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Criminal
Court

Original: **English**

No.: **ICC-01/04-01/06**
Date: **18 February 2013**

**THE APPEALS CHAMBER**

**Before:** **Judge Erkki Kourula, Presiding Judge**
**Judge Sang-Hyun Song**
**Judge Sanji Mmasenono Monageng**
**Judge Anita Ušacka**
**Judge Ekaterina Trendafilova**

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

**Public Redacted Document**
**with Confidential Annex 1 and Public Redacted Annex 2**

# Prosecution's Response to Thomas Lubanga's Appeal against Trial Chamber I's Judgment pursuant to Article 74

**Source:** **Office of the Prosecutor**

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

**The Office of the Prosecutor**

**Counsel for the Defence**
Ms Catherine Mabille
Mr Jean-Marie Biju-Duval

**Legal Representatives of Victims**
Mr Luc Walleyn
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Paul Kabongo Tshibangu
Mr Joseph Keta Orwinyo

**The Trust Fund for Victims**

**The Office of Public Counsel for Victims**

**REGISTRY**

**Registrar**
Ms Silvana Arbia

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### 2. Errors of Fact

## Introduction

1. Thomas Lubanga Dyilo (the "Appellant") is appealing Trial Chamber I's "Judgment pursuant to article 74 of the Statute" (the "Judgment"), in which he was found guilty as a co-perpetrator of three counts of war crimes: enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities in the Ituri region of the Democratic Republic of the Congo (the "DRC") from early September 2002 to 13 August 2003.[1]

2. The Appellant raises eight grounds of appeal. Broadly speaking, since there is internal overlap in his argument, three relate to alleged violations of his right to a fair trial;[2] three relate to the sufficiency of the evidence to establish the crimes of enlistment, conscription and use;[3] and two relate to the evidence of the individual responsibility of the Appellant.[4] The Prosecution opposes all eight grounds and requests that the appeal be rejected in its entirety.

3. Many of the Appellant's arguments repeat trial arguments that were considered and correctly rejected by the Trial Chamber. The Trial Chamber correctly interpreted the legal elements of the charges, reasonably assessed the reliability and credibility of each item of evidence as well as the totality of trial evidence and made reasonable inferences of fact in reaching its conclusion that the elements of the crimes charged had been established beyond reasonable doubt.

4. The Appellant does not seriously question the fairness of the trial. The Appellant continuously raised issues relating to the Prosecution's obligations throughout the trial, which the Trial Chamber addressed on each occasion. The Chamber took numerous and generous precautions specifically to preserve a fair trial, which included two stays of proceedings, disclosure orders, orders for the provision of

[1] ICC-01/04-01/06-2842.
[2] Appeal Brief, paras.21-123.
[3] Appeal Brief, paras.124-325.
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summaries, alternative evidence, the appearance of intermediaries and the re-calling of witnesses. It detoured the trial for one year to allow the Appellant to proffer evidence and argue that the case had to be dismissed for alleged abuse of process in connection with Prosecution intermediaries, precisely the same grounds as the second and third grounds of appeal set out herein. The Chamber continued to ensure the Appellant's right to a fair trial. As the Appellant himself acknowledges, in its final determination the Trial Chamber declined to rely on witness testimony and other items of evidence whenever it assessed the evidence to be unreliable or not credible. The Appellant fails to demonstrate any basis for his claims that the trial was unfair or lacked integrity. Fairness to the Appellant was one of the paramount features of the trial.

5. As to his arguments on the insufficiency of evidence to establish the crimes (grounds 4-6) and his individual criminal responsibility (grounds 7-8), the Appellant simply disagrees with the Trial Chamber's conclusions that rejected his arguments. His assertions are repetitious and do not meet the threshold for intervention by an appellate court. The Trial Chamber considered all trial arguments and evidence, reaching correct legal conclusions and reasonable factual findings. The Appellant attacks individual findings without acknowledging the pool of equivalent corroborating evidence or explaining why the conviction should not stand on the basis of the remaining evidence.

6. Nor should the additional evidence the Appellant seeks to present pursuant to regulation 62 be admitted.[5] The Appellant has failed to establish that the requirements for admissibility at the appeals stage have been met. None of the items of evidence sought to be presented could have had any impact on the Judgment, let alone a decisive impact. Critically, these items were available and could have been introduced at trial had counsel acted with due diligence. Nor are

[5] ICC-01/04-01/06-2942-Conf., annexes 1-8 (annex 6 contains 4 items of evidence). Public redacted version at ICC-01/04-01/06-2942-Red.

they capable of impacting on material findings made in the Judgment. Further, their reliability is doubtful at its best.

7. The appeals process is corrective in nature; it reviews alleged errors at trial, it is not an opportunity for a new trial, with evidence that the Appellant could have but failed to introduce the first time. The Appellant's failure to timely investigate and use information that was available to counsel acting with due diligence cannot be remedied at this stage.

## Procedural History

8. On 10 February 2006, the Pre-Trial Chamber issued a warrant of arrest against the Appellant.[6] On 20 March 2006, the Appellant made his first appearance before the Pre-Trial Chamber.[7]

9. The Prosecution filed its Document Containing the Charges ("DCC") on 28 August 2006 in which it submitted that the Appellant, as a co-perpetrator under article 25(3)(a) of the Statute, conscripted and enlisted children under the age of 15 and used them to participate actively in hostilities between 1 July 2002 and 31 December 2003 in Ituri, DRC.[8] The DCC sets out that the Appellant was charged with large-scale recruitment and use of children under the age of 15[9] and that the experiences of the identified victims in the DCC were representative of those of other children.[10]

[6] ICC-01/04-01/06-2-US-tEN.
[7] ICC-01/04-01/06-T-3-ENG (hereinafter transcripts will be cited as "T-").
[8] ICC-01/04-01/06-356-Anx1. Public redacted version at ICC-01/04-01/06-356-Anx2.
[9] ICC-01/04-01/06-356-Anx2, paras.14, 19-40.
[10] ICC-01/04-01/06-356-Anx2, para.87.

10. The Prosecution first filed a list of evidence on 28 August 2006,[11] followed by an updated list of evidence on 20 October 2006.[12] On 2 and 7 November 2006, the Appellant filed a list of evidence.[13] The confirmation hearing was held from 9 to 28 November 2006,[14] following which written submissions were filed by the Prosecution and the Appellant.[15]

11. On 29 January 2007, Pre-Trial Chamber I issued its confirmation decision.[16] It dismissed the Appellant's challenge to the form of the DCC, finding that it "meets the criteria set forth in regulation 52 of the *Regulations of the Court* and is indeed a 'detailed' description of the charges".[17]

12. The Pre-Trial Chamber found substantial grounds to believe that the Appellant, as a co-perpetrator, was responsible for enlisting and conscripting children under the age of 15 into the FPLC and using them to participate actively in hostilities within the meaning of 8(2)(b) and 25(iii)(a) of the Statute from early September 2002 to 13 August 2003.[18] Specifically, it found that the conscription and enlistment of children under the age of fifteen years was "a systematic practice" of the FPLC which "targeted a large number of children".[19]

13. Upon confirmation, the case progressed to the Trial Chamber. On 23 May 2008, the Prosecution filed an updated summary of the presentation of evidence, setting out a complete narrative of its case theory and evidence[20] that cited the "policy" and "pattern" of broad recruitment and large-scale use of children under the age

[11] ICC-01/04-01/06-595-Conf-Exp-Anx7.
[12] ICC-01/04-01/06-595-Conf-Exp-Anx1.
[13] ICC-01/04-01/06-644 and ICC-01/04-01/06-673.
[14] ICC-01/04-01/06-678.
[15] Prosecution: ICC-01/04-01/06-749, ICC-01/04-01/06-755. Appellant: ICC-01/04-01/06-763-tEN, ICC-01/04-01/06-764, ICC-01/04-01/06-758, ICC-01/04-01/06-759.
[16] ICC-01/04-01/06-796-Conf-tEN, with public version: ICC-01/04-01/06-803-tEN.
[17] ICC-01/04-01/06-796-Conf-tEN, para.150.
[18] ICC-01/04-01/06-803-tEN, p.157-158.
[19] ICC-01/04-01/06-796-Conf-tEN, paras.250-251.
[20] ICC-01/04-01/06-1354-Conf-AnxA.

of 15 and the Appellant's criminal responsibility.[21] On 22 December 2008, the Prosecution submitted an Amended DCC.[22]

14. The trial began on 26 January 2009. The Prosecution and the Appellant presented opening statements.[23] The Prosecution thereafter presented its evidence, through 29 witnesses and 368 documents, closing its case on 14 July 2009. The Appellant delivered two opening statements, one on 27 January 2009 and another on 27 January 2010, in which it set out its submissions on the Appellant's right to a fair trial, its anticipated evidence on witness collusion and on the substantive allegations against him.[24] The presentation of evidence in the trial started on 28 January 2009 and was formally closed on 20 May 2011.[25]

15. The Appellant split his case. The first part - from 27 January 2010, commencing with a second opening statement, to 1 December 2010[26] - challenged the testimony of the Prosecution's nine child soldier witnesses in an attempt to demonstrate that the witnesses not only presented false testimony but also that they were brought to the Prosecution's attention by corrupt intermediaries. The Appellant then sought a stay of proceedings for abuse of process, on the basis that they had been "irremediably vitiated by serious breaches of the fundamental principles of justice [and] the norms of a fair trial".[27] The Appellant raised three main arguments: (i) Prosecution intermediaries were involved in soliciting false testimony from the individuals called to give evidence as former child soldiers;[28] (ii) one participating victim solicited false evidence and the Congolese authorities fraudulently

[21] ICC-01/04-01/06-1354-Conf-AnxA, paras.37-41.
[22] ICC-01/04-01/06-1571-Conf.
[23] T-107-ENG, p.4, line 10 to p.36, line 4.
[24] T-109-ENG (27 January 2009); T-236-ENG, p.20, lines 16 to p.25, line 1 (27 January 2010).
[25] T-110-Red-ENG and T-355-ENG.
[26] One additional witness related to this part of the Appellant's case was called from 14-18 April 2011.
[27] ICC-01/04-01/06-2657-tENG-Red, para.5.
[28] ICC-01/04-01/06-2657-tENG-Red, paras.21, 29-68, 75-137, 149-195.

intervened in the investigations;[29] and (iii) the Prosecution failed to discharge its statutory obligations.[30]

16. On 23 February 2011, the Trial Chamber rejected the Appellant's application as it was not persuaded that the Appellant's rights had been breached to an extent that a fair trial had been rendered impossible or that the Appellant was precluded from properly defending himself.[31] It found that the alleged facts relied on by the Appellant were incapable of substantiating the suggested inference that the Prosecution was aware that it had been infiltrated by agents of the Congolese government who was seeking to introduce false evidence in order to secure a conviction.[32] Finally, the Trial Chamber held that it would be able to "reach final conclusions on the alleged impact of the involvement of intermediaries on the evidence in this case, as well as on the wider alleged prosecutorial misconduct or negligence based on the suggested failure by the Office of the Prosecutor to supervise or control the individual intermediaries and to act on indications of unreliability (together with the consequences of any adverse findings in this regard, which the defence alleges taints all the prosecution's evidence)".[33]

17. Following this decision, the Appellant's case resumed. Between 30 March and 14 April 2011, it focussed on the Appellant's individual criminal responsibility. Five witnesses testified on various aspects of the substantive allegations against the Appellant.

18. On 1 June 2011, the Prosecution filed its closing submissions.[34] On 15 July 2011, the Appellant submitted his closing submissions, comprehensively addressing the substantive charges against him and challenging the Prosecution's evidence.[35]

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[29] ICC-01/04-01/06-2657-tENG-Red, paras.25, 200-228.
[30] ICC-01/04-01/06-2657-tENG-Red, paras.23, 263-285.
[31] ICC-01/04-01/06-2690, para.188.
[32] ICC-01/04-01/06-2690, para.193.
[33] ICC-01/04-01/06-2690, para.198.
[34] ICC-01/04-01/06-2478-Conf. See also Prosecution's reply at ICC-01/04-01/06-2778-Conf.

19. On 14 March 2012, the Trial Chamber convicted Thomas Lubanga of three counts of war crimes.[36]

20. Thereafter, the parties and the legal representatives of victims submitted observations regarding the principles to be applied to sentencing.[37] On 14 May 2012, the Prosecution[38] and legal representatives of victims[39] filed their submissions on the appropriate sentence to be imposed in this case. The Appellant filed his sentencing submissions on 3 June 2012.[40] A sentencing hearing was held on 13 June 2012.[41]

21. On 10 July 2012, the Trial Chamber rendered its "Decision on Sentence pursuant to article 76 of the Statute" in which the Majority imposed a joint sentence of 14 years imprisonment for Thomas Lubanga's crimes (the "Sentencing Decision").[42]

22. On 3 October 2012, the Prosecution filed a Notice of Appeal against the Sentencing Decision under articles 81(2), 83(2) and 83(3), in which the Prosecution requested the Appeals Chamber to revise upward the sentence imposed against Thomas Lubanga.[43] On the same day, Thomas Lubanga filed Notices of Appeal against the Judgment[44] and the Sentencing Decision[45].

23. On 26 November 2012, the Appellant submitted a « *Requête de la Défense aux fins de présentation* d'éléments *de preuve supplémentaires dans le cadre des appels à*

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[35] ICC-01/04-01/06-2773-Conf-tENG. See also Appellant's response to the Prosecution's reply at ICC-01/04-01/06-2786-Conf.
[36] ICC-01/04-01/06-2842.
[37] ICC-01/04-01/06-2868 ; ICC-01/04-01/06-2864; ICC-01/04-01/06-2869.
[38] ICC-01/04-01/06-2880; ICC-01/04-01/06-2882.
[39] ICC-01/04-01/06-2881.
[40] ICC-01/04-01/06-2891-Conf-Exp.
[41] T-360-Red2-ENG.
[42] ICC-01/04-01/06-2901.
[43] ICC-01/04-01/06-2933 OA4.
[44] ICC-01/04-01/06-2934 OA5.
[45] ICC-01/04-01/06-2935 OA6.

*l'encontre du « Jugement rendu en application de l'Article 74 du Statut » et de la « Décision relative à la peine, rendue en application de l'article 76 du Statut* ».[46]

24. On 29 November 2012, the Prosecution filed the « Prosecution's Request for Instructions under Regulation 62 of the Regulations of the Court ».[47]

25. On 3 December 2012, the Appellant filed two appeal briefs, against the conviction[48] ("Appeal Brief") and the sentence[49]. On the same day, the Prosecution filed its appeal brief against sentence.[50]

26. On 21 December 2012, the Appeals Chamber decided, pursuant to Regulation 62 of the Regulations of the Court, that the Prosecution may respond to the Appellant's request to present additional evidence in its response on the merits of the appeals against conviction and sentence.[51]

27. On 1 February 2013, the Appeals Chamber granted an extension of 20 pages.[52]

## Confidential filing

28. The Prosecution files confidentially given that it is responding to two filings classified as confidential by the Appellant[53] and makes reference to information that could potentially identify witnesses for whom protective measures were granted by the Trial Chamber. The Prosecution will file a public redacted version without delay.

[46] ICC-01/04-01/06-2942-Conf.
[47] ICC-01/04-01/06-2947-Conf.
[48] ICC-01/04-01/06-2948-Conf.
[49] ICC-01/04-01/06-2949.
[50] ICC-01/04-01/06-2950 A4.
[51] ICC-01/04-01/06-2958 A5 A6. The Appeals Chamber extended the page limits for the Prosecution's responses by 25 pages each.
[52] ICC-01/04-01/06-2965 A5.
[53] ICC-01/04-01/06-2948-Conf and ICC-01/04-01/06-2942-Conf.

**Standards of Review**

29. The Appellant advances errors of law and fact, but fails to articulate in a clear manner the applicable standards of review for such errors. The Prosecution notes that in some instances the Appellant refers to the findings that a "reasonable judge" would adopt.[54] He appears, therefore, to endorse the standard of review for errors of fact as advanced by the Prosecution in its appeal on sentence.[55] He also fails to refer to the high level of deference afforded to the factual findings and credibility assessments made by a Trial Chamber who was able to examine, at first instance, the evidence at trial. [56]

30. The Appeals Chamber has stated that there is an *error of fact* when the Trial Chamber misappreciated facts, disregarded relevant facts or took into account facts extraneous to the *sub judice* issues.[57] The Appeals Chamber has set out a standard of reasonableness in the review of appeals judgments on interim release; its reasoning equally applies to purported errors in the Trial Chamber's appreciation of evidence in a final appeal:

> "The Appeals Chamber will not interfere with a Pre-Trial or Trial Chamber's evaluation of the evidence just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it. In the absence of any clear error on the part of the Pre-Trial Chamber, the Appeals Chamber defers to the Pre-Trial Chamber."[58]

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[54] See, for example, paras.39, 44, 75, 82, 89, 272.
[55] ICC-01/04-01/06-2950 A4, paras.16, 19.
[56] ICC-01/04-01/10-283 OA, para.17. ; ICC-01/04-01/07-2259 OA10, para.75; ICC-01/04-01/06-2582 OA18; para.56; ICC-01/05-01/08-1626-Red OA7, para.45; ICC-01/05-01/08-2151-Red OA10, para.16.
[57] ICC-01/05-01/08-631-Red OA2, para.66.
[58] ICC-01/04-01/10-283 OA, para.17. A standard of reasonableness is also applied by the ICTY Appeals Chamber in the review of purported errors of fact in a final appeal. *Gotovina*, Appeal Judgment, para.13 and authorities cited therein.

31. For *legal errors*, the Appeals Chamber "will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law."[59] The Appeals Chamber will therefore articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[60]

32. If a *procedural error* is alleged "an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision".[61]

33. Many claims notably will present mixed errors of law, fact and/or procedure. In those instances, the various errors are considered in light of their appropriate standards.[62]

**Summary Dismissal**

34. Finally, the Appeals Chambers in the *ad hoc* tribunals have held that they may immediately dismiss arguments raised on appeal without considering them on the merits where such arguments do not have the potential to cause the impugned decision to be reversed or revised.[63]

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[59] ICC-02/05-03/09-295OA, para.20.
[60] The ICTY Appeals Chamber has held that in cases of an incorrect legal standard, the Appeals Chamber, after identifying the correct standard, will apply it to the evidence contained in the trial record and determine whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant. *Gotovina*, Appeal Judgment, para.12. See also *D. Milosevic* Appeal Judgment, paras.13-14 and authorities cited therein.
[61] ICC-01/05-01/08-962OA3, paras.102; 133-134; ICC-02/04-01/05-408OA3, para.48. Cited in ICC-01/09-01/11-307OA, para.87; ICC-01/09-02/11-274OA, para.85.
[62] *D. Milosevic*, Appeal Judgment, para.18.
[63] *D.Milosevic*, Appeal Judgment, para.17; *Krajisnik* Appeal Judgment, para.47; *Martic* Appeal Judgment, para.15; *Strugar* Appeal Judgment, para.17.

35. These Appeals Chambers have identified the following grounds for summary dismissal:

(i) arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings;

(ii) mere assertions that the Trial Chamber must have failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the evidence could have reached the same conclusion as the Trial Chamber did;

(iii) challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding;

(iv) arguments that challenge a Trial Chamber's reliance or failure to rely on one piece of evidence, without explaining why the conviction should not stand on the basis of the remaining evidence;

(v) arguments contrary to common sense;

(vi) challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the appealing party;

(vii) mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the Trial Chamber constituted an error warranting the intervention of the Appeals Chamber;

(viii) allegations based on material not on record;

(ix) mere assertions unsupported by any evidence, undeveloped assertions, failure to articulate error; and

(x) mere assertions that the Trial Chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner.[64]

36. The Appellant must provide precise references to relevant transcript pages or paragraphs in the judgment to which the challenge is made.[65] The Appeals Chamber cannot be expected to consider a party's submissions in detail if they are

[64] *D. Milosevic* Appeal Judgment, para.17. See authorities cited therein.
[65] *Gotovina* Appeal Judgment, para.15 referring to Practice Direction on Formal Requirements for Appeals from Judgment, IT/201, 7 March 2002, paras.1(c)(iii)-(iv), *Boskoski* Appeal Judgment, para.17; *Mrksic* Appeal Judgment, para.17; *Bagasora* Appeal Judgment, para.20.

obscure, contradictory, vague or suffer from other formal and obvious insufficiencies.[66]

**Prosecution's Submissions**

## PART I. APPELLANT'S PROPOSED ADDITIONAL EVIDENCE

## A. THE APPELLANT'S REQUEST TO PRESENT ADDITIONAL EVIDENCE SHOULD BE REJECTED

### 1. Legal requirements for the admission of additional evidence on appeal

37. Regulation 62 sets out the requirements governing admissibility of evidence on appeal, and in particular in appeals against convictions or sentence. According to the regulation, the party seeking additional evidence must file an application setting out (a) the evidence to be presented, and (b) the ground of appeal to which the evidence relates and the reasons why the evidence was not adduced before the Trial Chamber.

38. The Prosecution submits that the admissibility of additional evidence on appeal must be governed by the corrective nature of the appellate process. As the Appeals Chamber has repeatedly stated, its review of interlocutory decisions is "corrective in nature and not *de novo*".[67] The same corrective approach is even more compelling when reviewing a final judgment. An appeal against an article 74 decision is not a new evidentiary hearing or an opportunity for a party to

[66]*Gotovina* Appeal Judgment, para.15 referring to *Boskoski* Appeal Judgment, para.17; *D. Milosevic* Appeal Judgment, para.16; *Bagasora* Appeal Judgment, para.20.
[67]See, inter alia, ICC-02/05-03/09-295 OA2, para.20.

remedy its earlier failings or oversights during the pre-trial and trial phases.[68] The duty on every party is to "put forward its best case in the first instance".[69] It necessarily follows that regulation 62 is not designed or intended to authorize a re-opening of the evidentiary phase of the trial or allow for the liberal admission at the appellate level of evidence related to the merits of the case. The corrective nature of the appeal process and the requirements of finality[70] mean that the admission of evidence on appeal should be exceptional and governed by strict requirements. Thus, regulation 62 is a "corrective measure" created to address the situation where a party is in possession of specific material that could not be placed before the first instance court and is additional evidence of a fact or issue litigated at trial.[71]

39. The admission of additional evidence is accordingly dependent on the *unavailability* of the evidence at trial and its particular *quality*. Under existing international practice, additional evidence will only be admitted if (a) it was not available at trial to duly diligent counsel; (b) it is relevant and credible; and (c) it could have been a decisive factor in the decision.[72] The Prosecution submits that these factors ensure that the admission of additional evidence on appeal will preserve the corrective nature of the appellate process.[73] Finally, the burden is on

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[68] *Nahimana*, Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, ICTR-99-52-A, 8 September 2006, para.4 (hereinafter, *Nahimana* Decision).

[69] *Prosecutor v. Kupreskic et al*, Decision on the Motions of Drago Josipovic, Zoran Kupreskic and Vlatko Kupreskic to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94 (B), IT-95-16-A, 8 May 2001, para.10 (hereinafter, Second *Kupreskic* Decision).

[70] See *Prosecutor v. Tadic*, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, IT-94-1-A, 15 October 1998, para.35, emphasizing the importance of the "principle of finality" (hereinafter, *Tadic* Decision).

[71] *Nahimana* Decision, para.4; see also, inter alia, *Prosecutor v. Kupreskic et al*, Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001, IT-95-16-A, 11 April 2001, para.6 (hereinafter First *Kupreskic* Decision).

[72] *Archbold, International Criminal Courts*, 3rd edition (2009), pp.1460-1461; see also L. Bianchi and I. Onsea, *Additional Evidence on Appeal, Review Proceedings, and the Remedy of Reconsideration* in: K. Khan, C. Buisman and C. Gosnell, *Principles of Evidence in International Criminal Justice* (2010), p.726.

[73] The Prosecution notes that the first version of ICTY Rule 115 was framed in very general terms, not unlike the current version of regulation 62. This, however, did not prevent the ICTY Appeals Chamber from developing in its first decision on additional evidence the corrective requirements that have

the applicant to establish that all requirements for admissibility of the newly-proferred evidence have been met.[74]

*(a) Unavailability at trial*

40. Regulation 62(1)(a) requires that the applicant explain why he failed to adduce the evidence at trial. This requirement disallows a party that investigated inadequately because it bet on a favourable verdict from re-litigating the issue with new facts or new evidence on appeal when its gamble fails.

41. Because appeals are inherently a review based on an existing record, and there is limited divergence from this rule, in another context the Appeals Chamber rejected new evidence on appeal because the applicant failed to establish that the evidence was unavailable during the first instance proceedings.[75] The Prosecution submits that, even more so in the context of final appeals, the party seeking admission of additional evidence must demonstrate that the evidence in question was not available to counsel acting with due diligence. In that regard, it is presumed that counsel *will* exercise due diligence, which is also seen as an attribute of professional conduct.[76]

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governed the admissibility of such evidence in the ICTY/R appellate proceedings until now. See *Tadic* Decision. This means that any difference in language between the current version of ICTY Rule 115 and regulation 62 is not really relevant. It also shows that it is perfectly appropriate for the Appeals Chamber to include the ICTY/R Rule 115 requirements in its interpretation of regulation 62 (on the Appeals Chamber's authority to consider ICTY/R practice and jurisprudence, see ICC-01/09-02/11-425 OA4, para.37 and ICC-01/09-01/11-414, para.31).

[74] *Tadic* Decision, para.52.

[75] ICC-01/05-01/08-962 OA3, para.32.

[76] First *Kupreskic* Decision at para.24: "[t]here is a strong presumption that counsel at trial acted with due diligence, or putting it another way, that the performance of counsel fell within the range of reasonable professional assistance".

42. Under the test uniformly accepted in international criminal practice, the applicant must show that (a) the evidence was unavailable at trial in any form[77] and (b) it could not have been discovered through the timely exercise of due diligence.[78] The test requires that the applicant explain how and when he or she became aware of the evidence and why it could not have been discovered previously.[79] The application must detail the steps taken at trial to discharge the duty of diligence.[80] In particular, an applicant's duty to act with due diligence includes making use of all existing mechanisms to bring the evidence before the Trial Chamber.[81] These include an accused person's ability to seek from the Court orders and/or cooperation requests that may be necessary in the preparation of the defence pursuant to article 57(3)(b),[82] as well as protective measures for witnesses that the accused person wishes to call at trial. Counsel is also expected to apprise the Trial Chamber of difficulties in locating or otherwise obtaining the evidence.[83]

43. A limited exception to this rule has been accepted in extraordinary instances where, even though it would have been available to counsel acting with due diligence, the evidence is of such substantial importance that its exclusion "would lead to a miscarriage of justice, in that if it had been available at trial it *would* have

[77] *Krstic*, Decision on Applications for Admission of Additional Evidence on Appeal, IT-98-33-A, 5 August 2003, p.3.
[78] *Tadic* Decision, paras. 36-45. This aspect of the test has been consistently followed in subsequent ICTY/R case-law. See Archbold at pp. 1461-1462.
[79] Bianchi and Onsea at p. 729, with additional authorities.
[80] Ibid.
[81] See, inter alia, *Milosevic*, Decision on Dragomir Milosevic's Third Motion to Present Additional Evidence, IT-98-29/1-A, 8 September 2009, para.7 (hereinafter, *Milosevic* Decision). The decision refers to the ICTY's mechanisms of "protection and compulsion", which include the ability to issue subpoenas due to the Chapter VII nature of the Tribunal. The ICC does not have the same powers, but it can request cooperation under Part 9 of the Statute.
[82] Under article 61(11), this authority may also be exercised by the Trial Chamber.
[83] *Nahimana* Decision, para.5 (quoting prior decisions). The ICTY/R Appeals Chamber explained that this is not only a first step in exercising due diligence, but also "a means of self-protection in that non-cooperation of the prospective witness is recorded contemporaneously"(ibid).

affected the verdict".[84] In such an exceptional case, the interests of justice "require that an appellant not be held responsible for the failures of counsel".[85]

*(b) Relevance and credibility*

44. The applicant must further establish that the evidence offered for the first time on appeal is both highly relevant and credible. "Relevance" means in this context that the evidence must relate to material findings "in the sense that those findings were crucial or instrumental to the decision".[86] The evidence cannot relate to a general issue but must relate directly to a specific finding of fact made by a Trial Chamber.[87] "Credibility" entails an assessment that the newly-offered evidence appears to be reasonably capable of belief or reliance.[88] By admitting the evidence at this stage the Appeals Chamber need not accept it as true, [89] because the opposing party will retain the right to test or counter the evidence for instance, via cross-examination or the filing of rebuttal evidence. [90]

*(c) Decisive factor at trial*

45. The final and ultimately most critical requirement relates to its impact on the impugned decision: had the Trial Chamber had the proffered evidence at trial, "it could have had an impact on the verdict, i.e. it could have shown that a

[84]*Milosevic* Decision, para.10 (emphasis in the original).
[85]*Nahimana* Decision, para.31.
[86] *Haradinaj et al*, Decision on LahiBrahimaj's request to Present Additional Evidence under Rule 115, IT-04-84-AR65.2, 3 March 2006, para.26.
[87]Bianchi and Onsea, p.731 (providing examples of cases where additional evidence was rejected due to the applicant's failure to identify with precision the specific findings it allegedly related to).
[88]*Nahimana* Decision, para.5.
[89] Bianchi and Onsea, p.732.
[90]Archbold, pp.1463-1464.

conviction was unsafe".[91] This has been interpreted to mean that had the Trial Chamber had the evidence before it, "*it probably would have come to a different result*".[92] The burden is on the applicant to demonstrate this potential impact on the decision.[93]

46. The impact must accordingly be a very significant one. Mere discrepancies in testimony by the same witness in different trials, for instance, have been found not to meet the test.[94] Also, it is not sufficient for the evidence to merely strengthen or reinforce an issue already taken into account by the Trial Chamber.[95]

## B. PROSECUTION'S SUBMISSION ON THE APPELLANT'S REQUEST

47. The Prosecution submits that none of the evidence proffered by the Appellant is capable of satisfying the requirements for admissibility set out above.

