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**PRE-TRIAL CHAMBER II**

**Before:** Judge Ekaterina Trendafilova, Presiding Judge  
Judge Hans-Peter Kaul  
Judge Cuno Tarfusser

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

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

**Public**

**Public Redacted Version of Prosecution's submissions on issues that were raised  
during the confirmation of charges hearing, 7 March 2014 , ICC-01/04-02/06-276-  
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## INTRODUCTION

1. Bosco Ntaganda and the UPC/FPLC conducted a widespread or systematic attack directed against a civilian population pursuant to an organisational policy between 2 July 2002 and 31 December 2003. During this time, the UPC/FPLC was engaged in protracted armed violence, not of an international character, with organised armed groups capable of carrying out such violence.
2. During two specific assaults on the Banyali-Kilo *collectivité* on or about 15 November to on or about 15 December 2002 and on Walendu-Djatsi *collectivité* on or about 16 February to on or about 3 March 2003, Bosco Ntaganda and the UPC/FPLC committed the crimes of murder and attempted murder, forced displacement, attack against a civilian population, persecution, rape, sexual slavery, pillaging, destruction of property and attacks against protected objects.
3. During the entire period of the charges, Bosco Ntaganda and the UPC/FPLC enlisted and conscripted children under the age of 15 and used them to participate actively in hostilities. During the same time frame, the UPC/FPLC commanders and troops raped and sexually enslaved child soldiers.
4. The Prosecution alleges that Bosco Ntaganda bears individual criminal responsibility for the crimes charged which he committed, ordered, induced and/or attempted, pursuant to article 25(3)(a), 25(3)(b) and 25(3)(f), or to which he contributed pursuant to article 25(3)(d), or as a military commander pursuant to article 28(a). In particular, he personally committed crimes, committed them jointly with others or through other persons. He ordered or induced the commission of crimes. As the most senior military commander in charge of operations and organisation, he had effective command and control over the

UPC/FPLC troops and Hema civilian fighters but he failed to take all reasonable and necessary measures to prevent or repress crimes or punish the perpetrators.

5. Bosco Ntaganda and others conceived a plan to take the political and military control of Ituri, occupy the non-Hema dominated areas and expel the non-Hema civilian population. The non-Hema civilian population was comprised of ethnicities including the Lendu, Ngiti and *non-originaires* (ethnic groups not indigenous to Ituri). Bosco Ntaganda made an essential contribution to the common plan: he planned attacks, secured and delivered weapons and ammunition before and during attacks, deployed troops, commanded and participated in assaults, issued orders, insisted on respect for hierarchy, created sectors, promoted staff, had the power to discipline his troops, recruited for the army and trained the recruits, kept a watchful eye on the day to day activities of his forces and regularly communicated with superiors and subordinates.
6. Bosco Ntaganda intended or was aware that implementing the common plan would in the ordinary course of events result in the commission of the crimes charged. In the alternative, he acted with a group with a common purpose to commit crimes to which he contributed either with the aim of furthering the criminal activity or in knowledge of the groups's intent to commit the crimes.
7. The evidence presented in the Prosecution's list of evidence, in-depth analysis chart ("IDAC"), confirmation hearing and herein establishes substantial grounds to believe that Bosco Ntaganda is criminally responsible for the crimes charged.<sup>1</sup>

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<sup>1</sup> The Prosecution attaches as Annex A, a chart identifying the relevance of Prosecution witnesses' evidence; as Annex B, a UPC/FPLC organigram [REDACTED]; and as Annex C, a table of UPC/FPLC radio logbook messages relevant to the assaults in Banyali-Kilo and Walendu-Djatsi. The messages presented in Annex C show Bosco Ntagada receiving reports from and giving orders to his subordinates in the field during the assaults on Banyali-Kilo and Walendu-Djatsi *collectivités*.

## CONFIDENTIALITY

8. The present filing is classified as ‘Confidential’ as it refers to evidence bearing that confidentiality level. The Prosecution will file a public redacted version.

## PROCEDURAL HISTORY

9. On 4 February 2014, the Single Judge issued a decision on the schedule of the confirmation hearing.<sup>2</sup> On 14 February 2014, the Chamber granted the parties and participants the right to submit written observations limited to issues discussed at the confirmation hearing.<sup>3</sup> The parties and participants “are not allowed to raise new issues, and if they do so, the Chamber shall not consider the relevant part of said submissions in its decision confirming or not confirming the charges”.<sup>4</sup> The Chamber ordered the Prosecution and the Legal Representatives of Victims to submit their observations by 7 March 2014<sup>5</sup> and the Defence by 4 April 2014.<sup>6</sup>

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<sup>2</sup> ICC-01/04-02/06-245.

<sup>3</sup> ICC-01/04-02/06-T-11-ENG ET WT, p.11, lines 9-12.

<sup>4</sup> ICC-01/04-02/06-T-11-ENG ET WT, p.11, lines 12-14.

<sup>5</sup> ICC-01/04-02/06-T-11-ENG ET WT, p.11, lines 15-17.

<sup>6</sup> ICC-01/04-02/06-T-11-ENG ET WT, p.11, lines 17-19.



## PROSECUTION'S SUBMISSIONS

10. The Defence indicated on at least nine occasions<sup>7</sup> that it would develop its oral arguments in its written closing brief. Mindful of the Chamber's express order that the parties not raise new issues, if any new or newly developed issues are raised that could not have been anticipated based on the oral submissions, the Prosecution reserves its right to seek leave to reply.<sup>8</sup>

### I. Contextual Elements of Crimes Against Humanity

#### *A. Widespread or Systematic Attack*

11. The 'attack' against a civilian population is constituted of multiple acts that amount to a course of conduct during eight assaults: the assaults on Banyali-Kilo and Walendu-Djatsi *collectivités*, in respect of which the underlying acts committed have been charged; and six other assaults, relevant for contextual purposes and the child-soldier related charges, that took place in, amongst other places, Bunia, Songolo, Zumbe, and Mambasa-Komanda-Eringeti. However, the Prosecution points out that the acts perpetrated during the two assaults in

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<sup>7</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.11, lines 16-17; p.17, lines 24-25; p.21, lines 24-25; p.29, lines 2-3; p.35, lines 23-25; p.41, lines 6-8 and 23-25; p.48, lines 12-14; ICC-01/04-02/06-T-11-ENG ET WT, p.10, lines 13-14.

<sup>8</sup> Particularly so where the Defence indicated that it was only giving "*une idée générale*" of topics it would develop further in writing: ICC-01/04-02/06-263-Conf-AnxD, p.45, lines 4-6.

Banyali-Kilo and Walendu-Djatsi, individually and collectively, are sufficient in and of themselves to constitute the attack against the civilian population.<sup>9</sup> In this case, the acts arising during the six other assaults would constitute evidence supporting the existence of a widespread or systematic attack.

