEMBO had a tough and merciless nature.", DRC-OTP-0105-0119, para. 182. Furthermore, according to Floribert Kisembo, "Thomas Lubanga had not trained these soldiers… to be his soldiers… It was a consequence of the policy… which was not working… Which resulted in the fact that… these soldiers were there… but he did not like… he himself did not have control over his soldiers… He had no control over his soldiers… During that period " ([REDACTED], line 1471 to [REDACTED], line 1483).

[464] Transcript of the interview with [REDACTED], lines 2421-2447 and [REDACTED], lines 2448-2450.

[465] Transcript of the interview with [REDACTED], line 434 to [REDACTED], line 444.

[466] Transcript of the interview with [REDACTED], lines 446 and 447, [REDACTED], line 564, line 582 and lines 38-54) and Statement of [REDACTED] (DRC-OTP-0105-0111, para. 144 and DRC-OTP-0105-0118, para. 177); Human Rights Watch, *Ituri: "Covered in Blood" Ethnically Targeted Violence in Northeastern DR Congo*, DRC-OTP-0163-0306. Transcript of video material DRC-OTP-0164-0672, lines 634-638.

377. There is also sufficient evidence to establish substantial grounds to believe that:

i. when the FPLC was established in early September 2002, there was an agreement or common plan between Thomas Lubanga Dyilo, Chief Kahwa Panga Mandro (UPC Deputy National Secretary for Defence),[467] Rafiki Saba (UPC Chief of Security),[468] Floribert Kisembo (FPLC Chief of Staff),[469] Bosco Ntaganda (FPLC Deputy Chief of Staff for Military Operations),[470] and other FPLC senior commanders, including Commander Tchalingonza, who was in charge of the South-East Sector[471] to further the UPC/RP and FPLC war effort by (i) recruiting, voluntarily or forcibly, young people into the FPLC; (ii) subjecting them to military training and (iii) using them to participate actively in military operations and as bodyguards;

ii. although the agreement or common plan did not specifically target children under the age of fifteen years – it did target young recruits in general – in the normal course of events, its implementation entailed the objective risk that it would involve children under the age of fifteen years; and

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[467] According to [REDACTED], Chief Kahwa Panga Mandro, who was below Thomas Lubanga Dyilo in the chain of command, [REDACTED] ([REDACTED], lines 1313-1333), started having problems with Thomas Lubanga Dyilo in mid-October 2002 ([REDACTED], lines 2421-2425) and sometime before the end of 2002, had left the UPC/RP and founded his own movement, PUSIC ([REDACTED], lines 1313-1335). In this regard, see Decree No. 016/UPC/RP/CAB/PRES/ 2002 (DRC-OTP-0089-0057), signed by Thomas Lubanga Dyilo in Bunia, on 2 December 2002, dismissing Chief Kahwa who, at the time, was Deputy National Secretary for Defence, from the UPC/RP.

[468] [REDACTED] says that Rafiki Saba was UPC/RP Chief of Security at the time ([REDACTED], lines 115 and 116). [REDACTED] ([REDACTED], lines 109-112 and [REDACTED], lines 113-127) and [REDACTED] (DRC-OTP-0105-0111, para. 144) both refer to the close ties between Thomas Lubanga Dyilo, Rafiki Saba and Bosco Ntaganda.

[469] According to [REDACTED] from its inception until 3 December 2003 ([REDACTED], line 1195 to [REDACTED], line 1310). See also Decree No. 08bis/UPC/RP/CAB/PRES/2003 (DRC-OTP-0132-0237), signed by Thomas Lubanga Dyilo in Kinshasa, on 8 December 2003, in which Floribert Kisembo is suspended from his duties as FPLC Chief of Staff and replaced by Bosco Ntaganda.

[470] According to [REDACTED], Bosco Ntaganda was the FPLC Deputy Chief of Staff for Military Operations until [REDACTED] 8 December 2003 ([REDACTED], lines 1608-1616 and [REDACTED], lines 2659-2661). See also Decree No. 08bis/UPC/RP/CAB/PRES/2003 (DRC-OTP-0132-0237).

[471] According to [REDACTED], Tchaligonza was initially Deputy Commander then later FPLC Commander for the South-East Sector ([REDACTED], lines 1945-1952).

iii. the implementation of the agreement or common plan started at the latest when the FPLC was founded, i.e. in early September 2002, and lasted at least until the end of 2003.[472]

378. In this regard, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo, Chief Kahwa, Rafiki Saba, Floribert Kisembo, Bosco Ntaganda and Tchalingonza knew each other and had worked together well before the creation of the FPLC. This conclusion follows from the fact that there is sufficient evidence to establish substantial grounds to believe that:

a. the above-named persons were in one way or another involved in the July 2000 Hema mutiny within the APC, which triggered the creation of the UPC;[473]

b. they subsequently underwent military training at the Jinja military camp in Uganda;[474]

c. in early 2001, all these persons, except Thomas Lubanga, Chief Kahwa and Rafiki Saba, were military personnel assigned to the Simba Battalion deployed to the Équatoriale Province as members of the FLC;[475]

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[472] The Chamber has already found in Section IV/ B. that there is sufficient evidence to establish substantial grounds to believe that voluntary and forcible recruitment of young recruits, including those under the age of fifteen years, and their active participation in military operations and as bodyguards, continued throughout this period, although there is evidence that the FPLC allegedly lost control of a number of its military training camps at various times. See, for example, para. 185 above, concerning the FPLC's loss of control of the Mandro training camp at the beginning of December 2002, after Chief Kahwa left the UPC/RP and founded PUSIC. See also para. 185 above, concerning the FPLC's loss of control over a number of its military training camps close to Bunia, in particular, the Rwampara Camp, after the withdrawal of the FPLC from Bunia on 6 March 2003, following the joint UPDF-FNI attack on Bunia, until the FPLC regained control of Bunia in early May 2003, following the withdrawal of the UPDF forces stationed in Bunia.

[473] See the evidence considered in paragraph 168 above.

[474] See the evidence considered in paragraph 171 above.

[475] See the evidence considered in paragraph 171 above.

d. after the split within the FLC, they were redeployed to Bunia as members of the APC and worked alongside Thomas Lubanga Dyilo insofar as the latter was Defence Minister in the RCD-K/ML Government;[476]

e. after the UPC withdrew from the RCD-K/ML Government on 17 April 2002, they formed the core of the UPC military wing, which formally became the FPLC by a decree dated early September 2000 and signed by Thomas Lubanga Dyilo;[477]

f. from early September 2002: a) military matters were handled by Thomas Lubanga Dyilo and Chief Kahwa, UPC/RP Deputy National Secretary for Defence, directly with FPLC military commanders and, after the departure of Chief Kahwa from the UPC/RP, such matters came under the exclusive remit of the office of the President of the UPC/RP[478], and b) Rafiki Saba, as UPC/RP Chief of Security, was also involved in such matters.[479]

379. In addition, even though the agreement or common plan was not explicit, the Chamber has concluded that it existed and has made findings as to the content thereof having found that there was sufficient evidence to establish substantial grounds to believe that from early September 2002 to the end of 2003:

i. the FPLC repeatedly admitted into its ranks young recruits, including children under the age of fifteen years, who wished to voluntarily join the FPLC;[480]

ii. the FPLC repeatedly forcibly recruited into its ranks young recruits, including children under the age of fifteen years;[481]

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[476] See the evidence considered in paragraphs 165 and 166 above.
[477] See the evidence considered in section IV.A.I.a. above.
[478] Statement of [REDACTED], paras. 135-137.
[479] Transcript of the interview with [REDACTED], lines 38-54, [REDACTED], line 109 and [REDACTED], line 127); Statement of [REDACTED], DRC-OTP-0105-0111, para. 144.
[480] See para. 250 above.
[481] See para. 251 above.

iii. the FPLC encouraged the practice whereby each Hema family was to contribute to the war effort, in particular, by supplying young recruits, including children under the age of fifteen years;[482]

iv. the FPLC sent its young recruits, including children under the age of fifteen years, to the FPLC military training camps in Centrale, Rwampara, Mandro, Irumu, Bule, Bogoro, and Sota;[483]

v. the aim of the military training was to prepare the young FPLC recruits, including those under the age of fifteen years, to participate actively in military operations; the training lasted up to two months, and included physical exercises like learning to salute, march, run, take up positions and use firearms;[484]

vi. the young FPLC recruits, including those under the age of fifteen years, were subject to strict military discipline[485] and the instructors sought to boost their morale by making them sing aggressive military songs;[486]

vii. the most senior FPLC commanders – Thomas Lubanga Dyilo[487], Floribert Kisembo[488] and Bosco Ntaganda[489] – regularly visited FPLC military

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[482] See para. 252 above.
[483] See para. 265 above.
[484] See para. 265 above.
[485] See para. 265 above.
[486] See footnote 352.
[487] During his visits to the training camps, Thomas Lubanga Dyilo saw young FPLC recruits, including recruits under the age of fifteen years, undergoing training. He spoke to them and encouraged them to fight. The Statements [REDACTED] (DRC-OTP-0108-0129, para. 30), [REDACTED] (DRC-OTP-0126-0129, para. 34) and [REDACTED] (DRC-OTP-0126-0158, para. 23) describe Thomas Lubanga Dyilo's visits to the training camps at Centrale, Rwampara and Irumu, sometime before early September 2002 and 13 August 2003, when young FPLC recruits, including those under the age of fifteen years, were beginning their military training. The video recording of Thomas Lubanga's visit to the Rwampara Camp on 12 February 2003 and the transcript of the speech he gave before the young FPLC recruits, including those under the age of fifteen years, shows that he encouraged them to complete their military training and to prepare to take part in military operations (DRC-OTP-0120-0342, line 131 and DRC-OTP-0120-0349, line 329).
[488] [REDACTED] said that when he could he would attend the parades held to mark the end of the military training for young FPLC recruits ([REDACTED], line 377 to [REDACTED], line 396). In addition, [REDACTED] notes that during his stay at the [REDACTED] military training camp,

training camps where young recruits, including those under the age of fifteen years, were being trained;

viii. upon completion of their military training, Floribert Kisembo[490] and Bosco Ntaganda[491] and other senior commanders (such as Tchalingonza)[492] provided the young recruits, including those under the age of fifteen years, with a military uniform and a personal weapon (usually a firearm), and soon thereafter ordered them into combat on the front line in military operations conducted in Libi and Mbau in October 2002, in Largu in early 2003, in Lipri and Bogoro in February and March 2003, in Bunia in May 2003 and in Djugu and Mongwalu in June 2003;[493]

ix. it was common practice[494] among the most senior FPLC commanders (i.e. Thomas Lubanga Dyilo[495], Floribert Kisembo[496] and Bosco Ntaganda[497])

[REDACTED], in addition to Bosco Ntaganda who, at the time, was responsible for military training, he also saw Rafiki Saba, Floribert Kisembo and Tchalingonza (DRC-OTP-0127-0081, para. 50).