### 1. Evidence related to D-0040 and D-0041

*(a) The evidence was available at trial to counsel acting with due diligence*

48. The Appellant seeks to call witnesses D-0040 and D-0041 before the Appeals Chamber, or in the alternative tender their transcripts and a signed statement, and also to introduce three additional items of evidence related to their proposed

[91] *Nahimana* Decision, para.6; see also *Kristic*, Decision on Applications for Admission of Additional Evidence on Appeal, IT-98-33-A, 5 August 2003.
[92] Bianchi and Onsea, p.732.
[93] Bianchi and Onsea, p.733.
[94] Ibid., p.734, citing specific case law
[95] Ibid.

testimony. The Appellant claims that the evidence will refute the Trial Chamber's findings that UPC/FPLC child soldiers – including, allegedly, the two now-proffered witnesses -- appearing in videos were under the age of 15 in 2002-2003.

49. The Prosecution opposes the Appellant's request to present the proposed evidence related to D-0040 and D-0041 on appeal. This evidence was fully available at trial to counsel acting with due diligence, it is not relevant to an appeal issue, there are questions as to its reliability and it could not have a decisive impact on the Judgment given that the two videos were part of a wider universe of evidence establishing the enlistment, conscription and use of children under the age of 15 in the UPC/FPLC.

50. First, the evidence was available at trial to counsel acting with due diligence. Accordingly, the Applicant should have offered such evidence at that time, further to his duty to "put forward its best case in the first instance".[96] Contrary to the Appellant's assertions at paragraphs 45 and 46 of his request, he had specific and ample notice of the video excerpts the Prosecution sought to admit to establish that children under the age of 15 were in the UPC/FPLC.

51. To prove the presence of children under the age of 15 within the ranks of the FPLC, the Prosecution cited the videos among its various sources of evidence. From its opening statement on 26 January 2009[97] until the submission of its Closing Brief,[98] the Prosecution repeatedly stated that the video excerpts were substantive evidence of the presence of FPLC child soldiers *visibly* under the age of 15. In his opening statement, the Prosecutor stated: "To prove they were under

[96] Second *Kupreskic* Decision, para.10.

[97] In its opening statement on 26 January 2009, the Prosecution played a video showing two young FPLC child soldiers at the back of the truck, at which time the Prosecutor commented: "you can pay attention to the two kids in the back. At least these two are **manifestly** under 15 years old." [97] (emphasis added) (T-107, p.11, lines 15-16). The Prosecutor further stated: "You will see, your Honours, during the Prosecution's case, complete videos showing how children, some of these -- how young some of these children were as bodyguards. You will hear evidence that Lubanga used soldiers to guard his own residence, as well as the check-points leading to his house." (T-107, p.29, lines 21-25).

[98] ICC-01/04-01/06-2748-Anx2, Chart of relevant evidence.

the age of 15, the Prosecution has relied on different sources including testimonies, videos, documents, and scientific analysis. Videos filmed between September 2002 and August 2003 will show the presence of child soldiers **manifestly** under the age of 15 in Lubanga's military compounds or their use as bodyguards." (emphasis added)[99]

52. Following the testimony of witness P-0030 on 16-19 February 2009, the Trial Chamber asked the Prosecution to specify the video excerpts it sought to be admitted and the relevance of each excerpt. On 25 February 2009, the Prosecution submitted a request[100] in which it (i) sought admission of 15 video excerpts, (ii) indicated that it was only relying on the excerpts that were played during the trial/ examination of witness P-0030, and (iii) in an appended Annex 2 provided a very detailed summary of each excerpt and an explanation of its relevance and the trial issue to which the excerpt related.

53. In this filing of 25 February, the Prosecution cited the two video excerpts for which the Defence now seeks to present rebuttal evidence, including the precise *seconds* at which the child soldiers appear,[101] and unambiguously urged that children in the excerpts were visibly under the age of 15. The Prosecution indicated that it was relying on the "views only" (i.e. that it was not relying on the sound of the video),[102] which made it clear its position that the video

[99] T-107, p.16, lines 19-24.
[100] ICC-01/04-01/06-1730-Conf.
[101] ICC-01/04-01/06-1730-Anx2, para.13 (in relation to video DRC-OTP-0127-0061 – EVD-OTP-00571): "Excerpts minutes 02.44.00-02.44.40 and **02.47.00-02.47.53**" (emphasis added). And ICC-01/04-01/06-1730-Anx2, para.34 (in relation to video DRC-OTP-0120-0294 – **EVD-OTP-00574**): "Excerpt minutes **01.48.41-01.49.04** and 01.52.56-01.54.30" (emphasis added).
[102] ICC-01/04-01/06-1730-Anx2, para.13 (in relation to video DRC-OTP-0127-0061 – EVD-OTP-00571): "Excerpts minutes 02.44.00-02.44.40 and 02.47.00-02.47.53: ***reliance on views only:*** span of the audience as they listen to Thomas LUBANGA's speech. Amongst the audience are many children. **The excerpt shows two UPC/FPLC soldiers that in the Prosecution's submission are visibly under 15 years old** (at minutes 02.44.18 and 02.47.19)." (emphasis added)
And ICC-01/04-01/06-1730-Anx2, para.34 (in relation to video DRC-OTP-0120-0294 – EVD-OTP-00574): "Excerpt minutes 01.48.41-01.49.04 and 01.52.56-01.54.30: ***reliance on views only:*** depicts soldiers guarding the Office of Thomas LUBANGA, **including at least one who, in the Prosecution's submission, is visibly under the age of 15**. The UPC/FPLC soldiers have radios." (emphasis added)

depictions themselves, along with other trial evidence, were proof that child soldiers under the age of 15 were in the UPC/FPLC.

54. If the language of the 25 February submission was not sufficient, the Trial Chamber's subsequent decision confirmed that the video excerpts were proffered as proof of age: "In the judgment of the Bench, annex 2 to the present application is a useful demonstration of the kind of document that should be provided in this context: Its detail ensures that the stance of the party or participant introducing the material is clear, and at any relevant stage any other party or participant may file additional submissions".[103]

55. In short, there was no ambiguity or unclarity – the Prosecution precisely identified the video excerpts and their relevance. In the face of such precise notice, the Appellant's claim that he was justifiably unable to identify before the final judgment whether, or which, video excerpts would be deemed material to establish that children under 15 were in the militia is entirely unfounded.[104]

56. The Appellant did nothing to investigate this, including trying to locate the children captured in the video excerpts. He admits, in fact, that he decided to initiate this investigation only after the Article 74 Judgment (14 March 2012).[105] Between mid-March and May 2012, the Appellant located and interviewed the first proposed witness and by September 2012 he had located and interviewed the second proposed witness. Clearly, that the investigation and interviews occurred in such a short time demonstrates that with even the slightest modicum of due diligence the Appellant would have uncovered this evidence before the close of the trial evidence.

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[103] T-179-CONF-ENG ET, 27 May 2009, p.33, lines 12-17.

[104] This is not to concede, however, that the Appellant would succeed in a complaint that he could not predict what evidence a Trial Chamber would find to be most material or persuasive. See para.59, *supra.*

[105] Appellant's Request, para.42.

57. When the Defence attempted to offer this evidence at sentencing, the Trial Chamber rightly rejected it:

> "[I]t might be observed that this is evidence more relevant to the issues that were litigated during the trial rather than at sentence. […] This is gravely in danger of amounting to an attack on the Article 74 decision. We have reached conclusions as regards the use of child soldiers at the relevant time that involved this accused and, in part, what you are seeking to do is to question part of the basis on which the Trial Chamber reached that decision. That is, I'm afraid, impermissible. […] [T]his is in fact an attempt to mount a collateral attack on the Article 74 decision, and I'm sure as an advocate who understands his responsibility you wouldn't have used it for those purposes." [106]

58. In short, as the Chamber substantiated, the newly proffered evidence should have and could have been presented in the 24 months between the Prosecution's February 2009 submission and the close of the Appellant's case.

59. The Appellant attempts to bypass the due diligence requirement by arguing that he could not have anticipated that the Trial Chamber would consider the video evidence in reaching conclusions regarding the ages of the children seen in them. But the evidence was offered for that purpose, so the Appellant knew how its relevance would be argued to the Chamber. In the face of this notice, the Appellant made a tactical assumption that the excerpts, though offered expressly as evidence that the children depicted were underage, would not influence the Trial Chamber's Judgment. In retrospect, the Appellant was mistaken, but his mistake does not make the Chamber's consideration of the evidence unanticipatable or justify a failure to exercise the requisite diligence. The Prosecution deals with the merits of the Appellant's unsubstantiated contention - that no judge could reasonably consider the testimony of non-expert witnesses to prove age - at paragraphs 161-164, herein.

[106] T-360, p.24, lines 21-23, p.27, lines12-20 and p.28, lines 17-20, emphasis added.

60. The Appellant also submits that his miscalculation was predicated upon a suggestion by the Trial Chamber that it would not consider the video images for that purpose. That claim misconstrues the record. The Trial Chamber made no ruling or gave any indication suggesting that it would not consider the video images to determine whether children under the age of 15 were in the UPC/FPLC. To the contrary, the Trial Chamber indicated that this was a "live issue" since the Prosecution had asked the Trial Chamber to assess that the children in the videos were underage. The Appellant responded that appearance was not a sufficient basis on which to make an age determination. The Trial Chamber was noncommittal; it noted that "obviously, the Chamber, if the Chamber wishes, can commission an expert" but "in the first instance" it asked whether either of the parties had considered it and intended to call expert witnesses "to deal with what now appears to be a live issue in the case".[107] Though the Appellant argues that this signifies that the Trial Chamber ruled that it would not consider the images on the videos to conclude that children under the age of 15 were in the UPC/FPLC, this clearly is not the case.

61. Subsequent developments confirm that the Trial Chamber continued to view the issue as a live one. To that effect, the Trial Chamber routinely permitted fact witnesses to give their estimate of the age of children in the UPC/FPLC during the entire course of the trial. All but two of the Prosecution's fact witnesses testified as to the age of the children in the UPC/FPLC based on their knowledge and experience.[108] On 6 March 2009, P-0010 was permitted to provide an estimate of the age of recruits appearing in a video,[109] from which the Appellant should have concluded that the issue remained a live one and that the evidence could properly be relied upon by the Chamber.

[107] T-132-ENG, p.34, ln.8 to p.35, ln.10.
[108] ICC-01/04-01/06-2478-Conf, paras.153-166.
[109] T-145-CONF-ENG, p.18, lines 5-14; p23, line 24 to p.24, line 2.

62. The Prosecution never altered the position it had articulated in its filing of 25 February 2009 that it would ask the Chamber to evaluate the video images in corroboration of its trial evidence that children under the age of 15 were in the UPC/FPLC. Equally, the Trial Chamber never stated or suggested that it would not rely on the video evidence for the purpose of determining the age of the children in the UPC/FPLC. This indeed remained a live issue in as illustrated by the Prosecution's[110] *as well as the Appellant's*[111] final closing brief, right up until the issuance of the Judgment.

63. As the ICTY Appeals Chamber has held, "the defence has no right to assume what a Chamber will or will not accept in making its findings; it must put forward its best case in the first instance".[112] This record reflects that the Appellant here did precisely what the ICTY Appeals Chamber rejected – it assumed that the Trial Chamber would not rely on the video evidence and thus chose not to address the evidence itself. That is not sufficient justification for the extraordinary measure of proffering new evidence on appeal.

64. The Appellant's claim that he was not required to rebut the evidence, and that imposing such a duty would impermissibly shift the burden of proof, is also without merit.

65. The Prosecution bears the burden to prove beyond reasonable doubt that children under the age of 15 were enlisted, conscripted and used by the UPC/FPLC to participate actively in hostilities. In discharging that burden, it could have tried to identify, locate and call as witnesses the children in the videos, but it was not required to do so. Rather, the Prosecution is entitled to rest its case if it believes its evidence is sufficient and that it has adequately complied with its duties under article 54(1)(a). The Appellant has the right but not the obligation to offer evidence, and he too can assess whether he believes the Prosecution met its

[110] ICC-01/04-01/06-2748, annex 2.
[111] ICC-01/04-01/06-2773-Conf-tENG, paras.703-707.
[112] Second *Kupreskic* Decision, para.10.

burden. But that does not mean that the Appellant, having assumed that the videos would not be regarded as proof that children were in the militia and having waived his right to present allegedly contrary defence evidence at trial, has a right to a post-judgment opportunity to supplement the record.

*(b) The evidence could not been a decisive factor in the Judgment*

66. It is inescapable that the Appellant made an unsuccessful tactical decision or misappreciated the relevance and weight of the video excerpts, and thus failed to act with due diligence. That should ordinarily be the end of the matter. Assuming that in the absence of due diligence, late evidence may be offered for the first time on appeal if it renders the finding of guilt unsafe, this evidence also fails to meet that test.

67. The Trial Chamber's findings as regards the presence of children below the age of 15 within the ranks of the UPC/FPLC was based on the "sheer volume" of credible evidence presented and discussed at trial.[113] The Trial Chamber relied on the testimonies of both Prosecution and Defence witnesses,[114] including insider witnesses, witnesses who were in Bunia during relevant periods and who worked closely with the UPC/FPLC, witnesses who worked with demobilized child soldiers in and around Bunia, as well as UPC documents.[115]

68. At paragraph 869 of the Judgment, the Trial Chamber held (in relation to the use of bodyguards under the age of 15):

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[113] Judgment, para.643.

[114] Prosecution witnesses: e.g. P-0038 (Judgment, paras.688-691, 801, 814, 821-824), P-0016 (Judgment, paras.687, 807-808, 864), P-0017 (Judgment, paras.668, 680-682, 809, 813, 845, 872), P-0046 (Judgment, paras.831), P-0012 (Judgment, paras.826-830), P-0014 (Judgment, paras.707-709, 789, 832), P-0024 (Judgment, paras.663, 836-838), P-0041 (Judgment, paras.695-698). Defence witnesses: e.g. D-0004 (Judgment, paras.767), P-0030 (Judgment, paras.713, 717-718).

[115] See other corroborating evidence of the presence of children under the age of 15 in the UPC/FPLC (Judgment, paras.741-748), including one document emanating from the UPC/FPLC in February 2003 noting the presence of child soldiers under the age of 15: EVD-OTP-00518.

> *"[…] the Chamber has determined that P-0016, P-0030, P-0041 and P-0055 were consistent, credible and reliable witnesses, and when their accounts are considered alongside the video footage described above – which clearly portrays children amongst Mr Lubanga's bodyguards – the Chamber discounts the essentially irreconcilable evidence of D-0011 and D-0019 on this issue. On the basis of the accounts of P-0016, P-0030, P-0041 and P-0055 as well as the video footage, the Chamber is satisfied that between September 2002 and 13 August 2003, Thomas Lubanga, as President and Commander-in-Chief of the UPC/FPLC, used a significant number of children under the age of 15 within his personal escort and as his bodyguards."*

69. The two excerpts challenged by the Appellant were used by the Trial Chamber solely to corroborate the evidence from trial witnesses on the presence and/or use of children under the age of 15 in the UPC/FPLC. Thus, even assuming the truth of the newly-proffered evidence that two of the children in the videos were not under 15 at the time, it does not demonstrate a miscarriage of justice. Rather, even if accepted and found to be credible, it would discredit only one item of corroborating evidence, and thus would not impact the Judgment.

70. Lastly, the proffered evidence is unreliable. D-0040 and D-0041 claim that they were not under the age of 15 at the time the videos were recorded and substantiate their version with DRC election cards. But neither D-0040 nor D-0041 gives any explanation as to the type of corroborating information, if any, they provided to the DRC authorities in order to obtain the election cards. As a letter by the DRC Ministry of the Interior, adduced as rebuttal evidence by the Prosecution, specifies, election cards are not official identity documents, do not require written proof to corroborate the information on them, and cannot guarantee the civil status of the holder, in particular, the veracity of the date of birth.[116] D-0040's state diploma does not provide sufficient corroboration; as the Appellant himself acknowledged, state diplomas can be falsified - indeed, he

[116] See attached letter from the Ministry of the Interior, Annex A.

made this point in his application to stay the proceedings.[117] Witnesses in the case against *Katanga and Ngudjolo* testified to the uncomplicated falsification of election cards and school records in the DRC, as noted by Trial Chamber II.[118]

*(c) The proposal to admit the evidence without live witness testimony*

71. If the Appeals Chamber determines that it would consider for the first time on appeal the proposed additional evidence on this issue, the Prosecution submits that the Chamber should consider whether it has sufficient information before it enabling it to adequately weigh the evidence. The Prosecution recalls that the Appellant attempted to call witness D-0040 at sentencing, but the Trial Chamber refused to accept the evidence at that stage. Accordingly, the Prosecution did not have an opportunity to question the witness during the sentencing hearing. It has also not been able to test the account of D-0041 since he has only now been identified to the Prosecution. Thus, the evidence of both witnesses is untested. The Prosecution considers that the material placed before the Appeals Chamber, in particular the letter from the DRC authorities presented as rebuttal evidence, demonstrates that little or no weight can be placed on the evidence of these witnesses on appeal. Should the Chamber consider that a more in-depth inquiry is needed, then the Prosecution submits that the witnesses should be called to testify in person and the Prosecution be given an opportunity to challenge their accounts.

[117] ICC-01/04-01/06-2657-Conf-tENG, para.246. T-336-Conf-FRA-ET, p.10, lines 4-21.
[118] ICC-01/04-02/12-3, paras.178, 236.

### 2. Evidence related to P-0297

72. In relation to P-0297, the Appellant seeks to introduce: (i) a letter dated [REDACTED] signed by a representative of [REDACTED] which states that P-0297 was a member of this organization;[119] and (ii) several photographs [REDACTED], also allegedly proving that P-0297 was a member of this organization ("P-0297 Materials"). The Appellant claims that the P-0297 Materials support his ground of appeal that the Trial Chamber erred in failing to find that the Congolese authorities influenced the investigations of the Prosecution, thereby impacting the fairness of the proceedings and the totality of the Prosecution's evidence.

73. The P-0297 Materials do not appear to be newly-available. Further, there is no showing how the purported outside political influence rendered this trial unfair or could have been a decisive factor in the Judgment. Accordingly, the Appellant's request to introduce the Materials on appeal should be dismissed.

*(a) The evidence was not unavailable at trial to counsel acting due diligently*

74. The Appellant fails to explain why this information could not have been found through the exercise of due diligence during trial. One of the purported membership cards pre-dates P-0297's trial testimony. The Appellant could have asked P-0297 about his current or past memberships or political affiliations, particularly if the Appellant intended to argue wrongful Congolese influence on the trial.

[119] Appellant's Request, Annex 5.

*(b) The proposed evidence is not relevant*

75. The Appellant bears the burden of identifying with precision the specific finding of fact made by the Trial Chamber to which the additional evidence pertains. In the context of the P-0297 materials, the Appellant fails to do so, nor can the Prosecution discern any relevant finding. Instead, the Appellant argues generally that the proceedings were unfair due to the "infiltration of agents of the Congolese authorities in the investigations of the Court".[120]

76. Accordingly, the Appellant proffers this evidence not to demonstrate that the verdict (i.e. the finding of guilt) was unsafe, but to allege that the investigation was politically manipulated by the Congolese authorities and that the Trial Chamber failed to adequately consider this fairness issue or to assess this outside influence on the Prosecution's investigation. The Prosecution firstly notes that under existing international practice, the use of additional evidence on appeal is generally confined to material concretely relevant to the guilt or innocence of an accused.[121] Nor is there precedent for using the limited ability to consider newly discovered evidence on appeal to raise a whole factual issue rather than to contest a factual finding made by the Trial Chamber. But even assuming that new evidence of "unfairness" (not affecting guilt or innocence) could be entertained for the first time on appeal, it is not clear what the Appellant's fairness claim is. It appears to be based on a theory that the Prosecution was wrongly influenced by Congolese authorities. Neither this claim nor the P-0297 Materials appear to be capable of demonstrating that the Chamber erred in rejecting this fairness claim,

[120] Appellant's Request, p.9.

[121] Archbold, p.1460. The Appeals Chamber in *Kupreskic* discussed the admission of new evidence where the challenge was not to the conviction but to the fairness of the trial. Rule 115 of the ICTY Rules of Procedure and Evidence was held not to be applicable where the fairness of the trial was challenged; rather, the admission was governed by Rule 89(C) – admission of evidence that is relevant and probative: "If the Appeals Chamber considered that the proposed additional evidence related to a fact or issue already litigated at trial, Rule 115 was usually applied." (*Kupreskic* Appeal Judgment, paras.55-57).

much less that it based its judgment on inadequate evidence of the Appellant's guilt.[122]

77. The P-0297 Materials do not show interference by the Congolese government. The materials indicate that P-0297 was armed at the time of his arrest (a fact already in the trial record)[123] and that he was a member of an organization called [REDACTED] in [REDACTED], *after* P-0297 first met with the Office of the Prosecutor in 2007. The witness' post-investigation political affiliation ([REDACTED]) does not indicate a broader infiltration by the Congolese government in the Prosecution's investigations.

78. Nor can the appearance of P-0297 as a witness be cited as confirmation that Congolese authorities successfully manipulated the Prosecution's case: the Prosecution notes that *the Appellant* asked the Chamber to call P-0297, after the Prosecution had removed him from its list of witnesses due to his health.[124]

*(c) The evidence could not have been a decisive factor in the Judgment*

79. P-0297 was not relied on by the Trial Chamber.[125] Even if the Appellant's allegation that P-0297 was tainted by the Kabila government were accurate, his evidence did not form the basis for the conviction or sentence. The Appellant thus

[122] For instance, in an interlocutory appeal the Appeals Chamber held that due to their corrective nature, the scope of proceedings on appeal was "determined by the scope of the relevant proceedings before the Pre-Trial Chamber. The instant proceedings before the Pre-Trial Chamber concluded with the issuance of the Impugned Decision. Facts which postdate the Impugned Decision fall beyond the possible scope of the proceedings before the Pre-Trial Chamber and therefore beyond the scope of the proceedings on appeal. As the Updated Investigation Report concems facts which postdate the Impugned Decision, it is not relevant for this appeal and must be rejected *in limine*". ICC-01/09-02/11-202 OA, para.12; ICC-01/09-01/11-234 OA, para.13.
[123] ICC-01/04-01/06-2784-Conf, 10 August 2011.
[124] ICC-01/04-01/06-2307-Conf (Appellant's request to call P-0297) and ICC-01/04-01/06-22345-Conf (Prosecution's response).
[125] ICC-01/04-01/06-2842, para.429.

has not demonstrated that the P-0297 Materials could, much less would, render the verdict unsafe. This alone justifies the rejection of the evidence.

80. Nor is the proffered evidence relevant to the issue on appeal of improper Congolese influence on the case. Since nothing in these Materials establishes that P-0297 was a Congolese infiltrant into the Prosecution's investigation, these materials add nothing to the similar allegations previously made against P-0316 and P-0016. Those allegations were comprehensively considered by the Trial Chamber. In its Judgment, the Trial Chamber assessed the relationship between P-0316 and the Congolese government [126] and the impact P-00316 may have had on other trial witnesses.[127] Similarly, the Trial Chamber carefully considered and rejected the Appellant's allegations – based on a complete lack of evidence - that P-0016 provided false testimony out of loyalty to the Congolese government.[128]

81. It is clear from the above that the Trial Chamber considered any allegations of government influence over witnesses when the Appellant raised such issues at trial. The Appellant had an opportunity to be heard regarding every such violation.[129] The allegations were unproven.

82. In light of the above, the new allegations regarding P-0297 have no bearing on the validity of the Trial Judgment. The Appellant has not demonstrated that the proffered evidence regarding P-0297 was unavailable at trial or could render the verdict unsafe.

[126] Judgment, paras.366-368.
[127] Judgment, paras.340-349, 372-374.
[128] Judgment, paras.685-686, citing Defence Submissions ICC-01/04-01/06-2773-Red-tENG, paras.405-407.
[129] See generally ICC-01/04-01/06-2773-Red-tENG.

### 3. Evidence related to non-disclosure of an FPLC document

83. The Appellant proffers a list of FPLC members dated 11 December 2004 (16 months after the end of the period of the charges in this case).[130] The document was referenced in a prior witness statement that the Appellant received in disclosure in May 2010. After the Judgment in 2012, the Appellant requested the document, and the Prosecution immediately provided it. Not only was this document facially not exculpatory (and thus subject to disclosure obligations); its existence was known to the Appellant since May 2010, and had it asked it would have received it. Finally, it is not relevant to an appeal issue and bears no conceivable impact on the Judgment.

*(a) The evidence was not unavailable at trial*

84. The document was available to the Appellant at trial through the exercise of due diligence. Indeed, the Appellant concedes that it was mentioned in the transcript of a 2010 telephone interview with a witness. This record of the interview was (a) disclosed to the Appellant on 23 April 2010 and (b) thereafter tendered as defence evidence.[131] Nothing in this record suggests that, had the Appellant asked during trial, the Prosecution would have refused or failed to disclose the document; to the contrary, the quick compliance with the request demonstrates a willingness to provide irrelevant materials, if asked.

85. The Appellant completely fails to address the issue of availability, one of the critical factors it bears the onus of addressing on this application.[132] The Appellant

[130] DRC-OTP-0141-0009.
[131] Annex 8 to the Appellant's Request.
[132] Bianchi and Onsea at p.729, with additional authorities.

does not even attempt to explain why it failed to make the request during the trial, on the basis of information available to it at that time. On this basis alone, the Appellant's request to present this evidence on appeal must fail.

*(b) The proposed evidence is not relevant*

86. The Prosecution firstly notes that the Appellant is proffering this evidence not for the purposes of demonstrating that the verdict (i.e. the finding of guilt) was unsafe, but to support an argument that the Prosecution persistently violated its disclosure obligations, for which the Trial Chamber should have provided a remedy.

87. As set out above at paragraph 45, the use of additional evidence on appeal should primarily be confined to material relevant to the guilt or innocence of an accused.[133] Second, in this case, the Appellant is actually adducing a new fact (that a particular document was not disclosed at trial), not new evidence pertaining to a finding made by the Trial Chamber. That new fact is a post-Judgment development, and in this case, does not appear to be capable of demonstrating any error in the Judgment.

88. Finally, the newly proffered document neither challenges any factual findings nor proves that the Prosecution deliberately withheld material that it was obligated to disclose. The Prosecution assessed before and during trial that the list of militia membership in 2004 was irrelevant -- not exculpatory, impeaching, or material to the preparation of the Appellant's defence. Had the Appellant, when he reviewed the 2010 statement in which the list was mentioned, believed otherwise he would have asked for it and would have received it promptly (as happened when the he asked for it after conviction).

[133] Archbold, p.1460.

89. On the relevance of this evidence to the factual findings underpinning the Judgment, the Appellant contends that the December 2004 membership list would have discredited the Prosecution evidence that one witness (P-0038) was a member of the FPLC. This is untrue. First, as noted by the Prosecution in its email exchange with the Appellant,[134] the list significantly postdates the period of charges (the list is dated December 2004 while the indictment period is September 2002 – August 2003). Second, the list does not include all members of the FPLC as of December 2004; according to the Prosecution's understanding, and contrary to the Appellant's assertion, the document lists only those FPLC members who were nominated for a process whereby soldiers from rebel armed groups would join the DRC national army. Indeed, the list bears the title "Liste Nominative", indicating that the document is nominating a group of persons and that it contains a subset of the full FPLC force as of that point in time. Given the purpose of the document, child soldiers in the FPLC could not have been nominated and thus would not have appeared on the list, since membership in the Congolese national army was then (and is still) limited to soldiers aged 18 and above. Equally, other FPLC soldiers may not have opted or been nominated for transfer into the DRC national army.

*(c) The evidence could not been a decisive factor in the Judgment*

90. The document can have no impact on the verdict. The Prosecution reiterates in this context the *corrective* nature of these appeals proceedings.[135] This is not a trial *de novo* and is not an opportunity for a party to remedy any and all failings or oversights made during the trial phase – including what precise questions could have been posed to individual witnesses.

[134] Annex 8 to the Appellant's Request.
[135] See the discussion of the law on this point at para.38 above.

91. The Appellant contends that the proffered evidence is relevant to demonstrate that Defence witnesses D-0037 and D-0006 were members of the UPC/FPLC in 2004. Yet, this was not a live issue at trial.[136] The Trial Chamber accepted that D-0037[137] and D-0006[138] were members of the UPC/FPLC, which the Prosecution never disputed.[139] Admitting this document for that purpose would have no impact on the Judgment.

92. Finally, the Prosecution disagrees with the Appellant's assertion that the document was essential to his ability to identify former FPLC soldiers.[140] As Commander in Chief of the FPLC,[141] a status never disputed by him, the Appellant was best-placed to access information related to his own troops.

93. The Appellant's request to present this evidence before the Appeals Chamber must fail because it was available at trial, it is not relevant to issues on appeal and it has no decisive impact on the Judgment.