12. The Defence makes three arguments when asserting that there is no evidence of a widespread or systematic attack. First, the Defence argues that the evidence of the six other assaults must not be considered for contextual purposes where the underlying acts committed were not charged.<sup>10</sup> This is legally incorrect. These six assaults are relevant for both contextual purposes, as well as for the war crimes charges related to child soldiers and fall within the temporal and geographical scope of those charges. Evidence regarding events in which the underlying acts committed were not charged, and even falling outside the temporal or geographical scope of the charges, has been accepted as admissible evidence both before this Court and the *ad hoc* international tribunals, including: to track the existence of a group acting with a common purpose, to demonstrate the relationship between the suspect/accused and his co-perpetrators, to demonstrate that the suspect/accused acted with the requisite knowledge and intent, as well as to demonstrate the background and context (including the chapeau elements) in which crimes charged were committed.<sup>11</sup> The *ad hoc* international tribunals have also confirmed that evidence of events where the underlying acts were not charged and that fall outside the temporal or geographical scope of the charges may be admissible, *inter alia*: to assess a deliberate pattern of conduct or practice (including how the crimes charged were previously carried out); to establish by inference the elements of criminal conduct occurring in the temporal period of the charges; to establish the suspect/accused's intent and knowledge; to assess

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<sup>9</sup> See e.g. *Prosecutor v Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008, para.395.

<sup>10</sup> ICC-01/04-02/06-T-9-CONF-ENG, p.72, ll.14 – p.73, l.2.

<sup>11</sup> ICC-01/04-01/06-803-tEN, para.152; ICC-01/04-01/07-717, paras.225-228.

development of a common purpose and role played by the suspect/accused;<sup>12</sup> to assess the contacts or relationships of relevant individuals with the suspect/accused<sup>13</sup> including to establish the roles, preparations, relationships, communication and coordination efforts amongst members of an alleged joint criminal enterprise;<sup>14</sup> and for background and context including for the chapeau requirements of the crimes.<sup>15</sup>

13. Second, contrary to what the Defence suggests,<sup>16</sup> when assessing the scope of the attack in this case, the eight assaults must not be assessed separately and artificially in isolation. Rather, pursuant to article 7(2)(a), the multiple acts arising during these assaults must be assessed as a whole, as a “*course of conduct*”.<sup>17</sup> In *Gbagbo*, the Appeals Chamber acknowledged that it is not necessary that each separate incident relied upon be proven to the requisite standard, but instead that when describing a series of incidents the requisite threshold for an attack be

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<sup>12</sup> *Prosecutor v Stakic*, IT-97-24-A, Appeal Judgment, 22 March 2006, paras.122-123, 135, 128; *Prosecutor v Dordevic*, IT-05-87/1-A, Judgement, Appeals Chamber, 27 January 2014, paras.293, 295, 297; *Prosecutor v Karemera and Ntirumpatse*, ICTR-98-44-T, Judgment and Sentence (Trial Chamber III), 2 February 2012, paras.13-14; *Prosecutor v Nahimana, et al*, ICTR-96-11, Appeals Judgment, 28 November 2007, paras. 315-316; *Prosecutor v Ntirabatware*, Decision on Defence motion to exclude evidence falling outside the temporal jurisdiction of the Tribunal (Trial Chamber II), 3 February 2011, ICTR-99-54-T, paras.1-5, 8-12, 15-16; *Simba v Prosecutor*, ICTR-01-76-AR72.2, Decision on Interlocutory Appeal regarding temporal jurisdiction, 29 July 2004, pp. 3-4; *Prosecutor v Taylor*, SCSL-03-01-T, Judgement, 18 May 2012, paras.92, 98-111 (“*Taylor Judgment*”).

<sup>13</sup> *Prosecutor v Stanisic and Simatovic*, IT-03-69-T, Decision on seventeenth prosecution motion for leave to amend its rule 65 *ter* exhibit list, 8 December 2010, para.9

<sup>14</sup> *Prosecutor v Mladic*, IT-09-92-T, Decision on the admission of intercepts and authentication charts, 6 February 2014, para.20.

<sup>15</sup> *Prosecutor v Perisic*, IT-04-81-T, Decision on defence motion to exclude the expert report of Morten Torkildsen, 30 October 2008 para.15, Decision on Expert Reports of Ewa Tabeau, 23 April 2009, para.16; *Prosecutor v Stanisic and Simatovic*, IT-03-69-T, Decision on the Prosecution’s revised first motion for admission of exhibits from the bar table, 3 February 2011, para.22; *Prosecutor v Hadzic*, IT-04-75-T, Decision on Prosecution Motion for admission of exhibits cited in amalgamated expert report of Reynaud Theunens, 29 July 2013, paras.19-20; *Prosecutor v Gatete*, ICTR-2000-61-T, Decision on defence motion for exclusion of evidence and dilution of the defence case (Trial Chamber III), 26 March 2010, paras.23-27, Decision on defence motion on admissibility of allegations outside the temporal jurisdiction of the Tribunal, ICTR-2000-61-T, 3 November 2009, paras.1, 2-8, 10, 16-19; *Prosecutor v Taylor*, SCSL-03-01-T, Judgement, 18 May 2012, paras.92, 98-111.

<sup>16</sup> ICC-01/04-02/06-T-9-Red-ENG, p.72, line 14 – p.73, line 14; ICC-01/04-02/06-263-Conf-AnxA, p. 39, ll-26-28, p. 40, ll.1-26.

<sup>17</sup> See also ICC-02/11-01/11-534 (OA5) (Amicus Curiae Observations).

established.<sup>18</sup> Similarly, when determining whether the constitutive contextual elements of a widespread or systematic attack have been proven, the Chamber must consider the totality of all of the relevant evidence.<sup>19</sup>

14. Third, contrary to the Defence's assertions,<sup>20</sup> the Prosecution's case regarding the widespread or systematic nature of the attack is not based mostly on reports and press releases. The evidence regarding the acts arising during this course of conduct, including as described during the oral hearing, comes from: political and military insiders; eyewitness accounts of survivors; contemporaneous reports, applying rigorous methodologies, written by experts and independent observers including those living in Ituri at the time or who conducted extended missions to Ituri and witnessed the assaults or recorded the accounts of numerous direct eyewitnesses shortly after the events took place; contemporaneous documentary evidence such as letters or reports from Lendu community leaders and a written order signed by Bosco Ntaganda; and the UPC/FPLC logbook of radio communications.

15. The Defence's attack on any UN or NGO reports that the Prosecution does rely upon, on the basis that they constitute inadmissible anonymous hearsay, must also fail.<sup>21</sup> Hearsay evidence is admissible and can be relied upon.<sup>22</sup> It must be

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<sup>18</sup> ICC-02/11-01/11-572, OA5, para.47.