[489] According to [REDACTED], Bosco Ntaganda had direct responsibility for training the young FPLC recruits and [REDACTED], Bosco Ntaganda would address the recruits at the parades held to mark the end of their military training ([REDACTED], line 1195 and [REDACTED], lines 398 and 399). Bosco Ntaganda also appears on video recording DRC-OTP-0120-0293 (minute 00:03:10), which proves that he was at the Rwampara Camp when Thomas Lubanga Dyilo visited it on 12 February 2003.

[490] This practice is described by [REDACTED] ([REDACTED], lines 160 and 161 and [REDACTED], lines 162-177).

[491] Statements of [REDACTED] (DRC-OTP-0114-0024, para. 45 and DRC-OTP-0114-0025, para. 48) and [REDACTED] (DRC-OTP-0126-0131, para. 41).

[492] Statement of [REDACTED] (DRC-OTP-0126-0159, para. 26 and DRC-OTP-0126-0062, para. 37).

[493] See para. 266 above. Statements of [REDACTED] (DRC-OTP-0126-0131, para. 43, DRC-OTP-0126-0132, para. 44, DRC-OTP-0126-0133, para. 47, DRC-OTP-0126-0138, paras. 63-65, DRC-OTP-0126-0139, para. 68 and DRC-OTP-0126-0140, para. 70) and [REDACTED] (DRC-OTP-0108-0072, paras. 39-44). More specifically, the following soldiers, who were under the age of fifteen years at the time, said that they had been in combat under the direct orders of Bosco Ntaganda: [REDACTED], in 2003 (DRC-OTP-0114-0024, para. 45); [REDACTED], in late 2002 (DRC-OTP-0126-0131, para. 41) and [REDACTED] in 2003 (DRC-OTP-0126-0139, paras. 68 and 70); and [REDACTED] en 2003 (DRC-OTP-0132-0088, para. 46 to DRC-OTP-0132-0089, para. 50).

[494] See para. 267 above.

[495] Kristine Peduto testified that during her visit on 30 May 2003 to Thomas Lubanga Dyilo's residence in the Mudzi Pela neighbourhood (in Bunia), she saw a child, whose physical appearance clearly showed that he was under the age of fifteen years, who was guarding the residence, in uniform and bearing a Kalashnikov rifle (ICC-04-01-01-06-T-37-EN[15Nov2006Edited], p. 99, line 24 to p. 101, line 17). When cross-examined by the Defence, witness Peduto repeated what she had said in her examination-in-chief (ICC-04-01-01-06-T-39-EN[21Nov2006Edited], p. 98, line 3 to p. 100, line 6).

[496] [REDACTED] says that [REDACTED] had to wait, sometimes with the bodyguards of [REDACTED], who included child soldiers (DRC-OTP-0132-0087, para. 39). Furthermore, according to

and other senior commanders (such as Tchalingonza[498]) to use young recruits, including those under the age of fifteen years, as bodyguards to protect military objectives, such as their physical safety (including during military operations) and FPLC military quarters.

380. The conclusion reached by the Chamber as to the existence, content, and timeframe of the common plan is no way undermined by the statement of [REDACTED], who works for [REDACTED] in Bunia, and according to whom:

i. the problem of child soldiers in Bunia only surfaced after the UPDF and the FNI retook control of Bunia from the UPC on 6 March 2003 – which until then had been in the hands of the UPC;[499] and

ii. upon the UPC's and Thomas Lubanga Dyilo's return to Bunia in early May 2003, Thomas Lubanga Dyilo encouraged the demobilisation of child soldiers from all armed groups active in Ituri, including the FPLC.[500]

381. In this regard, the Chamber notes that this statement is at odds with several pieces of evidence admitted for the purpose of the confirmation hearing.[501] The

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[REDACTED], Floribert Kisembo and Bosco Ntaganda "were always escorted by three or four bodyguards each. Their escorts were adult militia members and young people my age." (DRC-OTP-0114-0021, para. 31).

[497] Regarding [REDACTED], [REDACTED] says that "[a]fter giving these specific instructions to his men, he turned towards us, the young recruits, and chose [REDACTED], including myself, and [REDACTED] militiamen over the age of eighteen to join his own escort. One of the [REDACTED] was my age, while [REDACTED] was younger. […] From that day until I left the UPC militia, I followed my commander everywhere he went, as my new duties required." (DRC-OTP-0126-0134, para. 52). [REDACTED] said that it was [REDACTED] responsibility as [REDACTED] bodyguard to follow [REDACTED] to collect [REDACTED] weapons and bring them back to Bunia (DRC-OTP-0126-0136, para. 58 to DRC-OTP-0126-0137, para. 61), to guard [REDACTED] house as the hostilities were about to begin and to participate directly in combat when ordered to do so (DRC-OTP-0126-0138, paras. 63 and 64); see also [REDACTED] (DRC-OTP-0114-0021, para. 31); [REDACTED] (DRC-OTP-0132-0087, para. 39).

[498] [REDACTED] asserts that [REDACTED] had [REDACTED] young FPLC soldiers as bodyguards, some of whom were under the age of fifteen years ([REDACTED], (DRC-OTP-0126-0159, para. 26).

[499] Statement of [REDACTED].

[500] Statement of [REDACTED].

[501] For example, according to [REDACTED]: "The history of child soldiers in the UPC goes back to 2000 when the mutiny took place and the mutineers were sent to KYAKWANZI on training. A lot of

Chamber has given special consideration to [REDACTED] statement regarding the extent to which the Child Demobilisation Decree signed on 1 June 2003 by Thomas Lubanga Dyilo was implemented,[502] and to the Circular[503] signed on 5 June 2003 by Floribert Kisembo ordering all FPLC units to implement the said decree. According to [REDACTED] "[t]his order has not been executed."[504]

382. In addition, the Chamber recalls that when she was asked about the Child Demobilisation Decree of 1 June 2003, Kristine Peduto answered that she thought it was "a public relations operation."[505]

b. Co-ordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime

383. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that from the time the FPLC was established in early September

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children had enlisted in the RCD/K-ML's APC because they had nowhere to go: most of them were orphans." ([REDACTED], para. 183). Similarly, [REDACTED] also believes that the children started to join Hema militia groups during the last six months of 2000. Furthermore, [REDACTED], para. 184) both refer in their statements to the training of young Hemas at the Mandro Camp as from June or July 2002 (DRC-OTP-0105-0105, paras. 115 and 116) and to the fact that "[w]hen the UPC drove out Lopondo [in early August 2002], the children joined the UPC army and fought for the FPLC" (DRC-OTP-0105-0099, para. 80).

[502] The *Décret n° 01bis/UPC/RP/CAB/PRES/2003 du 1er juin 2003 portant démobilisation des enfants-soldats des Forces patriotiques pour la libération du Congo* (DRC-OTP-0151-0299), signed by Thomas Lubanga Dyilo in Bunia on 1 June 2003, ordered as follows:

> "Art. 1: All individuals under the age of 18 years are, from this date, discharged from the *Forces patriotiques pour la libération du Congo*.
>
> Art. 2: The National Secretary for Follow-up and monitoring and the Chief of General Staff of the FPLC are both responsible for the implementation of this Decree, which shall enter into force on the date of its signature."

[503] See transcript of the interview with [REDACTED], line 385 to [REDACTED], line 484.

[504] Transcript of the interview with [REDACTED], lines 512 and 513).

[505] ICC-04-01-01-06-T-37-EN[15Nov2006Edited], p. 107, lines 2-25; In addition, see Human Rights Watch, *Ituri: "Covered in Blood" Ethnically Targeted Violence in Northeastern DR Congo*: "The Mothers Forum of Ituri complained to UPC President Lubanga in late 2002 about the recruitment of children. The UPC opened a small demobilization center, but according to local people, this was a mere public relations gimmick; the recruitment of children continued." (DRC-OTP-0163-0344).

2002 up until 13 August 2003 (when Thomas Lubanga Dyilo was placed under house arrest in Kinshasa):[506]

i) those participating in the common plan, in addition to Thomas Lubanga Dyilo,[507] had more direct responsibility for carrying out several aspects of the implementation of the plan, including:

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[506] See footnote 267.