### 4. Testing the evidence

94. In the event that the Appeals Chamber rejects the above arguments and decides to admit the evidence for the first time on appeal, the Prosecution notes the jurisprudence of the ICTY Appeals Chamber on the procedure by which the evidence may be tested when, such as in this case, its veracity is disputed. The Appeals Chamber can either: (i) test the evidence itself to determine veracity by holding an evidentiary hearing; (ii) order the case to be remitted to a new Trial

[136] Appellant's Request, para.38.
[137] ICC-01/04-01/06-2842, paras.725-727.
[138] ICC-01/04-01/06-2842, paras.261-262, 690, 1078, 1111.
[139] In fact, the Prosecution relied on the testimony of D-0037 and D-0006 that they were members in the FPLC in May and June 2002 to support its arguments on the existence of the FPLC and training by the FPLC in Mandro prior to September 2002, which the Appellant denied (See ICC-01/04-01/06-2748, para.108).
[140] Appellant's Request, para.38.
[141] Judgment, para.1356.

Chamber to hear the new evidence; or (iii) admit all items of conflicting evidence without holding a hearing, without prejudice to the determination of the weight to be attached to the evidence.[142] To the extent necessary, the Prosecution has addressed its specific arguments on the weight of the additional evidence within each relevant section of its substantive response to the Appellant's appeal, below. In relation to the proposed witness evidence, the letter from the DRC authorities at Annex A hereto establishing that election cards do not guarantee civil status and can be falsified given that they can be obtained without written proof of date of birth, confirms that the evidence has no proper weight. As already advanced, the Prosecution considers that if and when the Appeals Chamber, having determined that the evidence is admissible, is of the view that a more complete testing of the evidence is required, then the witnesses should be called and their evidence tested through cross-examination.

### 5. Whether the additional evidence establishes a miscarriage of justice

95. Once the Appeals Chamber has admitted additional evidence, the relevant question at this stage is whether the Appellant has established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber, together with the additional evidence admitted during the appellate proceedings.[143] Again, the Prosecution has addressed this question

[142] *Kupreskic* Appeal Judgment, paras.70-71.

[143] *Kupreskic* Appeal Judgment, paras.75-76. The Prosecution notes that in a subsequent case, the ICTY Appeals Chamber appears to have endorsed a different standard, whereby the Appeals Chamber must determine on the basis of the evidence on the record and any additional evidence whether "it is itself convinced beyond a reasonable doubt as to the finding of guilt"(*Blaskic* Appeals Judgment, para.24 (c) (ii)); this standard, however, has been very controversial and its compatibility with the corrective nature of the appeals process and the limited function of the Appeals Chamber is doubtful (see Partial Dissenting Opinion of Judge Weinberg de Roca in the same *Blaskic* Appeals Judgment, paras. 3-9, inter alia, emphasizing that even in cases with additional evidence the question for the Appeals Chamber remains "whether a reasonable trier of fact could have reached the Trial Chamber's factual conclusion" (para.47).

in each section herein, in its response to the merits of the proposed additional evidence.

## II. PART II: PROSECUTION'S RESPONSE TO THE APPELLANT'S EIGHT GROUNDS OF APPEAL

### A. FIRST GROUND: NOTICE AND SPECIFICITY OF THE CHARGES

#### 1. There was sufficient notice of the charges

96. In his first ground of appeal, the Appellant argues that he was not fully informed of the nature, cause and content of the charges against him and that the DCC fails to specify any of the material facts underpinning the charges.[144] His argument is that the DCC is sufficiently specific solely if the evidence of the nine former child soldiers is accepted; without this evidence, he claims that the DCC fails to specify the identity of victims, without which, he had no notice of the charges.

97. Contrary to this argument, there can be no doubt that the Appellant has been fully on notice of the charges against him for over two years before his trial began. Prior to the confirmation hearing, the Prosecution filed the DCC in 2006 and an updated version in 2008.[145] Both documents contained clear, timely and consistent information detailing the factual basis underpinning the charges against him,[146] including precise details on the alleged mode of criminal responsibility. Following a three-week confirmation hearing at which the Appellant tendered evidence and challenged the Prosecution's evidence, the Pre-

[144] Appeal Brief, paras.1-20.
[145] ICC-01/04-01/06-356-Anx2 and ICC-01/04-01/06-1571-Conf.
[146] See the requirements as set out in: *Kupreskic* Appeal Judgment, para.114; *Kvocka* Appeal Judgment, paras.43-53.

Trial Chamber confirmed the charges, and its decision referenced specific facts and evidence.[147] After that decision was handed down, in May 2008, the Prosecution filed an updated summary of its presentation of evidence, once again comprehensively setting out its position on the crimes committed by the Appellant and his criminal responsibility.[148] And at trial, it delivered a lengthy opening statement articulating its case theory,[149] which remained unchanged throughout the trial. Finally, the Appellant's full understanding of the nature of the Prosecution's case can be observed from his final trial brief and closing submissions.[150]

98. The Pre-Trial Chamber considered and rejected the Appellant's attack on the sufficiency of the charging document, stating that it met 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".[151]

99. The Appellant also fails to note that the confirmation decision sets out the material facts underpinning the charges clearly and with sufficient specificity. The Appellant's complaint that the Trial Chamber excluded in its Judgment all of the "essential facts" presented by the Prosecutor and found by the Pre-Trial Chamber in support of the charges[152] is incorrect and reveals the Appellant's confusion between facts and evidence.[153] The Trial Chamber excluded the *evidence* of the alleged former child soldiers but not the *facts* underpinning the charges.

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[147] ICC-01/04-01/06-796-Conf-tEN.
[148] Prosecution's Updated Summary of Presentation of Evidence and Annexes, ICC-01/04-01/06-1354-Conf, The two annexes contained the list of evidence related to the witnesses the Prosecution intended to call and documents and other items of evidence the Prosecution intended to rely upon.
[149] T-107, p.4, line 10 to p.36, line 4.
[150] See *Kvocka* Appeal Judgment, paras.51-53.
[151] ICC-01/04-01/06-796-Conf-t-EN, paras.146-153.
[152] Appeal Brief, para.9.
[153] As noted by the ICC Appeals Chamber, there is a distinction between the facts (which refers to the factual allegations which support each of the legal elements of the crime charged) and the evidence put forward by the Prosecutor: ICC-01/04-01/06-2205. See also ICC-01/05-01/08-836, para.31 and ICC-01/04-01/07-1547, paras.23, 30.

### 2. The charges were sufficiently specific

100. The core of the Appellant's complaint appears to be that (a) the Prosecution had an obligation to identify, by name, some undefined number[154] of alleged victims in the DCC to satisfy regulation 52 of the RoC; *and* (b) the Trial Chamber had an obligation to find beyond reasonable doubt that the Appellant committed crimes against *those* identified victims. Both of these contentions are ill-founded; there is no legal requirement to name the victims of genocide, crimes against humanity, or war crimes in order for the charges to be sufficiently specific.

101. First, as the Appellant acknowledges,[155] the Prosecution alleged from the outset,[156] and the Pre-Trial Chamber confirmed, charges that the Appellant enlisted, conscripted and used children in his militia, on a wide scale, over a one-year period and an extended geographic territory, and further to a common plan.[157] The DCC further named nine children, as representative examples, of the Appellant's broad campaign to recruit and use child soldiers.[158] And indeed, it is

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[154] The Appellant accepts at para.12 of his Appeal Brief that the Prosecution need not identify all victims by name or the time and location of the crimes when charging a policy of recruitment and use of child soldiers. He complains simply that none of the 9 identified victims were relied upon by the Chamber for the conviction.

[155] Appeal Brief, para.16.

[156] DCC, ICC-01/04-01/06-356-Anx2, 28 August 2006, para.87. Amended DCC, ICC-01/04-01/06-1571-Conf-Anx, 22 December 2008, para.101; public redacted version filed on 23 December 2008: ICC-01/04-01/06-1573, para.101.

[157] Amended DCC, ICC-01/04-01/06-1571-Conf, 22 December 2008, paras.6-40. The document contains sections entitled "Policy of enlisting and conscripting children under the age of fifteen years and using them to participate actively in hostilities" (p.10) and "Pattern of enlisting and conscripting children under the age of fifteen years and using them to participate actively in hostilities"(p.12).

[158] The Prosecution's "Updated Summary of Presentation of Evidence" refers to the "policy of broad recruitment" and the "pattern of large-scale enlistment and conscription of child soldiers".[158] The Amended DCC sets out the indictment period (1 September 2002 and 13 August 2003) and identifies the location (Ituri district): para.6 "all acts alleged in this DCC occurred between 1 September 2002 and 13 August 2003 in the district of Ituri".[158] "After the foundation of the FPLC, through the remainder of 2002 and throughout 2003, TLD in pursuing the UPC policy, jointly with a variety of high-level and mid-level subordinate FPLC commanders, continued to enlist and conscript children systematically and in large numbers, including children under the age of fifteen years, to militarily train them and to use them to participate actively in hostilities."[158] Para 29 sets out the features of the "repeated" campaigns to recruit children. It sets out the contributions of Accused to the crimes, the

that broad campaign that the Pre-Trial Chamber found, when it observed that the conscription and enlistment of children under the age of 15 years was a "systematic practice" of the FPLC - a "recruitment policy" - that targeted a large number of children:

> "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, in Sota at the beginning of 2003 and in Centrale."[159]

102. That core finding was reiterated in the final Judgment. With respect to the specifically-identified victims, the Trial Chamber stated in its Judgment that "it is relevant to note that these nine individuals were identified by the prosecution at an early stage in these proceedings as demonstrating the way in which children were enlisted, conscripted and used by the FPLC".[160]

103. The Prosecution submits that the two Chambers below correctly recognized that it was not essential to include in the charges the nine specific children alleged to have been recruited and used, or essential for the Court to find – either based on substantial grounds or beyond a reasonable doubt -- that any, some, or all of the nine were child soldiers.

104. Thus, the Appellant was fully on notice that the Prosecution's case was in no way limited to the nine sample episodes chosen as evidence. And the Trial Chamber, in turn, was not limited in its evaluation of the evidence of large-scale and widespread (temporal and geographic) recruitment and use to those nine instances. Indeed, evidence of the enlistment, conscription and use of child

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identity of some of his co-perpetrators, the common plan. It refers to the "pattern" of recruiting and using children under the age of 15. After rehearsing the stories of the nine alleged former child soldiers, at para 101 of the Amended DCC, the Amended DCC explicitly stated that "the children's experiences are representative of those other children enlisted, conscripted and used by the FPLC".

[159] ICC-01/04-01/06-796-Conf, paras.250-251.

[160] Judgment, para.480.

soldiers by the UPC/FPLC, and of the Appellant's responsibility for these crimes, came principally from numerous sources in addition to the alleged former child soldiers.[161] As the Trial Chamber explained, "the sheer volume of credible evidence relating to the presence of children below the age of 15 within the ranks of the UPC/FPLC has demonstrated conclusively that a significant number were part of the UPC/FPLC".[162]

105. Turning to the Appellant's contention that it is necessary as a matter of law to identify specific victims in mass crimes, again the Prosecution disagrees. In certain cases it will neither be possible nor necessary to provide specific information on the identity of victims. As recognised by the ICTY Appeals Chamber in *Kupreškić*,

> "there may be instances where the sheer scale of the alleged crimes 'makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes'".[163]

The Chamber further noted that:

> "Such would be the case where the Prosecution alleges that an accused participated, as a member of an execution squad, in the killing of hundreds of men. The nature of such a case would not demand that each and every victim be identified in the indictment. Similarly, an accused may be charged with having participated as a member of a military force in an extensive number of attacks on civilians that took place over a prolonged period of time and resulted in large numbers of killings and forced removals. In such a case the Prosecution need not specify every single victim that has been killed or expelled in order to meet its obligation of specifying the material facts of the case in the indictment. Nevertheless, since the identity of the victim is information that is valuable to the

[161] Judgment, paras.1019-1357.
[162] Judgment, para.643.
[163] *Kupreškić* Appeal Judgment, para.89; *Kanyarukiga* Judgment and Sentence, para. 32.

> preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so."[164]

106. The Prosecution has consistently articulated that the Appellant's crimes were committed on a large scale throughout the region of Ituri over a one-year period. Given the nature of the crimes in this case, the names of individual child soldiers is not essential as an attribute of fairness to provide the Defence with notice of the parameters of the charges.[165] Nor is it set out as a requirement in regulation 52 of the RoC. In the *Bemba* case, the Chamber considered it unnecessary for the Prosecutor to demonstrate, for each individual killing, the identity of the victim and the direct perpetrator or the precise number of victims. [166]

107. Similarly, the Appeals Chamber in the *RUF* case (SCSL) rejected Appellant Sesay's arguments on appeal, *inter alia*, that the Trial Chamber did not make proper findings as to whether the crimes of conscription and use of child soldiers were part of his 'design' because it had failed either to identify the child soldier victims, to require a specimen count or to approximate the number of child soldiers used pursuant to his plan.[167] It stated that:

> "Sesay cites no authority for his position that the Trial Chamber could only make such a finding on the basis of the identity of victims, or that the Trial Chamber was required to demand a specimen count here. In this respect, the Appeals Chamber considers that the Trial Chamber found that the crimes committed were those that Sesay substantially contributed to the planning of on the basis of the identity of the perpetrators and the manner in which the crimes were committed." [168]

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[164] *Kupreškić* Appeal Judgment, para.90.
[165] SCSL *Sesay et al.* Appeal Judgment, paras.771-776 (no requirement to plead the identity of child soldier victims or to identify the precise number of victims). SCSL *Taylor* Trial Judgment, paras.1355-1361 (there is no legal requirement to plead specific locations of conscription, enlistment or use. See in particular para.1357).
[166] ICC-01/05-01/08-424, 15 June 2009, para.134.
[167] SCSL *RUF* Appeal Judgment, paras.771-776.
[168] SCSL *RUF* Appeal Judgment, para.773.

108. In this case, the Appellant was charged with having made an essential contribution to a common plan that resulted, in the ordinary course of events, in the enlistment, conscription and use of children under the age of 15 to participate actively in hostilities. The DCC specifically identified the Appellant's co-perpetrators and described the common plan, his essential contribution, his awareness that the enlistment, conscription and use of children under the age of 15 would occur in the ordinary course of the implementation of the common plan, the places of recruitment, and the locations of training camps. It also particularly alleged the presence of child soldiers in the UPC/FPLC and the use of children under 15 to participate actively in hostilities.[169] This level of detail was sufficient to put the Appellant on notice of the precise nature of the charges against him, their cause and their content.

109. The Appellant makes the unsustainable argument that the conviction, without the evidence of the nine alleged former child soldiers, somehow prejudiced him in his ability to prepare his defence, either because this evidence was excluded late, after he had focussed his defence on discrediting it, or because the remaining evidence on which the conviction was based did not reach a sufficient level of precision to enable him to prepare his defence.[170] These assertions ignore that the Prosecution's case, as already demonstrated, was always broader: the case never relied solely or even primarily on the recruitment and/or use of these nine individuals; and the Appellant had ample notice of both the breadth of the charges and the entire body of evidence to be relied upon by the Prosecution. The Appellant's admission that he focused "the essential" of his investigations on the nine witnesses[171] may reveal his strategic choice, but that strategy, even if erroneous, does not entitle him to claim that he was deprived of notice or fair treatment at trial.

[169] ICC-01/04-01/06-356-Anx2; ICC-01/04-01/06-1571-Conf-Anx; ICC-01/04-01/06-1354-Conf.
[170] Appeal Brief, paras.14-15.
[171] Appeal Brief, para.16.

110. In addition, the Prosecution stresses that the Appellant *did* investigate the broader case against him and he called witnesses and led evidence in relation to it. The witness list he submitted on 18 December 2009 identified 10 witnesses to respond to this broader case, and he ultimately called five witnesses to deal with the substantive issues in the case.[172] The Appellant "bifurcated" his case, first challenging the testimony of all Prosecution child soldier witnesses then focussing on the individual criminal responsibility of the Appellant.[173] All substantive aspects of the Prosecution's case were covered.

111. The Appellant had every opportunity to conduct investigations into the charges, to present evidence at the confirmation hearing and at trial, to challenge all Prosecution witnesses as well as documentary and/or any other evidence regarding the enlistment, conscription and use of children under 15 in the UPC/FPLC. For the reasons set out above, this ground of appeal must fail.

## B. SECOND GROUND: THE PROSECUTION DID NOT VIOLATE ITS STATUTORY OBLIGATIONS

112. Under this second ground of appeal, the Appellant argues that the Prosecution violated four statutory obligations (to investigate exonerating circumstances, to disclose exculpatory information, to remain independent, and the duties of fairness and impartiality), thereby impacting the reliability of all Prosecution trial evidence and the fairness of the trial.[174] Not only are these arguments unsupported by the evidence; they are entirely repetitive of arguments at trial that were considered and correctly rejected by the Trial Chamber. The

[172] Judgment, para.40.
[173] Judgment, paras.37-51.
[174] Appeal Brief, paras.23-109.

Appellant fails to demonstrate how their rejection constituted an error warranting intervention by the Appeals Chamber. Accordingly, this ground of appeal should be dismissed *in limine*.

113. The Appellant argued these same four alleged violations in a motion to stay the proceedings due to alleged abuse of process.[175] After hearing evidence on this complaint for a year and considering extensive briefs by the parties and participants, the Trial Chamber concluded that there had been no violation of his right to a fair trial and denied the Appellant's application on all grounds.[176] The Appellant then renewed the claims in his closing brief,[177] literally importing the prior arguments from his abuse of process application.[178] In its Judgment, the Trial Chamber addressed these arguments afresh[179] and concluded that it was "unpersuaded by the suggested violations of the prosecution's statutory duties, particularly since the Chamber took measures throughout the trial to mitigate any prejudice to the defence whenever these concerns were expressed. Additionally, the Chamber kept these obligations on the part of the prosecution permanently under review".[180] The Trial Chamber did not neglect to consider any of the Appellant's arguments. The Appellant merely disagrees with the Chamber's assessment of the evidence and ultimate conclusions.

114. The Appellant now contends that the Chamber erred in rejecting his complaints about prosecutorial conduct. He first claims that the Chamber failed to consider the impact of his arguments on the totality of the Prosecution's evidence.[181] To the contrary, the Trial Chamber addressed that point in paragraphs 37-39, 119-123 and 178-179 of its Judgment; the very title of the section at paragraphs 119-123 in the Judgment is "[t]he defence challenge to the entirety

[175] ICC-01/04-01/06-2657-Conf-tEng, paras.229-322.
[176] ICC-01/04-01/06-2690-Conf, paras.170-222.
[177] ICC-01/04-01/06-2773-Conf-tEng, paras.1-18.
[178] ICC-01/04-01/06-2773-Conf-tEng, para.3.
[179] Judgment, paras.119-123, 179.
[180] Judgment, para.120.
[181] Appeal Brief, para.29.

of the prosecution's evidence".[182] And when considering the alleged violations of prosecutorial duties, the Trial Chamber did not limit its analysis to one segment of the evidence. Indeed, it stated that "whenever violations of the prosecution's statutory obligations have been demonstrated, the Chamber has evaluated whether, and to what extent, they affect the reliability of the evidence to which they relate. In each instance, any problems that have arisen have been addressed in a manner which has ensured the accused has received a fair trial".[183] The Trial Chamber did not err in this approach.

115. Should the Appeals Chamber consider that the Appellant's arguments as advanced in this ground of appeal should be entertained, the Prosecution responds to the substance of each allegation below.

**1. Investigation of exonerating circumstances**

116. The Appellant argues that the Trial Chamber erred in fact in assessing the gravity of the Prosecution's alleged failings regarding investigations,[184] in assessing the alleged corresponding harm to the Appellant, and in remedying the Prosecution's alleged lack of investigation into exonerating circumstances.[185]

117. These arguments on alleged factual errors fail to explain how no reasonable trier of fact, on the basis of the record before it, could have concluded (a) that measures were taken throughout the proceedings to ensure the rights of the Appellant were respected; and (b) that the suggested breaches did not taint the totality of the Prosecution evidence and that the trial was fair.

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[182] Judgment, p.60.
[183] Judgment, para.123. See also ICC-01/04-01/06-2690-Conf, para.198.
[184] Appeal Brief, paras.28-34.
[185] Appeal Brief, paras.35-39. On their face, the errors do not appear to be pure factual errors but rather mixed legal and factual errors, or procedural ones. This, however, does not alter the Prosecution's response.

118. In its decision on the Appellant's abuse of process application, the Trial Chamber clearly stated that "this is not a situation in which alleged prosecutorial misconduct has disabled the accused from properly defending himself. The Chamber has responded comprehensively to the defence submissions so as to ensure that the totality of available evidence on the relevant intermediaries is explored during the trial".[186] After detailing the orders it made to ensure that the Appellant could investigate these issues (such as calling intermediaries and Prosecution representatives to testify and issuing various disclosure orders), the Trial Chamber concluded that it was "unpersuaded, in these circumstances, that 'the accused's rights have been breached to the extent that a fair trial has been rendered impossible'".[187]

119. The Trial Chamber addressed the issue again in its Judgment at paragraphs 118-123. It rejected the Appellant's overall arguments on the suggested violations of the Prosecution's statutory duties,[188] setting out the individual measures it took throughout trial to mitigate any prejudice to the Appellant.[189]

120. These measures included, as the Appellant acknowledges, the exclusion in its Judgment of evidence that had been specifically challenged by him.[190] Despite the Appellant's attempt to underplay the scope of this exclusion and its significance, in fact the Court's refusal to consider the challenged evidence was the best remedy possible in relation to that evidence. The Appellant's complaint that the Trial Chamber did not assess other evidence in considering the claims of prosecutorial misconduct and defence prejudice is without merit. The Trial

[186] ICC-01/04-01/06-2690-Conf, para.188.
[187] ICC-01/04-01/06-2690-Conf, para.188.
[188] Judgment, para.120.
[189] Judgment, paras.121-122.
[190] Appeal Brief, para.37.

Chamber carefully evaluated *all* trial evidence in its Judgment prior to reaching conclusions on each item.[191]

### 2. Disclosure of exculpatory information

121. The Appellant claims that the Trial Chamber committed a factual and a legal error regarding the late disclosure of exculpatory evidence. First, he alleges a factual error in the Trial Chamber's conclusion that it had fully addressed any potential prejudice to him arising from incomplete or late disclosure.[192] His argument is that the Trial Chamber can never assume that the Prosecution has made full disclosure, all it knows is when instances of non-disclosure are brought to its attention by either the Prosecution or the Defence. But that will always be the case, since a Chamber can never know what it does not know. That, however, does not justify the entirely speculative presumption that the Prosecution is deliberately withholding information that ought to have been disclosed.

122. To support its presumption, the Appellant cites two examples of late disclosure. Of course, the fact that the disclosures were made, even if late, itself contradicts his conclusion that the Prosecution is continuing to withhold disclosable materials. Nor, on the merits, are these examples sufficient to raise a red flag on prosecutorial practices generally.

123. The first example is one that he also raised during the trial, regarding the late disclosure of the relevant part of an internal OTP memo, which is not disclosable

[191] Judgment, para.94, 101-102 and subsequent assessments of individual items of evidence and witness testimony.
[192] Appeal Brief, para.45.

ordinarily as internal work product,[193] in which two OTP investigators recorded P-0031's failure to turn over promised documentation to them and cited that as a basis for questioning his credibility, an assessment reversed several months later after P-0031 provided the promised materials as well as other items.[194] The Trial Chamber considered this complaint twice: first, in a specific decision on disclosure related to this witness,[195] in which it noted that disclosure was made and accepted the Prosecution's explanation, and then in the comprehensive assessment of P-0031's credibility,[196] including this argument,[197] in its Judgment.

124. Following Prosecution submissions,[198] the Chamber agreed that the investigators' personal assessments of the witness were not disclosable, though the underlying fact – that he delayed providing promised materials, causing the investigators to cease contact with him for a time – "may well have constituted information which should have been provided to the defence".[199] The Trial Chamber concluded nonetheless that it was "persuaded that the principles applied by the Prosecutor to disclose, in this context, are appropriate and conform with the Rome Statute framework and the jurisprudence of the Court".[200] And since the material was disclosed and the Chamber accepted that the Prosecution did not act in bad faith, that resolved the issue.[201]

125. Moreover, in the context of addressing the complaint about this late disclosure, the Trial Chamber undertook an in-depth review of the disclosure practices of the Prosecution and found that its underlying principles were appropriate and consistent with the Statute and judicial decisions.

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[193] Rule 81(1).
[194] Appeal Brief, paras.48-52; ICC-01/04-01/06-2657-Conf-tEng, paras.277-278.
[195] ICC-01/04-01/06-2656-Conf.
[196] Judgment, paras.451-477.
[197] Judgment, paras.456-459.
[198] E-mail from the Office of the Prosecutor to the Legal Officer of the Chamber on 9 November 2010 at 15:59. Pursuant to Trial Chamber's Order: T-326, p.4, lns.19-25 and ICC-01/04-01/06-2625-Conf.
[199] ICC-01/04-01/06-2656, para.16.
[200] ICC-01/04-01/06-2656-Conf., para.17.
[201] ICC-01/04-01/06-2656-Conf, para.19.

126. The second example of factual error cited by the Appellant relates to a document that forms part of his request to present additional evidence at trial. For the reasons set out above in paragraphs 83 - 85, and contrary to the Appellant's suggestion,[202] this evidence was not deliberately withheld. It was expressly referred to in a statement given to the defence in May 2010, and the statement was subsequently tendered into evidence by the Appellant. When the Appellant made an inexcusably tardy request for it after the article 74 Judgment, the Prosecution produced it immediately. Like the other instance of alleged misconduct, this example cannot support a presumption that the Prosecution wilfully ignores its disclosure obligations; it assessed the document (and continues to assess it) as completely irrelevant. The Prosecution is not obligated to produce everything in its files – indeed, were it to do so the Appellant would likely complain about being overwhelmed with hundreds or thousands of irrelevant documents. Its obligations are to disclose evidence that it reasonably determines is exculpatory, impeaching, or material to the preparation of the defence. As argued above (paragraphs 84-85), this document clearly fell outside that scope.

127. Third, the Appellant claims the Chamber committed a legal error in concluding that the late disclosure of evidence did not prejudice his rights, citing one example of the disclosure in October 2010 of notes relating to the interview of a person, in 2006, who claimed to have been the Appellant's bodyguard throughout the period and who denied having seen child soldiers in the UPC and the Appellant's Presidential Guard; according to this same person, the Appellant was opposed to the recruitment of child soldiers.[203] The Appellant complains that disclosure was too late for him to be able to locate this person and that the

[202] Appeal Brief, paras.53-65.
[203] Appeal Brief, para.70. The Appellant made arguments on this document at trial: ICC-01/04-01/06-2773-Red-tEng, para.848, referring to ICC-01/04-01/06-2657-Red-tEng, paras.279-280.

Chamber is not entitled to reject the information in his statement solely on the basis that it is undermined by other, credible evidence.[204]

128. Simply put, this is not a serious complaint. If the person had been the Appellant's bodyguard, surely the Appellant would have known his identity and that he would have first-hand knowledge of the facts. It is wholly irrational for the Appellant to assert that (a) the late disclosure of this information denied him the ability to identify his own bodyguard as a potentially exculpatory witness and the opportunity to call the witness at trial, and (b) that a Trial Chamber is precluded from performing its ordinary task of evaluating evidence and determining which evidence is worthy of belief - which necessarily entails assessing competing evidence, making determinations as to reliability and discarding evidence that is not credible, either in whole or in part - , by preferring the credible evidence. Moreover, the Appellant misrepresents the authority he cites for the contention that a Chamber cannot reject an item of evidence when that evidence is refuted by other evidence.[205] The cited paragraph of the ICTR decision refers to the specific situation in that case, in which the Trial Chamber did not provide a reasoned opinion for preferring the evidence of two witnesses whose evidence it said it would approach with caution over the evidence of one witness whom it found to be credible.[206]

129. None of these three examples, moreover, had any conceivable prejudicial impact on the verdict and do not establish unfairness to the Appellant. On the first, the Appellant acknowledges that he could have requested additional investigation time or the recalling of witnesses – but chose not to - as these remedies were granted by the Trial Chamber on other occasions.[207] Equally importantly, at the end of the case, the Trial Chamber did not rely on P-0031's

[204] Appeal Brief, para.72 citing the Judgment, para.1261.
[205] Appeal Brief, para.73.
[206] *Muvunyi* Judgment, para.147.
[207] Appeal Brief, paras.67-68. The Chamber permitted the Appellant to recall P-0581 at his request: T-310-CONF-ENG, p.69, line 14 to p.70, line 8.

evidence for any of its factual findings in the Judgment. The irrelevance of the second document, argued previously, equally contradicts the Appellant's claim that the failure to disclose it earlier denied him a fair trial. And the third item – that the Appellant's purported bodyguard exonerated him – if true would have been available to the Appellant even without disclosure, and if untrue cannot possibly form a rational basis for a claim of prejudice. In short, the Appellant has not established that a reasonable tribunal of fact would not have reached a conclusion of guilt had it had these allegedly withheld items earlier.

130. The Appellant overlooks that the Trial Chamber, in its Judgment, set out the measures it took at trial to address "any potential prejudice to the accused arising from incomplete or late disclosure".[208] The types of measures taken by the Trial Chamber illustrate the seriousness with which it evaluated the Prosecution's disclosure obligations: two stays of proceedings, the disclosure of alternative evidence or summaries, granting permission to recall witnesses and granting the Appellant permission to raise issues related to late disclosure in his closing submissions if there were consequences that needed to be addressed. It cannot seriously be argued that the Trial Chamber failed at any stage to appreciate the significance of incomplete or late disclosure to the Appellant.