<sup>19</sup> See e.g. *Prosecutor v. Martić*, IT-95-11-A, A.Ch., Judgment, 8 October 2008, para.233; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Decision, 7 July 2006, para.174 *Prosecutor v. Halilović*, IT-01-48-A, Decision, 16 October 2007, para.125 (emphasis added); *R v. Morin* [1988] 2 S.C.R. File No.: 20449, at p.347; *Thomas v. The Queen*, [1972 N.Z.L.R. 34 (C.A.) at p.36; *German Federal Court of Justice*, First Senate for criminal affairs, Case 1StR231/88.BGHSt35, pp.308-318, which described the obligation of the judges in its fact-finding process to evaluate all the evidence cumulatively, by using the key term "*Gesamtwürdigung*"; see also *German Federal Court of Justice*, First Senate for criminal affairs, Case 1 StR 354/03, pp.7-8. See also ICC-02/11-01/11-534 (OA5) (Amicus Curiae Observations).

<sup>20</sup> ICC-01/04-02/06-T-9-Red-ENG, p. 73, lines 3-9.

<sup>21</sup> ICC-01/04-02/06-T-9-Red-ENG, p. 73, lines 3-9; ICC-01/04-02/06-263-Conf-AnxA, p. 39, ll.17-22.

<sup>22</sup> ICC-01/04-01/06-803-tEN, para 101, at p.39; ICC-01/05-01/08-424, para 46.

assessed in the context of the totality of the evidence.<sup>23</sup> As the ICTR Appeals Chamber reiterated: *"it is well-established, that as a matter of law, it is permissible to base a conviction on circumstantial evidence and/or hearsay evidence."*<sup>24</sup>

16. Finally, the Defence incorrectly asserts that UN and NGO reports cannot be relied upon at all as evidence of such acts. The recent Appeals Chamber decision in this case in the appeal on interim release provides an important determination on the potential indicia of reliability and credibility of UN reports; this determination is relevant to assessments under article 69(4) and rule 63(1) and (2). The Appeals Chamber referred to the following relevant indicia: the nature of the methodology used, whether the standards applied were rigorous; the contemporaneous nature of the events described in the report; the level of detail provided; whether the sources were known to the authors of the report and the extent to which the authors corroborated the information when making their findings.<sup>25</sup>

17. In the present case, the reports relied upon clearly meet, and exceed, these indicia of reliability, in that: (a) the reports were written by independent observers including P-46, P-317 and P-315; (b) the reports were written not long after the events and based on on-site missions, first-hand observations, and contemporaneous accounts from interviews with hundreds of witnesses including direct eyewitnesses; and (c) the witnesses have described their rigorous methodologies in detail in their witness statements.

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<sup>23</sup> ICC-01/04-01/07-717, para.141; *Prosecutor v. Milutinovic et al.*, IT-05-87-T, Judgment, 26 February 2009, paras.35-36; *Prosecutor v. Brima et al.*, Decision on Joint Defence Motion to Exclude all Evidence from Witness TF-277 Pursuant to Rule 89(c) and/or Rule 95, SCSL-04-16-PT, 24 May 2005, para.15.

<sup>24</sup> *Prosecutor v. Gacimbisi*, ICTR-2001-64-A, 7 July 2006, para.115.

<sup>25</sup> ICC-01/04-02/06-271-Red OA, paras.33-43.

## ***B. Attack Directed Against the Civilian Population***

18. The Defence asserts that there was no attack *directed against the civilian population*, arguing that they were not the primary object of the attack and were just incidental victims, as the assaults on Banyali-Kilo and Walendu-Djatsi *collectivités* had a pure military objective.<sup>26</sup> The Prosecution repeats that underlying this contextual element of crimes against humanity, is the “*absolute prohibition on the targeting of civilians in customary international law*”.<sup>27</sup> Motives, including for military or other purposes are irrelevant.<sup>28</sup> Accordingly, for the purposes of crimes against humanity, it is not relevant if there was any military purpose for the attack if civilians were intentionally targeted.
19. However, civilians *were* clearly treated as a primary object of the attack. The intentional and directed nature of this attack is demonstrated *inter alia*, by: (1) the identification of the Lendu and *non-originaires* as “*the enemy*”, including in orders or instructions (explicit and implied), given before and during assaults to target these civilians; (2) the intentional targeting of these civilians during or after the execution of the assaults; and (3) the failure to punish or discipline for the crimes perpetrated against these civilians.

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<sup>26</sup> ICC-01/04-02/06-T-9-Red-ENG, p. 47, line 8 – p. 72, line 10,

<sup>27</sup> *Prosecutor v Blaskic*, Appeal Judgment, 29 July 2004, Case No. IT-95-14-A, para. 109 (“Blaskic Appeal Judgment”). See also International Court of Justice, Legality of Threat or Use of Nuclear Weapons (Advisory Opinion) 1996 ICJ Rep 226, para.78.

<sup>28</sup> See the Prosecution’s presentation on contextual elements and the Prosecution’s Closing Statement.

(i) *Identification of the Lendu and non-originaires as the “enemy”*

20. The attack was directed against the non-Hema civilian population, particularly the Lendu and *non-originaires* civilians perceived as allied with the Lendu and/or RCD-K/ML, because they were all considered to be the “enemy” of the UPC/FPLC. While it is necessary to establish that these civilian groups were intentionally targeted, under article 7 and as a matter of customary international law, it is not necessary to additionally prove that they were intentionally targeted with a discriminatory intent, except for the crime of persecution.<sup>29</sup> Bosco Ntaganda’s personal views or motives, or those of the co-perpetrators and any direct perpetrators, are irrelevant to this determination.<sup>30</sup>

21. Nevertheless, it is evident, including from the orders or instructions given by Bosco Ntaganda and other UPC/FPLC commanders, that the Lendu and *non-originaires* civilians were identified as the UPC/FPLC’s enemy.

(ii) *The Lendu*

22. Prior to and during military assaults, Bosco Ntaganda and other UPC/FPLC commanders gave orders or instructions to the UPC/FPLC forces and Hema civilian supporters to target the Lendu civilian population. P-768 heard Bosco Ntaganda instruct the Hema military and Hema civilians he was arming, on

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<sup>29</sup> O. Triffterer (ed), Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article – Second Edition, C.H.Beck.Hart. Nomos, 2008 (“Triffterer”), ‘Article 7: Crimes against humanity’, C.Hall, p.182. *See also* p.168.

<sup>30</sup> Triffterer (ed), ‘Article 7: Crimes against humanity’, C.Hall, p.182: [citing *Prosecutor v Kunarac et al.*, Case No. IT-96-23-A, Judgement, Appeals Chamber, 12 June 2002, para.94.]

numerous occasions, to chase the Lendu from the territories that they were occupying and exterminate them.<sup>31</sup>

23. During UPC/FPLC military training, recruits were taught that Lendu were the enemy, including civilians. While at the Mandro camp, P-16 heard trainers and officers sing songs that the Lendu should be exterminated, including in Bosco Ntaganda's presence. Other witnesses who trained in these camps describe how they were made to sing anti-Lendu songs and told that their mission was to free Congo of the Lendu. Recruits were instructed, including by Bosco Ntaganda, to kill all the Lendu, without making any distinction between civilians and fighters, and so they did, when they participated in battles.<sup>32</sup> Hema-Gegere civilians were warned of attacks in advance, whilst Lendu were not.<sup>33</sup> According to P-16, three quarters of the villages that the UPC attacked were Lendu or Ngiti– that all the population were viewed as the enemy;<sup>34</sup> and that Floribert Kisembo only ever attacked Lendu villages.<sup>35</sup> The UPC/FPLC troops did not warn villagers; the entire population was considered an enemy.<sup>36</sup>

24. Prior to hostilities in Bunia, in August 2002, UPC/FPLC soldiers were ordered to kill everyone; UPC/FPLC soldiers pillaged and burnt homes.<sup>37</sup>

25. Before and during the assault on Banyali-Kilo, Bosco Ntaganda referred to all Lendu, civilians included, as being the enemy and encouraged them to kill all of

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<sup>31</sup> P-0768, EVD-PT-OTP-06484, at pp.0517-0518, ll.509-541.