[507] Regarding Chief Kahwa Panga Mandro, [REDACTED] stated that the Department of Defence was in charge of the training of new recruits ([REDACTED], lines 84-87), and identifies Chief Kahwa as UPC Defence Minister up to the beginning of December 2002 ([REDACTED], lines 2421-2425 and [REDACTED], lines 419-432). In this respect, [REDACTED] para. 137 and [REDACTED], para. 153) explains that i) in the first UPC/RP executive, Thomas Lubanga Dyilo delegated responsibility to Chief Kahwa Panga Mandro, Deputy National Secretary for Defence, for dealing with defence-related issues, and that ii) the Office of the President performed this role after Chief Kahwa's post was abolished by Decree No. 018/UPC/RP/CAB/PRES/2002 of 11 December 2002. Furthermore, [REDACTED] says that after Chief Kahwa returned from his mission to Rwanda, "he held discussions with the UPC's other Hema militiamen and the Hema dignitaries in order to locate a site where the military training could be conducted. The traditional chiefs were afraid and so Chief KAHWA offered MANDRO as the UPC's first military training centre. With the site agreed upon, the Hema traditional chiefs sent their young people to MANDRO to undergo military training […] Chief KAHWA [REDACTED] that initially he was the one who welcomed the young Hemas to the MANDRO training camp. Bosco NTAGANDA joined him at the camp and helped train the troops." (DRC-OTP-0105-0105, paras. 115 and 116).
[REDACTED] describes the importance of Rafiki Saba within the UPC/RP and FPLC as a result of his close ties with Thomas Lubanga Dyilo and Bosco Ntangada ([REDACTED], lines 109-112, and [REDACTED], lines 113-127); in this regard, see also the Statement of [REDACTED] (DRC-OTP-0105-0111, para. 144). [REDACTED] also says that [REDACTED] in June/July 2002, in addition to Bosco Ntaganda, who was responsible for military training at the time, he also saw Rafiki Saba, Kisembo and Tchalingonza, amongst others, at the camp (DRC-OTP-0127-0181, para. 50).
Regarding [REDACTED], he states that parades were held to mark the end of the military training for young FPLC recruits and that, [REDACTED] generally attended the parades to address the recruits, to boost their morale and advise them on their military role ([REDACTED], lines 377-390 and [REDACTED], lines 393-396). In addition, regarding [REDACTED] use of children under the age of fifteen years as bodyguards, see footnote 496.
[REDACTED] describes the importance of Bosco Ntaganda within the FPLC, and his close ties with Thomas Lubanga Dyilo and Rafiki Saba ([REDACTED], lines 109-112 and [REDACTED], lines 113-127); in this regard, see also the Statement of [REDACTED] ([REDACTED], para. 144). Also, according to [REDACTED], Bosco Ntaganda had direct responsibility for training and [REDACTED], Bosco Ntaganda would address the young FPLC recruits at the parades held to mark the end of their military training ([REDACTED], lines 398 and 399). According to [REDACTED], Bosco Ntaganda was in charge of military training at the Mandro Camp in June/July 2002 (DRC-OTP-0127-0181, para. 50). Video recording DRC-OTP-0120-0293 shows Bosco Ntaganda during Thomas Lubanga Dyilo's visit to the Rwampara Camp on 12 February 2003. When Thomas Lubanga Dyilo asked them if Bosco Ntaganda had visited the camp, the young FPLC recruits, including those under the age of fifteen years, answered in the affirmative (DRC-OTP-0120-0343, lines 179-182 and DRC-OTP-0120-0344, lines 183-185). Furthermore, these recruits were clearly told, including those under the age of fifteen years, that they should discuss any problems they may have with Bosco Ntaganda because he would then inform the upper echelons of the hierarchy (DRC-OTP-0120-0351, lines 386-391). See also the

- the voluntary or forcible recruitment of young persons, including children under the age of fifteen years, into the FPLC and their transportation to FPLC military training camps,

- militarily training them and supplying them with arms at the said camps,

- assigning them, at the conclusion of their military training, to military units or as bodyguards to protect military objectives; and

- ordering them into combat;

ii) Thomas Lubanga Dyilo played a key overall co-ordinating role in the implementation of the common plan, in particular, by:

- having direct and ongoing contacts with the other participants in the common plan tasked with carrying out the various aspects of the implementation of the plan,[508]

- inspecting several FPLC military training camps to encourage the new FPLC recruits, including those under the age of fifteen years, and prepare them to participate in hostilities,[509]

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evidence relating to visits by Bosco Ntaganda to FPLC training camps where children under the age of fifteen years underwent training (see footnote 489 above), and the use of children under the age of fifteen years by Bosco Ntaganda to participate actively in military operations (see footnote 493 above), and the use of children under the age of fifteen years as personal bodyguards by Bosco Ntaganda (see footnote 497 above).
Regarding Tchalingonza, [REDACTED] explained that he was the instructor at the Centrale Camp when [REDACTED] underwent [REDACTED] military training around [REDACTED] (DRC-OTP-0126-0161, para. 33). See also the evidence regarding the use by Tchalingonza of children under the age of fifteen years to participate actively in military operations (see footnote 492 above and the Statement of [REDACTED], DRC-OTP-0108-0071), and the use by Tchalingonza of children under the age of fifteen years as personal bodyguards (see footnote 498 above).

[508] See footnote 461 above.

[509] See the Statements [REDACTED] (DRC-OTP-0108-0129, para. 30), [REDACTED] (DRC-OTP-0126-0129, para. 34) and [REDACTED] (DRC-OTP-0126-0158, para. 23), describing visits by Thomas Lubanga Dyilo to the FPLC training camps in Centrale, Rwampara and Irumu between early 2002 and 13 August 2003, in which FPLC recruits under the age of fifteen years were undergoing military

- providing the necessary financial resources for the implementation of the common plan;[510]

iii) Thomas Lubanga Dyilo personally performed other tasks in the implementation of the common plan, in particular, by:

- encouraging the making of contributions to the war effort through the provision of young recruits to the FPLC, including children under the age of fifteen years,[511] and

- using children under the age of fifteen years as his personal bodyguards.[512]

384. In reaching its findings on the role played by Thomas Lubanga Dyilo, the Chamber attached particular weight to certain pieces of evidence.

385. Paragraph 20 of the report of 26 March 2003 entitled *Histoires individuelles – Bunia (Ituri)* prepared by Kristine Peduto, a MONUC child protection official, summarises the interview of a 14 year old child conducted [REDACTED] on 26 March 2003.[513] According to the summary:

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training at the time. See also the video recording of Thomas Lubanga Dyilo's visit to the Rwampara Camp on 12 February 2003, DRC-OTP-0120-0293.

[510] [REDACTED] says that [REDACTED] often met Thomas Lubanga Dyilo for logistic reasons: "[REDACTED]… often it was to try to ask him if we could have some money to get some food for the soldiers and that is what he did… [REDACTED] go and see him frequently." ([REDACTED], lines 2453-2456). [REDACTED] also said that other FPLC commanders met Thomas Lubanga Dyilo to discuss financial matters ([REDACTED], lines 2565 to 2566).

[511] Testimony of Kristine Peduto, ICC-04-01-01-06-T-37-EN[15Nov2006Edited], p. 94, line 25 to p. 96, line 15.

[512] See footnote 495.

[513] The introduction to the report states that "[TRANSLATION:] the interviews of the children were conducted in the Rwampara military camp by Protection staff from MONUC, the NGOs [REDACTED]; other interviews were carried out by CPA MONUC on CIP Bunia's premises" (DRC-OTP-0152-0274). In her testimony, Kristine Peduto confirmed that she had drafted the document using notes taken during interviews conducted at the Rwampara Camp and in Bunia in March 2003 (ICC-04-01-01-06-T-37-EN[15Nov2006Edited], p. 78, line 21 to p. 80, line 25). Furthermore, when asked why she had prepared the document, she stated: "[I] had begun keeping the notes of interviews carried out with children associated with various armed groups already in Butembo and Beni areas with – in order to document the experiences of these children associated with armed groups and, in addition, to enable us to prepare better the responses which we could give to these children if we succeeded in

> [TRANSLATION] [REDACTED] is a 14 year old boy who was forcibly recruited in Mungwalu by the UPC in February 2003 […] On the road to the Mungwalu market where he was visiting his family, [REDACTED] was taken in a vehicle in which Thomas Lubanga Dyilo was travelling with 6 other soldiers. [REDACTED] was with his older brother who was able to flee. Other children were caught, three of them were older, the others were younger: [REDACTED], four from Mungwalu, the others from Bunia. Thomas Lubanga Dyilo told them that they would go as far as Beni and that they would become rich […] They were all taken to Mandro where there were a lot of soldiers. They were organised into groups of 20, with Commander Fiston, Gegere, as their instructor. They received one week of training during which they learned how to handle GPMG weapons, rocket launchers and "*rapides*". They ate beans and maize with difficulty. He was then sent to a small village to provide security with about 30 other persons. After 6 March, he remained in the bush for a week before returning to his father's home in Bunia.[514]

386. After stating that while he was undergoing his military training at the [REDACTED] Camp at the beginning of 2003,[515] other children under the age of fifteen years were also undergoing the same training at the camp, [REDACTED] asserted that:

> From what I was told by the other militiamen, the President periodically visited the training camps to speak to the new recruits.[516]

387. [REDACTED] also provided the following information about the specific protocol they learnt at the [REDACTED] Camp for Thomas Lubanga Dyilo's visits:

> A while after we had begun our military training, some other militiamen came to the camp to teach us the protocol for visits by superiors. If President LUBANGA came you had to lift your rifle by holding the butt in your hand and resting the barrel on your shoulder, and then march past him with your legs very straight.[517]

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having them leave these armed groups. Based on these experiences we felt that we would be better armed to respond, and also by taking notes we could have a memory record of the questions which we had put and not have to put the same questions several times over, and to have a basis on which to work with them on an individual basis in the future. Excuse me. Also, in my specific role at MONUC the objective was to document and to archive information on the recruitment and utilisation of children by various armed groups, so the idea was to document what was happening as to prepare the response which one might have to give these children." (ICC-04-01-01-06-T-37-EN[15Nov2006Edited], p. 79, line 14 to p. 80, line 7).

[514] DRC-OTP-0152-0277 and DRC-OTP-0152-0278, para. 20. Under cross-examination by the Defence, Christine Peduto confirmed the information she had provided under examination by the Prosecution (ICC-04-01-01-06-T-39-EN[21Nov2006Edited], p. 74, line 25 to p. 76, line 12).

[515] In his statement, [REDACTED] says that he was forcibly taken to the FPLC training camp in [REDACTED] "[o]ne day in early 2003" (DRC-OTP-0108-0126, para. 19 and DRC-OTP-0108-0127, para. 22).