### 3. Duty of Independence

131. The Appellant argues that the Trial Chamber committed factual errors, first, in failing to draw conclusions on investigative missions entrusted to intermediaries who had an "evident" interest in the Appellant's conviction and, second, in concluding that it had remedied all violations of the appellant's rights.[209] Once again, with the exception of an item relevant to his application to present

[208] Judgment, paras.120-122.
[209] Appeal Brief, para.81.

additional evidence on appeal,[210] these arguments have been fully rehearsed by the Appellant both in his closing brief and his application to stay the proceedings for abuse of process[211] and properly addressed by the Trial Chamber.[212] The Appellant does not advance any submissions capable of demonstrating how and why the Trial Chamber erred in its determinations.

132. In his application to stay the proceedings for abuse of process, the Appellant made general accusations that the DRC authorities had infiltrated the investigations of the Prosecution with reference to P-0316.[213] The Trial Chamber analyzed these allegations and concluded that "these alleged facts, as relied on by the defence, are incapable of substantiating the suggested inference that the Office of the Prosecutor was aware that it had been infiltrated by agents of the Congolese President, who was seeking, by introducing false evidence, to secure a conviction of the accused. […] To this extent, the defence theory of 'instrumentalization' has not been made out on the evidence".[214]

133. Further, each time the Appellant raised bias or external influence (whether by the DRC authorities or any other source) as a basis for discounting evidence in his closing arguments, the Trial Chamber considered the allegations.[215] In relation to P-0316, whom the Appellant suggested had infiltrated the Prosecution's investigation at the behest of the DRC government, the Trial Chamber considered the witness' professional obligations towards that government.[216] It found that while it was acceptable for the Prosecution to obtain intelligence information from individuals with ties to the DRC government, they should not form part of the Prosecution team.[217] For other reasons, the Chamber did not find the witness

210 Appeal Brief, paras.84-91.
211 Appeal Brief, paras.7-18 and ICC-01/04-01/06-2657-Conf-tEng, paras.226-228.
212 ICC-04-01/06-2690-conf, paras.190-193, 199. Judgment, paras.685-686.
213 ICC-01/04-01/06-2657-Conf-tEng, paras.69-74 and 318-322.
214 ICC-01/04-01/06-2690-conf, para.193.
215 See Judgment, paras.451-477, 665-667, 671 and 676, 685-686.
216 Judgment, paras.366-368.
217 Judgment, para.368.

to be credible.[218] For P-0016, the Appellant contended that the witness's testimony should be approached with caution as there were reasonable grounds to conclude that he had particularly close ties to the Congolese government.[219] The Trial Chamber held that "notwithstanding these criticisms, on analysis, there is no evidence to support the contention that he provided false testimony out of loyalty to the DRC government".[220]

134. The Trial Chamber committed no error in appreciating this evidence or the Appellant's arguments in relation to it. The Appellant argues that the Trial Chamber erred in not remedying this "evident" lack of independence by, for example, continuing to credit P-0038 even though he had been introduced to the Prosecution by P-0316. But the Chamber accepted P-0038's evidence only after thoroughly assessing the witness's testimony and also the information related to P-0316.[221] Indeed, the Chamber stated clearly that its findings on P-0316's credibility could potentially affect P-0038, as it did affect P-0015, but that after having "scrutinised" P-0038's evidence, it determined that he was not affected in the same way.[222]

135. To bolster the argument that the DRC authorities infiltrated the Prosecution's investigation and prosecution, the Appellant also seeks to introduce an additional item of evidence for the first time on appeal, to establish that P-0297 belonged to an organization [REDACTED]. As canvassed at paragraphs 72-82, the evidence should not be admitted by the Appeals Chamber for several reasons, including that it does not prove that P-0297 was influenced by the DRC authorities when he met with investigators in 2007 ([REDACTED] prior to the date of the [REDACTED]). Moreover, P-0297's evidence was not accepted by the Trial Chamber in any event so there is no prejudice to the Appellant and no error on

[218] Judgment, paras.369-374.
[219] ICC-01/04-01/06-2773, paras.405-407.
[220] Judgment, para.686.
[221] Judgment, paras.688-693.
[222] Judgment, para.374.

the part of the Trial Chamber. Lastly, this evidence has no impact on the verdict of guilt which was based on the wealth of reliable evidence adduced at trial on the crimes committed by the Appellant. The Appellant has not established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the proposed additional evidence.

**4. Duty of Fairness and Impartiality**

136. The Appellant argues that the Prosecution acted partially and unfairly by failing to report inaccuracies in its evidence to the Court in a timely manner and by making manifestly biased public statements.[223] He argues that the Trial Chamber erred in law by failing to assess the combined effect of all the Prosecution's statutory violations on the fairness and integrity of the proceedings in its Judgment[224] and made errors of fact in not finding that the Prosecution's failings affected all its trial evidence.[225]

137. First, the Prosecution never breached its duties of fairness or impartiality. The few instances that the Appellant uses to try to support his argument fail to demonstrate any such breach. To the contrary, they illustrate that the Prosecution informed the Chamber when it had information that merited disclosure to the Chamber.

138. In relation to P-0316, the Prosecution took every opportunity to deal squarely when surprised by the allegations against him. Once those allegations surfaced, the Prosecution interviewed P-0316 prior to his testimony in order to put certain

[223] Appeal Brief, paras.98-102.
[224] Appeal Brief, para.103.
[225] Appeal Brief, para.103.

allegations directly to him for his response.[226] Subsequently, during the in-Court examination of P-0316, the Prosecution, with the Chamber's permission, put the allegations to the witness, in court and under oath. The Chamber allowed the questions stating that the Prosecution did not, however, need to detail every allegation.[227]

139. In relation to P-0157, the Prosecution maintained during the Appellant's trial that P-0157 had been a child soldier within his armed group. As set out in its filing on the same subject in April 2010,[228] the Prosecution did not abandon that position; contrary to Appellant's suggestion, [229] it never took the position in the case against *Katanga and Ngudjolo* that P-0157 was not a former child soldier within the UPC/FPLC. The withdrawal of the witness from the *Katanga and Ngudjolo* case, entirely within the proper discretion of the Prosecution, was not inconsistent with its position in the Appellant's case, nor could it be interpreted as a concession that the Prosecution did not believe the witness to be credible. Despite the Appellant's complaints, the Trial Chamber did not find any inconsistency in the Prosecution's withdrawal of the witness in one case and not the other.

140. In relation to P-0007 and P-0008, who claimed to be [REDACTED] but in fact were [REDACTED], the Appellant's argument demonstrates that the Prosecution *did* advise the Trial Chamber of the information in its possession that contradicted their testimony as to their familial relationship.

141. The Appellant's argument that a response by a Prosecution official in a press interview demonstrated the Prosecution's lack of impartiality were already made in his application to stay the proceedings.[230] In dismissing this allegation, the Trial Chamber held that the public statement would have no adverse influence on the

[226] T-303-CONF-ENG, p.24, ln.12 to p.25, ln.5.
[227] T-329-CONF-ENG, p.24, line 24 to p.25, line 4.
[228] ICC-01/04-01/06-2393.
[229] Appeal Brief, para.99.
[230] ICC-01/04-01/06-2657-Conf-tEng, paras.286-297 and 317.

determination of guilt or innocence and that "to the extent that it is proper to infer an attitude or an approach on the part of the Prosecutor from the public statements or writings of these two individuals, this would be insufficient to reach the conclusion that: either it would be 'odious' or 'repugnant' to the administration of justice to allow the proceedings to continue, or, the accused's rights have been breached to the extent that a fair trial has been rendered impossible".[231] The Appellant has failed to explain how the Trial Chamber erred in this assessment.

142. The Appellant's complaint about remarks by the former Prosecutor post-Judgment regarding the testimony of witnesses ignores that the Trial Chamber concluded that "[witnesses] may well have given a truthful account as to elements of their past, including their involvement in the military, whilst at the same time – at least potentially – lying about particular crucial details, such as their identity, age, the dates of their military training and service, or the groups they were involved with".[232] The Trial Chamber's ultimate determination that it would not rely on the accounts of the alleged former child soldiers for the purpose of determining guilt or innocence is not a conclusion that they had never been child soldiers. In any case, the Appellant has again failed to demonstrate what impact this could have on the guilty verdict.

143. The Appellant then argues that the Trial Chamber erred in law in failing to consider the combined effect of all the Prosecutor's failings in relation to the integrity of the trial and claims that, had it done so, it would have had to acquit.[233] This claim is without merit. The Trial Chamber carefully evaluated these assertions when it denied the abuse of process stay in February 2011 and found that there was no impact to the fairness of the trial.[234] It considered the same

[231] ICC-01/04-01/06-2690-Conf, para.222.
[232] Judgment, para.180.
[233] Appeal Brief, para.103.
[234] ICC-01/04-01/06-2690-conf, paras. 188, 193, 204, 205, 212, 222.

arguments again when assessing the evidence at the end of trial ("defence challenges to the entirety of the prosecution's evidence").[235] The Chamber concluded that where problems arose it had addressed them so as to ensure that the Appellant received a fair trial.

144. The Appellant's argument that the Prosecution failed to verify the statements of all witnesses it called is unsupported and must also fail.[236] As it did with the complaints regarding bias and undue influence by the DRC government or suspect intermediaries, the Trial Chamber considered the Appellant's arguments on the credibility and reliability of each trial witness.[237] The Trial Chamber simply did not accept the Appellant's arguments that every Prosecution witness had demonstrated bias or was not credible and reliable. The Appellant fails to show why and how the Trial Chamber erred in these assessments. This argument, along with the entirety of the second ground of appeal, must be rejected.

## C. THIRD GROUND: THE INTEGRITY OF THE TRIAL WAS NOT INFRINGED

145. The Appellant alleges that the Chamber committed an "error" – without identifying if it is factual, legal or procedural error – by failing to conclude that the Prosecution's trial evidence was insufficiently reliable for a finding of guilt beyond reasonable doubt.[238] He also alleges that the Prosecution's violations against the integrity of the trial presented an image of the trial that justice was not done.[239] In essence, the Appellant imports the same alleged violations from his second ground but this time presents the impact as affecting the overall integrity of the trial. This ground of appeal should be summarily dismissed: the Appellant

[235] Judgment, paras.119-123.
[236] Appeal Brief, paras.104-108.
[237] Judgment, paras.645-718.
[238] Appeal Brief, para.122.
[239] Appeal Brief, para.123.

does not identify any error, but rather merely repeats unsuccessful trial arguments and, in fact, repeats arguments from his second ground of appeal.[240]

146. The Prosecution notes at the outset that the Appellant suggests that the Chamber repeatedly stated that the procedures surrounding the conduct of the Prosecution's investigations cast serious doubt on the integrity of the trial.[241] Neither of the two decisions he cites support this contention. The decision to stay the proceedings due to the Prosecution's failure to disclose P-0143's identity before protective measures were imposed does not state that the Prosecution's investigations cast serious doubt on the integrity of the trial.[242] Nor does the earlier decision on intermediaries support the Appellant's contention: paragraphs 138 and 140 as cited by the Appellant merely rehearse the trial evidence that there is a risk that intermediaries could influence witnesses and it was therefore necessary for the defence "to research that possibility with all of the intermediaries".[243]

147. The Appellant also asserts that the Trial Chamber found reasons to believe that Prosecution officials had participated in drafting false testimonies intended to convict the appellant and that a "large" number of witnesses had deliberately lied in court, citing paragraph 483 of the Judgment.[244] This misstates the Judgment: the cited paragraph states only that the Chamber found "reasons to

[240] The Appellant's argument that the Prosecution breached its statutory obligations and that, therefore, none of the Prosecution's evidence is reliable to establish guilt (paras.114-119) is a repeat of its arguments at, *inter alia*, paras.29, 37, 103-109. His arguments on the Prosecution's investigations and use of intermediaries is dealt with also at paras.76-91 of his Appeal Brief and his arguments on the failings of the Prosecutor to 'denounce' the evidence is already dealt with at paras.98-100 of his Appeal Brief.

[241] Appeal Brief, para.110.

[242] ICC-01/04-01/06-2517-Conf. Paragraph 31, cited by the Appellant, does not refer to the Prosecutor's investigations but, rather, with the Prosecution's failure to implement a Chamber's order to disclose the identity of an intermediary prior to protective measures being put in place.

[243] ICC-01/04-01/06-2434-Conf, para.138.

[244] Appeal against Conviction, para.111.

believe" that *one* intermediary (and not Prosecution officials) may have encouraged, persuaded or assisted witnesses to give false evidence.[245]

148. The Appellant complains that the Chamber wrongfully refused to draw any conclusions as to the Prosecutor's responsibility for adducing false evidence.[246] He claims, first, that the Prosecutor knew of misconduct but did not take measures to investigate or take action against the perpetrators or inform the Court. Second, he claims that none of the Prosecution's evidence could establish his guilt beyond reasonable doubt because the Prosecution's evidence was manipulated by outside sources. These are entirely repetitive of his arguments under the second ground of appeal.[247]

149. After assessing all trial evidence and argument, the Chamber *did* reach final conclusions on the alleged impact of the involvement of intermediaries and on the wider alleged prosecutorial misconduct and any impact on the totality of the Prosecution's evidence:[248] it declined to rely on a number of witnesses and it considered, but was not persuaded by, the Appellant's arguments that alleged prosecutorial failures tainted all trial evidence.[249]

[245] The Chamber does not reach the same conclusions on the three intermediaries, see Judgment, para.483.
[246] Appeal Brief, para.113.
[247] Appeal Brief, paras.21-109.
[248] ICC-01/04-01/06-2690-Conf, para.198.
[249] ICC-01/04-01/06-2842, paras.120-123.

## D. FOURTH GROUND: THE EVIDENCE ESTABLISHED THE PRESENCE OF CHILD SOLDIERS IN THE UPC/FPLC BEYOND REASONABLE DOUBT

150. The Appellant raises three grounds of appeal in the second part of his appeal brief related to the crimes of enlistment, conscription and use. [250] In the first of these three grounds, he alleges that the Trial Chamber erred (i) in fact by not acquitting after it disregarded the evidence of the nine alleged former child soldiers and failed to identify one child soldier;[251] (ii) in law by first suggesting that it would not consider non-expert evaluations of age and then proceeding to do so;[252] (iii) in fact by reaching its own conclusions as to the age of child soldiers in videos and by accepting the evidence of witnesses that child soldiers were under the age of 15.[253] Finally, the Appellant argues that the Trial Chamber erred in its interpretation of one document in support of its conclusion that children under the age of 15 were members of the UPC/FPLC.[254]

### 1. The evidence of the nine alleged former child soldiers is not essential to conviction

151. The first alleged error repeats arguments made under the Appellant's first and second grounds of appeal[255] (a) that the evidence from the nine alleged former child soldiers was "primary" evidence supporting the charges, the exclusion of which left no specific and verifiable examples of the recruitment of child soldiers

[250] Appeal Brief, paras.124-325.
[251] Appeal Brief, paras.124-137.
[252] Appeal Brief, paras.142-145.
[253] Appeal Brief, paras146-227.
[254] Appeal Brief, paras.218-227.
[255] ICC-01/04-01/06-2773, paras.732-736.

under the age of 15 in the UPC/FPLC; (b) that no other witnesses identified any of the child soldiers by name or date of birth; and (c) that without the "essential evidence" of the nine alleged former child soldiers or sufficient specificity on identity from other witnesses, the Trial Chamber could not reasonably find guilt beyond reasonable doubt. The Appellant also refers to points made under his second ground of appeal to the effect that the evidence was not verified by the Prosecution and consequently is unreliable, and that he was prevented from investigating the evidence of other witnesses or documents. As with the first ground of appeal, these arguments completely fail to explain how the Chamber's assessment and reliance on the "sheer volume of credible evidence"[256] relating to the presence of children below the age of 15 in the UPC/PFLC was wrong. And as with the second ground of appeal, the Appellant's blanket statement that the evidence was not verified is unsupported, as is the allegation that he was unable to investigate the Prosecution's case.[257]

152. The Appellant repeats his closing submission that a conviction can only be based on evidence from former child soldiers.[258] This is legally incorrect,[259] as the Prosecution set out at paragraphs 97-111 above. In this case, the nine alleged former child soldiers were part of a larger body of evidence demonstrating the recruitment and use of children under the age of 15 in the UPC/FPLC.

153. Moreover, the Prosecution was not required to prove victims' identities in order to prove the crimes. The Appellant simply disagrees with the ultimate conclusions of the Trial Chamber.[260] There is no inconsistency in the Trial Chamber's position to decline to rely on certain items of documentary evidence

[256] Judgment, para.643.
[257] Appeal Brief, paras.30-32, 67.
[258] See ICC-01/04-01/06-2773, para.732.
[259] See, for example, in *Prosecutor v Taylor*, where the Trial Chamber rehearses the evidence it relied upon for recruitment and use of child soldiers: reports and "many witnesses who observed children who appeared to be under the age of 15 at training bases, or engaged in various war-related activities": SCSL-03-01-T, Judgment, 18 May 2012, paras.1358-1361.
[260] Appeal Brief, paras.132-134.

while relying on the evidence of witnesses who testified under oath as to the recruitment and use of children under the age of 15 by the Appellant and his armed group.

## 2. The Chamber did not err in assessing age of child soldiers in videos and in accepting witness testimony on age of child soldiers

154. The Appellant next alleges that the Trial Chamber made one legal and various factual errors when it evaluated all trial evidence other than that of the nine alleged former child soldiers.[261] His alleged legal error is that the Trial Chamber "clearly indicated" that witnesses could not estimate age[262] and "led the Defence to believe" that the Trial Chamber considered itself unable to determine the age of individuals in videos.[263] The Prosecution refers to its arguments in paragraphs 51-55 above, demonstrating that the Trial Chamber never stated that it would not consider the age of the persons identified by the Prosecution as being under the age of 15 in videos. If the Appellant concluded otherwise, in the absence of any such order, that was a defence error but certainly not an error by the Trial Chamber. As for his assertion that the Trial Chamber clearly indicated that witnesses cannot estimate age, this ignores that nearly every fact witness for the Prosecution was permitted to provide evidence on their assessment of the age of child soldiers in the UPC/FPLC.[264] Indeed, the Trial Chamber did not preclude P-0010 from providing her estimate of the age of the recruits appearing in a video,[265] from which the Appellant should have concluded that such estimates from witnesses are appropriate and could be relied upon by the Trial Chamber.

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[261] Appeal Brief, paras.138-227.
[262] Appeal Brief, para. 144 (Prosecution translation).
[263] Appeal Brief, para.142 (Prosecution translation).
[264] See Judgment, paras.641-731 whereby the Trial Chamber assessed the witnesses' credibility in order to rely on their age assessment.
[265] T-145-CONF-ENG, p.18, lines 5-14; p23, line 24 to p.24, line 2.

155. The Prosecution also refers to its arguments at paragraphs 156 - 173 herein regarding the alleged factual errors concerning the Trial Chamber's age estimates of child soldiers in videos. In summary, (a) there was no reversal of the burden of proof, (b) there is no legal requirement to prove the identity of the children in the videos for the Chamber to accept that they appear manifestly to be under the age of 15, and (c) the Appellant chose not to bring much of this evidence[266] at the relevant time and should be precluded from doing so now.

156. In relation to the specific errors alleged in the identification of children under the age of 15 in videos, the Appellant's complaint at paragraphs 172-175 ignores that the Trial Chamber did not solely rely on these three video extracts for its conclusion that the UPC/FPLC "frequently used children under the age of 15 as bodyguards".[267] In fact, the Trial Chamber relied also on the oral testimony of five witnesses in reaching this conclusion.

157. One of these five witnesses, P-0055, testified about "kadogos" – a word meaning a small child[268] - used as escorts by all members of the main staff.[269] The Appellant attacks P-0055's evidence, failing however to add that the Trial Chamber found that "given P-0055's testimony that the kadogos ranged in age from 13 to 16 years old, the Chamber is unable to conclude on the basis of his evidence alone that children at the various places he mentioned in his testimony were necessarily younger than 15, and has only drawn conclusions from his evidence when it was corroborated by the testimony of other witnesses".[270] There is nothing unreasonable in this approach.

158. The Appellant's complaint at paragraphs 176-178 relates to a reference by the Trial Chamber in paragraph 1249 of the Judgment, last sentence, to a video that

[266] The evidence in relation to proposed witnesses D-0040 and D-0041 referred to at paras.158-171 of the Appeal Brief.
[267] Judgment, para.915.
[268] T-174-CONF-ENG, p.40, lines 5-8.
[269] Appeal Brief, para.174.
[270] Judgment, para.839.

depicts the Appellant's bodyguards, in which the Chamber finds that one of the guards is below 15 years of age. The Prosecution cannot say definitively whether or not the reference contains a typographical error or other type of error affecting the reference. Even if the Appellant's assumption is correct, however, it does not have any impact on the Judgment.

159. The Appellant argues at paragraphs 179-180 that the Trial Chamber's conclusions that one male child soldier who appears under the age of 15 is wrong because Prosecution witness P-0010, (whose evidence was not relied upon by the Chamber), stated that the individual in question is female. Therefore, according to the Appellant, the Appeals Chamber must conclude that the Chamber has erred in all of its age assessments. The Prosecution notes that this example demonstrates that the Trial Chamber's assessments of age are correct: P-0010 also indicated that the individual in question *was less than 12 years old*.[271]

160. At paragraphs 181-187 in relation to three video excerpts, the Appellant disagrees with the Trial Chamber's assessment that the child soldiers depicted in the images appear to be under 15 years old. The Appellant fails, however, to demonstrate that, because the Appellant disagrees with the conclusion, the Chamber therefore erred in its finding.

161. The Appellant thereafter contends that no judge could reasonably consider the testimony of non-expert witnesses to prove age beyond reasonable doubt.[272] The Appellant cannot provide any authority for this proposition. The assertion that judges are precluded from assessing evidence of age itself, or from non-expert witnesses, lacks any legal foundation. Indeed, courts do accept such evidence.

162. The Trial Chamber was fully entitled to evaluate the videos and reach reasonable conclusions as to the age of the persons depicted on them. Video images are routinely admitted as evidence in international tribunals because "the

[271] T-145-CONF-ENG, p.18, lines 5-14.
[272] Appeal Brief, paras.189-217.

video footage contained therein will usually speak for itself".[273] Judges in national jurisdictions have considered video evidence to be at least as reliable as eyewitness testimony.[274] For instance, the U.S. Supreme Court held that it will assign greater weight to video evidence that directly contradicts the party's claim.[275] The Supreme Court of Canada upheld convictions based solely on video evidence.[276] Similarly, "videotape evidence can present such very clear and convincing evidence of identification that triers of fact can use it as the sole basis for the identification of the accused" in Canada and the United Kingdom.[277]

163. Also, in child pornography cases in the United States, judges and juries may assess the age of a child in a videotape with or without the assistance of lay or expert testimony. As the Fifth Circuit Court of Appeals explained:

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[273] *Karadzic*, Case No. IT-95-5/18-T, Decision on Prosecution's Bar Table Motion for the Admission of Documents Related to the Sarajevo Component, 11 May 2012, para.20. Video evidence may provide independent substantive evidence. When presented with video evidence that directly conflicted with the accused's testimony, the ICTY Trial Chamber in *Krstic* rejected General Krstic's testimony in favour of the video evidence and concluded that General Krstic was in Potocari for one to two hours with other VRS officers and thus must have known of the appalling conditions facing the Bosnian Muslim refugees and the general mistreatment inflicted by VRS soldiers on that day. The Trial Chamber also relied solely on vide evidence to determine that General Krstic was with the VRS officers who walked through the streets of Srebrenica, on the afternoon of 11 July 1995, and that he was standing with Colonel Popovic during the televised interview in Potocari on 12 July 1995 (*Krstic* Trial Judgmentparas.354, 409, 410). The Special Court of Sierra Leone Trial Chamber held that a video exerpt of a rebel attack corroborated eyewitness testimony (*Taylor* Trial Judgment, para. 1687). In *Akayesu*, the ICTR held that film footage of corpses floating in the Kagera river and accompanying testimony supported the determination that acts of violence committed in Rwanda during that time were committed with the intent to destroy the Tutsi population (*Akayesu* Trial Judgment, paras. 161-168).

[274] *R. v. Nikolovski*, [1996] 3 S.C.R. 1197; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, pp. 768 and 774 (praising video evidence as a "milestone" contributing to the "triumph of a principled analysis over a set of ossified judicially created categories").

[275] *Scott v. Harris*, 550 U.S. 372 (2007)(In considering motion for summary judgment, the court assess the trial evidence against the video evidence); *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011) ("Although we review evidence in the light most favorable to the nonmoving party, we assign greater weight, even at the summary judgment stage, to the facts evident from video recordings taken at the scene.").

[276] *R. v. Leaney*, [1989] 2 S.C.R. 393, (upholding a conviction on the basis of the trial judge's own observations of a videotape of the crime in progress and his comparison of the tape to the accused).

[277] *R. v. Nikolovski*, [1996] 3 S.C.R. 1197, para. 23. *See also R. v. Dodson*, [1984] 1 W.L.R. 971 (C.C.A.) (unanimously holding that the photographs taken by a security camera were relevant and admissible evidence that could be used by the jury to identify the accused) (affirmed by *R. v. Downey*, [1995] 1 Cr. App. R. 547).

> The threshold question – whether the age of a model in a child pornography prosecution can be determined by a lay jury without the assistance of expert testimony – must be determined on a case by case basis. As the government correctly points out, it is sometimes possible for the fact finder to decide the issue of age in a child pornography case without hearing any expert testimony.[278]

Thus, there "is no requirement that expert testimony be presented in child pornography cases to establish the age of the children in the pictures."[279] In cases involving images of clearly prepubescent children, there may be no need to present expert testimony as to whether the image depicts a person under the age of eighteen.[280] The courts have found that "[c]ommon knowledge and experience is generally sufficient to identify a minor as prepubescent."[281] Even in instances where the images are of children who are not clearly prepubescent, the images can sometimes be introduced without expert opinion evidence, if bolstered by other evidence.[282] Testimony from lay witnesses is appropriate to assess age: "age

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[278] *U.S. v. Katz*, 178 F.3d 368, 373 (5th Cir. 1999).

[279] *U.S. v. Nelson*, 38 Fed. Appx. 386, 392 (9th Cir. 2002); accord *U.S. v. Gallo*, 1988 WL 46293 (4th Cir., May 12, 1988) (unpublished).

[280] *U.S. v. Rearden*, 349 F.3d 608, 614 (9th Cir 2003) (emphasis added) "Rearden admitted on the stand that he knew at least one of the images he sent was of "somebody under 18," *and it is obvious from the pictures themselves that they are of children*. Expert testimony was not, therefore, necessary in this case to assist the court."; *U.S. v. Fox*, 248 F.3d 394, 409 (5th Cir. 2001) (no abuse of discretion in admitting photographs without testimony as to subjects' ages where even defendant conceded that "[s]ome of the photos appear to be prepubescent children who are . . . obviously less than 18"), vacated on other grounds, 535 U.S. 1014 (2002).

[281] *U.S. v. Kimler*, 335 F.3d 1132, 1144 (10th Cir. 2003) "[The trial exhibits] depict children who were so obviously prepubescent that expert testimony would not have been necessary or helpful to the court. The images themselves provided sufficient evidence of prepubescence to support the sentence enhancement." See also, *U.S. v. Fox*, 248 F.3d 394, 409 (5th Cir. 2001).

[282] *U.S. v. Hilton*, 167 F.3d 61, 75 (1st Cir. 1999) ("Without limiting a priori the type of evidence that would be admissible on this question in a given case, the following proof could be offered to establish the apparent age of the person shown: the physical characteristics of the person; expert testimony as to the physical development of the depicted person; how the disk, file, or video was labelled or marked by the creator or the distributor of the image, or the defendant himself. . . and the manner in which the image was described, displayed, or advertised. While this list is hardly exhaustive, it gives a flavor of the ways in which a depicted person's apparent age might be objectively proven."); *U.S. v. O'Malley*, 854 F.2d 1085, 1086 and 1088 fn.3 (8th Cir. 1988) (sufficient evidence existed to support the District Court's factual determination that images depicted persons under the age of eighteen where

is a matter on which everyone has an opinion. Knowingly or unknowingly, we all form conclusions about people's ages every day. It is therefore particularly appropriate for a lay witness to express an opinion on the subject."[283] Such testimony may be admissible regardless of whether the court views the testimony as lay opinion testimony akin to that of an expert or merely lay opinion testimony based on ordinary human experience.[284]

164. There was accordingly no error in the Trial Chamber's reasoning on the age of the child soldiers in the videos.

165. Moreover, the Trial Chamber noted in its Judgment that personal perceptions of estimated ages may vary and that it "has exercised caution when considering this evidence".[285] It added, however, that "[e]ven allowing for a wide margin of error in assessing an individual's age, *the Chamber has concluded that it is feasible for non-expert witnesses to differentiate between a child who is undoubtedly less than 15 years old and a child who is undoubtedly over 15*."[286] The Trial Chambers at the SCSL exercised similar caution but were nonetheless also able to rely on the evidence of non-expert witnesses to establish that child soldiers in armed forces were under the age of 15.[287] The Appellant fails to explain how this careful approach is wrong.

166. The Appellant's next argument is that the Trial Chamber has confused witness credibility with the reliability of his or her account.[288] He cites the evidence of P-0046 who met with numerous children from Ituri armed groups, including from the UPC/FPLC. According to the Appellant, the Chamber should not have accepted her evidence as to the age of the children she met or their membership

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photographs depicted young females, one of whom wore braces, and the other appeared "diminutive in all her bodily proportions").