<sup>32</sup> P-0010, EVD-PT-OTP-02690 at p.120, para.37, at pp.0126-0127, paras.28, 31, 34, at pp.0132-0133, paras.43, 47; P-0758, EVD-PT-OTP-06335 at 0202, para 42; at 0209, paras. 93, 95; P-0016, EVD-PT-OTP-02701, paras.56-58; EVD-PT-OTP-06141, pp.19-20.

<sup>33</sup> **P-0758**, EVD-PT-OTP-06335 at 0208, 0210-0211, paras.87-101.

<sup>34</sup> P-0016, EVD-PT-OTP-02701, paras.210, 216-230.

<sup>35</sup> P-0016, EVD-PT-OTP-02701 at 0436, para. 83

<sup>36</sup> P-0016, EVD-PT-OTP-02701, paras.210, 216-230. See also, **P-0055**: EVD-PT-OTP-06505, at 1026-1029, lines 277-368; **P-0016**: EVD-PT-OTP-02701, paras 247-250; **P-0017**: EVD-PT-OTP-06107 at 0503, line 270 to 0505, line 349, at 0516, lines 787-790 and at 0517, lines 810-823; EVD-PT-OTP-06108, at 0526, line 17 to 0528, line 102; EVD-PT-OTP-06111 at 0609, line 601 to 0610, line 635; EVD-PT-OTP-06149 at 2161, lines 10-21; EVD-PT-OTP-06107 at 0503-0505, lines 270-349, at 0516-517, lines 787-823.**P-0768**: EVD-PT-OTP-06485, at 0536-0537, lines 296-329; **P-0055**: EVD-PT-OTP-06505 at 1028, lines 328- 344287

<sup>37</sup> P-0758, EVD-PT-OTP-06335, at 0206, paras. 70, 73.



them.<sup>38</sup> The troops were told to arrest the Lendu, to eliminate them and chase them away.<sup>39</sup> Similarly, prior to the Walendu-Djatsi assault, P-55, P-38 and P-17 confirm that they were told that the road between Lipri, Kobu and Bambu had to be cleansed of Lendu and they were to take control of the area.<sup>40</sup> It was a tribal war and all Lendu, civilians and fighters, were the enemy.<sup>41</sup> UPC/FPLC troops were ordered to clean out and flatten the villages with heavy weapons<sup>42</sup> and to carry out “sweep operations” to find and kill Lendu.<sup>43</sup>

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<sup>38</sup> **P-0017**, EVD-PT-OTP-04138 at 1684, ll.17-41 AND EVD-PT-OTP-06149 at 2166, l.23 to 2167, l.23, at 2162, l.15-20 AND EVD-PT-OTP-06109 at 0538-0539, 0545-0546 and 0548, 0550-0553, 0555-0556 AND EVD-PT-OTP-06110 at 0569-0571, ll.452-529; **P-0038**, EVD-PT-OTP-03725 at 2473, 2477-2480, ll.530-681, 2489, 2500, l.1198-1209 AND EVD-PT-OTP-03728 at 2555, ll.647-714, 2560, ll.827-846 AND EVD-PT-OTP-03743 at 3020-3021, l.662-674 AND EVD-PT-OTP-03734 at 2764-2767 AND EVD-PT-OTP-06234 at 0092, l.111-126, 0101, ll.424-436 AND EVD-PT-OTP-06235 at 0110, 0115, 0117, l.291-310 AND EVD-PT-OTP-06240 at 0199, lines 256-261; **P-0768**, EVD-PT-OTP-06422 at 1632-1633, ll.818-867 AND EVD-PT-OTP-06424 at 1671-1673 AND EVD-PT-OTP-06423 at 1645, ll.270-277 AND EVD-PT-OTP-06425 at 1696-1697 ll.350-386, 1709 AND EVD-PT-OTP-06428 at 1757-1758, ll.680-687, ll.726-734, , at 1701-1702, ll.529-678 AND EVD-PT-OTP-06429 at 1763; **P-0804**, EVD-PT-OTP-06391 at 1132, paras. 19-20; **P-0800**, EVD-PT-OTP-06476 at 0643; [REDACTED], EVD-PT-OTP-00781 at 0666, 0668; [REDACTED], EVD-PT-OTP-00782 at 0828; **P-0022**, EVD-PT-OTP-01862-R01 at 0030, para. 22; **P-0800**, EVD-PT-OTP-06476 at 0644; and EVD-PT-OTP-06181 ; EVD-PT-OTP-06483, at 0498-0501, lines 822-920; EVD-PT-OTP-06484 at 0517-0518, lines 509-541; at 0518-0519, lines 560-604; 0522-0525, lines 695-814.

<sup>39</sup> **P-0768**, EVD-PT-OTP-06483, at 0498-0501, lines 822-920; ICC-01/04-02/06-258-AnxA3.

<sup>40</sup> **P-0055**: EVD-PT-OTP-04625, at 0394-0395, lines 384-433, at 0397, lines 498-510; EVD-PT-OTP-04642, at 0766, lines 190-215, 0769-0770, lines 310-380; EVD-PT-OTP-06213 at 7437, lines 22-24; EVD-PT-OTP-04625 at 0397, lines 498-505; EVD-PT-OTP-04642 at 0766, lines 190-202; EVD-PT-OTP-04625 at 0395, lines 404-409; EVD-PT-OTP-06505, at 1038-1046, lines 678-970; EVD-PT-OTP-06505, at 1039-1046, lines 718-966; **P-0038**: EVD-PT-OTP-06183 at 4862, lines 7-13; EVD-PT-OTP-03729 at 2569-2570, lines 158-172; EVD-PT-OTP-03729, at 2591-2593, lines 855-858; EVD-PT-OTP-03732 at 2708, lines 301-305; EVD-PT-OTP-03742, at 2992, lines 424-430; EVD-PT-OTP-06236 at 0138-0140, lines 449-459; **P-0017**: EVD-PT-OTP-06283 at 0719, lines 186-194; at 0720, lines 216-234; at 0721, lines 263-289; at 0724, lines 395-405; EVD-PT-OTP-06284 at 0733, line 30 to 0734, line 56.