[516] Statement of [REDACTED] (DRC-OTP-0108-0129, para. 31).

[517] Statement of [REDACTED] (DRC-OTP-0108-0129, para. 31).

388. [REDACTED] also described one of Thomas Lubanga Dyilo's visits to the [REDACTED]Camp while it was under FPLC control:[518]

> I remember that President LUBANGA once came to visit us at the military camp during our training and that he told us that we had to fully understand what our instructors taught us so that we could attack and annihilate "those who wanted to play with us". I think that by this he meant the Lendu fighters.[519]

389. After equally stating that while [REDACTED] was undergoing her military training at the [REDACTED] Camp, other children under the age of fifteen years were also undergoing the same training at the camp,[520] [REDACTED] also described one of Thomas Lubanga Dyilo's visits to the [REDACTED] Camp while it was under FPLC control as follows:[521]

> We already knew Commander BOSCO because during our military training he visited [REDACTED] camp twice. The first time he spoke to us saying that we had better not run away from the camp or we would be killed and that we should make every effort to reach the end of our training because it was for our future well-being. The second time was two weeks before the end of our training, but he did not address us because he was just accompanying the UPC president, Thomas LUBANGA, with whom he had arrived. Each of them was in his own jeep. LUBANGA encouraged us to withstand the difficulties of the training until the end because it was to free our country from the Ugandans and the Lendu. He spoke to us in Swahili. He added that it was not the responsibility of others to make the Congo free, but our own. I would not be able to say who LUBANGA was referring to by "others". At the end of his speech, LUBANGA asked if anyone had any questions, but the threatening look that Commander [REDACTED] turned towards us made us understand that there were none, so no one dared speak and he departed in his jeep followed by BOSCO's jeep.[522]

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[518] [REDACTED] stated that his military training started in early 2003 (DRC-OTP-0108-0126, para. 19) and ended at least 15 to 30 days before the FPLC attack on Lipri (DRC-OTP-0108-0131, para. 42) which, as indicated above, was carried out between the end of February and early March 2003. So Lubanga's visit to [REDACTED] Camp mentioned by [REDACTED] took place before the FPLC withdrew from Bunia in early March 2003, after the joint UPDF and FNI attack on Bunia.

[519] Statement of [REDACTED] (DRC-OTP-0108-0129, para. 31).

[520] Statement of [REDACTED] (DRC-OTP-0126-0126, paras. 23 and 24).

[521] [REDACTED] stated that she was forced to go to the [REDACTED] Camp while she was fleeing Bunia after the UPC offensive against APC troops in Bunia, which caused Governor Jean-Pierre Lopondo to flee and which occurred in early August 2002 (DRC-OTP-0126-0126, paras. 22-24); that training at the [REDACTED] Camp lasted between one and a half months and two months (DRC-OTP-0126-0128, para. 31 and DRC-OTP-0126-0129, para. 33); and that Thomas Lubanga Dyilo visited [REDACTED]Camp about two weeks before the end of the training (DRC-OTP-0126-0129, para. 34).

[522] Statement of [REDACTED] (DRC-OTP-0126-0129, para. 34).

390. After stating that while she was undergoing her military training at the [REDACTED] Camp in 2003, other children under the age of fifteen years were also undergoing the same training at the camp,[523] [REDACTED] recalled two of Thomas Lubanga Dyilo's visits to the camp while it was under FPLC control:[524]

> [h]e visited the camp at least twice during my military training in Centrale but I was unable to attend his visits because each time I was sent shopping in the village market and therefore missed him. According to what the other recruits told me on my return to camp, upon his arrival LUBANGA only spoke to the camp commanders and not to the young fighters who were there for training. The other militia members also said that the aim of the meetings was to give commanders instructions on how to improve the way the camp was run and motivate them in their activities.[525]

391. Video number DRC-OTP-0120-0293 features Thomas Lubanga Dyilo visiting the Rwampara Camp on 12 February 2003 and, in his speech, he encourages young FPLC recruits, including those under the age of fifteen years, to participate in hostilities. He was preparing them in this regard when he stated:

> What we are doing, and we are doing it together with you, is to build an army … that can prevent … the killings … for all the tribes that are here in Ituri. Our army does not have one tribal enemy, no … the Bira tribe is not the enemy of our army, nor the Lendu tribe, nor the Hema tribe. Our enemy is any person… who refuses to allow peace to return to us here. Do we agree?[526]
>
> "[…] I wish you …. good training, do it, persevere, and tomorrow you will stand with a weapon and a uniform and the citizens will recognize you that now we have gotten protectors… We travelled some time before, we… returned recently … This army that we are protecting here is not a joke. It is an important army… I think that, in a few days from now, some among you who studied … who will finish the training, we … they will continue with other training, hey? They should continue to grow".[527]
>
> "[…] It should be a worthy army that we will present to the people. And already, the work that our army is doing now is of value to us all… When you finish, others will come behind you … we are forming this army and everybody feels …. "I am a useful soldier"… You stand facing the his… hi.. history of the country and you

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[523] Statement of [REDACTED] (DRC-OTP-0126-0158, para. 21 and DRC-OTP-0126-0159, para. 22.
[524] According to [REDACTED], Lubanga visited the [REDACTED] Camp in 2003 while [REDACTED] was undergoing military training (DRC-OTP-0126-0158, para. 23) and sometime before [REDACTED] participated in FPLC military operations in Lipri at the end of [REDACTED] military training (DRC-OTP-0126-0161, para. 32). Moreover, the FPLC military operations in Lipri took place in February and in early March 2003, i.e. before and around the time of the FPLC's retreat from Bunia in March 2006 as a result of a joint UPDF-FNI attack (see para. 184 above).
[525] Statement of [REDACTED] (DRC-OTP-0126-0158, para. 23).
[526] Transcript of video material (DRC-OTP-0120-0346, lines 255-261).
[527] Transcript of video material (DRC-OTP-0120-0348, lines 307-314).

know you are a useful soldier. We, as leaders, are doing everything so that you can get that benefit and meaning… Therefore…. continue to suffer for a few days… so that… so that you finish the training, and then erm… after the training, you… they will give you … they will give you work… It is for our benefit, it is for the benefit of… our country, it is for the benefit of our progress, it is for the benefit of our party".[528]

392. In her testimony, Kristine Peduto explained as follows what she had heard about the instructions given by Thomas Lubanga Dyilo and the UPC/RP leadership to mobilise the Hema community in a bid to intensify its war effort:

Q: Did you hear or did you get to know as to whether Thomas Lubanga participated in such sort of public calls to the Hema community?

A: This is something that was reported to us, but – which I did not hear myself.

Q: What have you – what has been reported to you in respect of Thomas Lubanga Dyilo?

A: That orders had been sent to the superiors of the UPC – to UPC officials, to ensure that recruitments took place.

Q: And can you provide some detail on what these orders were about in more concrete terms?

A: The orders were to mobilise and make sure that the Hema community mobilised to defend itself against attacks from Lendu militias. When we refer to the Hema community, we are referring here to all the population with messages as clear as calls to families to give up one of their children. There was one of the messages – one of the clearest messages which was given to the families, which was that they should contribute to the struggle of the movement of the party, either giving a child a cow, or sometimes these requests were for material support of the child while the child was a member of the movement. This was a recurrent message within the Hema community.

Q: And how did you get to know about this recurrent message within the Hema community?

A: By many various testimonies from various sources, either from informers or from people who were in charge of protecting children. It was mostly the protection agencies that told us about us – but there were also people that we met in the course of our general investigations, which were – who were not involved in the politics as pursued by one or other of the groups. They told us this on many occasions. This seemed to be the order of the day for a large number of people in the areas that were under UPC control."[529]

393. Kristine Peduto also explained that she met Thomas Lubanga Dyilo in person for the first time during a meeting held on 30 May 2003 at his residence in Mudzi-

[528] Transcript of video material (DRC-OTP-0120-0348, line 319 to DRC-OTP-0120-0349, line 329).
[529] ICC-04-01-01-06-T-37-EN[15Nov2006Edited], p. 94, line 25 to p. 96, line 15. Under cross-examination by the Defence, witness Peduto repeated what she had stated under examination by the Prosecution (ICC-04-01-01-06-T-39-EN[21Nov2006Edited], p. 81, line 18 to p. 83, line 16).

Pela, a neighbourhood of Bunia.[530] When asked whether Thomas Lubanga Dyilo's residence was guarded at the time of the meeting, Kristine Peduto stated the following:

> A. Yes, it was guarded and I remember especially because this is something that really shocked us. It was guarded by children – armed children – not only armed children, but including armed children, and they were wearing uniforms.
>
> Q. And these armed children wearing uniforms, just for clarification, were guarding the residence of Thomas Lubanga Dyilo? This is a question.
>
> A. Yes, that's right, exactly; they were guarding this residence and it was obvious in the way in which they approached the vehicles of MONUC that parked in the compound of that residence and who took part in effecting our entry into the residence of Mr Lubanga.
>
> Q. And do you still, Ms Peduto – do you still have a recollection about the age of these children?
>
> A. I thought that they were young enough to – for all of us to be shocked at their presence during our arrival. I remember seeing one who was particularly small, but at the same time, it was nearly nightfall, so we did not carry out a detailed investigation on the membership of the guard. We were particularly shocked by their presence and I saw – I remember seeing a young child who was less than 15 years of age, obviously. I didn't really take note of the other ones.
>
> Q. You mentioned that these children, including the one child in respect of which you were sure that it was under 15 years, that these children were armed. What sort of arms did they have?
>
> A. I think they had Kalashnikovs.
>
> Q. And how did you feel at the time when you went to Thomas Lubanga Dyilo with the purpose to talk about the use of children in the UPC militia and you arrived at his residence and you saw children, including young children, guarding his residence?
>
> A. We thought it was somewhat provocative, especially as the MONUC officer was going to the meeting, whereas, in my view, the interview should have been conducted in MONUC. The MONUC field office manager was courteous enough to go to the place of the meeting and I felt that this episode was a provocation of some sort by Mr Lubanga.
>
> Q: [Not interpreted]
>
> A: By Mr Lubanga.[531]

394. The Prosecution submits that Thomas Lubanga Dyilo's responsibility for the voluntary and forcible recruitment of children under the age of fifteen years into

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[530] ICC-04-01-01-06-T-37-EN[15Nov2006Edited], p. 98, line 3 to p. 99, line 8.