[283] *U.S. Yazzie*, 976 F.2d 1252, 1256 (9th Cir.1992).

[284] *U.S. v. Davis*, 41 Fed.Appx. 566, 571 (3rd Cir. 2002).

[285] Judgment, para.643.

[286] Judgment, para.643, emphasis added.

[287] SCSL *Taylor* Judgment, paras.1358-1361; SCSL *RUF*, Judgment, paras.1627-1628.

[288] Appeal Brief, paras.196-204.

in the UPC/FPLC because this information may have been falsely given to the witness and could not be verified by the Appellant or the Chamber. In its evaluation of P-0046, the Trial Chamber found her to be credible and reliable, explaining that it was "persuaded that P-0046's professional history and personal experience with the children she interviewed enabled her to provide realistic age estimates". [289] The Appellant has demonstrated no error in this assessment. Indeed, the Trial Chamber did not necessarily accept all evidence, even from the witnesses it found to be credible and reliable.[290]

167. The Chamber also noted that a Defence witness admitted that there were children aged 12, 14 and above in the UPC/FPLC. The Appellant insists that the transcript reflects a translation error[291] or is ambiguous.[292] It is clear from the record that the defence witness acknowledged that children under 15 were in the ranks of the UPC/FPLC. The Trial Chamber did not err in relying upon this evidence to establish the presence of children under the age of 15 in the UPC/FPLC.

168. The Appellant also attacks the Trial Chamber's factual findings related to witnesses P-0024, P-0012, P-0016, P-0014 and P-0017 on the age of UPC/FPLC child soldiers.[293] Once more, the Appellant simply disagrees with the factual findings of the Chamber yet fails to demonstrate how the Chamber's conclusions are unreasonable.

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[289] Judgment, para.655.
[290] See, for example, Judgment, paras.668, 676, 686, 724, 727, 730, 731.
[291] Appeal Brief, paras.206-210.
[292] Appeal Brief, para.208. See T-243-CONF-ENG, p.20, lines 19-20: "Q: And if you were born in 1990, in 2002 you were 12; is that right? A: Yes that is true." Then see p.21, line 25 to p.3: "And some of these street kids who had enlisted in the UPC were about your age, 12 or so; is that right? A: Yes, there were some who were 12 years or maybe 14 or even 15 years of age, or more." Compare with the French corrected version T-243-CONF-FRA CT4, p.24, lines 12-14: "Q: Et certains de ces enfants qui étaient enrôlés dans…au sein de l'UPC avaient votre âge, autour de 12 ans, n'est-ce pas? R: Il n'y avait pas également jusqu'à 12 ans, d'autres avaient même 14, 15 et plus."
[293] Appeal Brief, paras.211-214.

169. The Chamber correctly addressed the same submissions advanced now by the Appellant as to P-0024 in its Judgment.[294] Contrary to the Appellant's contention, there is nothing inconsistent between P-0024's evidence and the Trial Chamber's findings. P-0024 stated that the children he demobilized in November 2001, ages 8.5 to 18 years old,[295] were re-recruited in 2002 after "the RCD had been ousted from Bunia by the new movement that took over Bunia, the UPC"[296] when Thomas Lubanga was UPC President.[297]

170. The Appellant complains about the Chamber's reliance on P-0012's evidence that children under the age of 15 were in the UPC/FPLC, claiming (i) that P-0012 did not say that "many" children under 15 were in armed groups in Bunia in 2003 but rather said that "there were many of them, even under 15"; (ii) that he does not specify that he refers to the FPLC; and (iii) that he does not specify the age of the children in battle in Bunia in May 2003.[298] P-0012 testified that he saw a "tiny child" that he estimated was about 12 years old[299] during the battle for Bunia in May 2003,[300] who belonged to the UPC.[301] He also saw many UPC child soldiers, including children under 15, at the front lines in battle in May 2003.[302] Nothing in the Appellant's submissions demonstrates that the Chamber erred in accepting this evidence.

171. The Trial Chamber also made no errors in accepting P-0014 and P-0016's evidence that children under the age of 15 were recruited and trained in August-September 2003 and in concluding that this practice continued thereafter.[303] For P-0014, the Chamber accepted his evidence that (i) he witnessed the UPC provide

[294] Judgment, paras.659, 661-663.
[295] T-170-Red-ENG CT WT, p.47, lines 3-7.
[296] T-170-Red-ENG CT WT, p.51, lines 5-6.
[297] T-170-Red-ENG CT WT, p.51, lines 5-6.
[298] Appeal Brief, para.212.
[299] T-168-Red-ENG CT WT, p.77, lines 6-12.
[300] T-168-Red-ENG CT WT, p.76, line 19 to p.77, line 16.
[301] T-68-Red-ENG CT WT, p.79, line 19 to p.80, line 15.
[302] T-68-Red-ENG CT WT, p.73, line 8 to p.80, line 15.
[303] Appeal Brief, para.213.

military training to children under the age of 15 between 30 July to 20 August 2002 and (ii) recruitment continued thereafter.[304] The period relevant to the charges started on 1 September (10 days later). As for P-0016, the Chamber accepted his evidence that when he left the UPC headquarters (Mandro) at the end of August or the beginning of September 2002, recruits under the age of 15 were present.[305] The Chamber did not err in reaching the conclusion, based in part on this evidence that "children under the age of 15 were trained by the UPC/FPLC at its headquarters from July 2002 and this continued after September 2002".[306] The Appellant fails to explain how this conclusion is unreasonable.

172. P-0017 testified at length about child soldiers under the age of 15 in the UPC/FPLC at various locations.[307] He stated that he visited the Mongbwalu camp where he saw between 380 and 420 recruits including both adults and children.[308] The Appellant complains that the evidence is not probative since P-0017 did not identify the "children" as being under 15. However, it was reasonable for the Chamber to conclude that he was including children under 15 given the context of his evidence that children under the age of 15 were in various locations and training camps. Again, the Appellant makes no effort to explain why the Chamber's conclusion is unreasonable.

173. Lastly, the Appellant argues that the Chamber erred in its interpretation of a UPC/FPLC document as further evidence that children under 15 were soldiers in the UPC/FPLC.[309] The document, dated 12 February 2003, is an official UPC/FPLC letter addressed to the G5 commander of the FPLC by the National Secretary for Education of the UPC/FPLC, copied to the Appellant, referring to a demobilization programme and referencing children between the ages of 10 to 15

[304] Judgment, para.789.
[305] Judgment, para.790.
[306] Judgment, para.791.
[307] Judgment, para.680, 809, 818, 871.
[308] T-154-Red3-ENG, p.45, line 11 to p.46, line 3.
[309] Appeal Brief, paras.218-227.

or 16 years of age who are "willing" to return to civilian life.[310] The Chamber considered the Appellant's arguments that this document did not refer to FPLC child soldiers, and all trial evidence regarding this document, concluding in the end that it was a reliable document that "significantly corroborates" other evidence that children under the age of 15 were soldiers in the UPC/FPLC.[311] The Appellant's own witness, D-0019, confirmed that the demobilization programme concerned child soldiers in the UPC,[312] thereby contradicting the Appellant's closing argument. The Appellant's complaint that witnesses who could have testified regarding this document did not appear is completely irrelevant vis-à-vis the Chamber's assessment. The Chamber looked at all of the evidence that *was* on the record and reached reasonable factual findings.

## E. FIFTH GROUND: CONSCRIPTION OF CHILDREN UNDER 15 YEARS OF AGE

### 1. Error of Law

174. The Appellant submits that the Trial Chamber erred in law when it considered the charges of conscription and enlistment together, noting that the crimes each are committed when a child under 15 is incorporated into an armed force or joins the ranks – the distinction being solely whether compulsion was used.[313] According to the Appellant, these are two different crimes that ought to be treated separately.[314] Second, he claims that the Chamber erred when it found it unnecessary to establish a distinction between enlistment and conscription on the

[310] EVD-OTP-00518, Judgment, para.741-748.
[311] Judgment, para.748.
[312] T-346-ENG, p.45, lines 11-18.
[313]Appeal Brief, para.228 referring to Judgment, paras.618 and 759.
[314] Appeal Brief, paras.229-230.

basis that a child under the age of 15 cannot give informed or genuine consent to being incorporated into a military group.[315] According to the Appellant, lack of consent is a constituent element of the crime.[316] Third, the Appellant complains that the Chamber does not explain the circumstances that warrant a common examination of the crimes of enlistment and conscription.[317] Finally, he argues that there is no valid evidence establishing the existence of the crime of conscription; rather, the Chamber wrongly relied on evidence that had been tendered to establish the presence of child soldiers in the ranks of the FPLC and on mobilisation and recruitment campaigns conducted by UPC/FPLC for the purposes of substantiating its findings on conscription.[318] According to the Appellant, this error invalidates the conviction for the crime of conscription.[319]

175. As it will be developed below, these arguments are legally incorrect and demonstrate no error in the Trial Chamber's interpretation of the law or assessment of the evidence to establish the crime of conscription.

*(a) The Trial Chamber correctly defined the crimes of conscription and enlistment*

176. The Trial Chamber correctly found that the crimes of conscription, enlistment and use are three separate offences,[320] and that conscription and enlistment are both forms of recruitment in that they refer to the incorporation of a child under 15 into an armed group, coercively (conscription) or voluntarily (enlistment).[321] In light of their plain and ordinary meaning, the Chamber defined "enlisting" as "to

[315] Appeal Brief, paras.234-5 referring to Judgment, paras.613 and 618.
[316] Appeal Brief, para.233 referring to Judgment, para.617.
[317] Appeal Brief, para.237 referring to Judgment, para.618.
[318] Appeal Brief, paras.239-240.
[319] Appeal Brief, para.242.
[320] Judgment, para.609.
[321] Judgment, para.607.

enrol on the list of a military body", and "conscripting" as "to enlist compulsorily".[322] This approach is consistent with Pre-Trial Chamber I's approach in the *Lubanga* Confirmation Decision,[323] as well as SCSL jurisprudence.[324] And indeed, the Appellant acknowledges that the Chamber correctly separated and defined these crimes.[325]

*(b) Consent is irrelevant to the crimes*

177. Contrary to the Appellant's submissions, the lack of a child's consent is not a requirement of the elements of the crime of conscription.[326] The Trial Chamber correctly concluded that consent is irrelevant and in light of the circumstances of the case decided to deal with these two crimes jointly.[327]

178. It is a consistent principle of criminal law that a child is mentally and emotionally incapable of consenting to an act when he or she has no real understanding of the consequences of that consent. For example, children cannot give knowing or intelligent consent to sexual acts.[328] The same principle applies to this case.[329] Accepting a child into an armed group is accordingly a crime, regardless of whether or not that child affirmatively volunteered or otherwise subjectively believed he or she was "in agreement". In addition, "consent" does not automatically equate absence of coercion. On the contrary, consent can be

[322]Judgment, para.608.
[323]Judgment, para.607 referring to ICC-01/04-01/06-803, para.246.
[324] Judgment, footnote 1781, referring to SCSL *AFRC* Trial Judgment, para.733; SCSL *CDF* Appeals Judgment, para.139 and SCSL *Norman* Appeals Chamber Decision on Preliminary Motion based on Lack of Jurisdiction, Dissenting Opinion of Justice Roberson, para.5.
[325] Appeal Brief, paras.229, 232.
[326] A. Smith, "Child Recruitment and the Special Court for Sierra Leone", (2004) 2 Journal of International Criminal Justice, 1141 at 1148 whereby the author noted that "conscription and enlistment of a child under the age of 15 is a crime, whether the child is coerced or volunteers, the forcible or voluntary nature of the recruitment is not an element of the crime".
[327] Judgment, para.759.
[328] See Elements of Crimes, footnote 16.
[329] See the testimony of the Court appointed expert on trauma: T-166-ENG, p.12, line 24 to p.14, line 10 ; p.47, line 20 to p.48, line 1.

negated by coercive circumstances that undermine the victim's ability to give voluntary and genuine consent.[330] This is the situation here. The case against the Appellant involved mobilization campaigns[331] that included both compulsory conscription through the use of physical force (such as abductions), as well as by psychological pressure and fear or threats of harm exerted by elders and wise men, the cadres and the army.[332] The Trial Chamber accepted that the practical reality of daily living conditions in the DRC at the time including, *inter alia*, poverty, ethnic rivalry and ideological motivation resulted in children feeling compelled to join armed groups for survival.[333] As Ms Radhika Coomaraswamy (CHM-0003), Special Representative, noted in her written submissions:

> "[…m]any children, especially orphans, join armed groups for survival to put food in their stomachs. Others do so to defend their ethnic group or tribe and still others because armed militia leaders are the only seemingly glamorous role models they know. They are sometimes encouraged by parents and elders and are seen as defenders of their family and community […] "[t]he line between voluntary and forced recruitment is therefore not only legally irrelevant but practically superficial in the context of children in armed conflict."[334]

179. The Chamber thus correctly concluded that a child's consent is irrelevant and appropriately addressed the crimes of conscription and enlistment together. In addition, the Chamber's position with respect to the irrelevance of the child's consent is consistent with the jurisprudence of the SCSL[335] as well as with the Pre-Trial Chamber in the *Lubanga* Confirmation Decision.[336]

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330 See Rule 70 (principles of evidence in cases of sexual violence).
331 Judgment, paras.770-785. See also ICC-01/04-01/06-1573-Anx1, para.29, ICC-01/04-01/06-803, paras.249-253.
332 Judgment, paras.763, 764, 770, 781 and 785.
333 Judgment, para.613.
334 EVD-CHM-00007, paras.13-14, quoted in Judgment, paras.611-612.
335 SCSL *CDF* Appeal Judgment, para.139 and Trial Judgment, para.192, referred to in Judgment, footnotes 1788-1789.
336 Judgment, paras.614-615 referring to ICC-01/04-01/06-803, paras.247-248.

*(c) Coercion can also entail non-physical violence*

180. While the child's consent is not relevant to assessing the voluntary or compulsory nature of the recruitment, the accused's conduct (or the actions of others that are attributed to him) will be an important consideration to the circumstances of the enlistment or conscription. For enlistment, it is sufficient that the relevant forces "accept[..] and enrol[…] individuals when they volunteer to join an armed force or group".[337] On the other hand, conscription requires that those forces forcibly recruit children into their ranks through acts of coercion. These acts of coercion can include physical violence (such as abductions)[338] as well as psychological pressure. The *Taylor* case is instructive in this regard. The Trial Chamber in that case summarised the prior jurisprudence and concluded that,

> '[c]onscription' encompasses any acts of coercion, such as abductions and forced recruitment of children… '[e]nlistment' entails accepting and enrolling individuals when they volunteer to join an armed force or group. Enlistment need not be a formal process, and may include "any conduct accepting the child as part of the [armed group]..." Conscription and enlistment are both types of recruitment, and while conscription involves an element of express compulsion or coercion, this element is absent in enlistment.[339]

*(d) Ample evidentiary basis to establish the crime of conscription*

181. Contrary to the Appellant's submissions, the Trial Chamber did not limit its findings to the mere presence of children in the ranks to conclude that the crime of conscription was committed.[340] Rather, the Trial Chamber indicated that the offences of enlistment or conscription are continuing crimes that commence at the

[337]SCSL *Taylor* Trial Judgment, para.442; SCSL *AFRC* Trial Judgment, para.735. See Judgment, para.608.
[338] SCSL *AFRC* Trial Judgment, para.734.
[339] SCSL *Taylor* Trial Judgment, paras.441-442.
[340] Appeal Brief, para.241.

moment a child under the age of 15 is entered into an armed force or group, with or without compulsion, and end when the child reaches 15 or leaves the group.[341] In other words, a crime is committed each day a child under the age of 15 remains in the armed group.

182. Further, and also contrary to the Appellant's submissions, the Chamber's reasoning and subsequent conclusion that the Appellant bears responsibility for the recruitment of children – whether through enlistment or conscription -- is wholly supported by the evidence. First, the Trial Chamber noted that the age of the children was not taken into consideration when recruiting them; instead, criteria such as the size of the recruits and their ability to hold a weapon and to participate in training were employed.[342] This means that the very system of recruitment invited the acceptance of children under 15 in the UPC ranks, or, at a minimum, had no built-in safeguards to exclude under-age recruits. Even without proof of an affirmative policy to target only, or particularly, children, the fact that the system reflected affirmative willingness to recruit children, because the system regarded the distinction between adults and children as an entirely irrelevant factor.

183. Second, the Trial Chamber assessed whether UPC/ FPLC forces carried out actions to forcefully recruit (or conscript) children under 15 or to ensure their enlistment into the ranks. In particular, "rallies, recruitment drives and mobilisation campaigns" can – and did – lead to both (voluntary) enlistment and (forceful) conscription.[343] As the Chamber noted, it "heard evidence concerning the recruitment of young people (including children under the age of 15) into the UPC/FPLC by the party 'cadres' and the FPLC army. In the course of this process,

[341] Judgment, paras.618,759.
[342] Judgment, para.764. The testimony of P-0055, as corroborated by D-0037, were indicative of these considerations.
[343] Judgment, paras.770-785.

pressure was exerted on communities that did not want to surrender their children."[344]

184. P-0055, a former high ranking official within the FPLC, provided evidence of coerced recruitment. He had been told by a child, recruited within the ranks of the UPC, that he and his friends were taken by UPC/FPLC forces.[345] The witness also described the pressure exerted over families, including by the communities themselves, to surrender their children to the UPC army. He explained that communities that refused to give up their children to the army would be left undefended in case of attack:

> So this is the example I'm going to give: For instance, the city of The Hague. If The Hague as a city refuses to hand over their children to the army, if the city of The Hague refuse to make a contribution to the army, the city will be left alone. And if they are attacked, nobody will defend them. So this is something that I'm saying as an example. If the city of The Hague refuses to hand over children for -- for recruitment, the city will be left without any protection.[346]

185. P-0017 corroborated this account. He testified that he went to Kilo at the end of 2002 or the beginning of 2003 where he witnessed Floribert Kisembo informing an "old wise man" that in order to bring peace and to avoid future problems, the community needed to contribute to the militia forces by providing individuals for training.[347] According to witness P-0024, a social worker with a local NGO founded by the United Nations, from 2002 to 2003 when the Appellant was the leader of the UPC, the risk for those who did not rejoin the army was that they or their families would be threatened or attacked.[348] In the same vein, P-0041, a member of the UPC executive appointed by the Appellant, testified that some families acted under "an obligation", in the sense that nearly all the groups in

[344] Judgment, para.770.
[345] Judgment, para.763. Notably, the child's mother had complained about the child's recruitment.
[346] T-175-Red3-ENG, p.61, lines.2-16
[347] Judgment, para.783.
[348] Judgment, para.765.

Ituri asked parents to give one of their sons for "work".[349] P-0014 testified that in August 2002 he was told by an individual associated with the UPC that it was important for him to "contribute and to go and develop awareness of children in [his] village and bring them".[350]

186. P-0046 testified that in her professional capacity, she received information about recruitment by the UPC/FPLC in the area near Ndrele in February 2003. On a market day, armed men recruited between 50 and 60 individuals, some of whom she later spoke with, including children.[351]

187. In sum, witnesses P-0055, P-0017, P-0024, P-0041, P-0014 and P-0046 each testified to the forceful recruitment of persons including, without distinction, children.[352] That evidence permitted the Chamber to reasonably conclude that "considerable pressure was exerted on various communities to send young people, including children under the age of 15, to join the UPC/FPLC army during the time frame of the charges".[353]

**2. Errors of Fact**

188. The Appellant submits that the Trial Chamber committed several errors of fact in its evaluation of the evidence to establish conscription.[354] He claims that the Chamber's interpretation of P-0041's testimony is erroneous[355] and that recruitment campaigns cannot constitute acts of conscription, because they were intended to convince people to join the armed forces voluntarily.[356] According to

[349] Judgment, para.781.
[350] Judgment, para.782.
[351] Judgment, para.766.
[352]See transcript references in Judgment, paras.763 ( P-0055), 765 (P-0024) and 781 (P-0041).
[353]Judgment, para.785.
[354]Appeal Brief, para.243.
[355]Appeal Brief, paras.244-245.
[356]Ibid., paras.246-250.

the Appellant, these factual errors invalidate the Chamber's findings on conscription.[357]

*(a) Witness P-0041*

189. The Appellant argues that the Chamber principally relied on witness P-0041 to support its conclusion about the existence of pressure on families to send children to join the army[358] and that: (i) witness P-0041 did not say that the recruitment was systematic and mandatory; and (ii) although armed groups requested families give their children to work, P-0041 did not specify which armed group made such demands.[359]

190. These are repeated arguments from the Appellant's closing submissions.[360] The Appellant now rehearses the same arguments without indicating how the Trial Chamber erred in its evaluation of the evidence from this witness or how this error impacts on the Judgment. Moreover, the Appellant's submissions, as explained below, are grounded on a misrepresentation of the evidence and the Chamber's findings. Both of these factors should constitute grounds for summary dismissal.

191. Contrary to the Appellant's contention, the Chamber did not rely solely on witness P-0041 to support its finding regarding the widespread nature of the recruitment campaigns. Rather, the Chamber also relied on the evidence of witnesses P-0014, P-0016, P-0017, P-0024, P-0030, P-0038, P-0046 and P-0055, coupled with video and documentary evidence to conclude that children under the age of 15 were voluntarily or forcibly recruited into the UPC/FPLC and sent to

[357]Ibid., para.251.
[358] Appeal Brief, para.244.
[359] Appeal Brief, para.245.
[360] ICC-01/04-01/06-2773, paras.375, 384, 743.

the headquarters or training camps.[361] Indeed, as the Chamber correctly noted, P-0041 testified to the compulsory recruitment by UPC/FPLC forces but the witness merely indicated that the recruitment was not obviously "regular" or "systematic".[362]

192. Further, and contrary to the Appellant's submissions, the evidence of witness P-0041 plainly indicates that the UPC was forcibly recruiting children. In particular, this witness was asked "*do you know how these children got into the UPC?*"[363] to which he responded, "*it would seem that some of them had been recruited in families where it was, in fact, an obligation*".[364] The reference to "obligation" supports the Chamber's ultimate conclusion that the presence of these children in the militia was clearly not voluntary. And the correctness of that conclusion is in no way diminished by P-0041's inability only to identify which particular individual(s) pressured the families to give their children to the UPC.[365]

*(b) The campaigns of mobilisation and recruitment*

193. The Appellant argues that the Trial Chamber erred in finding that recruitment campaigns were acts of conscription. Instead, he asserts, they solely encouraged voluntarily enlistment.[366] The Appellant submits that the voluntariness of these enlistments is shown in the testimony of witnesses P-0055, P-0017 and P-0016,[367] and that the evidence does not establish that considerable pressure was exerted

[361] Judgment, para.912.
[362] Judgment, para.781. The Chamber relied on witnesses P-0055, P-0014 and P-0017 and the documentary evidence to establish that the UPC/FPLC was responsible for the widespread recruitment of children under 15 between 1 September 2002 and 13 August 2003. Judgment, para.911.
[363] T-125-Red3-ENG, p.64, ln.25.
[364] T-125-Red3-ENG, p.65, lns.6-7.
[365] Judgment, para.765.
[366] Appeal Brief, para.246.
[367] Ibid., para.247.

on communities.[368] He claims the Trial Chamber committed an error of fact when it found that children under 15 were conscripted.[369]

194. First, the Prosecution notes that the Appellant misrepresents the Judgment by selectively quoting certain passages. The Trial Chamber did not find that the recruitment campaigns themselves constituted acts of conscription; rather, it found that crimes of conscription and recruitment occurred against the backdrop of these campaigns.[370] As an example of the Appellant's selective and partial quoting, he cites paragraph 771 of the Judgment to bolster his argument that the campaigns only sought to raise awareness.[371] That paragraph, however, does not exclude that acts of conscription took place in the implementation of recruitment drives and mobilisation campaigns, which is addressed in other passages not cited by the Appellant. In particular, the Trial Chamber found in paragraph 770 that, "pressure was exerted on communities that did not want to surrender their children", and in paragraph 775 that, "[y]oung people were enlisted and conscripted whenever they were encountered and the elders delivered them to the closes battalion or brigade". The evidence of witness P-0055, P-0017, P-0024, P-0041 and P-0046 developed above further support this conclusion.

195. Second, the Appellant also selectively quotes the evidence of witnesses P-0055 and P-0017. As noted above, P-0055 testified about the abduction of children under 15 and the pressure exerted on the families during recruitment campaigns.[372] P-0055 expressly referred to the pressure exerted by elders and wise men and members of the cadre.[373] Similarly, P-0017 testified that Kisembo informed the "old wise man" that the community needed to contribute to the UPC forces and to provide individuals for training. And indeed, shortly

[368] Appeal Brief, para.248.
[369] Ibid., para.249.
[370] Judgment, paras.770-785.
[371] Appeal Brief, para.247.
[372] See above, para.184.
[373] Judgment, paras.771,775. See transcript references in fn.2144. See also T-174-CONF-ENG, p.34, lns.1-12.

thereafter, this witness saw recruits arriving at the camp from Kilo; though the recruits were generally between 16 and 18, some were younger.[374]

196. In addition and with respect to P-0016, the Chamber did not rely on this witness to conclude that acts of conscription and enlistment took place,[375] but to establish that children under the age of 15 were trained[376] at the headquarters in Bunia[377] and in the camps of Mandro[378] and Mongbwalu.[379]

## F. SIXTH GROUND: USE OF CHILDREN UNDER 15 TO PARTICIPATE ACTIVELY IN HOSTILITIES

### 1. Error of Law

197. The Appellant submits that the Trial Chamber erred in its interpretation of "'active participation in hostilities' by considering that, in order to determine whether a child actively participates in hostilities, it would analyse the risk incurred by him or her when providing support to the combatants, rather than assessing the extent of the contribution provided by the child to the military operations or to the military capability of a party to an armed conflict".[380] According to the Appellant, "only the participation of children under 15 in fighting or their presence in the battlefield warrants the characterisation of the crime of using child soldiers to actively participate in hostilities".[381] The

[374]Judgment, para.783. See transcript references cited therein.
[375] Judgment, para.911 that refers to P-055, P-0014 and P-0017 as well as documentary evidence.
[376] Judgment, paras.912-913.
[377] Judgment, para.790.
[378] Judgment, paras.802, 804-808.
[379] Judgment, para.812.
[380] Appeal Brief, para.253
[381] Appeal Brief, para.269.

Chamber's error allegedly led it to consider activities not related to the hostilities, such as domestic chores.[382]

198. The Appellant argues that the Trial Chamber erred in drawing a distinction between direct and active participation,[383] and in the criteria it established to determine which sorts of indirect participation are covered by the provision.[384] According to the Appellant, the international law of armed conflict makes no distinction between active and direct participation in hostilities but instead uses both terms interchangeably. He refers to the ICRC Interpretative Guidance on the notion of Direct Participation in Hostilities ("ICRC Interpretative Guidance")[385] and endorses the three cumulative criteria advanced therein to qualify an act as direct participation in hostilities.[386] The Appellant argues that the Trial Chamber applied a broad interpretation of the Statue in violation of articles 21(1)[387] and 22(2).[388]

199. As it will be developed below, the Appellant's arguments are baseless. The notion of "active participation" endorsed by the Chamber is consistent not only

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[382] Ibid., para.261.

[383] Appeal Brief, para.260, referring to Judgment, para.627.

[384] Appeal Brief, para.252-235 referring to Judgment, para.628.

[385] ICRC Interpretative Guidance on the notion of Direct Participation in Hostilities under International Humanitarian Law, Nils Melzer, Legal adviser, ICRC, Geneva May 2009, p.43 (English version). See Appeal Brief, para.256.

[386] Namely, (1) the act must be likely to adversely affect military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); (2) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus). Appeal Brief, para.259 referring to ICRC Interpretative Guidance, p.46 (English text).

[387] Appeal Brief, paras.254-255; 264-6.

[388] Ibid., paras.262-263. Note that according to the Appellant, the international law of armed conflict makes no distinction between active and direct participation in hostilities and both terms have been used interchangeably. The Appellant refers to the ICRC Interpretative Guidance on the notion of Direct Participation in Hostilities ("ICRC Interpretative Guidance") and endorses the three cumulative criteria advanced therein to qualify an act as direct participation in hostilities. See Appeal Brief, paras.252-235,256. See also para.256 ICRC Interpretative Guidance on the notion of Direct Participation in Hostilities under International Humanitarian Law, Nils Melzer, Legal adviser, ICRC, Geneva May 2009, p.43 (English version).

with the protection afforded to children participating in hostilities under international humanitarian law, but also with the drafting history of this provision, scholarly commentaries and the jurisprudence of other international criminal tribunals. The Trial Chamber correctly applied the Statute and the Elements of the Crime in full compliance with articles 21 and 22. Also, even if the Appellant's interpretation was to be accepted, this would not modify the outcome of the decision. The activities that the Trial Chamber verified in its decision would also be covered by the concept of "direct participation" espoused by the Appellant. Thus, the error that the Appellant claims, even if affirmed, would not lead to a reversal, since it does not materially affect the decision.

200. The root of the Appellant's arguments lies in an erroneous extensive application of the standard of protection afforded to civilians by international humanitarian law to children participating in hostilities.[389] However, and as the Trial Chamber noted, international humanitarian law affords special and wider protection to children, "[who] are particularly vulnerable [and] require privileged treatment in comparison with the rest of the civilian population".[390] Further, the Appellant's concept of active or direct participation is restricted to participation in combat activities on the battlefield.[391] This restrictive interpretation, which was expressly rejected by the drafters of the Rome Statute, does not correspond with (and is much narrower than) the international humanitarian law concept of direct (or active) participation of civilians in hostilities developed in the ICRC

[389] See common Article 3 of Geneva Conventions; Article 51 of Additional Protocol I; Article 13(3) of Additional Protocol II.