<sup>41</sup> **P-0038**: EVD-PT-OTP-06236 at 0142-0143; EVD-PT-OTP-03732 at 2706-2708; **P-0038**: EVD-PT-OTP-06234, at 0089, lines 439-446; EVD-PT-OTP-03725 at 2474, lines 450-458; EVD-PT-OTP-03733 at 2749, lines 592-593; EVD-PT-OTP-03725 at 2474, lines 450-458; **P-0017**: EVD-PT-OTP-06111 at 0609; **P-0017**: EVD-PT-OTP-06289, at 0770-0771.

<sup>42</sup> P-0017: EVD-PT-OTP-06149, at 2187, lines 8-18; EVD-PT-OTP-06236, at 0143, lines 600-608.

<sup>43</sup> P-0017: EVD-PT-OTP-06285, 0766-0767; EVD-PT-OTP-06285, 0770-0771; P-0038: EVD-PT-OTP-03730 at 2626-2627, lines 653-690; EVD-PT-OTP-03732 at 2726-2727, lines 889-924; EVD-PT-OTP-03743 at 3013, lines 430-450; ICC-01/04-02/06-258-AnxA4

(iii) *The Non-Originaires*

26. The “*non-originaires*” was the term used for those ethnic groups that were perceived as outsiders not belonging to Ituri. The *non-originaires* specifically targeted in the UPC/FPLC attack were those *non-originaires* viewed as allied with the Lendu and/or RCD-K/ML, in particular the Nande and Bira.

27. [REDACTED] the nature of the different ethnic groups in Ituri: “*With ethnic identity of growing importance, a new group has emerged, the ‘non-originaires’, that is ‘outsiders’, who were not born in Ituri. The Nande of North Kivu represent the most prominent of the non-originaires.*”<sup>44</sup>

28. P-5 and [REDACTED] in the UPC executive were accused of collaborating with the Hema to chase the Nande out of Ituri.<sup>45</sup> P-12 and P-43 explained that those deemed to be “*non-originaires*” of Ituri included the Lendu’s allies such as the Nande.<sup>46</sup> He states that: “*les non-originaires les plus visés par l’UPC étaient les Nande.[...]. Mbusa NYAMWISI étant Nande, ils étaient également visé en tant que groupe ethnique.*”<sup>47</sup>

29. Prior to the assault on Bunia of August 2002, the Hema started putting up posters calling for the *non-originaires* to leave.<sup>48</sup> When the UPC regained control of Bunia: “*les Lendus, les Ngitis, les membres d’autres tribus de l’Ituri et tous les non-originaires ont fui la ville par peur de l’UPC.*”<sup>49</sup>

<sup>44</sup> EVD-PT-OTP-00782, [REDACTED], at p.14.

<sup>45</sup> P-0005, EVD-OTP-PT-04084, at p.18, para.81.

<sup>46</sup> P-0012, EVD-PT-OTP-01890, at 0108, para. 129, and at 0114, para. 164; P-0043, EVD-PT-OTP-02686, at 0092, para. 34.

<sup>48</sup> P-0016, EVD-PT-OTP-02701, at 0428, para. 39 ; at 0429, para.41.

<sup>49</sup> P-0012, EVD-PT-OTP-01890, paras.129, 169.

30. P-14, who was in Bunia during the August 2002 assault, says he saw a group of armed men with Hema leader Pilo KAMARAGI, who shouted that they were going to kill all non-Hema. He was himself threatened and accused of being a *non-originaire*.<sup>50</sup> P-14 describes how the Hema former Governor of Ituri Adele LOTSOVE told him that the primary goal of the creation of the province was to *“libérer l’Iturien de la servitude des non-Ituriens communément appelés chez nous ‘Jajambu’ qui veut dire littéralement non-originaires”*<sup>51</sup> Describing a subsequent meeting [REDACTED] with Thomas Lubanga, he said that the UPC’s message was clear that the Ituri population had to fight and that it was necessary to *“drive [the non-originaires] out, it was necessary to replace them”*.<sup>52</sup> Non-Hema and *non-originaires* were also targeted during the UPC/FPLC assaults on Mabanga and Songolo in August 2002.<sup>53</sup>

31. UN investigator P-317 led the investigative team that conducted interviews of more than 1600 witnesses from late March 2003,<sup>54</sup> found that each time the UPC took control of Bunia in August 2002 and May 2003, the UPC/FPLC forces conducted *“a manhunt for Lendu, Bira, Nande and non-Iturians whom they considered opponents; many persons were killed and many others disappeared or chose to leave Bunia.”*<sup>55</sup> In the Bunia August 2002 assault *“UPC militias and civilian vigilante groups under the command of BOSCO...[killed] those suspected of belonging to ‘opposing’ ethnic groups”*.<sup>56</sup> P-46 who was living in Bunia in May 2003 confirmed that non-Iturians were particularly targeted.<sup>57</sup>

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<sup>50</sup> P-0014, EVD-PT-OTP-00702, paras. 107-110.

<sup>51</sup> P-0014, EVD-PT-OTP-00702, paras.34-35.

<sup>52</sup> P-0014, EVD-PT-OTP-06129 at 0468-0479.

<sup>53</sup> P-0056, DRC-OTP-0159-0408, at pp. 0418-0419.

<sup>54</sup> P-0317, EVD-PT-OTP-00779, at 0435, para.32, at 0436, para. 34; EVD-PT-OTP-06473, at 0297, para. 76.

<sup>55</sup> EVD-PT-OTP-00779 at pp.15-16, paras.37, 119.

<sup>56</sup> EVD-PT-OTP-00779, at p.18, para.47.

<sup>57</sup> P-0046, DRC-OTP-2055-0221, at p.18, para.100.

32. During the assaults on Banyali-Kilo and Walendu-Djatsi, non-Hema were considered the enemy and were targeted on the basis of their ethnicity.<sup>58</sup>
33. P-317, P-46 and other UN investigators concluded, on the basis of interviews with 502 witnesses, *inter alia*, that most of the victims of the assault on Komanda were killed by UPC elements and that the incidents targeted mainly the Nande population.<sup>59</sup>
34. After the UPC's takeover of Bunia, in May 2003, there was a campaign of arbitrary arrests, executions and disappearances; and in particular, there was a "manhunt" for Lendu, Ngiti, *non-originaires* and others who opposed the policies of the UPC.<sup>60</sup> P-317, P-46 and other UN staff found that UPC troops killed hundreds of civilians, the majority of whom were Lendu, Ngiti and "Jajambo" (*non-originaires*) from other districts, especially Nande.<sup>61</sup>
35. Similarly, in a report regarding UPC "atrocities in Ituri" in August to September 2003, there are reports of attacks on Lendu villages, abductions and murders of Lendu and *non-originaires* civilians.<sup>62</sup>

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<sup>58</sup> **P P-0017**, EVD-PT-OTP-06109, at pp.0538-0539, ll.115-153; EVD-PT-OTP-06112, at p.0615, l.64-p.0618, l.176; **P-0315**, EVD-PT-OTP-06363, at p.0994, para.23, at p.1012, para.127, p.1014, paras.130-132. See also [REDACTED], EVD-PT-OTP-00781, at p.0664, p.0666; [REDACTED], EVD-PT-OTP-00782, at p.0829; EVD-PT-OTP-04498, at 1314; P-0019, EVD-PT-OTP-02447, at p.0144, para.16; P-0018, EVD-PT-OTP-??[DRC-OTP-0096-0116-RO1, paras.16-18; DRC-OTP-2052-0176-R01, paras.14, 16, 19-21, 23, 25-28.