[531] ICC-04-01-01-06-T-37-EN[15Nov2006Edited], p. 100, line 3 to p. 101, line 17. Under cross-examination by the Defence, witness Peduto reasserted what she had stated under examination by the Prosecution ICC-04-01-01-06-T-39-EN[21Nov2006Edited], p. 98, line 3 to p. 101, line 20.

FPLC ranks and using them to participate actively in hostilities covers the period from 1 July 2002 to the end of 2003.

395. However, as stated in paragraphs 370 and 377 above, the Chamber simply found that there is sufficient evidence to establish substantial grounds to believe that the implementation of the common plan started no later than when the FPLC was founded at the beginning of September 2002.

396. The Chamber has found that there is sufficient evidence to establish substantial grounds to believe that while he was under house arrest from 13 August 2003 to the end of 2003, Thomas Lubanga Dyilo continued to exercise *de facto* within the UPC/RP and FPLC, the powers that he had exercised since the beginning of September 2002.

397. However, on the evidence admitted for the purpose of the confirmation hearing, there is insufficient evidence to establish substantial grounds to believe that while he was detained in Kinshasa from 13 August 2003 to the end of 2003, Thomas Lubanga Dyilo continued to play a co-ordinating role in the implementation of the common plan. In this respect, the Chamber notes that all the evidence referred to in the preceding paragraphs pertains to events which occurred between early September 2002 and 13 August 2003.

398. The Chamber also finds that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo and the other participants in the common plan implemented it in a co-ordinated manner, and that Thomas Lubanga Dyilo had joint control over the implementation of the plan in so far as the essential overall co-ordinating role which he played gave him the power to frustrate the implementation of the plan if he refused to play his part.

399. In this regard, the Chamber has already found that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo, Chief Kahwa, Rafiki Saba, Floribert Kisembo, Bosco Ntaganda and other senior FPLC commanders

(such as Tchaligonza) knew each other and had been working together from the time of the Hema mutiny which broke out within the APC in July 2000 and which had triggered the creation of the UPC.[532] Moreover, it appears from the transcript [REDACTED][533] and the statements of [REDACTED],[534] [REDACTED][535] and [REDACTED][536] that the other participants in the common plan allegedly visited Thomas Lubanga Dyilo regularly and that he was allegedly briefed about FPLC military operations and the situation in the FPLC military training camps.

[532] See paragraph 168 above.

[533] [REDACTED] states that [REDACTED] often went to see Thomas Lubanga Dyilo, particularly to discuss logistic and financial difficulties ([REDACTED], line 2366 to [REDACTED], line 2379 and [REDACTED], lines 2559-2573); Statement of [REDACTED] (DRC-OTP-0127-0084, para. 65 and DRC-OTP-0127-0087, para. 81). [REDACTED] also refers to the close ties between Thomas Lubanga Dyilo and Rafiki Saba and Bosco Ntaganda ([REDACTED], [REDACTED], [REDACTED], lines 109-112 and [REDACTED], lines 113-127).

[534] [REDACTED] explains that [REDACTED] described to him the close ties between Thomas Lubanga Dyilo, Bosco Ntaganda and Rafiki Saba (DRC-OTP-0105-0111, para. 144).

[535] According to [REDACTED], Bosco Ntaganda used a Motorola to communicate with Thomas Lubanga, Chief Kahwa and Floribert Kisembo (DRC-OTP-0127-0082, para. 55). In particular, [REDACTED] points out that Bosco Ntaganda contacted Thomas Lubanga regularly. "[REDACTED] he would contact him at least once a day and brief him on the situation and how the training was going." (DRC-OTP-0127-0082, para. 56). [REDACTED] also mentions the daily communication between Bosco Ntaganda and Rafiki Saba (DRC-OTP-0127-0091, para. 102).

[536] [REDACTED] refers to frequent meetings between Thomas Lubanga, Floribert Kisembo and Bosco Ntaganda which were held at Thomas Lubanga Dyilo's residence and during which, [REDACTED] (DRC-OTP-0126-0137, para. 60). [REDACTED] also describes how Bosco Ntaganda used a Motorola or a radio to brief Thomas Lubanga Dyilo on ongoing military operations from the field (DRC-OTP-0126-0136, para. 57 and DRC-OTP-0126-0139, para. 69).

400. In the view of the Chamber, the following excerpts from the speeches given by Thomas Lubanga Dyilo and Jean de Dieu Tinanzabo before young FPLC recruits, including those under the age of fifteen years, at the Rwampara Camp on 12 February 2003 are indicative of the level of co-ordination in the implementation of the common plan:

> TL: […] I am Thomas Lubanga, the President of our party, the UPC. I think this is the first time that many of you have seen me… isn't it?
>
> ALL: Yes
>
> TL: Ah?
>
> ALL: Yes
>
> TL: Have you seen me before?
>
> [00:09:55. Cut to view of onlookers]
>
> TL: You are used to… talking with our commanders… who are … erm… are… helping with this… work… of training… who are…. are… building the army every … everyday. I am with them all the time but there is a lot of work… A lot… And… sometimes my work requires me to go abroad or I have meetings all the time …. So it is difficult for me to meet with you all the time.
>
> [00:10:40 Cut to view of onlookers]
>
> TL: …erm, the Chief of Staff, Commander Bosco, comes to see you. Does he come here?
>
> ALL: Yes.
>
> TL: Does he come here regularly?
>
> ALL: Yes.
>
> TL: If he does not come, you tell me. Does he come here regularly?
>
> ALL: Yes![537]
>
> JT: […] Now I have seen you, I do not want to talk for too long. Continue your training. We are keeping an eye on you all the time. So that we can know your problems… and solve them. You said a while ago that the Operations Commander…. Commander Bosco comes to see you regularly. If you have difficulties, tell him. And they will get to a higher level… of our leadership. Because he is a senior leader of our army the FPLC.

401. Regarding the crucial role played by Thomas Lubanga and his ability to frustrate the implementation of the common plan, [REDACTED] states that [REDACTED] had to meet Thomas Lubanga Dyilo because he was the only person in

[537] DRC-OTP-0120-0343, line 159 to DRC-OTP-0120-0344, line 185.

a position to solve the logistic and financial difficulties that they sometimes had to contend with.[538]

402. According to [REDACTED], [REDACTED] told him that Thomas Lubanga "used to take most of the decisions himself without consulting with the members of the movement's executive"[539] and "was running the movement like a dictator and was against any dialogue within the movement."[540]

403. Furthermore, when asked whether the UPC identified itself with Thomas Lubanga Dyilo, Kristine Peduto answered as follows:

> The movement recognised him as its leader. The UPC at that time was widely described as being under the control of Mr Lubanga. The briefings I received from my colleagues, the military observers, also indicated that that was the case.[541]

2. Subjective elements

a. The suspect must fulfil the subjective elements of the crime charged

404. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that from early September 2002 to 13 August 2003, Thomas Lubanga Dyilo:

i. was, at the very least, aware that, in the ordinary course of events, the implementation of the common plan would involve:

- the voluntary recruitment of children under the age of fifteen years into the FPLC;

- the forcible recruitment of children under the age of fifteen years into the FPLC;

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[538] See footnote at para. 393 above.
[539] DRC-OTP-0105-0111, para. 144.
[540] DRC-OTP-0105-0111, para. 145.
[541] Testimony of Kristine Peduto (ICC-01-04-01-06-T-38-EN[20Nov2006Corrected], p. 48, lines 5-9.

- the use of children under the age of fifteen years to participate actively in military operations and as bodyguards to protect military objectives;

ii. accepted such a result by reconciling himself with it or by condoning it.

405. In reaching this finding, the Chamber has given special consideration to the following evidence:

i. Kristine Peduto's written report of 26 March 2003 entitled "*Histoires individuelles – Bunia (Ituri)*", which situates Thomas Lubanga Dyilo at a place and time where children under the age of fifteen years were being forcibly enrolled into the FPLC;[542]

ii. Kristine Peduto's testimony about the visible presence of children under the age of fifteen years among FPLC soldiers guarding UPC buildings in Bunia in September 2002;[543]

iii. the combination of the evidence relating to:

- the extent of the voluntary and forcible recruitment of children under the age of fifteen years into the FPLC and their active participation in military operations and as bodyguards to protect military objectives;[544] and to

- the proximity of the FPLC military training camps, where young recruits under the age of fifteen years were receiving military training, to Thomas Lubanga Dyilo's residence in Bunia;[545]

iv. the statements of [REDACTED],[546] [REDACTED][547] and [REDACTED][548] concerning Thomas Lubanga Dyilo's visits to FPLC training camps in

[542] MONUC, *Histoires individuelles – Bunia (Ituri) Enfants soldats* (DRC-OTP-0152-0278).
[543] ICC-04-01-01-06-T-37-EN[15Nov2006Edited], p. 28, line 6 to p. 29, line 25.
[544] See Sections IV/ B. 1) and 2) above.
[545] For example, those in Centrale, 12 kilometres north of Bunia, Rwampara, 15 kilometres south-west of Bunia, and Mandro, 15 kilometres east of Bunia (see para. 265 above).
[546] Statement of [REDACTED] (DRC-OTP-0108-0129, paras. 30-31).