[390] Judgment, paras.605,619. IHL disposes of specific provisions that apply and prohibit the use of children in hostilities. As with regular civilians, the terms used are not homogenous. See Article 4(3)(c) of Additional Protocol II that includes an absolute prohibition of children against the recruitment and use of children under the age of 15 in hostilities in non-international armed conflict; Article 77(2) of Additional Protocol I that prohibits the direct participation in hostilities of children below 15 in an international armed conflict; Article 38, paras.2 and 3 of the Convention on the Rights of the Child, that refers to direct participation in hostilities.

[391] Appeal Brief, para.269.

Interpretative Guidance, which includes conduct taking place away from the battlefield.

*(a) The Chamber's criteria is correct*

201. The Appellant misrepresents the Judgment and erroneously expands the Chamber's interpretation of "active participation" to include all situations where the child is placed at risk.[392] This was not the Chamber's approach. Rather, the Trial Chamber set out cumulative criteria to determine when children who are not engaging in combat are considered to be "actively participating in hostilities", which include those cases where: (i) the child is supporting the combatants; and (ii) the child is exposed to real danger as a potential target. The Chamber noted that "[t]hese combined factors […] mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them. Further, this has to be a case-by-case determination."[393] The Appellant has once more misrepresented the Trial Chamber's findings, and his arguments should be accordingly dismissed.

*(b) The Chamber's notion is in full compliance with the statutory framework*

202. The Chamber's interpretation of article 8(2)(e)(vii) fully complies with the framework of the Rome Statute and the relevant instruments of statutory interpretation. The Trial Chamber was entirely mindful of its obligation to determine "the scope of the activities covered by 8(2)(e)(vii)[…] in accordance with articles 21 and 22(2)".[394] As the Chamber noted, it applied the provisions of the Statute "as opposed to the more general concept of children associated with

[392] Appeal Brief, paras.255,264-6.
[393] Judgment, para.628.
[394] Judgment, paras.600, 602.

armed conflict".[395] Applying the Appeals Chamber's jurisprudence and the Vienna Convention on the Law of Treaties, the Trial Chamber interpreted the statutory provisions in light of its wording, object, purpose and context.[396] The literal interpretation and reading of the provision endorses the Chamber's conclusion that active participation goes beyond direct participation in combat. Had the drafters intended to afford protection only to children fighting in the front lines, they would have included those terms.

203. With respect to the teleological interpretation, international humanitarian law and international instruments concerning children seek to provide a wider and more robust protection for children from the risks associated with armed conflicts than even the protection afforded to regular civilians who are participating in hostilities. In international humanitarian law, civilians are entitled to immunity from attack unless and for such time as they take a direct part in hostilities. Therefore, "direct" participation is read narrowly (as the ICRC Interpretive Guidance suggests) such that civilians retain their protected status unless it is forfeited due to the nature of their activities. As such, child soldiers conscripted or enlisted into armed forces are no longer entitled to protected civilian status -- they belong to the armed forces and can therefore be legitimately targeted. For this reason, irrespective of the function or role assigned to the child, he or she is at risk of death or injury by virtue of their loss of protected civilian status. Since deploying a child soldier to actively participate in hostilities may significantly increase this danger, treating that deployment as criminal, regardless of whether the child's participation in hostilities is direct or indirect, affords the broadest possible protection to children.

[395] Judgment, para.606.
[396] Ibid., para.601.

*(c) There is ample support for the Trial Chamber's interpretation*

204. In addition, the position of the Trial Chamber is consistent with the drafting history of this provision and relevant scholarly commentaries. As developed below, there is ample support for interpreting the Statute in a manner that encompasses a wider range of activities beyond the participation of children in combat.[397]

205. With respect to the drafting history, the Trial Chamber notes that the travaux préparatoires suggest that although direct participation in combat is not necessary, a link with combat is nonetheless required.[398] The Chamber then quotes a footnote from the draft Statute of the Preparatory Committee on the Establishment of an International Criminal Court, finalized at a meeting in Zutphen prior to the Rome Diplomatic Conference, which reads:

> The words 'using' and 'participate' have been adopted in order to cover both *direct participation in combat* and also *active participation in military activities* linked to combat such as scouting, spying […].linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, use of children in *a direct support function* such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology (emphasis and underlying added).[399]

[397] *A contrario*, Appeal Brief, para.269.
[398] Judgment, para.621.
[399] UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, U.N. Doc. A/CONF.183/2/Add.1, 14 April 1998, page 21 and footnote 12. Note that the text of the footnote had the following introduction: "This option seeks to incorporate the essential principles contained under accepted international law while using language suitable for individual criminal responsibility as opposed to State responsibility". Quoted in Judgment, para.621.

206. The Zutphen text accordingly establishes a hierarchy of categories of activities in its attempt to draw a distinction between the types of activities which are not prohibited (activities "clearly unrelated to the hostilities") and those which are. In the category of prohibited activities, in descending order of proximity to combat and hostilities, are: (i) direct participation in combat; (ii) active participation in military activities linked to combat; and (iii) direct support functions. The examples of individuals tasked with taking supplies to the frontline are illustrative of this third category, and are not meant to be exhaustive.

207. While the footnote referred to above – like all other interpretative footnotes in the Preparatory Committee's Report -- did not appear in the text of the Statute, it was clearly in the minds of the drafters of the Statute and Elements of the Crimes.[400] Scholars noted that the provision relating to the use of children under 15 to actively participate in hostilities in the Rome Statute sought to prohibit a broader range of activities than just those covered by direct participation.[401] Further, one commentator highlighted the speciality of the provisions related to the participation of children in hostilities:

> On the level of participation, a compromise was reached on the phrase 'using them to participate actively in hostilities'. This was preferred to the more usually accepted phrase 'taking a direct part in hostilities' normally used in relation to civilians in general. The decision to move away from accepted wording was due to the increased use of civilians in support roles in the military and thus the tendency for this term to be interpreted in the narrowest

[400] Garraway C., in Lee R., *The International Criminal Court. The Elements of Crimes and Rules of Procedure and Evidence*, p. 206. See also Knut Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, 2003 Cambridge University Press, p.376. The ICRC Interpretative Guidance expressly refers to this footnote and notes that the drafters did not depart from IHL. The Guidance noted that although it appeared that they drew a distinction between the terms "active" and "direct" in the context of recruitment of children, they actually made a distinction between "combat" and "military activities linked to combat". ICRC Interpretative Guidance, footnote 84.
[401] Triffterer, Article 8, pp. 470-471[229].

possible way. With children, it was considered that a phrase should be used that could be capable of wider interpretation.[402]

*(d) The Trial Chamber's notion is consistent with the Pre-Trial Chamber and relevant jurisprudence of international criminal tribunals*

208. The formula outlined in the Zutphen text above was adopted in its entirety by Pre-Trial Chamber I in the Confirmation Decision delivered in this case.[403] The Pre-Trial Chamber expressly stated that, "active participation in hostilities means *not* only *direct participation in hostilities, combat* in other words, but also covers *active participation in combat related activities* such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints".[404] Additionally and importantly, the Pre-Trial Chamber accepted that persons acting as guards of military objectives (like military quarters or the physical safety of military commanders, especially bodyguards), and therefore not directly participating in combat, carried out activities "related to hostilities".[405]

209. The Trial Chamber's interpretation is equally consistent with jurisprudence of the SCSL on the scope of active participation in hostilities under article 4(c) of its Statute, which is identical to article 8(2)(e)(vii) of the Rome Statute. In the *AFRC* case, the Trial Chamber determined that the use of children to participate actively in hostilities is not restricted to children who directly participate in combat activities and also includes "any labour or support that gives effect to, or helps

[402] Garraway C., in Lee R., *The International Criminal Court. The Elements of Crimes and Rules of Procedure and Evidence*, p. 206.
[403] ICC-01/04-01/06-803, para.260.
[404] ICC-01/04-01/06-803, para.261 quoted in Judgment, para.622 (emphasis added).
[405] Ibid, para.263. The Pre-Trial Chamber noted that this would be case "where the military commanders [who are protected] are in a position to take all necessary decisions regarding the conduct of hostilities and the activities have a direct impact on the level of logistic resources and on the organization of operations required by the other party to the conflict whose aim is to attack such military objectives".

maintain, operations in a conflict", namely support roles within military operations.[406] The Trial Chamber in the *Taylor* case similarly found that "using children to participate actively in the hostilities encompasses putting their lives directly at risk in combat, but may also include participation in activities linked to combat such carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields".[407]

210. The SCSL jurisprudence is not the sole authority that supports the Chamber's position as has been demonstrated above, contrary to the Appellant's submissions. Further, the Trial Chamber was very careful when it referred to the SCSL jurisprudence. It expressly noted that those cases are not part of the case-law directly applicable under article 21, but that due to the similarity of the two provisions on child recruitment and use, the SCSL jurisprudence assists in the interpretation of the Rome Statute provisions. [408]

*(e) The Appellant's concept of direct participation does not correspond with IHL and is of no consequence for this case*

211. Finally and as noted above, the Appellant's notion of active or direct participation is restricted to direct participation in combat or "the participation of children under 15 in fighting or their presence in the battlefield".[409] This concept

[406] Judgment, paras.624-625, citing and quoting the AFRC Trial Judgment, para.737. The Trial Chamber also relied on the approach of the Preparatory Committee, whose footnote is partially quoted in pra.736.

[407] SCSL *Taylor* Trial Judgment, para.444. In that case, using children to guard diamond mines constituted active participation in hostilities because control over the mines was so central to the war effort that the mines themselves were a real target. The Prosecution submits that the same reasons underlying the appropriateness of considering jurisprudence of the ad hoc Tribunals, as determined by the Appeals Chamber, apply to the case-law from the SCSL, where relevant (see ICC-01/04-01/06-1433OA11, para.78. See also ICC-01/09-02/11-425OA4, para.37, and ICC-01/09-01/11-414, para.31).

[409] Appeal Brief, para.269.

does not correspond with and is more restrictive than the notion of direct participation in hostilities of regular civilians. The ICRC Interpretative Guidance recognizes that conduct taking place away from the battlefield (such as the exercise of control over or guarding of military objectives or personnel) may constitute direct participation in hostilities.[410]

212. The Prosecution submits that even if the concept of direct participation for regular civilians participating in hostilities was to be accepted, in this case, the Chamber would have reached the same factual findings. This is because this concept, notwithstanding the three criteria set out in the ICRC Interpretative Guidance,[411] would encompass all the conducts considered to be "active participation" in the Judgment. In particular: children used as soldiers in battles, as military guards and body guards and escorts of commanders and other high-ranking UPC/FPLC officials (including the Appellant), the Kadogo unit and girls used for domestic work in addition to other tasks as UPC/FPLC soldiers.[412]

213. Further, and contrary to the Appellant's submissions, domestic chores were not considered to be "active participation in the hostilities". With respect to domestic work, the Chamber noted that "a significant number of girls under the age of 15 were used for domestic work, *in addition to* the other tasks they carried out as UPC/FPLC soldiers, such as involvement in combat, joining patrols and

[410]ICRC Interpretative Guidance, p.48. Finally, the Appellant's reference to ICTR and ICTY jurisprudence and the UN General Assembly is inapposite because they refer to the regular principle of distinction and do not address the participation of children in hostilities. Appeal Brief, paras.257-8. For example and with respect to the *Akayesu* and *Rutaganda*, the applicable provision for children in non-international armed conflict is article 4, para.3(c) of APII which states that children under 15 should not be "allowed to take part in hostilities" and would therefore afford protection to "any" children involved in hostilities. The reference to *Galic* is further irrelevant because it refers to international armed conflict. In addition, most of the sources cited in fn.303 simply discuss the meaning of direct participation and not the synonymous meaning of active and direct.
[411]ICRC Interpretative Guidance, p.46.
[412] Judgment, paras.821-882,915.

acting as bodyguards".[413] Thus, the Chamber did not find that domestic staff alone constituted "actively participation in hostilities".

**2. Errors of Fact**

214. The Appellant argues a series of factual errors, challenging every factual finding relating to the use of children to actively participate in hostilities. The Prosecution will respond to the Appellant's arguments below.

*(a) On the age determinations*

215. The Appellant argues that the evidence relied upon by the Chamber to determine that the children were under 15 years of age is imprecise and general, and that the Chamber made several errors of fact in its assessment of the factual evidence presented to demonstrate the use of children under 15 by the FPLC.[414] This argument is a mere repetition of the arguments regarding age assessments advanced in the Appellant's fourth ground of appeal. The Prosecution refers to its response at paragraphs 151 - 173 above.

*(b) Participation of children in fighting*

216. The Appellant argues that the Chamber erred when it found that between September 2002 and 13 August 2003 the UPC/FPLC used children under 15 years

[413] Judgment, para.882 (Emphasis added).
[414] Appeal Brief, paras.270-273 referring to paras.124-227.

of age to participate actively in fighting in Bunia, Kobu and Mongbwalu on the basis of the testimony of witnesses P-0038, P-0012 and P-0046.[415]

- *Witness P-0038*

217. The Appellant submits that the Trial Chamber has committed a factual error in assessing P-0038's credibility.[416] The Appellant repeats his closing submissions and basically submits that P-0038's evidence lacks credibility because he was introduced to the Prosecution by intermediary P-00316 and knew intermediary P-00183.[417] In addition, the Appellant argues that the Chamber should have not credited P-0038's statement that P-00316 did not ask him to lie to the Court[418] and complains that the document he received in November 2012, which he now seeks to adduce as additional evidence, would have, had he received it sooner, allowed him to challenge P-0038's submission that he was part of FPLC since 2005.[419]

218. These arguments, again, were duly considered and appropriately rejected by the Trial Chamber.[420] There was no error in that Chamber's conclusion. First, the Trial Chamber conducted a thorough assessment of the reliability of this witness and the possible interference with his evidence by intermediary P-0316.[421] The Chamber concluded that "he was a reliable witness whose evidence is truthful and accurate. […] P-0038 stated that he and P-0316 never talked about what he was supposed to say to the OTP and P-0316 did not tell him to provide false stories to the prosecution".[422] Second, none of the transcript references quoted by the Appellant call into question the veracity of the evidence given by witness P-

[415] Appeal Brief, paras.274-275.
[416] Appeal Brief, para.276.
[417] Ibid., referring to Judgment, paras.341, 348, 373, 368.
[418] Appeal Brief, para.277 referring to Judgment, paras.331,348. The Appellant further notes that the Trial Chamber had ordered article 70 proceedings against intermediary 316.
[419] Appeal Brief, para.278.
[420] Judgment, paras.340-349.
[421] Judgment, paras.688-693. See also paras.348,481.
[422] Judgment, para.348.

0038. Third and as explained above with respect to the additional evidence, the document at issue, dated 11 December 2004, is a non-exhaustive list of FPLC members who wanted to be selected for integration into the FARDC.[423] Thus, it does not disprove that P-0038 was in the FPLC in 2005, much less in 2003, as the Appellant asserts. It is noteworthy that at trial the Appellant never suggested to P-0038 that the witness was not part of the UPC from 2001 to 2005. Yet, in his closing brief the Appellant submitted without any basis that it was implausible that P-0038 had been in school during the day and in the UPC at night in 2003 and 2004.[424] The Trial Chamber reviewed this argument and rightly disregarded it.[425] On these grounds the Appellant's arguments with respect to the reliability of P-0038's evidence should be rejected.

219. Other arguments advanced by the Appellant are either inaccurate or irrelevant. First, the Appellant is not correct in stating that five individuals made false statements upon request from P-00316 or P-0183.[426] The Appellant refers to two witnesses (P-0015 and D-0016) and to three other individuals who were not witnesses at this trial, in particular, a witness in the *Katanga and Ngudjolo* case (P28)[427] and two other individuals (NK and Jules Bunia) who did not testify in either trial. It is the case that the Trial Chamber chose not to rely on the evidence of P-0015[428] and concluded that P-00316 tried to persuade D-0016 to give a false account,[429] but the remainder of the Appellant's submissions on this point are incorrect.

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[423] See above paras.88-93.
[424] ICC-01/04-01/06-2773, para.458.
[425] Judgment, paras.345-346.
[426] Appeal Brief, para.276, third bullet point.
[427] Note that Trial Chamber II found in its Article 74 Judgment with respect to Mathieu Ngudjolo that he could only rely on certain parts of this witness' evidence. The Chamber did not conclude that the fact he could not rely on the totality of the evidence was due to this witness' connection with P-00316 or P-0183. See ICC-01/04-02/12-3, paras.251-254.
[428] The Trial Chamber did not rely on the evidence of P-0015 because he had given false statements to the Prosecution upon request of P-0316. The Chamber however found that the evidence of this witness at trial was credible, but it did not rely in its Article 74 Judgment. See Judgment, paras.324-339.
[429] Judgment, para.365.

220. The Appellant asserts that the Trial Chamber misinterpreted the statements of P-0012.[430] According to the Appellant, this witness was talking about all the armed groups in the region, in particular the PUSIC, and did not mean that he had seen children specifically within the FPLC.[431] As to the child whom P-0012 claims to have seen in Bunia in May 2003,[432] the Appellant submits that it has not been established that this child belonged to the FPLC or that he was under 15.[433] Further, the Appellant argues that the Chamber overlooked the witness' bias against the Appellant due to his membership in the PUSIC.[434]

221. The Appellant's submissions with respect to witness P-0012 are without merit and entirely repetitive of the arguments under his fourth ground of appeal.[435] First, the Appellant misrepresents the Article 74 Judgment in regard to the evidence of this witness.[436] Although the wording used by the Chamber to summarise the evidence of P-0012 is not a verbatim repetition of his testimony, the Chamber accurately represented his evidence.[437] Second, the Appellant is repeating the same arguments put forward at trial without showing how the Trial Chamber erred.[438] The Trial Chamber already considered and dismissed the arguments advanced by the Appellant.[439] In particular, the Chamber rejected the Appellant's submission at trial that the evidence of witness P-0012 was compromised by virtue of his previous position at PUSIC.[440] Finally, the Appellant's submissions selectively quote the evidence of P-0012 who clearly

[430] Appeal Brief, para.280 referring to Judgment, para.826. The Appellant submits that the witness did not say that "he saw child soldiers, many of whom were under 15", but that he had seen many child soldiers, "including some under the age of 15."See Appeal Brief, fn.336.
[431] Appeal Brief, para.280.
[432] Judgment, paras. 827-830.
[433] Appeal Brief, para.281.
[434] Appeal Brief, para.283.
[435] See Appeal Brief, para.212.
[436] Appeal Brief, para.280.
[437] The Chamber in para.836 of the Judgment indicated that "P-0012 gave evidence that the saw child soldiers, many of whom were under 15". The witness testified that "there were many of them, even under 15". See T-168-Red2-ENG, p.76, ln.1, cited in fn.336 of the Appeal Brief.
[438] ICC-01/04-01/06-2773, paras.554-555.
[439] Judgment, paras.828,830.
[440] Judgment, paras.666-667.

testified that the child that he encountered in Bunia, in May 2003 belonged to UPC.[441] On any of these three grounds this argument should be rejected.

- *Witness P-0046*

222. The Appellant argues that the evidence of witness P-0046 is hearsay and the Trial Chamber erroneously relied on it to establish that children under the age of 15 took part in combat during the timeframe covering the charges.[442] In addition, the Appellant submits that the Chamber erroneously relied on a document (*Histoires Individuelles*) which had been excluded.[443]

223. The Appellant's submissions with respect to witness P-0046 should be rejected. First, they are partly repetitive of arguments advanced in his fourth ground of appeal.[444] The Prosecution refers to its submissions made in paragraph 166 above. Second, the Appellant's arguments merely repeat closing submissions without showing any error by the Trial Chamber.[445] The Trial Chamber considered the Appellant's submissions and, after thoroughly assessing the evidence of this witness and her working methods, concluded that she was overall a reliable and credible witness.[446]

224. Finally, the Appellant's assertion that the Trial Chamber relied on interviews from a document that was excluded from the record is incorrect.[447] Further to the Appellant's objection, the Trial Chamber ruled that P-0046's notes of interviews with 34 former child soldiers could not be introduced during her examination.[448] Thereafter, the Prosecution elicited evidence *not on these notes* but rather related to

[441] See T-168-Red2-ENG, p.76, ln.19 to p.78, ln.11, cited in Judgment, fn.2334. See also T-168-Red2-ENG, p.79, ln.19 to p.80, ln.15.
[442] Appeal Brief, paras.203-204 and 285.
[443]Ibid., para.286 referring to Judgment, para.833.
[444] Appeal Brief, paras.232,203-4.
[445] ICC-01/04-01/06-2773, paras.638-639,646.
[446] Judgment, paras.645-655.
[447] Appeal Brief, para.286 referring to Judgment, para.833.
[448] T-205- Red3-ENG, p.2, ln.13 to p.3, ln.19.

a database of 687 child soldiers she met with, 220 of whom were under 15 and 167 of whom had been part of the UPC/FPLC.[449] She clarified that 26 of the 167 children had participated in combat for the UPC/FPLC between mid-2002 and mid-2003.[450] Curiously, the Appellant in his sentencing appeal *relies* on this same evidence that he now claims was excluded from the record.[451]

225. Further, it should be noted that the Trial Chamber did not only rely on these three witnesses to conclude that children under 15 years of age participated in combat activities. The Chamber also relied on the testimony of witnesses P-0016 and P-0014 in this regard.[452] The Appellant has not even attempted to undermine the Chamber's reliance on this evidence.

*(c) The use of children as military guards*

226. The Appellant submits that the Trial Chamber erred in fact when it considered that the statements of witnesses P-0016 and P-0024 demonstrated beyond reasonable doubt that children under the age of 15 were used as military guards.[453]

227. With respect to P-0024, the Appellant submits that the Trial Chamber erred in not considering and ruling on the purported resentment that the witness held towards the UPC/RP.[454] Further, the Appellant submits that it was unfair to rely on the visual evaluation by this witness of the ages of certain non-identified individuals about whom the Prosecution provided no information to the Defence.[455] On P-0016, the Appellant submits that his general evidence about the

[449] T-205-Red3-ENG, p.71, ln.2 to p.73, ln.5.
[450] T-207-Red2-ENG, p.12, lines 18-22.
[451] Defence Appeal Brief against Sentence, ICC-01/04-01/06-2949, para.21.
[452] Judgment, paras.821,825,832.
[453] Appeal Brief, para.289.
[454]ICC-01/04-01/06-2773, para.586.
[455] Appeal Brief, para.290.

deployment of "recruits" after their training in Mandro camp does not correspond to children under 15 of age and therefore does not corroborate the evidence of witness P-0024.[456] As a result, the evidence of P-0024 fails to demonstrate beyond reasonable doubt that children under 15 took part in hostilities.[457]

228. The Appellant's arguments are without merit. First, the Appellant fails to establish how the Chamber's alleged disregard for P-0024's purported resentment towards the UPC impacts upon the conviction. Further, the Prosecution notes that the Chamber undertook a careful assessment of the credibility of witness P-0024[458] and concluded that the witness gave "credible and reliable evidence that he saw children well below the age of 15".[459] Second, with regard to the Appellant's submissions about the P-0024's determination of the children's age, the Appellant is merely repeating the arguments he raised in closing submissions, which were considered and rejected by the Chamber in the Judgment,[460] and Appellant does not identify error beyond his general disagreement with the Chamber on three points. In addition, the Prosecution refers to its submissions in response to this argument also raised in the Appellant's fourth ground of appeal in paragraph 169 above.

229. On P-0016, the Appellant misrepresents and selectively quotes the witness's evidence.[461] In addition, the Appellant does not seem to challenge the Chamber's findings on children being used as military guards,[462] but rather takes issue with the witness's determination of the age of the children in Mandro, generally.[463] P-0016 said that there were over 100 recruits and others in the camp and clarified

[456] Appeal Brief, para.291. See fn.356.
[457] Appeal Brief, para.292.
[458] Judgment, para.656-663.
[459] Judgment, para.663.
[460] See ICC-01/04-01/06-2773, para.588 and Judgment, para.837.
[461] See for example fn.356.
[462] Judgment, paras.835-7.
[463] This is an argument that the Appellant also raises in his fourth ground of appeal, above. See Appeal Brief, para.213.

that about three-quarters were children. When he was asked how many children were 14 years old or below, he testified that he did not know the exact figure but they were less than 50 percent.[464] The Chamber was fully entitled to take this assessment into account, provided that it had, and articulated, a well-reasoned basis to do so. In this instance, the Trial Chamber thoroughly assessed P-0016's credibility[465] and concluded that the witness "provided a clear and credible explanation as to how he assessed the ages of the children".[466] The Chamber considered and dismissed the Appellant's challenge to P-0016's assessment of the age of children he estimated to be under the age of 15 in the UPC/FPLC, finding that "P-0016 was convincing on the issue", repeating the comprehensive basis given by P-0016 for reaching his conclusions on age.[467]

*(d) Bodyguards and escorts of the military chiefs and other UPC/FPLC senior officials*

230. The Appellant challenges the Chamber's finding that children under the age of 15 years were used as bodyguards and escort soldiers by members of the General Staff and military chiefs of the UPC/FPLC between September 2002 and 13 August 2003.[468]

231. First, the Appellant attacks the Chamber's reliance on video EVD-OTP-00572 and argues that the children featured therein are not under the age of 15.[469] The Prosecution refers to its submissions above with respect to the probative value of video evidence.[470] Second, the Appellant submits that the evidence of witnesses P-0041, P-0017, P-0038, P-0055 and P-0014 does not permit the Chamber to conclude

[464] Judgment, paras.804-805 and transcript referred to in fns.2263 to 2272.
[465] Judgment, paras.683-686.
[466] Judgment, para.687.
[467] Judgment, para.687.
[468] Appeal Brief, para.293.
[469] Ibid. paras.295-6. See also para.302. The Appellant refers to his submissions in Part II.
[470] See above, paras.162-163.

that a significant number of children under 15 years of age were used as bodyguards. These arguments repeat arguments advanced elsewhere in his appeal brief. They are not based on a correct evaluation of the evidence and fail to demonstrate any error on the part of the Trial Chamber.

- *Witness P-0041*

232. On *P-0041*, the Appellant submits that the Chamber incorrectly interpreted his evidence, and in particular the age and the school year of his bodyguards.[471]

233. The Prosecution submits that the Appellant fails to show the impact of any of the purported inaccuracies on the Judgment and consequently, the argument should be dismissed. In addition, and contrary to the Appellant's submissions, although the Chamber did not reproduce witness P-0041's testimony verbatim, it provided an accurate summary of the evidence and correctly noted that several of the Appellant's bodyguards were under 15 years of age.[472] The Appellant correctly notes that witness P-0041 first stated that the children had not reached the fourth year of primary school and shortly thereafter corrected himself and said fourth year of secondary school.[473] The Trial Chamber does not note this correction by the witness, referring only to primary school in the Judgment. However, this oversight has no impact on the witness' evidence regarding the age of the children nor on the Trial Chamber's conclusions, since a child who has not reached the fourth year of secondary school is still under 15 years of age.

[471] Appeal Brief, paras.297-8, referring to Judgment, para.846. According to the Appellant, P-0041 did not testify that he had 12 bodyguards who were between 13/14 and 16 years old and who had not reached the fourth year of primary school – as the Chamber noted - rather, he testified that one or two of his guards could be 13 or 14 and the others were 16and that none of his guards had reached the fourth year of secondary school.
[472]The witness did say that one or two were aged 13 or 14 and the rest were 16 – however, the Chamber's summary of the witness evidence (namely that their ages ranged from 13/14 till 16 is accurate).
[473]T-125-Red3-ENG, p.50, lns.19-20.

- *Witness P-0014*

234. On *P-0014*, the Appellant submits that the testimony of this witness is not specific enough for the Chamber to conclude that the witness was referring to his personal assessment of the age of the children, or whether the Appellant was aware of the age of the child who worked as his bodyguard.[474]

235. The Appellant's submissions with respect to P-0014 are without merit. This witness clearly indicated that the Appellant accepted a child who was 14 years old as his bodyguard. Further, the Appellant did not need to know the age of every single child for him to be held liable; it suffices that he knew that children under 15 years of age were conscripted, enlisted and used to participate in hostilities. As developed above with respect to the required specificity of the charges, in this case the Prosecution did not need to single out and name every victim. As a result, the Prosecution also did not need to prove that the Appellant knew that all the young children recruited were under 15 years of age.

236. In any event, even in the extreme case that the evidence of P-0014 was to be rejected, the Chamber's findings with respect to the use of children under 15 as personal guards of commanders and high-ranking UPC/FPLC, including the Appellant, would remain undisturbed. First, and with respect to the Chamber's conclusion that commanders and senior UPC/FPLC members used children under 15 as bodyguards, the Chamber also relied on other evidence than P-0014, in particular, P-0055, P-0017, P-0041, P-0038 and video footage.[475]Second, and regarding the Appellant's bodyguards, the Chamber did not rely on P-0014, but on the evidence of P-0016, P-0030, P-0041 and P-0055 as well as video footage.[476]

[474]Appeal Brief, para.299.
[475]Judgment, paras.839-857.
[476]Judgment, para.869.