<sup>59</sup> EVD-PT-OTP-00779, at p.32, para.109.

<sup>60</sup> EVD-PT-OTP-00064, at 0080; EVD-PT-OTP-04807, at 2397.

<sup>61</sup> EVD-PT-OTP-06057; EVD-PT-OTP-06058, para.425.

<sup>62</sup> EVD-PT-OTP-00059 at 0041; *See also*: **P-0031**, EVD-PT-OTP-03746, paras.84-86.

(iv) *Intentional targeting of the Lendu and non-originaires*

36. The UPC/FPLC adopted a regular pattern and *modus operandi* that included the same prohibited acts: a strategy of cutting off escape routes; the destruction of homes and key civilian infrastructure and large-scale pillaging of their goods; and at Songolo and Zumbe, laying of landmines – making it hard for civilians to return.
37. In the Bunia August 2002 assault, eyewitnesses P-16, P-14, and survivors speaking to UN investigators P-46, P-317 and international NGO researcher P-315 confirm that UPC forces and supporting Hema civilians hunted down Lendu and *non-originaires* killing them in their homes, public places and road blocks. P-56 confirms Lendu were raped. P-758 and P-14 confirm that UPC/FPLC pillaged and destroyed civilian property. Thousands fled.<sup>63</sup>
38. Similarly, in the assault on the predominantly Ngiti village of Songolo on 31 August 2002, UPC/FPLC targeted civilian homes and fleeing civilians with heavy weapons and *armes blanches*. Civilians were killed as they tried to flee, including at positions set up to cut off escape routes. Women and girls were raped and taken as sex slaves. Homes were destroyed, key infrastructure targeted and landmines deliberately laid that also killed and injured returning civilians. In the Zumbe October 2002 attack, Lendu civilians were again deliberately targeted, homes and key civilian infrastructure was destroyed, goods were systematically pillaged, women raped, and landmines deliberately laid that injured and killed returning survivors. In the Mambasa-Komanda-Eringeti assault, the UPC/FPLC

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<sup>63</sup> See the Prosecution's presentation on contextual elements.

troops advancing on Komanda committed murders, systematic pillaging and rape, and targeted Nande and pygmies viewed as allied with the RCD-K/ML.<sup>64</sup>

39. In the Banyali-Kilo and Walendu-Djatsi *collectivités*, the evidence shows that the UPC/FPLC systematically targeted civilians.<sup>65</sup> During the March and May 2003 assaults on Bunia, Lendu, Ngiti, and *non-originaires* were again targeted and raped, tortured and killed, as the “enemy”. After the UPC/FPLC takeover of Bunia in May 2003, the UPC/FPLC forces systematically hunted down Lendu and the *non-originaires* and continued their assaults against them in the period up to and including December 2003.<sup>66</sup>

(v) *Failure to punish or discipline for attacks on Lendu / non-  
originaires*

40. The Prosecution refers to its presentation during the oral hearing regarding Bosco Ntaganda’s command responsibility under article 28.

41. P-5 states that the UPC/FPLC senior leadership was kept informed of the exactions committed by FPLC elements, including to Lubanga.<sup>67</sup> Senior military insider P-16 stated that: “Après chaque opérations, il y avait des viols. [...] Si les militaires FPLC violaient des femmes, ils savaient très bien qu’il n’y aurait pas de punition pour cela.[...] Quand les FPLC combattaient les Lendus, les hauts commandants n’étaient pas intéressés à savoir les dégâts sur la population civile [...] ils considéraient que c’était normal que les femmes soient régulièrement violées pendant la guerre [...]”

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<sup>64</sup> See the Prosecution’s presentation on contextual elements.

<sup>65</sup> ICC-01/04-02/06-258-AnxA3 and ICC-01/04-02/06-258-Conf-AnxA4

<sup>66</sup> See the Prosecution’s presentation on contextual elements and the section below on the contextual elements of war crimes.

<sup>67</sup> EVD-PT-OTP-04084 at paras. 203, 216.

NTAGANDA, LUBANGA et KISEMBO étaient au courant de ses activités quotidiennes [...] toutes les opérations se déroulaient de la même façon à chaque fois. »<sup>68</sup>

42. Military insider P-17 confirms that he never heard of punishments for stealing from a Lendu, or for beating, torturing or killing a Lendu; except at Kobu, a soldier was punished for shooting at an old man.<sup>69</sup>

### C. Organisational Policy

43. The organisational policy does not need to be explicitly or precisely defined or formalised. The policy requirement, not part of customary international law, was meant only to ensure that random or isolated acts are excluded from the scope of crimes against humanity. Accordingly, an attack, that was planned, directed or organised, as opposed to random or isolated acts of violence, satisfies this criterion.<sup>70</sup> It is therefore possible to infer the policy, *inter alia* from the following factors: (1) the coordinated pre-planning prior to assaults; (2) the orders or instructions (both explicit and implied) given before and during assaults to target and expel the non-Hema civilians, including the Lendu and *non-originaires*, from their areas; (3) the intentional targeting of the non-Hema civilians during and after the execution of the assaults; (4) the crimes directly perpetrated by Bosco Ntaganda and other senior UPC/FPLC commanders against Lendu and *non-originaires* non-Hema civilians; (5) the manner in which the UPC/FPLC

<sup>68</sup> EVD-PT-OTP-02701, at 0463-0464, paras. 235-243.

<sup>69</sup> EVD-PT-OTP-04145, at pp.0127-0128, ll.760-782.

<sup>70</sup> See Triffterer (ed), 'Article 7:Crimes against humanity', C.Hall, pp.179-180. It has been recognised that the requirement to prove a policy "*is not part of customary international law [and was] justified as a basis for ensuring that random or isolated acts are excluded from the scope of crimes against humanity*". See e.g. ICC-01.05-01.08-424, 15 June 2009, para.81; ICC-01/04-01/07-717, para.396 ICC-02/11-01/11-9-Red, para.37. See also e.g. *Prosecutor v Tadic*, IT-94-I-T, 7 May 1997, para.653 The term 'policy' was used to explain the idea that an attack is not composed of "*isolated, random acts of individuals*" and "*cannot be the work of isolated individuals alone.*"; "[*the*] policy need not be formalised and can be deduced from the way in which the acts occur"; *Prosecutor v Blaskic*, IT-95-14-T, 3 March 2000, para.204 *Prosecutor v Fofana and Kondewa* ("CDF case"), SCSL-04-14-A, 28 May 2008, para.307.

maintained its occupation of the areas from which the Lendu and *non-originaires* non-Hema civilians were expelled; (6) the manner in which Hema civilian supporters were also used to target Lendu and *non-originaires* non-Hema civilians; and (7) the failure to punish or discipline for crimes perpetrated against these civilians.