[REDACTED] at a time when the camps were under FPLC control and when recruits under the age of fifteen years were undergoing military training there;

v. the video of Thomas Lubanga Dyilo's visit to the Rwampara Camp on 12 February 2003 and the transcript of the speech he gave before the young FPLC recruits, including those under the age of fifteen years, urging them to complete their military training and prepare to participate in military operations;[549]

vi. Kristine Peduto's testimony that Thomas Lubanga issued instructions that Hema families be encouraged to provide young recruits to the FPLC, including children under the age of fifteen years;[550] and

vii. Kristine Peduto's testimony that Thomas Lubanga Dyilo used children under the age of fifteen years as bodyguards to guard his home.[551]

406. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that:

i. from early September 2002 to 2 June 2003, Thomas Lubanga Dyilo was aware of the factual circumstances that established the existence of an armed conflict of an international character;

ii. from 3 June 2003 to 13 August 2003, Thomas Lubanga Dyilo was aware of the factual circumstances that established the existence of an armed conflict not of an international character;

iii. from early September 2002 to 13 August 2003, Thomas Lubanga Dyilo was aware of the existence of a nexus between the enlistment and conscription

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[547] Statement of [REDACTED] (DRC-OTP-0126-0129, para. 34).
[548] Statement of [REDACTED] (DRC-OTP-0126-0158, para. 23).
[549] Transcript of video material (DRC-OTP-0120-0342, line 142 to DRC-OTP-0120-0349, line 329).
[550] ICC-04-01-01-06-T-37-EN[15Nov2006Edited], p. 93, line 25 to p. 94, line 15.
[551] ICC-04-01-01-06-T-37-EN[15Nov2006Edited], p. 98, line 24 to p. 100, line 17.

of children under the age of fifteen years into the FPLC and their active participation in hostilities, on the one hand, and the armed conflict taking place in Ituri, on the other.

407. In reaching this finding, the Chamber has given special consideration to the evidence discussed in section IV.A.1.b.

b. The suspect and the other co-perpetrators must all be mutually aware and mutually accept that implementing their common plan may result in the realisation of the objective elements of the crime

408. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that from early September 2002 to 13 August 2003:

i. Thomas Lubanga Dyilo, Chief Kahwa Panga Mandro,[552] Rafiki Saba, Floribert Kisembo, Bosco Ntaganda and other senior FPLC commanders such as Tchalingonza were aware that, in the normal course of events, children under the age of fifteen years would be voluntarily or forcibly recruited into the FPLC and used to participate actively in military operations and as bodyguards to protect military objectives as a result of implementing their common plan in furtherance of the UPC/RP and FPLC war effort which entailed:

- the voluntary or forcible recruitment of young persons into the FPLC;
- subjecting the young FPLC recruits to military training; and
- using the young FPLC recruits to participate actively in military operations and as bodyguards to protect military objectives.[553]

[552] Concerning the period during which Chief Kahwa allegedly took part in implementing the common plan, see footnote 507 above.
[553] In the case of Thomas Lubanga Dyilo, the Chamber has given special consideration to the evidence discussed in the preceding sub-section. In the case of Chief Kahwa Panga Mandro, Rafiki Saba, Floribert Kisembo, Bosco Ntaganda and Tchalingonza, the Chamber has given special consideration to the evidence discussed in the paragraph referred to in footnote 507.

ii. Thomas Lubanga Dyilo, Chief Kahwa Panga Mandro, Rafiki Saba, Floribert Kisembo, Bosco Ntaganda and other senior FPLC commanders such as Tchalingonza accepted the idea that the implementation of their common plan would lead to:

- the voluntary or forcible recruitment of children under the age of fifteen years into the FPLC; and

- using them to participate actively in military operations and as bodyguards to protect military objectives.[554]

iii. Thomas Lubanga Dyilo, Kahwa Panga Mandro, Rafiki Saba, Floribert Kisembo, Bosco Ntaganda and other senior FPLC commanders such as Tchalingonza all shared the awareness of the consequences described in paragraphs i) and ii) above and accepted them.[555]

c. The suspect must be aware of the factual circumstances enabling him or her to exercise joint control over the crime

409. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that from early September 2002, when the FPLC was created, until 13 August 2003, Thomas Lubanga Dyilo:

i. was aware of the specific role that he played within the UPC/RP[556] and the FPLC;[557]

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[554] In the case of Thomas Lubanga Dyilo, the Chamber has given special consideration to the evidence discussed in the preceding sub-section. In the case of Chief Kahwa Panga Mandro, Rafiki Saba, Floribert Kisembo, Bosco Ntaganda and Tchalingonza, the Chamber has given special consideration to the evidence discussed in the paragraph referred to in footnote 507.

[555] In reaching this finding, the Chamber has given special consideration to i) the evidence relating to the fact that Thomas Lubanga Dyilo, Chief Kahwa, Rafiki Saba, Floribert Kisembo, Bosco Ntaganda and Tchalingonza knew each other and had worked together from the time of the Hema mutiny in July 2000 which led to the establishemnt of the UPC (para. 168 above); and ii) the evidence discussed in para. 358 above.

[556] In reaching this finding, the Chamber has given special consideration to the evidence discussed in section VI.B.1.a.

[557] In reaching this finding, the Chamber has given special consideration to the evidence discussed in section VI.B.1.a.

ii. was aware of his co-ordinating role in the implementation of the common plan in furtherance of the UPC/RP and FPLC war effort a) by voluntarily or forcibly recruiting young people into the FPLC; b) by subjecting them to military training; and c) by using them to participate actively in military operations and as bodyguards to protect military objectives;[558]

iii. was aware of the essential nature of his co-ordinating role in the implementation of the common plan and of his ability to frustrate the implementation of the plan by refusing to play this co-ordinating role.[559]

3. Conclusion

410. Accordingly, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that from early September 2002 to 13 August 2003, Thomas Lubanga Dyilo incurred criminal responsibility as a co-perpetrator within the meaning of article 25(3)(a) of the Statute for the crimes referred to in Section IV of this decision.

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[558] In reaching this finding, the Chamber has given special consideration to: i) the video recording of Thomas Lubanga Dyilo's visit to Rwampara Camp on 12 February 2003 during which, after introducing himself as the "President of your party", Thomas Lubanga Dyilo explained to the recruits, including those under the age of fifteen years, that, "You are used to… talking with our commanders… who are … erm… are… helping with this… work… of training… who are…. are… building the army every … everyday. I am with them all the time but there is a lot of work… A lot… And… sometimes my work requires me to go abroad or I have meetings all the time …. So it is difficult for me to meet with you all the time." (DRC-OTP-0120-0343, lines 169-175); ii) the transcript of the Prosecution's interview of [REDACTED], which shows that [REDACTED] ([REDACTED], line 2366 to [REDACTED], line 2411), and [REDACTED] ([REDACTED], lines 2565-2566) often had to meet Thomas Lubanga Dyilo, the only person in a position to resolve the logistic and financial difficulties that they sometimes had to contend with; iii) the transcript of the Prosecution's interview of [REDACTED] and the statements of [REDACTED], [REDACTED] and [REDACTED], who allege that other participants in the common plan often visited Thomas Lubanga Dyilo and that he was *de facto* regularly briefed about the general situation in Ituri and, in particular, about FPLC military operations and the situation in the FPLC military training camps (see footnotes 533 to 536); and iv) the Statements of [REDACTED] (DRC-OTP-0108-0129, paras. 30 and 31), [REDACTED] (DRC-OTP-0126-0129, para. 34), [REDACTED] (DRC-OTP-0126-0158, para. 23) regarding the visits paid by Thomas Lubanga Dyilo to FPLC military training camps located in [REDACTED] when they were under FPLC control, and where FPLC recruits under the age of fiteeen years were undergoing military training.

[559] In reaching this finding, the Chamber has given special consideration to the evidence referred to in the preceding footnote.

FOR THESE REASONS,

RECALLS that in its decisions of 10 February 2006 and 3 October 2006, the Chamber found that the instant case fell within the jurisdiction of the Court and was admissible pursuant to article 17 of the Statute, and **DECLARES** that no new submissions were made before the Chamber in this regard;

DECLARES that the Chamber did not decide anew upon the numerous Prosecution Rule 81 applications which are affected by the judgements rendered by the Appeals Chamber on 14 December as the Chamber is satisfied that the "sufficient evidence to establish substantial grounds to believe" standard under article 61(7) of the Statute has been met without reference to the Prosecution evidence affected by those judgements;

DECIDES to apply, in Annexes I and II of this decision, the guiding principles prescribed in the judgements rendered by the Appeals Chamber on 14 December 2006 to the redactions authorised to the following documents after the decisions affected by the said judgements were rendered:

i) the statements of [REDACTED], Kristine Peduto and [REDACTED],

ii) the transcript of the interview of [REDACTED],

iii) documents related to the said statements and transcripts;

DECIDES to admit into evidence the items seized from the home of [REDACTED];

DECLARES that the Defence has not presented sufficient evidence to lead to the conclusion that some Prosecution evidence was obtained as a result of the seizure conducted by Uruguayan MONUC forces on 6 September 2003, and that, as a result, the Chamber is under no obligation to consider whether items originally seized by these forces are admissible under article 69(7) of the Statute for the purpose of the confirmation hearing;

DENIES the Defence application to declare inadmissible any evidence for which the Prosecution has not provided an explanation as to the chain of custody and transmission;

DENIES the Defence application to declare inadmissible any anonymous hearsay evidence and **DECLARES** that, in principle, such evidence was only used to corroborate other evidence;

DENIES the Defence application to declare inadmissible the attestations of birth [REDACTED] and **DECLARES** that the probative value of these attestations was determined in the context of the assessment of the totality of the evidence admitted for the purpose of the confirmation hearing;

DECLARES that, in respect of the Defence challenge to the credibility and reliability of statements made by children and the entire testimony of Kristine Peduto, the Chamber attached more probative value to those pieces of evidence from the children and from Kristine Peduto that were corroborated by other evidence admitted for the purpose of the confirmation hearing;

DENIES the Defence application challenging the admission into evidence of four reports presented by the Prosecution at the hearing of 27 November 2006 concerning the meaning of the term "Hema Gegere" and an expert report submitted to the *Cour d'appel de Paris* presented by the Prosecution at the hearing of 27 November 2006 and **DECLARES** these reports to be admissible as evidence;