- *Witness P-0017*

237. The Appellant submits that no weight should have been given to the evidence of witness P-0017 who testified that the children acting as bodyguards were less than 15 years old but was unable to given an exact age.[477]Again, the Appellant misses the point: there is no requirement that the precise age of each child be identified, as long as it can be established beyond a reasonable doubt that the victims were under 15. P-0017 clearly testified that the children acting as bodyguards were under the age of 15 and accordingly it was perfectly appropriate for the Chamber to rely on the witness' evidence.[478]

- *Witness P-0038*

238. The Appellant submits that this witness did not testify that General Kisembo, Bosco Ntaganda and Chief Kahwa all had children under 15 years of age working as bodyguards, but rather referred only to Kisembo.[479] This is not accurate. During its examination of witness P-0038, the Prosecution asked the witness whether the three UPC high officials had children under 15 years of age working as bodyguards. P-0038 responded in the affirmative.[480]. But even if the witness was only referring to Kisembo, which he clearly was not, the finding of the Chamber with respect to children under 15 years of age being used as bodyguards would remain undisturbed as the Chamber did not solely rely on P-0038 but also on the evidence of P-0014, P-0055, P-0017, P-0041 and video footage.[481]

[477]Appeal Brief, para.300.
[478]See transcript reference in fn.2368 of the Judgment.
[479]Appeal Brief, para.301 referring to Judgment, para.852.
[480]See transcript reference in fn.2411 of the Judgment.
[481] Judgment, paras.839-857.

- *Witness D-0019*

239. The Appellant submits that the Trial Chamber incorrectly rejected the evidence of D-0019 who, in an attempt to refute the Prosecution evidence, including that of P-0017, testified that bodyguards were under 18 but not under 15 years of age.[482] The Appellant's arguments are without merit. Once again, the Appellant represents the evidentiary record only partially. The Chamber relied on other evidence, in addition to that of P-0017, to conclude that children under 15 years of age acted as bodyguards. In particular, the Chamber relied on witnesses P-0055 (whose evidence was corroborated by other witnesses), P-0014, P-0038 and P-0041, as well as video footage EVD-OTP-00572.[483] The Trial Chamber thoroughly assessed the credibility of witnesses P-0017 and D-0019 and concluded that the former provided "an honest and accurate account, particularly as regards the ages of the children he saw and their roles in connection with the armed forces".[484] With respect to the latter, the Chamber considered with caution his evidence related to the Appellant because he was evasive, contradictory and showed partiality towards the Appellant. However, the Chamber found D-0019's evidence that was not related to the Appellant, such as that concerning the structure of the UPC, was consistent, credible and reliable and accepted such evidence when it was corroborated.[485] Thus, it was on a solid basis that the Chamber came to the entirely reasonable finding that children under 15 years of age acting as bodyguards for UPC high officials.

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[482] Appeal Brief, para.303. The Chamber found that 'the evidence of D-0019 in light of P-0017 evidence does not contradict the statements that military chiefs used body guards under 15" (Judgment, para.844). The Appellant submits that P-0017 and D-0019 were the only witnesses who had personally lived the referred events and its main difference relates to a subjective assessment of the age of the bodyguards in light of their physical appearance, and no conclusion can be made of the contradictory evidence.

[483] Judgment, paras.839-857.

[484] Judgment, para.845. See also paras.677-682 on the age assessment and credibility of P-0017: the Chamber concluded that he was credible, consistent and reliable.

[485] Judgment, paras.728-730.

*(e) Thomas Lubanga's bodyguards*

240. The Appellant submits that the Trial Chamber erred in fact in relying on the evidence of witnesses P-0030, P-0055, P-0016 and P-0041 and some images from three pieces of video evidence to conclude that the Appellant's personal guard had a significant number of children under 15 years of age.[486]

- *Video evidence*

241. First, the Appellant submits it is impossible to demonstrate the age of the children in these videos beyond a reasonable doubt.[487] This argument has already been rehearsed elsewhere in the Appellant's brief. The Prosecution refers to its response to these arguments above in paragraphs 162-163.

- *Witness D-0040*

242. Second, the Appellant submits that the evidence of D-0040 contradicts that of P-0030 and that there were not in fact any children under 15 years in the Appellant's guard. Further, the Appellant contends that D-0040, one of the children who allegedly appear in the video dated 24 February 2003 (EVD-OTP-00574), was 19 years of age at that time.[488]

243. The Prosecution submits that the Appellant's arguments are without merit. D-0040 is one of the new witnesses the Appellant proposes to bring before the Appeals Chamber as additional evidence. As submitted above, the evidence of this witness should not be admitted.[489] But even if admitted, the evidence would not alter the Chamber's assessment of the evidence or its ultimate conclusion. The

[486] Appeal Brief, paras.305-309 referring to Judgment, para.869.
[487] Appeal Brief, para.306.
[488] Appeal Brief, para.307 referring to Judgment, para.858.
[489] See above paras.48-70.

Trial Chamber thoroughly assessed the credibility of P-0030 and found him credible and reliable.[490] D-0040's purported evidence does not undermine P-0030's testimony. P-0030 never testified that D-0040 was under the age of 15, but simply that children under 15 years of age were in the UPC/FPLC and that he captured some of them on video. This evidence is undisturbed by D-0040's statement.

244. The Appellant has not established that no reasonable trier of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber, together with the anticipated evidence of D-0040.

- *Witnesses P-0041 and P-0055*

245. The Appellant asserts that P-0041 and P-0055 only said in general terms that there were "jeunes" and "enfants or pmf" among the Appellant's guard without testifying to the actual age of these children.[491] The Appellant again selectively quotes the transcript and misrepresents the evidence. Witness P-0055 testified that members of the main staff had "kadogos" as bodyguards who ranged in age from 13 to 16. In light of this, the Trial Chamber concluded that P-0055's evidence needed to be corroborated.[492] Further, P-0041 did testify as to the ages of the children, indicating that the Appellant had bodyguards that ranged in age from 13 to 16 years of age.[493]

- *Witness P-0016*

246. Fourth, the Appellant makes a bare assertion that witness P-0016 modified his evidence upon the insistence of the Prosecutor when he testified that there were children between the ages of 13 and 14 years of age in the UPC/FPLC, contrary to a previous out-of-court statement. Further, the Appellant submits that this

[490] Judgment, paras.712-718.
[491] Appeal Brief, para.308.
[492] Judgment, para.839.
[493] Judgment, para.846- see fns.2392-3.

witness did not indicate how he had assessed the ages of the children.[494] The Appellant fails to identify an error that would impact on the Chamber's overall conclusion that the Appellant used children under 15 as bodyguards. Appellant made this argument to the Trial Chamber, and it expressly addressed the point.[495] Apart from enunciating his continuing personal disagreement with the Trial Chamber's conclusion, the Appellant has not shown that the Trial Chamber erred.

- *Witnesses D-0011, D-0019 and D-0037*

247. The Appellant submits that the Trial Chamber unjustifiably dismissed the evidence of witnesses D-0011 and D-0019 without explaining why it lacked credibility.[496] The Appellant then notes that the evidence of these two witnesses was corroborated by a witness whom the Defence did not have the opportunity to call.[497] This is simply incorrect. In fact, the Appellant is relying on an out-of-court witness statement that he tendered but that the Trial Chamber, after consideration, deemed not to be credible because it was "contradicted by a wealth of evidence that has been accepted by the Chamber".[498] There is nothing unreasonable in this evaluation by the Chamber. Moreover, the Appellant has fully ventilated this argument in his second ground of appeal.[499]

248. The Appellant further argues that witness D-0037, who was found to be credible, testified that there were no soldiers under the age of 15 in the UPC.[500] The Appellant's submissions on this point are similarly without merit. The Trial

[494] Appeal Brief, para.308 referring to Judgment, para.869.
[495] ICC-01/04-01/06-2773, para.417 and Judgment, para.864, which found "although he did not specify how he came to the conclusion that the youngest members of the PPU were 13 or 14, and notwithstanding the Chamber's recognition that differentiating between the ages of children can be difficult, on the basis of his detailed evidence the Chamber is satisfied that he was in a position to make a precise evaluation in this regard".
[496] Appeal Brief, para.310, referring to Judgment, para.869.
[497] See Appeal Brief, paras.70-75.
[498] Judgment, para.1261.
[499] Appeal Brief, paras.70-75.
[500] Appeal Brief, para.310.

Chamber thoroughly assessed the credibility of witnesses D-0011, D-0019 and D-0037, and explained the extent to which it found them credible and would rely on their evidence.

249. With respect to D-0011, an early member of the UPC, the Chamber opined that this witness' evidence with respect to the Appellant was evasive and showed partiality towards the Appellant; however, on issues not directly related to the Appellant his account was more consistent, credible and reliable. As a result, the Chamber accepted the testimony of D-0011 on such matters if it was corroborated or the evidence was uncontroversial.[501] Similarly, with respect to witness D-0019, the Chamber noted that due to the evasive nature of his testimony and his close professional relationship with the Appellant, the Chamber considered the evidence of this witness with caution and only relied on his account when it was supported by other credible evidence.[502] Finally, the Chamber reasonably concluded that the evidence of D-0037 was in most aspects credible, consistent and reliable, although on certain discrete issues, which have been addressed to the extent necessary, his evidence was of less assistance.[503] With respect to all of these witnesses, the Trial Chamber provided entirely adequate and detailed reasoning in support of its conclusions.

*(f) The Kadogo Unit*

250. The Appellant submits that the Chamber erroneously assessed the evidence of P-0017 and D-0019 and wrongly concluded that there were children below the age of 15 in a Kadogo unit established by the Chief of Staff for Kisembo in Mamedi.[504]

[501] Judgment, para.730. See also paras.729 and 867.
[502] Judgment, para.724. See also paras.724 and 866.
[503] Judgment, paras.726-7. The Chamber further considered D-0037's evidence in paras.764, 829, 903, 915, 1111, 1264-6.
[504] Appeal Brief, paras.311-313 referring to Judgment, para.877.

251. The Appellant's arguments are without merit. Witness P-0017 unmistakably testified that all of the approximately 45 children in this unit were below the age of 15, and that some were as young as 12.[505] Further, and contrary to the Appellant's submissions, the Chamber correctly noted the evidence establishing that some of these child soldiers acted as bodyguards for the Chief of Staff, and others were ordered to loot property. One of them died in battle. They were under a command and were monitored to ensure they did not behave improperly.[506] With respect to D-0019, the Chamber noted that the witness had seen children staying near Kisembo in the compound in Mamedi and reasonably concluded that "the details of D-0019's evidence on the children in Mamedi largely supports the testimony given by P-0017".[507]

*(g) The Girls used for Domestic Duties*

252. The Appellant submits that none of the evidence listed in paragraphs 878 to 882 of the Judgment is sufficient to establish that children under the age of 15 carried out domestic activities that could be considered "active participation in hostilities". Further, the Appellant argues that witnesses P-0055, P-0016 and D-0019 did not specify the age of the girls who performed domestic duties.[508]

253. The Appellant's arguments once more fail to accurately represent the evidence of the witnesses or the Trial Chamber's findings. The Trial Judgment did not make a blanket ruling that *all* domestic work met the criteria of "use [...] to participate actively in hostilities".[509] Rather, the Chamber assessed whether the support provided by girls under the age of 15 exposed them to danger by becoming a potential target and concluded that "a significant number of girls

[505] Judgment, para.871. See T-158-Red2-ENG, p.23, lines 6-9.
[506] Judgment, paras.871-875.
[507] Judgment, para.877; see also para.870.
[508] Appeal Brief, paras.314-316.
[509] Judgment, para.882.

were used for domestic work *in addition* to the other tasks they carried out as UPC/FPLC soldiers, such as involvement in combat, joining patrols and acting as bodyguards".[510] Further, and contrary to the Appellant's submissions, the witnesses relied on by the Chamber indicated that a significant number of the girls performing, *inter alia,* domestic work were under 15 years old.[511] Therefore, the Appellant's arguments with respect to those performing domestic work misrepresent the relevant evidence and factual findings and do not establish any error by the Trial Chamber.

*(h) The Self-Defence Forces*

254. The Appellant argues that the Chamber erred when it evaluated D-0007's evidence and concluded that, despite this evidence, there was a strong inference to be drawn that some of the young people sent by the self-defence forces to the UPC/FPLC for training were under the age of 15.[512] The Appellant merely complains that the Trial Chamber found part of D-0007's account to be implausible. However, this is perfectly within the powers of the Trial Chamber as the trier of fact. The Trial Chamber responsibly assessed D-0007's evidence and found a logical fault in his assertion that the self-defence forces made special arrangements (based on age) as regards the recruits who were sent for training with the UPC/FPLC, when they did not verify the ages of the children who were given and who they allowed to fight.[513]

255. Moreover, the Appellant's submissions, even if correct, would have no impact on the decision, and in particular would not modify the basis for the Appellant's conviction, as the Chamber concluded that some of the Self-Defence Forces

[510] Judgment, para.882 (emphasis added).
[511] Judgment paras.873-4, 880-1.
[512] Appeal Brief, paras.317-319 referring to Judgment, para.907.
[513] Judgment, para.902.

remained independent of the FPLC and that accordingly the UPC/FPLC was not responsible for any children below the age of 15 who were recruited or used by these groups.[514]

*(i) The harsh conditions endured by the FPLC children*

256. The Appellant submits that the Chamber erred when it concluded that "a number of recruits would have been subjected to a range of punishments during training with the UPC/FPLC, particularly given there is no evidence to suggest they were excluded from this treatment."[515] The Appellant further argues that the evidence of P-0016 and P-0014 refers to incidents that occurred before the timeframe of the charges and that P-0017 testified about "young soldiers" and not children under 15 years of age.[516]

257. The Appellant's arguments are without merit and do not impact the conviction. In addition, the Appellant's arguments are based on a misrepresentation of the factual findings and the underlying evidence. The Chamber's conclusion that there was no evidence indicating that children were excluded from the harsh conditions in the training camps is entirely reasonable in light of the established, recurring general abuse to which recruits were subjected.[517] Further, the Appellant's submissions with regard to witnesses P-0016, P-0014 and P-0017 are inaccurate. The Chamber noted that some of the incidents described by P-0016 occurred within the timeframe of the charges and that although some of the punishments that P-0014 witnessed occurred shortly before the period of the charges, children were not subsequently demobilized.[518]

[514] Judgment, paras.906-907. See also para.915; the Chamber, in its overall conclusions, did not include the self-defence forces as part of the use.
[515] Appeal Brief, para.321 referring to Judgment, para.889.
[516] Appeal Brief, paras.322-4.
[517] Judgment, para.889.
[518] Judgment, para.887.

In these circumstances, it was reasonable to conclude that such practices would have continued thereafter. Contrary to the Appellant's submissions, the Chamber did not place the burden of rebuttal upon the Appellant in violation of article 67(1)(i), since (a) he was not charged with cruel treatment, and (b) the Chamber, far from placing any onus on the Appellant, merely made a reasonable factual inference from the evidence before it. Finally, as set out above, the Appellant misrepresents the evidence of witness P-0017, who clearly testified that children below 15 years of age had been recruited and used in the UPC.[519]

## G. SEVENTH GROUND: OBJECTIVE REQUIREMENTS OF RESPONSIBILITY

### 1. Errors of Law

*(a) The "Critical Element of Criminality" of the "Common Plan"*

258. The Appellant submits that the Majority of the Trial Chamber erred in law when it considered the notion of "sufficient risk" to ascertain the "critical element of criminality" of the common plan.[520] According to the Appellant, this concept, which incorporates the notion of *dolus eventualis* excluded from the Statute, does not meet the criteria for criminal intention under Article 30(2)(b).[521] The Appellant submits that intent is established only when an accused is conscious that "the occurrence of such crimes was a virtually certain consequence of the implementation of the common plan."[522] According to the Appellant, this error

[519] See above para.237.
[520] Appeal Brief, paras.327, 329, referring to Judgment, paras.984, 985 and 987.
[521] Appeal Brief, para.328.
[522] Appeal Brief, para.328, quoting ICC-01/05-01/08-803, para.369.

would invalidate the Judgment because the common plan of building an army could not in and of itself be seen as a criminal plan pursuant to Article 30(2)(b).[523]

259. The Appellant's arguments are without merit. First, the Appellant had already advanced the position that for liability under co-perpetration to arise a plan needs to be criminal in his Closing Brief.[524] The Trial Chamber duly considered this position and ultimately dismissed it in its Article 74 Judgment.[525] The same defeated position is repeated on appeal without any showing of error from the Trial Chamber. The burden on the Appellant to demonstrate the existence of a legal error invalidating the decision is not met by the mere repetition of his position before the first instance Chamber. This argument should be therefore summarily dismissed.[526]

260. The Trial Chamber correctly found that the plan does not need to be criminal and that it suffices for the purposes of establishing criminal liability that the plan includes an element of criminality.[527] This position has been unanimously embraced by all Chambers of this Court which have addressed the objective requirements of common plan and of common purpose pursuant to articles 25(3)(a) and (d), respectively.[528] Nothing in the Appellant's submissions explains

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[523] Appeal Brief, para.330.
[524] ICC-01/04-01/06-2773, paras.77-78.
[525] Judgment, paras.955,984.
[526] *Gotovina* Appeals Judgment, para.14 referring to *Boskoski* Appeals Judgment, para.16; *Mrksic* Appeals Judgment, para.16; *Bagasora* Appeals Judgment, para.19.
[527] Judgment, para.984.
[528] This has been the position of the Chambers of this Court that have addressed the objective requirements of article 25(3)(a) or (d) and, in particular, the existence of the common plan or purpose. They have unanimously stated that although the plan does not need to be criminal and does not need to be directed to the commission of a crime, the plan must include an element of criminality (ICC-01/04-01/10-465, para.271; ICC-01/04-01/07-717, para.523; ICC-01/04-01/06-803, para.344). Pre-Trial Chamber II in the Kenya cases indicated that this means "that [the agreement or plan] must involve the commission of a crime with which the suspect is charged" (ICC-01/09-01/11-379-Red, para.301; ICC-01/09-02/11-382-Red, para.399). Pre-Trial Chamber I in the Confirmation Decision noted that (i) the co-perpetrators may agree to a non-criminal plan and only commit the crime if certain conditions are met, or (ii) that the co-perpetrators are aware of the risk that implementing the common plan will result in the commission of the crime and accept such outcome (ICC-01/04-01/06-803, para.344, which is quoted in Judgment, para.982). See also Olásolo, H., The Criminal Responsibility of Senior Political

why and how this consistent jurisprudence from the Court, and the Trial Chamber's findings supported by it, are erroneous.

261. With respect to the Appellant's arguments regarding the required degree of knowledge of the crimes involved by the common plan, the Appellant is in fact challenging the Chamber's interpretation of direct intent of second degree as provided by article 30(2)(b), that is, that "the person […] is aware that [the crime] will occur in the ordinary course of events". Elsewhere in the Judgment, the Chamber found that this category of intent is satisfied where the co-perpetrators knew of "the existence of a risk that the consequences will occur. […] A low risk will not be sufficient".[529] As the Appellant is also appealing the Chamber's concept of direct intent of second degree elsewhere in his Brief, the Prosecution will jointly address these submissions.[530]

*(b) On the essential contribution*

262. The Appellant submits that the Trial Chamber erred in law when it found that article 25(3)(a) does not require direct and personal participation in the crime, and that the mere fact of exercising "joint control over the crime" was sufficient to establish the "essential contribution" required under this mode of liability.[531]

263. The Appellant argues that the control of the crime theory does not find support in the Rome Statute, and that the Chamber violated articles 21 and 22 and the principle of legality by finding him responsible on the basis of this kind of participation.[532] The Appellant further submits that the responsibility of those removed from the scene of the crime, and who control or mastermind its

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and Military leaders as principals to International Crimes, 2009 Hart Publishing, p.158; *Krajisnik* Trial Judgment, para.883; *Brdjanin* Appeals Judgment, para.415.

[529] Judgment, para.1012.

[530] See below paras.289-297.

[531] Appeal Brief, para.332 referring to Judgment, paras.1002-1003.

[532] Appeal Brief, para.333.

commission, falls within article 25(3)(b) and article 28, rather than article 25(3)(a).[533] The effect of this error is that the Chamber incorrectly considered the Appellant's leadership functions and his knowledge of the crimes as constituent elements of his "essential contribution", while these elements would fall under article 28.[534] The Appellant then refers to the arguments advanced in his Closing Brief with respect to how his rights under article 67(1)(a) have been violated.[535]

- *There is no requirement for direct and personal participation in the crime under Article 25(3)(a)*

264. The Appellant's submissions are largely a repetition of arguments advanced in his closing submissions before the Trial Chamber.[536] The Appellant argued that article 25(3)(a) required a personal and direct participation in the crime,[537] unlike the responsibility under articles 25(3)(b) and 28.[538] The Trial Chamber duly considered and dismissed these submissions.[539] The Appellant demonstrates no error of law, and is simply rearguing the same point in appeal, without demonstrating why the Trial Chamber's legal findings are erroneous. On these grounds, the Appellant's argument should be summarily dismissed.

265. The Prosecution also notes that the Trial Chamber's conclusion is consistent with the case-law emerging from the Court.[540] It also notes that the ICTY Appeals Chamber in *Tadic* rejected the notion that joint commission of a crime should be limited to those individuals personally and directly participating in its execution, stating that: "... to hold criminally liable as a perpetrator only the person who

[533]Ibid.,para. 334 referring to Judgment, para.1003.
[534] Appeal Brief, para.335 referring to Judgment, para.1221.
[535]Ibid., para.338.
[536]ICC-01/04-01/06-2773, paras.59-73.
[537] ICC-01/04-01/06-2773, para.66.
[538]Ibid., paras.58-62,66-68.
[539]Judgment, para.1002.
[540] ICC-01/09-02/11-382-Red, para.402; ICC-01/09-01/11-373-Red, para.306, ICC-01/04-01/07-717, para.526. See also *Tadic* Appeal Judgment, para.196 and Roxin C., *Taterschaft und Tatherrschaft*, 7th ed., pp.282-3.

materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act".[541] The Appellant has made no effort to demonstrate why, despite this uniform jurisprudence supporting its legal conclusion, the Trial Chamber still committed error.

- *Essential contribution of the Appellant*

266. The Appellant also misrepresents the Judgment when he states that the Trial Chamber indicated that joint control over a crime was sufficient to establish the existence of an essential contribution.[542] The Trial Chamber made no such finding. The Appellant confuses the *quality* of contribution required by the Chamber to entail individual criminal responsibility ("essential") with the manner in which the Chamber will determine whether a particular contribution has that essential quality or not. For these purposes, consideration will be given to the actions of all co-perpetrators and not just the Appellant's actions taken alone. With respect to the quality or nature of the contribution, the Majority of the Chamber found that in order to be a co-perpetrator an accused must perform an essential role in accordance with the common plan and provide an essential contribution.[543] The Majority noted that the Prosecution does not need to prove that the contribution of the Appellant, taken alone, caused the crime in order to demonstrate the contribution of the Appellant was "essential". Rather, the responsibility of the co-perpetrators for the crimes resulting from the execution of the common plan arises from mutual attribution, based on the joint agreement or common plan.[544]

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[541] *Tadić* Appeals Judgment, para.192.
[542] Appeal Brief, para.332.
[543] Judgment, para.1000.
[544] Judgment, para.994. The Prosecution submitted that the Appellant's contribution did not need to be essential, and a substantial contribution was enough: ICC-01/04-01/06-2748-Red, para.65. However, considering that the Appellant's is not challenging this requirement, the Prosecution will not enter into this matter.

267. Beyond this point, it is difficult to understand what the core of the Appellant's claim is, and how the alleged error would affect the Judgment: if the conduct of an accused is such that he or she effectively exercises control over the crime, it will certainly be very difficult to conclude that his or her contribution to the common plan is something less than "essential".

- *The "control over the crime" theory*

268. The Appellant suggests, in a vague manner, that the "control over the crime" theory is not included within the Rome Statute. The Appellant however does not indicate how the Chamber erred in purportedly applying this theory, nor does he suggest a preferable interpretation of article 25(3)(a).

269. The Appeals Chamber should not be asked to rule *in abstracto* on the legal correctness of this theory.[545] An appeal is not an academic debate on competing legal theories. Rather, the Appellant's burden is to identify an error in the interpretation and application of the elements of the mode of liability charged which has an impact on the Judgment. As the Appellant has failed to do so, the Appellant's submissions should be dismissed.

270. The Prosecution firstly notes that the Trial Chamber correctly resorted to the Vienna Convention on the Law of Treaties in interpreting the relevant elements of article 25(3)(a).[546] Second, the Trial Chamber followed the case-law emerging from other Chambers of the Court in accepting the applicability of the theory of control over the crime to certain modes of liability under the Statute, in particular co-perpetration.[547] It is therefore the burden on the Appellant to demonstrate that this jurisprudence, which provides the basis for the Trial Chamber's legal

[545] The Prosecution does not necessarily agree with all aspects of the interpretation of this theory by the Trial Chamber; however, it considers that these differences did not have a meaningful impact on the Judgment.
[546] Judgment, para.979.
[547] ICC-01/04-01/06-803, paras.330-335,340-341; ICC-01/04-01/07-717, paras.480-486; ICC-01/05-01/08-424, para.348; ICC-01/09-01/11-373-Red, paras.287-292; ICC-01/09-02/11-382-Red, paras.296-297.

findings, is erroneous and incompatible with the Statute. In addition, the Trial Chamber did depart from the Pre-Trial Chamber's findings in some crucial aspects.[548]

- *The Appellant's role and contribution*

271. The Appellant misrepresents the Judgment when he submits that the Chamber only looked at his position within the UPC/FPLC and his knowledge of the crimes to determine his essential contribution to the common plan.[549] First, the Appellant is conflating his essential role and his essential contribution to the common plan; and second, the Chamber considered additional factors than the Appellant's position in both determinations. First, and to determine whether the Appellant's role under the common plan was essential, the Trial Chamber not only examined the Appellant's leadership position within the UPC/FPLC, but also the group's overall structure and hierarchy and functions exercised by its staff, the lines of reporting, the means of communication and the structure of meetings.[550] The Chamber concluded that the Appellant's role was essential on the basis of his function within the hierarchy of the UPC/FPLC, his involvement in planning military operations and his key role in providing logistical support.[551]

272. Second, in assessing the Appellant's overall contribution, the Chamber considered the evidence of his personal involvement as it related to the crimes charged,[552] namely, recruitment initiatives, visits to the troops and camps, and the use of children under 15 years of age as personal bodyguards.[553] Based on this evidence, the Chamber concluded that the Appellant's contribution was essential

[548] See for example Judgment, para.994 on the determination of the essential nature of the Appellant's contribution.
[549] Appeal Brief, para.335 referring to Judgment, para.1221.
[550] Judgment, paras.1140-1212.
[551] Ibid., para.1222. See also 1213-1223.
[552] Ibid., para.1224.
[553] Ibid., paras.1225-1262.

because, *inter alia*, he was actively involved in finding recruits; he was informed about general military matters including recruitment, condoned the recruitment policy and played an active role in its implementation;[554] he gave orders on military affairs and assisted in a variety of ways;[555] he visited the troops and training camps during the period covered by the charges;[556] he encouraged the recruits and made speeches at public rallies;[557] and he had children under the age of 15 as bodyguards and let them provide him with security during public events.[558] It was on the basis of all these factors that the Chamber reached the proper conclusion that the Appellant's contribution to the common plan was "essential". Nothing in the Appellant's arguments demonstrates any error on behalf on the Chamber.

- *The Appellant's right to be informed of the charges against him have been respected*

273. Finally, the Appellant concludes by making a passing and completely unsupported statement that "by holding [him] responsible for indirect participation under Article 25(3)(b) or Article 28, the impugned decision violates the requirements of fairness according to Article 67(1)(a)" and refers to his Closing Brief.[559] First and as noted above,[560] the Trial Chamber addressed and dismissed the Appellant's arguments that other modes of liability apply to the facts of this case. Second, the Appellant has always been charged - and was eventually convicted - as a co-perpetrator pursuant to article 25(3)(a); therefore, he was at all times informed of the charges for which he was found guilty. Third,

[554] Judgment, para.1234, 1266.
[555] Ibid., paras.1266, 1270.
[556] Ibid., paras.1245-6; 1266.
[557] Ibid., para.1266.
[558] Ibid., para. 1262.
[559] Appeal Brief, para.338 referring to ICC-01/04-01/06-2773, paras.48-57 thereby the Appellant elaborated on this right in abstracto, noting that an accused can only be convicted with the crimes charged and under the mode of liability charged.
[560] See para.264.

the Appellant has failed to show any error that would impact on his fair trial rights under article 67(1)(a) or on the Judgment. For all these reasons the Appellant's argument should be dismissed.

### 2. Errors of Fact

*(a) Common plan*

274. The Appellant submits that the Judgment contains numerous errors of fact that impact upon the Chamber's conclusions about the relationship between the co-perpetrators before and after the period of the charges, the common plan and his role before and during the period of the charges. The Appellant submits that not all these errors influenced the Judgment, so he does not examine them all in depth but rather refers to his Closing Brief.[561]

275. The Appellant further submits that no trier of fact could have reasonably found that the common plan to build an army would almost certainly result, in the ordinary course of events, in the conscription, enlistment and use of children under the age of 15 to participate in hostilities.[562] First, the Appellant submits that the Trial Chamber fails to specify the evidence that lead to this conclusion. As the Appellant argued in his Closing Brief, the establishment of an army would not ordinarily result in the commission of the crimes charged as a virtual certainty. Second, the Appellant maintains that the Chamber's conclusion is weakened in light of trial evidence that demonstrates that he and his alleged co-perpetrators imposed measures to prohibit or stop the crimes. The Appellant concludes that

[561] Appeal Brief, para.339.
[562] Ibid., paras.340-1.

this factual error negates the element of criminality of the common plan and any conviction on the basis of co-perpetration.[563]

276. At the outset, the Prosecution notes that the Appellant's referral to his Closing Brief is inappropriate. As already stated, the burden on the Appellant is to demonstrate before this Chamber the existence of a reversible error, not to replicate submissions made before the Trial Chamber.[564] It is similarly inadequate to advance submissions which, by the Appellant's own admission, have no impact on the judgment. Moreover, the Appellant merely makes unsupported statements without pointing out any specific factual error that would invalidate the Judgment.