*(i) Pre-planning*

44. During the prior planning stages, Bosco Ntaganda and his co-perpetrators recruited and trained armed forces, deployed a significant number of troops and transported weapons, ammunition and other supplies in a coordinated fashion.<sup>71</sup> The selection of targets for assault during the pre-planning phase demonstrates the organisational policy: P-16 confirms that three-quarters of the villages the UPC attacked were Lendu or Ngiti – that all the population was viewed as the enemy;<sup>72</sup> and that Floribert Kisembo only ever attacked Lendu villages.<sup>73</sup>

*(ii) Orders or instructions prior to or during assaults*

45. To demonstrate an organisational policy, it is only necessary to show a link between the policy and the organisation. It is also necessary to prove that the organisation actively promoted or encouraged such as an attack. However, this does not require proof that the highest levels of the organisation, including Bosco

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<sup>71</sup> See Prosecution's presentations on modes of liability under Articles 25 and 28, and regarding contextual elements.

<sup>72</sup> P-0016, EVD-PT-OTP-02701, paras.210, 216-230.

<sup>73</sup> P-0016, EVD-PT-OTP-02701 at 0436, para. 83.



Ntaganda,<sup>74</sup> personally conceived or even personally adopted the policy.<sup>75</sup> Moreover, the personal motives of Bosco Ntaganda, his co-perpetrators and any direct perpetrators are not relevant to the organisational policy.

46. However, it is clear from Bosco Ntaganda's actions and words, and those of other senior UPC/FPLC commanders, that they personally adopted, as well as actively encouraged and promoted, the organisational policy to attack and expel the Lendu and *non-originaires* from their areas.

47. As set out in detail in the sections herein on the elements to prove an attack against a civilian population (contextual elements of crimes against humanity) and the war crime of intentionally directing attacks against the civilian population, the evidence strongly demonstrates this organisational policy.

### (iii) *Intentional targeting of civilians in assaults*

48. As described at paragraphs 21-43, pursuant to the organisational policy, the attackers intentionally targeted the non-Hema civilians including the Lendu and *non-originaires* and chased them away from their areas. In all eight assaults, the attackers adopted a similar *modus operandi* that demonstrates the organisational policy to attack and chase out the Lendu and *non-originaires* from their areas: including deliberate "*manhunts*" for Lendu and *non-originaires* in house-to-house searches, "*sweep operations*" in surrounding bush and forests to search for fleeing civilians to capture and kill them, setting up of roadblocks to prevent civilians from fleeing and capturing and killing those found; use of rape as a tool of

<sup>74</sup> See e.g. *Prosecutor v Kunarac et al.*, Case No. IT-96-23-A, Judgement, Appeals Chamber, 12 June 2002, para.94

<sup>75</sup> See e.g. *Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases*, (Fujimori case), Case No. AV 19-2001, Sala Penal Especial de la Corte Suprema, 7 April 2009 (Supreme Court of Peru), para 715 (citing Kai Ambos), translation available at 25 Am.U.Int.L.Rev. (2010) *Prosecutor v Kupreskic*, Case No. IT-95-16-T, Judgement, Trial Chamber, 14 January 2000, para.555; *Prosecutor v Semanza*, Case No. ICTR-97-20-A, Judgement, Appeals Chamber, 20 May 2005, para.269.

warfare; systematic destruction of homes and key civilian infrastructure and pillaging of civilian goods, that made it difficult for civilians to return. In Songolo and Zumbe, UPC/FPLC forces even deliberately laid landmines making it dangerous for the survivors to return.

*(iv) Perpetration of crimes by Senior UPC/FPLC Commanders*

49. The organisational policy can also be inferred from the direct perpetration of crimes by the organisation's senior leaders.

50. During the Banyali-Kilo assault, military insiders P-768, P-17 and P-38 saw and heard Bosco Ntaganda targeting and killing Lendu civilians himself.<sup>76</sup> P-768 describes how Bosco Ntaganda gave the order to kill all Lendu civilians and that: *"Bosco executait [...] tous les civils qui se presentaient comme Lendu [...] il donnait l'ordre de les executer sur place."*<sup>77</sup> P-768 heard Bosco Ntaganda order the execution of captured Lendu.<sup>78</sup> Both P-768 and P-17 confirm that many civilians were captured and brought to Bosco Ntaganda's residence in Mongbwalu, where they were imprisoned. These civilians were interrogated and often executed.<sup>79</sup> For instance, P-768 witnessed the interrogation and execution of an Ngiti priest,<sup>80</sup> Abbé Boniface Bwanalonga, by Bosco Ntaganda.<sup>81</sup> P-768 also heard that Bosco Ntaganda ordered his escorts to rape three females detained at his residence in

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<sup>76</sup> **P-0768**, EVD-PT-OTP-06429 at 1763 AND EVD-PT-OTP-06423 at 1639-1642 and 1644-1648 and at 1653, 1.545-588 and at 1658, 1.756-780 AND EVD-PT-OTP-06431 at 1836-1838, 1.889-940; **P-0804**, EVD-PT-OTP-06391 at 1132 para 20; EVD-PT-OTP-00781 at 0669; **P-0038**, EVD-PT-OTP-06241 at 0217, lines 561-562; **P-0017**, EVD-PT-OTP-06107 at 0519-0521 and 0522-0523, 1.903-1071.

<sup>77</sup> EVD-PT-OTP-06484, at 0518-0519, lines 560-604; 0522-0525, lines 695-814; EVD-PT-OTP-06487, at 0581-0584, lines 37-177; EVD-PT-OTP-06486, 0573, lines 664-665.

<sup>78</sup> EVD-PT-OTP-06425, 1703-1704, ll.620-634.

<sup>79</sup> EVD-PT-OTP-06424, 1670-1672, ll.361-438; EVD-PT-OTP-06109, 0538-0539, ll. 115-153, 0553, ll. 684-693, 0548-0550, ll. 504-613;

<sup>80</sup> EVD-PT-OTP-06483 at 0501-0502, lines 925-960.

<sup>81</sup> EVD-PT-OTP-06422, 1635-1636, ll.910-957; EVD-PT-OTP-06423, 1639-1642, ll.41-176.

Mongbwalu.<sup>82</sup> Other UPC/FPLC commanders raped civilians in Mongbwalu<sup>83</sup> and Kilo.<sup>84</sup> Everybody pillaged at Mongbwalu and Sayo, including Bosco Ntaganda, and other UPC/FPLC commanders.<sup>85</sup> In the subsequent assault on Walendu-Djatsi *collectivité*, UPC/FPLC commanders themselves raped women, including UPC/FPLC Brigade Commander Salumu MULENDA;<sup>86</sup> UPC/FPLC Commander LINGAGA;<sup>87</sup> and UPC/FPLC Commander SIMBA.<sup>88</sup>

(v) *UPC/FPLC occupation of non-Hema civilian areas*

51. Although it is not necessary to prove that there was an organisational policy to permanently displace the Lendu and *non-originaires* civilians,<sup>89</sup> the UPC/FPLC made it difficult for the civilians to return. The UPC/FPLC forces systematically destroyed homes and key civilian infrastructure in the Lendu-Ngiti villages; they pillaged civilian goods; and in some instances laid landmines.