DENIES the Defence objections relating to the admissibility and probative value of some of the witness statements disclosed to the Defence;

DECLARES, in regard to the Prosecution application challenging the authenticity of some pieces of evidence presented by the Defence and requesting that no probative value be attached thereto, that the Chamber determined the probative value of these pieces of evidence on a case-by-case basis;

DENIES the Prosecution application objecting to the admissibility of the dated and signed version of [REDACTED] letter presented by the Defence on 27 November 2006;

DECLARES inadmissible the study by the University of California, Berkeley, which the Defence failed to provide to the Chamber;

DENIES the Defence application to withdraw the statement of [REDACTED] and the transcript of the interview of [REDACTED] from the Defence List of Evidence;

DENIES the Defence application concerning the form of the Document Containing the Charges;

DECLARES that the Chamber took into consideration only matters that were discussed orally by the parties at the confirmation hearing;

DENIES the urgent Defence application filed on 18 December 2006 seeking access to a Human Rights Watch and Redress report entered into the record of the Situation in the DRC on 30 June 2005;

DECLARES that no evidence was presented which would make it possible to conclude that the Prosecution did not disclose to the Defence the bulk of potentially exculpatory evidence or evidence that could be material to the preparation of the Defence;

CONFIRMS, on the evidence admitted for the purpose of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 25(3)(a) of the Statute from early September 2002 to 2 June 2003;

CONFIRMS, on the evidence admitted for the purpose of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that

Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute from 2 June to 13 August 2003;

COMMITS Thomas Lubanga Dyilo to a Trial Chamber for trial on the charges as confirmed;

TRANSMITS this decision and the record of the proceedings in the instant case to the Presidency pursuant to rule 129 of the Rules.

Done in French and English, the French version being authoritative.

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Judge Claude Jorda
Presiding Judge

_____ _____

Judge Akua Kuenyehia **Judge Sylvia Steiner**

Done on this Monday 29 January 2007

At The Hague

The Netherlands

ANNEXE I : ***Application des arrêts de la Chambre d'appel du 14 décembre 2006***

Version Publique

1) Remarques préliminaires

La Chambre a autorisé la suppression de mots ou d'expressions qui pourraient être préjudiciables aux enquêtes à venir du Bureau du Procureur si la Défense y avait accès.

Au préalable, la Chambre rappelle que la règle 81-2 du Règlement a pour objet de protéger d'une part les « enquêtes en cours » et, d'autre part, les « enquêtes à venir » du Bureau du Procureur. À cet égard, la Chambre a déterminé dans une décision antérieure que, à la différence des « enquêtes à venir », les « enquêtes en cours » doivent être entendues comme renvoyant à l'enquête en cours sur Thomas Lubanga Dyilo dans le cadre de l'affaire actuelle le concernant, telle qu'exposée dans le mandat d'arrêt délivré à son encontre.

La Chambre a déterminé que les termes dont la suppression a été autorisée pour éviter des préjudices aux « enquêtes à venir » du Bureau du Procureur relevaient de différentes catégories. Elle a dû évaluer l'étendue et le poids de ces termes dans chacune des déclarations de témoins et procéder à une analyse en deux temps.

Dans un premier temps, la Chambre a évalué si les termes visés par les requêtes introduites par le Procureur en vertu de la règle 81-2 du Règlement permettaient d'identifier ses enquêtes. À cet égard, la Chambre a considéré que la simple mention dans un témoignage d'un évènement, d'un lieu ou d'une personne sur lequel le Procureur a l'intention de mener une « enquête à venir » n'est pas suffisante pour en considérer l'expurgation nécessaire au sens de la règle 81-2 du Règlement. Ainsi, la Chambre s'est demandé si dans le contexte ressortant de chacune des déclarations de témoins, la Défense pouvait être amenée à identifier les enquêtes du Procureur.

En outre, la Chambre s'est demandée si la Défense pourrait être en mesure, le cas échéant, de porter préjudice aux « enquêtes à venir » du Bureau du Procureur, notamment en décourageant les informateurs de donner des informations, en menaçant des témoins et des victimes potentiels, en détruisant des éléments de preuve potentiels ou en fournissant à d'autres personnes les moyens de faire obstacle aux enquêtes du Procureur.

Dans un deuxième temps, la Chambre a procédé à l'évaluation des intérêts en présence afin de déterminer si la suppression de mots ou expressions pouvait être autorisée. En effet, gardienne de l'exercice effectif des droits de la Défense et des intérêts du Procureur de mener à bien ses enquêtes, la Chambre s'est assurée qu'un juste équilibre était préservé entre la préparation de la Défense aux fins de l'audience de confirmation des charges et la protection des enquêtes du Bureau du Procureur.

2) Les sources d'information du Bureau du Procureur

La première catégorie que la Chambre a identifiée est celle des sources d'information du Bureau du Procureur qui ont une connaissance directe des crimes et qui font ou pourraient

faire l'objet de ses « enquêtes à venir ». À cet égard, le témoignage de Kristine Peduto et les documents qui y sont annexés contiennent des expurgations effectuées en application de la règle 81-2 du Règlement, pour éviter que la Défense puisse identifier des personnes physiques ou morales qui ont une connaissance directe de crimes commis dans la région de Bunia.

Premièrement, ces personnes physiques ou morales sont importantes dans la mesure où elles s'investissent particulièrement dans la protection de l'enfance. De ce fait, elles sont en contact direct et régulier avec les enfants soldats et ont donc accès à des informations de première main s'agissant des crimes perpétrés à Bunia, région sur laquelle le Procureur a notamment focalisé ses enquêtes.

Deuxièmement, au vu des informations disponibles, certaines personnes physiques ou morales ont fait l'objet d'arrestation arbitraire, de taxation abusive, d'intimidation et de torture systématique, qui seraient le fait de l'UPC/FPLC.

La Chambre a considéré qu'à ce stade de la procédure, la protection de ces personnes physiques ou morales, de leurs personnels et de la collecte d'informations par le Procureur pour ses enquêtes à venir doit être mise en balance avec l'intérêt qu'a la Défense d'avoir accès aux noms de ces personnes en vue de vérifier si leurs allégations vont dans le même sens que celles de Kristine Peduto. En l'état, la Chambre a considéré i) que la protection de ces personnes physiques ou morales et de leurs personnels était nécessaire à ce stade pour préserver le processus de recueil d'informations par le Procureur, essentiel pour assurer l'efficacité de ses enquêtes à venir ; et ii) que, la Défense sachant que ces informations émanaient de personnes physiques ou morales, elle était en mesure de se préparer suffisamment aux fins de l'audience de confirmation des charges.

La Chambre a donc estimé nécessaire, à ce stade de la procédure, d'autoriser la suppression du nom de ces personnes physiques ou morales dans le témoignage de Kristine Peduto et les documents qui y sont annexés.

La Chambre a par ailleurs autorisé des expurgations pour éviter que la Défense puisse identifier d'autres sources d'information du Procureur qui ont une connaissance directe des crimes qui font ou pourraient faire l'objet des « enquêtes à venir » du Bureau du Procureur et sans lesquelles ces « enquêtes à venir » pourraient être affectées.

À titre d'exemple, dans le procès-verbal d'audition du témoin DRC-OTP-WWW-20, la Chambre a considéré que certains éléments permettent à la Défense d'identifier rapidement une certaine personne. Dans son procès-verbal d'audition, DRC-OTP-WWW-20 évoque aussi le recrutement de certaines personnes et sa rencontre avec deux d'entre elles. Les termes qualifiant les activités de ces personnes ont été supprimés car ils peuvent permettre de localiser le lieu où elles se trouvent actuellement.

Les informations disponibles indiquent que certains témoins potentiels auraient été enlevés, menacés ou harcelés et que ces problèmes seraient le fait de l'UPC/FPLC.

En l'état, la Chambre a considéré que la protection des sources d'information du Procureur était nécessaire à ce stade pour préserver le processus de recueil d'informations par le Procureur, essentiel pour assurer l'efficacité de ses « enquêtes à venir ». En outre, la Défense est au courant que certaines informations ont été communiquées au témoin DRC-OTP-WWW-20 par :

i) une personne ayant une certaine occupation (donc la Défense dispose de suffisamment d'éléments pour déterminer que le témoin DRC-OTP-WWW-20 a obtenu une partie de ses informations par le biais d'une telle personne) ; et

ii) deux personnes avec lesquelles il s'est entretenu. À cet égard, le profil de ces personnes a été communiqué à la Défense, cette dernière sachant que l'une faisait partie d'un groupe identifiable et que l'autre avait été recrutée par l'UPC/FPLC à un certain âge.

Ainsi, considérant que la Défense avait été mise en position d'être suffisamment préparée pour l'audience de confirmation des charges, la Chambre a estimé nécessaire, à ce stade de la procédure, d'autoriser la suppression du nom et des éléments identifiant ces personnes.

3) Les mouvements politiques et/ou militaires

La deuxième catégorie que la Chambre a identifiée comprend les mouvements politiques et/ou militaires qui font ou pourraient faire l'objet d'« enquêtes à venir » du Bureau du Procureur. Cette catégorie concerne, notamment, toute information qui pourrait révéler que certains membres de ces mouvements ou les lieux dans lesquels ils auraient commis des crimes (par exemple pendant certaines attaques) font ou pourraient faire l'objet d'« enquêtes à venir ».

À titre d'exemple, la Chambre a autorisé la suppression d'acronymes correspondant à des mouvements politiques et/ou militaires dans le procès-verbal d'audition de DRC-OTP-WWW-20. En effet, le début d'un des paragraphes de son procès-verbal d'audition permet de déterminer que le Procureur enquête sur un tel mouvement. À cet égard, le témoin précise qu'il est disposé à expliquer tout ce qu'il sait sur ce mouvement lors d'une audition ultérieure.