277. Further, and as discussed elsewhere in this response, the Appellant's submissions are premised on an erroneous interpretation of direct intent of second degree.[565] In any event, even if the Appellant's narrow concept of "virtual certainty" had been accepted and applied at trial, and considering the evidence on the record, the Trial Chamber would have undoubtedly concluded that the conscription, enlistment and use of children under 15 to actively participate in hostilities was a virtually certain or almost inevitable consequence of the implementation of the common plan of building an effective army in order to ensure the UPC/FPLC's political and military control over Ituri. In particular, the Trial Chamber found that at least from 2000 the Appellant had been in contact with his co-perpetrators and all were involved in the recruitment and training of Hema youth, including children. These activities continued during the timeframe of the charges. Further and during the summer of 2002, the Appellant and his co-perpetrators participated in the taking of Bunia and by September 2002, at the latest, it was clear that the UPC, which had a military wing (FPLC), had clear

[563] Appeal Brief, paras.339-345.
[564] The Prosecution refers to the specific requirements for documents in support of the appeal set out in Regulation 58 of the Regulations of the Court.
[565] See below paras.289-297.

military goals to expand its control over Ituri. Also by September 2002, at the latest, the Appellant and his co-perpetrators had agreed on building an effective army to ensure the UPC's control over Ituri. Hence, it was reasonable for the Chamber to conclude that the Appellant, founding member of the UPC and its President at the time of the charges, knew that children under 15 would be conscripted, enlisted and used to actively participate in hostilities as a result of the implementation of the plan, as it had occurred on ongoing basis during the previous years.[566] Moreover, and contrary to the Appellant's submissions, the Trial Chamber did specify the evidence upon which it relied in coming to its conclusions on the common plan.[567] The Chamber also ruled on the lack of genuine intention of the Appellant and other co-perpetrators to prohibit and stop the commission of the crimes.[568] The Appellant simply disagrees with the Chamber in its conclusion but fails to demonstrate any error.

*(b) Essential contribution to the commission of crimes*

- *The Appellant's Role within the UPC*

278. The Appellant submits that the Trial Chamber committed factual errors by basing its conclusions about the Appellant's essential contribution on facts stemming from his role and position within the UPC. According to the Appellant, such facts are irrelevant to his essential contribution to the common plan, which must be positive, personal and directly related to the commission of crimes, or charged under article 25(3)(b) or article 28.[569]

279. First, the Appellant submits that the Trial Chamber made a factual error in finding that he played an essential role in decisions concerning army and military

[566] Judgment, paras.1024-1136, 1351-7.
[567] Judgment, pages 442-480 and in particular paras.1126-1136.
[568] Judgment, para.1335.
[569] Appeal Brief, paras.346-349 referring to Judgment, paras.1141-1223.

operations.[570] According to the Appellant, this error rests in large part on the Chamber's erroneous reliance on the statements of witness P-0014.[571] Second, the Appellant submits that the Trial Chamber erred in finding that he had effective control over the UPC/FPLC. Referring again to his Closing Brief, the Appellant argues that the evidence proved that the military authorities in charge of recruitment, training and operations had powers above those he exercised.[572]

280. At the outset, the Prosecution notes that the Appellant's arguments are premised on a misunderstanding of the applicable law, which overlooks the existing jurisprudence of the Court. As Chambers of this Court have noted, the contribution of an accused person does not need to be positive, personal and direct for criminal liability to arise.[573] The Appellant fails to demonstrate that the Chamber erred by following this jurisprudence.

281. As to the factual aspects of the Appellant's argument, the Prosecution notes that at the core of his submissions lies a disagreement with the Chamber's assessment of the credibility of certain witnesses, without explaining why that assessment was wrong and thus why the Trial Court's findings should not be afforded deference. In addition, the Appellant points to no error in the Chamber's evaluation and conclusion with respect to his effective control over military matters and simply repeats his closing submissions which were adequately addressed by the Trial Chamber.[574] The Appellant's submissions should be therefore dismissed.

282. In addition, the arguments advanced are premised on an incorrect interpretation and selective reading of the evidence. For example, in complaining

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[570] Appeal Brief, para.350 referring to Judgment, paras.1213-1223.
[571] Appeal Brief, para.351.
[572] Appeal Brief, paras.353-5 referring to Judgment, paras.811-817.
[573] Judgment, paras.1002-1006, whereby the Chamber addressed these very same arguments raised by the Appellant in his Closing Brief, see paras.66-7, 73. See ICC-01/04-01/07-717, para.526; ICC-01/09-01/11-373, para.402; ICC-01/09-02/11-382, para.402.
[574] Judgment, paras.1002-1006, 1139 and 1221-2 where the Chamber addressed these same arguments raised by the Appellant in his Closing Brief, see paras.66-7, 73.

that the Chamber erroneously relied on P-0014, the Appellant fails to acknowledge that the Chamber considered far more than that witness's evidence when it concluded that the Appellant took part in decisions affecting army and military operations.[575] In fact, the Chamber based its conclusions on both Prosecution and Defence witnesses' evidence, documents and interviews given by the Appellant himself. The Chamber fully addressed the Appellant's arguments at trial about contradictory evidence and correctly concluded that he had control over military matters.[576] The Appellant also disregards the fact that witness P-0055 testified that the Appellant had made contributions to military operations.[577]

- *The Appellant's individual contribution*

283. The Appellant argues that the Chamber erred in law in its assessment of his individual contribution to the commission of the crimes prosecuted.[578] First, the Appellant argues that the Chamber based its conclusion that he was "personally involved in the recruitment process" on witnesses P-0055, P-0046 and D-0011, claiming that nothing in their evidence permitted such a conclusion.[579]

284. With respect to witness P-0055, the Appellant argues that no reasonable trier of fact could have used this evidence as a basis to conclude that the Appellant personally participated in the recruitment process. The Appellant selects one quote from P-0055's testimony and suggests that on the basis of this extract alone, the finding that he had a personal role in the recruitment process was erroneous.[580] As for P-0046, the Appellant submits that no reasonable Trial Chamber could have concluded that her evidence on his involvement in

[575] Judgment, paras.1142-1169.
[576] Judgment, paras.1144,1150,1156, 1157, 1158, 1159, 1160-1162, 1163, 1167.
[577] Judgment, paras.1145, 1151.
[578] Appeal Brief, paras.356.
[579] Ibid. para.357.
[580] Ibid., paras.358-361 referring to Judgment, para.1227.

recruiting a child soldier in Mongbwalu (which was uncorroborated and hearsay) could form a legitimate basis for the Chamber to conclude that he was actively involved in recruitment.[581] Finally, the Appellant submits that the Chamber erred in relying on the evidence of witness D-0011 to conclude that the Appellant was aware of or informed about recruiting practices.[582]

285. The Appellant also contends that the Trial Chamber erred in concluding that his visits to training camps and motivational speeches constituted an essential contribution without which the crimes would not have been committed. He claims that there is no evidence to suggest that he personally contributed to the commission of any of the three crimes charged, encouraged their commission, or was informed about their occurrence.[583] Finally, the Appellant argues that the Trial Chamber erred in fact when it concluded that children under 15 years of age acted as his escorts and bodyguards. He contends that the Chamber erred in relying on these findings to demonstrate his essential contribution.

286. The Prosecution notes once more that the Appellant premises his submissions on a misrepresentation of the findings of the Trial Chamber. First, the Trial Chamber did not rely on the evidence of P-0055 and P-0046 to determine that the Appellant was personally and directly involved in the recruitment of child soldiers. Rather, the Chamber stated that based on this evidence it was only able to conclude that the Appellant was actively involved in the exercise of finding recruits (without reference to their ages).[584] With respect to P-0055, the Appellant fails to refer to the relevant testimony of this witness that established his personal involvement on the recruitment process.[585] With respect to witness P-0046, the evidence, though hearsay, was in fact corroborated; and nothing in the Court's

[581] Ibid., paras.362-366 referring to Judgment, para.1234.
[582] Ibid., paras.367-369 referring to Judgment, para.1234.
[583] Ibid., paras.371-376 referring to Judgment, paras.1236-1246, 1266 and 1270.
[584] Judgment, para.1234. See also paras.1226 and 1231 where the Trial Chamber indicates it did not rely on the evidence of P-0055 and P-0046 to establish that Lubanga personally recruited children under 15.
[585] Judgment, para.1227, fn.3271. Note that part of this testimony was given in closed session.

basic documents precludes the Chamber's consideration of hearsay evidence. Indeed, in the Court's legal framework, and following international criminal practice, *all* types of evidence (including both hearsay and direct) are admissible as long as the evidence is relevant and has probative value, does not cause prejudice to the fairness of the proceedings, and has been obtained through means that are in conformity with the Statute and internationally recognized human rights.[586]

287. Second, and as developed above,[587] the Trial Chamber did not find that the contribution of the Appellant, taken alone, would have resulted in the crimes charged. Rather, the Chamber assessed the contribution of all co-perpetrators with respect to the execution of the common plan.[588] Further, the Trial Chamber did not find that the crimes were committed *only* because the Appellant visited the camps. To the contrary, the Trial Chamber looked at the totality of the evidence related to the Appellant's actions to determine whether he made an essential contribution to the crimes charged.[589] The Prosecution also notes that the Trial Chamber considered and disregarded these same arguments; yet again, the Appellant does not show any material error by the Trial Chamber that warrants reversal.[590]

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[586] Article 69 (4) and (7). On the specific admissibility of hearsay evidence before international criminal tribunals see, inter alia, the seminal rulings of the ICTY in the *Tadic* and *Aleksovski* cases, holding that the fact that evidence is hearsay does not deprive it of probative value (see Trial Chamber II, *Prosecutor v.Tadic*, Decision on Defence Motion on Hearsay, 5 August 1996, and Appeals Chamber, *Prosecutor v. Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999).

[587] See above para.266.

[588] Judgment, para.994.

[589] See Judgment, para.1267 whereby the Chamber stated that "[t]he essential nature of [Lubanga's] contribution to the common plan is not established by the discrete and undisputed fact that he visited the Rwampara camp, but instead it is founded on the entirety of the evidence relating to the contribution he made as the highest-ranking official within the UPC".

[590] Judgment, paras.1267-1272 addressing the Appellant's submissions in his reply to the Prosecution's Response, see ICC-01/04-01/06-2786-Red, paras.46-7.

288. Third, and as noted above, the Trial Chamber did not err in its findings that child soldiers were in the Appellant's bodyguard and escort.[591] The Trial Chamber comprehensively reviewed and assessed the evidence on this point and found that the Prosecution had it proven it beyond reasonable doubt.[592]

## H. EIGHTH GROUND: THE SUBJECTIVE MENTAL ELEMENT

### 1. Error of Law

289. The Majority of the Trial Chamber provided the following definition of direct intent of second degree, pursuant to article 30(2)(b):

> '[A]wareness that a consequence will occur in the ordinary course of events' means that the participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence will occur in the future. This prognosis involves consideration of the concepts of 'possibility' and 'probability', which are inherent to the notions of 'risk' and 'danger'. Risk is defined as danger (exposure to) the possibility of loss, injury or other adverse circumstance'. The co-perpetrators only 'know' the consequences of their conduct once they have occurred. At the time the co-perpetrators agree on a common plan and throughout its implementation, *they must know the existence of a risk that the consequence will occur*. As to the degree of risk, and pursuant to the wording of Article 30, it must be no less than awareness on the part of the co-perpetrators that the consequence 'will occur in the ordinary course of events". *A low risk will not be sufficient'*. [593]

290. The Appellant submits that the Majority erred "by considering the […] concepts of 'risk', 'probability' and 'possibility' to establish criminal intention according to Article 30(2)(b)".[594] This purported error invalidates the Judgment, he argues, because the Appellant was found guilty with direct intent of second

[591] See above paras.240-249.
[592] Judgment, paras.858-869.
[593] Judgment, para.1012 (emphasis added).
[594] Appeal Brief, para.380.

degree.[595] The Appellant incorrectly argues that the Majority merely required knowledge of a risk, a possibility or probability in order to establish direct intent of second degree under article 30(2)(b),[596] therefore applying a standard that incorporates the concept of *dolus eventualis*.[597] The Appellant contends that the Majority should have endorsed the interpretation of Pre-Trial Chamber II in the *Bemba* Confirmation Decision, which required knowledge that "the occurrence of such crimes was a *virtually certain consequence* of the implementation of the common plan".[598]

291. At the outset, the Prosecution notes that the Appellant misrepresents and partially quotes the findings of the Majority. It did not conclude that *any* risk, or the mere possibility or probability that a crime *may* be committed, will suffice to meet the mental element found in article 30(2)(b). Rather, the Majority explained that the wording of the Statute ("awareness that a consequence will occur in the ordinary course of events") entails a prognosis or assessment by an accused person *a priori*, or before acting, of what will occur and whether the crime will be perpetrated *a posteriori*, that is, after the implementation of the common plan. The Majority concluded that an accused has to know that there is a risk that a crime will occur as a result of the implementation of the common plan. In that context the Majority also indicated, importantly, that a "low risk will not be sufficient".

292. In addition, the Appellant's submissions on the merits are incorrect. First, the Majority's definition of direct intent of second degree does not include *dolus eventualis*. The Trial Chamber expressly departed from Pre-Trial Chamber I's ruling on the point and concluded that "the plain language of the Statute, and most particularly the use of the words ' will occur' in Article 30(2)(b) as opposed to 'may occur', excludes the concept of *dolus eventualis*".[599] It would be illogical for

[595]Appeal Brief, para.385.
[596]Appeal Brief, para.384.
[597]Appeal Brief, paras.382, 384.
[598]ICC-01/05-01/08-424, para.369, quoted in Appeal Brief, para.383. See also para.359.
[599]Judgment, para.1011.

the Majority to expressly find that *dolus eventualis*is is excluded from the Rome Statute only to subsequently import the concept and apply it to the facts of this case.

293. Second, the Majority correctly interpreted direct intent of second degree under article 30(2)(b). The definition endorsed by the Majority is consistent with the literal interpretation of this provision. Under the second sentence the accused person's awareness covers two elements: first, whether the events would occur as they ordinarily do and second, whether the crime would be committed if they do.

294. This necessarily entails some degree of uncertainty because it is impossible to predict precisely, with no margin of error, how the events will unfold. The definition of direct intent of second degree advanced by the Majority, namely, "the perpetrators must know the existence of a risk that the consequence will occur", captures the interaction between these two elements ("ordinary course of events" and occurrence of the crime). Further, the Majority added that "a low risk will not be sufficient". The Majority therefore provided a flexible concept in full compliance with article 21 and the principle of strict interpretation that adequately captures the complexity of the determination of the accused's mental element and permits Chambers of the Court to make case-by-case determinations.

295. Moreover, the Appellant misrepresents and selectively quotes Pre-Trial Chamber II in the *Bemba* Confirmation Decision. The Pre-Trial Chamber stated that a joint reading of the two elements "indicate[s] that the required standard of occurrence is close to certainty [and] the Chamber defines this standard as 'virtual certainty' or 'practical certainty', namely that the consequence will follow, *barring an unforeseen or unexpected intervention that prevent its occurrence*".[600] Therefore, the Pre-Trial Chamber similarly acknowledged the existence of a risk that unforeseen or unexpected facts disturb the occurrence of the ordinary course of events. Hence, there is no appreciable difference between the interpretation applied by

[600] ICC-01/05-01/08-424, para.362 (emphasis added).

the Chamber and the terminology employed by Pre-Trial Chamber II; rather, the Appellant is merely engaging in an exercise of semantics.[601]

296. Additionally, there is no universally accepted or applied definition of *dolus eventualis* in its application either to domestic or international criminal law, nor is it necessary to agree upon one for the purposes of this appeal. Critically, however, a global review of the interpretation and application of these concepts indicates that the standard set out by the Majority is far from the more common understanding of *dolus eventualis*, which is characterized by the existence – and acceptance by the accused - of a *possibility* that a crime *may* occur as a result if his or her conduct, even if that is not the main objective.[602] There is no requirement that such possibility be a high or a low one, as long as it has been taken into consideration by the accused. This is incompatible with the Majority's approach, and in particular its statement that a low risk would be insufficient, which is ultimately more protective of the Appellant than the alternative, and more common, approach.

297. Finally, even if the definition proposed by the Appellant were correct (and his interpretation of Pre-Trial Chamber II's ruling accurate), he would still be responsible under direct intent of second degree for the conscription, enlistment and use of children to actively participate in hostilities. The Chamber did not conclude that the Appellant was only aware of a risk that children would be incorporated into the UPC/FPLC's ranks. Rather, and as noted above, athe Chamber concluded, in light of the evidence before it, that the Appellant *knew*

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[601] Note that Ormerod noted that "no one can ever know that a result is certain to follow from an act. This is why Courts and writers are driven to speak of 'virtually' or 'morally' or 'almost' certain results". D. Ormerod, Smith and Hogan Criminal Law, (OUP, 12th ed)., p.101.

[602] See, inter alia, C. Roxin, *Strafrecht. AllgemeinerTeil*, Band I, 2. Auflage (1994), p. 359: dolus eventualis is affirmed when the accused seriously considers the possibility of the criminal result and yet continues to act in order to reach the desired goal; G. Werle and F. Jessberger, *'Unless Otherwise Provided': Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law'* (2005) 3 Journal of International Criminal Justice 35, p. 41; Mohamed Elewa Badar, '*The mental element in the Rome Statute of the International Criminal Court: a commentary from a comparative criminal law perspective*', (2008) 19 Criminal Law Forum 473, p. 490

that children under 15 *would* be conscripted, enlisted and used to actively participate in hostilities as a result of the implementation of his common plan to build an effective army to expand the UPC's control in Ituri[603]

**2. Errors of Fact**

*(a) Crime of enlistment*

298. The Appellant submits that the Trial Chamber bases its conclusions on the existence of criminal intent first, on the fact that he was aware that his actions will lead to the conscription, enlistment and use of children under 15 in the ordinary course of events and second, on the fact that the Appellant's behaviour was totally incompatible with a sincere intention not to recruit or demobilize children from the FPLC. According to the Appellant, these two assertions are riddled with errors of fact.[604]

- *Knowledge of enlistment "in the ordinary course of events"*

299. According to the Appellant, the Chamber's first conclusion is largely based on its finding that the Appellant was aware that children under 15 years of age were being enlisted. The Appellant submits that the lack of evidence establishing that he had such knowledge, coupled with the extreme uncertainty of assessing age by physical appearance alone, should have led the Chamber to conclude that there was a doubt as to the Appellant's knowledge.[605]

300. Second, the Appellant argues that he was not aware that his activities during the timeframe of the charges would almost certainly result in the enlistment of

[603] See above, para.277.
[604] Appeal Brief, para.386.
[605] Appeal Brief, paras.388-9.

children under 15 years of age. The Appellant further argues that the evidence does not permit the conclusion that he tried to convince young persons to join the army, and his close association with those who recruited and trained children does not provide a solid basis for this conclusion.[606]

301. The Prosecution submits that, yet again, the Appellant disagrees with the Chamber's assessment of the evidence and with the Chamber's rejection of his ow trial submissions. Contrary to the Appellant's argument, the Chamber based its conclusion on a significant amount of trial evidence.[607] Based on the evidence, the Trial Chamber correctly concluded that the Appellant knew that children under 15 were being enlisted and that children would be enlisted as a result of the implementation of the common plan.[608] In particular, the Chamber found that the Appellant was actively involved in the exercise of finding recruits and was informed about these activities.[609] The Chamber found that the Appellant said that he frequently tried to convince the population to provide food and to make youngsters available in order to join, and to train with, the army of the UPC/FPL and that he was in close contact with senior UPC staff involved on the recruitment of children. In addition, he knew and accepted that children under 15 were within the UPC ranks: he used children as his bodyguards and was aware that other senior officials did the same; he saw child soldiers bellow 15 when he gave speeches and attended rallies. Further, the Appellant condoned the recruitment of children and took steps to implement this policy along with his co-perpetrators.[610]

302. Finally, and as already noted above,[611] the Appellant continually refers to an erroneous definition of direct intent of second degree. In any event and as also

[606] Ibid. paras.390-5.
[607] Judgment, paras.1277-1348.
[608] See above, para.277.
[609] Judgment, para.1234,1356.
[610] Judgment, paras.1277-8.
[611] See above paras.289-297.

developed above, even if the definition advanced by the Appellant were applied to the facts of the case, the Trial Chamber would have reached the same conclusions and there would be no impact on the verdict.[612]

- *The Appellant's "genuine intention" to prohibit enlistment and organise the demobilisation of minors*

303. The Appellant submits that the Chamber erred in fact when it found that the evidence presented by the Appellant (measures prohibiting the enlistment and demobilization) did not demonstrate his sincere intention to put an end to the child soldier crimes.[613]

304. First, the Appellant submits that the fact that demobilization orders were issued from external pressure is irrelevant.[614] Second, the Appellant argues that the Chamber erred in concluding that the demobilization orders were made public.[615] Third, the Appellant disagrees with the conclusion that it was not proven that the demobilisation orders were effectively implemented. According to the Appellant this finding contradicts the evidence of two Defence witnesses (D-0001 and D-0019) and four Prosecution witnesses.[616] Fourth, the Appellant submits that the fact that recruitment of child soldiers continued despite these orders and that the UPC/FPLC did not cooperate with NGOs are not sufficient to deny his sincere intention to demobilise.[617] Fifth, the Appellant claims that his visit to *Rwampara* camp once during the course of his presidency does not establish that he approved the recruitment of children under the age of 15.[618]

[612] See above paras.297.
[613] Appeal Brief, paras.396-7.
[614] Ibid., para.398.
[615] Ibid., paras.399-400 referring to Judgment, para.1303.
[616] Ibid., paras.401-403 referring to Judgment, para.1321.
[617] Ibid., paras.404-408 referring to Judgment, paras.1299 and 1346.
[618] Ibid., paras.409-411 referring to Judgment, para.1333.

305. The Prosecution notes that the Trial Chamber in its Judgment thoroughly reviewed these very same arguments and rejected them.[619] The Appellant merely disagrees with the Chamber's conclusions and seeks to re-argue the same matters without indicating any error – beyond his personal disagreement -- in the Chamber's findings.

306. And no error is discernible. The Chamber's findings in relation to demobilisation and the Appellant's knowledge and intent are both reasonable and grounded in a large and solid evidentiary basis.[620] In particular, and contrary to the Appellant's submissions, the Trial Chamber correctly concluded that the demobilisation orders were made available to the public via the media[621] and that the lack of collaboration by the Appellant (both personally and by the other members of the UPC/FPLC over which the Appellant had uncontested authority)[622] with NGOs working in the field of demobilization and the threats directed towards individuals working in the field of children's rights undermined the Appellant's suggestion that demobilisation was intended.[623] Similarly, the Appellant's visit to *Rwampara* camp in February 2003, just two weeks after the first demobilisation orders were issued, where he encouraged the recruits (some of whom were visibly under the age of 15) by telling them that they would be armed and deployed after training, is demonstrative of his knowledge and his real intent. It was perfectly appropriate for the Trial Chamber to rely on that evidence and to reach those factual conclusions.[624]

307. Finally, the Trial Chamber assessed in depth the testimony and credibility of witnesses D-0011 and D-0019 and found them not to be credible on the subject of demobilisation. This conclusion is reasonable in light of the evidence before the

[619] Judgment, paras.1280-1348. See ICC-01/04-01/06-2773, paras.890-957.
[620] Judgment, paras.1280-1348.
[621] Judgment, paras.1299,1303.
[622] Judgment, para.1324.
[623] Judgment, paras.1283-1291,1348.
[624] Judgment, paras.1333-5,1348.

Chamber, in particular the close relation between those witnesses and the Appellant and their evasive answers with respect to him.[625] In sum, the Appellant has failed to show any error in the Chamber's findings.

*(b) Crime of conscription*

308. The Appellant submits that the Chamber erred in fact when it found that the mental element of the crime of conscription had been proved in his case. First, the Appellant submits that there is no evidence to establish that he knew that conscription took place or that he encouraged or approved it. Second, the Appellant submits that the Chamber does not indicate what evidence supports its conclusion that conscription was the virtually certain consequence of the common plan. Further, the Appellant argues that the Trial Chamber erred when it found that he was aware that conscription would occur in the ordinary course of events.[626]

309. Once again, the Appellant merely disagrees with the Chamber's overall conclusion about the applicable mental element, but fails to point to a concrete error that would invalidate the Judgment. In addition, the Appellant's submissions are without merit. First, and with respect to his knowledge and intent in relation to the crime of conscription, the Chamber carefully assessed the evidence, including the Appellant's submissions (which are now, again, largely repeated in this appeal).[627] The Trial Chamber ultimately concluded that the Appellant had attempted to convince the population to provide youngsters to join and train with the UPC/FPLC army; that he was in close contact with Mr Mafuta and with senior UPC staff who were significantly involved in the conscription, enlistment, use and training of children under the age of 15; that he personally

[625] Judgment, para.1282. See also paras.719-724 and 784-5,867-9 (D-0011) and 728-730,866,869 (D-0019).
[626] Appeal Brief, paras.412-7 referring to Judgment, paras.1355.
[627] ICC-01/04-01/06-2773, paras.881-889.

used children under 15 years of age as bodyguards and knew that other senior UPC staff also had children below the age of 15 as bodyguards; and that he gave speeches and attended rallies and military camps where UPC/FPLC soldiers under the age of 15 were present.[628] On the basis of all of this evidence, the Chamber concluded beyond any reasonable doubt that the Appellant knew that children under the age of 15 were being enlisted, conscripted and used; and that he condoned these practices and took steps to implement this policy in concert with his co-perpetrators.[629] In particular, the Chamber found that the Appellant was actively involved in the exercise of finding recruits and was informed about these activities.[630]

310. Second, the Trial Chamber reasonably concluded that the Appellant and his co-perpetrators agreed on a common plan to build an effective army to ensure UPC/FPLC's domination of Ituri, and that the Appellant was actively involved in its implementation. The Trial Chamber noted that from 2000 onwards, the Appellant, founding member of the UPC, was in contact with his co-perpetrators (including Floribert Kisembo, Bosco Ntaganda, Chief Kahwa, and commanders Tchaligonza, Bagonza and Kasangaki) who were involved in the recruitment and training of Hema youth, including young children. The Trial Chamber further found that these recruitment campaigns continued during the summer of 2002.[631] The Chamber noted that although there is uncertainty about the UPC aims and the Appellant's formal position within the UPC before the timeframe of the charges,[632] by September 2002 at the latest, the UPC exercised political and military control over Bunia and had the military aim to expand its role in Ituri.[633] Further the Trial Chamber found that at least from September 2002, the Appellant, as President of the UPC-RP, endorsed a common plan to build an

[628] Judgment, para.1277 and the evidence relied upon and paragraphs cited.
[629] Ibid., para.1278, 1347,1356.
[630] Judgment, para.1234,1356.
[631] Judgment, paras.1024-1045, 1111.
[632] Ibid., paras.1107-8, 1132.
[633] Judgment, para.1125.

effective army to ensure the UPC/FPLC's domination of Ituri, and he was actively involved in its implementation. The Appellant appointed Chief Kahwa, Floribert Kisembo and Bosco Ntaganda to senior posts within the UPC/FPLC, all of whom had played – and continued to play during the timeframe covered by the charges – a significant role in the recruitment and training of soldiers, including children. In due course, these soldiers became part of the FPLC and the training camps set up by Chief Kahwa and Ntaganda in Mandro continued to be used in this context. Thus, the Trial Chamber found beyond a reasonable doubt that as a result of the implementation of the common plan, children under the age of 15 were recruited and used to participate actively in hostilities.[634] In light of the amount and weight of the evidence detailed above, the Chamber's conclusion that the Appellant knew that as a result of the implementation of the common plan of building an army to guarantee UPC/FPLC's control over Ituri, children under 15 years of age would be enlisted, conscripted and used to actively participate in hostilities is entirely reasonable.[635]

*(c) The use of children under the age of 15 to participate actively in hostilities*

311. The Appellant submits that his arguments on enlistment and conscription apply *mutatis mutandi* to this crime.[636] Here again, the Prosecution submits that the Appellant's arguments with respect to this charge should be summarily dismissed. The Appellant challenges in general the overall finding of the Chamber with respect to the crime of use of children under 15 years of age to actively participate in hostilities and fails to identify any specific error that invalidates the Chamber's finding. As to the merits of the Appellant's arguments, the Prosecution refers to its response at paragraphs 298-310 above.

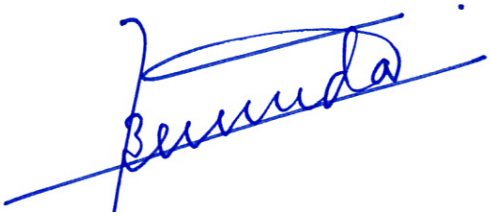
[634] Judgment, paras.1128-1136.
[635] Judgment, paras.1351-1357.
[636] Appeal Brief, paras.418-9.

**Relief sought**

312. For the reasons set out above, the Prosecution requests that the Chamber

(a) reject the Appellant's request to present new evidence on appeal, and

(b) dismiss the appeal against the Article 74 Judgment in its entirety.



Dated this 18th day of February 2013
At The Hague, The Netherlands