Premièrement, la Chambre observe que les « enquêtes à venir » du Bureau du Procureur concernant la situation en RDC sont effectuées dans des conditions particulières : les mesures d'enquête doivent avoir lieu sur le territoire de la RDC, soit loin du siège de la Cour, et sur la base d'un régime de coopération entre la Cour et la RDC d'une part, et une organisation internationale d'autre part. Par ailleurs, les membres de ces mouvements politiques et/ou militaires qui font ou pourraient faire l'objet d'« enquêtes à venir » du Bureau du Procureur se trouvent souvent près du lieu du ou des crimes et sont en mesure d'intimider les victimes et témoins potentiels et de perturber la collecte de preuves. Il est dès lors nécessaire de garder confidentielles les informations relatives aux mouvements qui font ou pourraient faire l'objet d'« enquêtes à venir » du Bureau du Procureur aux fins de la bonne conduite desdites enquêtes.

Deuxièmement, communiquer à la Défense ces informations avant que le suspect ne soit renvoyé devant une chambre de première instance pour y être jugé pourrait causer un préjudice aux « enquêtes à venir ». En effet, lorsque le suspect est un dirigeant politique connaissant bien lesdits mouvements, il existe un risque de causer un préjudice aux enquêtes à venir du Bureau du Procureur en divulguant une telle information ou en ne l'utilisant pas à bon escient.

En outre, dans la présente affaire, la Chambre a considéré que la Défense disposait de suffisamment d'éléments lui permettant de se préparer à l'audience de confirmation des

charges, notamment du point de vue de l'existence et de la qualification d'un conflit armé. Dès lors, gardienne de l'exercice effectif des droits de la Défense et des intérêts du Procureur de mener à bien ses enquêtes, la Chambre a considéré en l'espèce que la suppression de ces termes permet d'assurer un juste équilibre entre les divers intérêts en présence.

La Chambre a estimé nécessaire, à ce stade de la procédure, d'autoriser la suppression de toute expression permettant d'identifier les mouvements politiques et/ou militaires qui font ou pourraient faire l'objet d'« enquêtes à venir » du Bureau du Procureur.

4) Lieux dans lesquels les crimes allégués auraient été commis par l'UPC/FPLC

La troisième catégorie identifiée par la Chambre regroupe les informations permettant d'identifier les lieux dans lesquels des crimes auraient été commis par l'UPC/FPLC et qui font ou pourraient faire l'objet d'« enquêtes à venir » du Bureau du Procureur.

À cet égard, le procès-verbal d'audition de DRC-OTP-WWW-20 permet de comprendre aisément que le Bureau du Procureur a une « enquête à venir » sur l'attaque d'une certaine localité par l'UPC/FPLC. Le témoin mentionne de nombreux noms de personnes impliquées dans l'organisation ou l'exécution de l'attaque et les noms des commandants qui ont dirigé l'opération sur le terrain. Il expose également le parcours effectué par les membres de l'UPC/FPLC avant d'atteindre cette localité et il donne ses observations sur des photographies et des conversations radio qui auraient eu lieu au cours de cette attaque. L'autorisation donnée par la Chambre de supprimer ces noms de personnes et de lieux, ces échanges radio et la mention des actions ordonnées pendant cet événement permet ainsi de protéger les enquêtes à venir du Procureur. La Chambre fait le même constat s'agissant de la transcription de l'audition du témoin DRC-OTP-WWW-0036.

La Chambre a procédé à la même analyse dans le procès-verbal d'audition de DRC-OTP-WWW-20 s'agissant de la mention d'une certaine zone ; dans le procès-verbal d'audition de DRC-OTP-WWW-0029 s'agissant d'une autre zone et des groupements présents dans cette zone ; dans la transcription de l'audition de DRC-OTP-WWW-0036 s'agissant d'une troisième zone, de différentes routes et d'une certaine attaque.

Le témoin DRC-OTP-WWW-0036 mentionne également d'autres types d'informations qui pourraient amener à l'identification des lieux concernés, tels que : les commandants sur le terrain et leur origine, les dates ou périodes des attaques, les opérations menées pour récupérer des armes, le déplacement des troupes de l'UPC/FPLC et une réunion particulière.

Premièrement, considérant que l'UPC/FPLC joue encore aujourd'hui un rôle important dans la région de l'Ituri, si ces lieux sont identifiés par les membres de ce mouvement qui ont pu être impliqués dans les événements relatés, et que ces personnes sont toujours présentes sur cette partie du territoire de l'Ituri, les « enquêtes à venir » du Bureau du Procureur peuvent s'en trouver compromises. À cet égard, il existe des précédents dans le cadre de procédures nationales, dans lesquelles des personnes témoignant à l'encontre de membres de l'UPC/FPLC ont été menacées.

Deuxièmement, vu le rôle que Thomas Lubanga Dyilo joue actuellement au sein de l'UPC/FPLC, s'il est informé de ces éléments, il existe un risque qu'il les révèle à d'autres membres de l'UPC/FPLC. Dès lors, la Chambre estime que si ces informations sont

communiquées à la Défense, un préjudice pourrait être causé aux « enquêtes à venir » du Bureau du Procureur.

En outre, dans la présente affaire, la Chambre a constaté que la Défense disposait des éléments concernant les lieux de recrutement et d'entraînement ainsi que les opérations militaires auxquelles des enfants de moins de 15 ans auraient activement participé. Aux fins de l'audience de confirmation des charges, ces éléments lui ont permis de préparer suffisamment sa cause. Dès lors, gardienne de l'exercice effectif des droits de la Défense et des intérêts du Procureur de mener à bien ses enquêtes, la Chambre a considéré en l'espèce que la suppression de ces termes permet d'assurer un juste équilibre entre les divers intérêts en présence.

La Chambre a donc estimé nécessaire, à ce stade de la procédure, d'autoriser la suppression de toute information permettant d'identifier les lieux dans lesquels les crimes auraient été commis par l'UPC/FPLC et qui font ou pourraient faire l'objet d'« enquêtes à venir » du Bureau du Procureur.

5) Informations sur la nature des crimes

La quatrième catégorie identifiée par la Chambre couvre toute information i) sur les types de crimes éventuellement commis par Thomas Lubanga Dyilo ou d'autres membres de l'UPC/FPLC et qui font ou pourraient faire l'objet d'« enquêtes à venir » du Bureau du Procureur, ii) uniquement lorsque cette information est donnée de façon à ce qu'on puisse identifier la personne qui fait l'objet de l'enquête ou le lieu dans lequel le crime a été commis.

À titre d'exemple, le témoin DRC-OTP-WWW-0036 mentionne certains crimes qui auraient été commis par certains groupes armés.

Premièrement, considérant que l'UPC/FPLC joue encore aujourd'hui un rôle important dans la région de l'Ituri et que la plupart de ses membres sont toujours sur le territoire de l'Ituri, si lesdites informations sont connues par les membres de l'UPC/FPLC qui ont pu être impliqués dans les événements relatés, les « enquêtes à venir » du Bureau du Procureur peuvent s'en trouver compromises.

Deuxièmement, vu le rôle que Thomas Lubanga Dyilo joue actuellement au sein de l'UPC/FPLC, s'il accède à ce type d'information sur la nature des crimes, il existe un risque qu'il les révèle à d'autres membres de l'UPC/FPLC. Dès lors, la Chambre estime que si ces informations sont communiquées à la Défense, un préjudice pourrait être causé aux « enquêtes à venir » du Bureau du Procureur.

En outre, dans la mesure où les expurgations autorisées se limitent à des crimes spécifiques, la Chambre a considéré que la Défense disposait de suffisamment d'éléments pour se préparer aux fins de l'audience de confirmation des charges dans la présente affaire. Dès lors, gardienne de l'exercice effectif des droits de la Défense et des intérêts du Procureur de mener à bien ses enquêtes, la Chambre a considéré en l'espèce que la suppression de ces termes permet d'assurer un juste équilibre entre les divers intérêts en présence.

La Chambre a donc estimé nécessaire, à ce stade de la procédure, d'autoriser la suppression des informations relevant de cette quatrième catégorie.

6) La position de certaines personnes au sein de l'UPC/FPLC

La cinquième catégorie identifiée par la Chambre concerne les informations relatives à la position de certaines personnes au sein de l'UPC/FPLC et qui, dans le contexte des procès-verbaux d'audition, pourraient permettre d'identifier ces personnes comme cibles potentielles des « enquêtes à venir » du Bureau du Procureur. À titre d'exemple, dans la transcription de l'audition du témoin DRC-OTP-WWW-0036, certaines questions posées par le Procureur sur des personnes appartenant à l'UPC/FPLC peuvent permettre de déterminer aisément que ces personnes font ou pourraient faire l'objet d'« enquêtes à venir » par le Bureau du Procureur.

Premièrement, l'UPC/FPLC jouant encore aujourd'hui un rôle important dans la région de l'Ituri, si ces personnes toujours présentes sur le territoire de l'Ituri apprennent qu'elles font ou pourraient faire l'objet d'enquêtes du Bureau du Procureur, elles pourraient porter préjudice à ces « enquêtes à venir ».

Deuxièmement, vu le rôle que Thomas Lubanga Dyilo joue actuellement au sein de l'UPC/FPLC, s'il est informé de ces éléments, il existe un risque qu'il les révèle à d'autres membres de l'UPC/FPLC. Dès lors, la Chambre est d'avis que si ces informations sont communiquées à la Défense, un préjudice pourrait être causé aux « enquêtes à venir » du Bureau du Procureur.

Considérant que ces informations ont uniquement été supprimées lorsque le contexte permet de conclure aisément que la personne concernée fait ou pourrait faire l'objet d'une enquête du Bureau du Procureur, la Chambre a considéré que la Défense disposait de suffisamment d'éléments aux fins de l'audience de confirmation des charges. Dès lors, gardienne de l'exercice effectif des droits de la Défense et des intérêts du Procureur de mener à bien ses enquêtes, la Chambre a considéré en l'espèce que la suppression de ces termes permet d'assurer un juste équilibre entre les divers intérêts en présence.

La Chambre a donc estimé nécessaire, à ce stade de la procédure, d'autoriser la suppression des informations relevant de cette cinquième catégorie.