52. During the assault on Walendu-Djatsi, UN investigator P-317 states: " [...] *the main hospital of the region, all religious structures, the orphanage and the schools were looted*

<sup>82</sup> EVD-PT-OTP-06484 at 0508-0510, lines 187-252.

<sup>83</sup> EVD-PT-OTP-06235 at 0123, lines 522-528.

<sup>84</sup> EVD-PT-OTP-06112 at 0615 and 0618.

<sup>85</sup> **P-0038**, EVD-PT-OTP-03743 at 3019, lines 635-642; **P-0038**, EVD-PT-OTP-03728 at 2559, lines 809-810; **P-0768**, EVD-PT-OTP-06485 at 0534; **P-0017**, EVD-PT-OTP-04145 at 0118; EVD-PT-OTP-03728 at 2555-2559, lines 672-673 and 809-810; **P-0016** EVD-PT-OTP-02701, at 0465, para. 132, 247; **P-0768** EVD-PT-OTP-06487, at 0515, lines 440 - 442, 484-485, 0581-0584; **P-0315** EVD-PT-OTP-06363 at 1011-1012 para. 127. **P-0017**, EVD-PT-OTP-06110 at 0558, lines 14 - 0560, line 83 and at 0562, lines 151-154; **P-0016** EVD-PT-OTP-02701 para. 132; **P-0017**, EVD-PT-OTP-06149 at 2168-2171; **P-0038**, EVD-PT-OTP-06241 at 0216 lines 553-554 and 0217 lines 555-558; EVD-PT-OTP-06235 at 0117; 0118, lines 323-343 and 346-347; 0119, lines 382-395; **P-0768**, EVD-PT-OTP-06484 at 0515; **P-0768**, EVD-PT-OTP- at 0670, lines 600-609, **P-0800** EVD-PT-OTP-06476 at 0644; **P-0768**, EVD-PT-OTP-06491-, at 0670-0674, lines 600- 621.

<sup>86</sup> EVD-PT-OTP-06378 at 1083, para. 51.

<sup>87</sup> EVD-PT-OTP-06123 at 0063, para. 13; EVD-PT-OTP-06124.

<sup>88</sup> **P-0017**: EVD-PT-OTP-06286 at 0798, line 742 to 0800-0802, line 814-882; **P-0038**: EVD-PT-OTP-06241 at 0204-0206, lines 73-147.

<sup>89</sup> *Prosecutor v. Milomir Stakic*, IT-97-24-A, Appeal Judgement, 22 March 2006, para.317; *Prosecutor v. Zdravko Tolimir*, IT-05-88/2, Judgement, 12 December 2012, para.801; *Prosecutor v. Mico Stanisic and Stojan Zupljanin*, IT-08-9, Appeal Judgement, 27 March 2013, para.61; *Prosecutor v. Jovica Stanisic and Franko Simatovic*, IT-03-69-T, Appeal Judgement, 30 May 2013, para.995.

*and all electronic devices, archives and medical equipment destroyed.” This resulted in: “the complete destruction of 26 localities.”<sup>90</sup> The UN investigators concluded that the pattern of destruction demonstrated that the UPC: “wanted to completely eliminate all chances for the population of the region to have social assistance.”<sup>91</sup> UN investigator P-46, who was amongst the UN investigators who visited Bambu hospital confirmed that:<sup>92</sup> “[e]verything was systematically destroyed: from beds to cupboards. Nothing was functional.”<sup>93</sup>*

53. In some instances, Lendu who tried to return to UPC/FPLC occupied areas were killed.<sup>94</sup> P-55 describes Bosco Ntaganda admitting that he ordered his escorts to kill female Lendu civilians at a market place near a UPC area: “NTAGANDA told me that...the Ugandans had now allowed...the Lendus to come into the UPC area...He just killed them because they were Lendus coming into our area.”<sup>95</sup>

54. The UPC/FPLC even targeted those perceived as trying to assist the Lendu and non-originares.<sup>96</sup> A UPC/FPLC logbook message dated 2 January 2003 shows that Bosco Ntaganda ordered the arrest of a white Catholic priest who had been in contact with Lendu individuals.<sup>97</sup> The UPC expelled [REDACTED] P-56 for various reasons including providing assistance to Lendu, and a Belgian priest was expelled for helping a group of displaced Lendu.<sup>98</sup>

<sup>90</sup> **UN Security Council Special Report**, EVD-PT-OTP-00779, at 0444-0445, paras. 69-70 (FR) EVD-PT-OTP-02798 at 0458 EVD-PT-OTP-03424, para. 6.

<sup>91</sup> P-0046: EVD-PT-OTP-06242, at p.9, para.54; **P-0046**, EVD-PT-OTP-03424, para. 64; EVD-PT-OTP-06242, paras. 32, 54 and 55; and **UN report**, EVD-PT-OTP-03424, EVD-PT-OTP-03304, EVD-PT-OTP-03424, paras. 60-61.

<sup>92</sup> **P-0046**, EVD-PT-OTP-06242, at 0229, paras. 54-55.

<sup>93</sup> **P-0046**, EVD-PT-OTP-06242, at 0229, paras. 54-55; EVD-PT-OTP-03424, para.64; **P-0317**, EVD-PT-OTP-06473, para 48; EVD-PT-OTP-03424, para. 6 and 9; **UN Security Council report**, EVD-PT-OTP-00779 (FR) EVD-PT-OTP-02798 at 0458; EVD-PT-OTP-03304 at 0437.

<sup>94</sup> EVD-PT-OTP-06425, 1706-1707, ll.705-752

<sup>95</sup> **P-0055**: EVD-PT-OTP-06504, at p.0991, line 20 to p.0998, line 260.

<sup>96</sup> **P-0317**: EVD-PT-OTP-0779, at p.10, para.22, pp.37-38, paras.129-132 ; EVD-PT-OTP-06473, p.7, para.36, p.11, para.76.

<sup>97</sup> EVD-PT-OTP-03975 at 0982, bottom message. See also EVD-PT-OTP-03532 and EVD-PT-OTP-03531.

<sup>98</sup> **P-0056**: EVD-PT-OTP-03530, paras. 124, 128, 101-102, at paras.88 and 93 and at paras.74, 84 and 87; **P-0317**: EVD-PT-OTP-0779, at pp.37-38, paras.129-130 ; EVD-PT-OTP-06473, p.7, para.36, p.11, para.76; **P-**

(vi) *UPC/FPLC propaganda*

55. There is a mass of consistent evidence from military insiders, eyewitnesses, independent observers, and contemporaneous documents and reports, that confirm, on substantial grounds to believe, the existence of an organisational policy to attack and expel the Lendu and *non-originaires* non-Hema civilians.

56. Nevertheless, the Defence relies on self-serving UPC/FPLC videos and documents including statements made by UPC/FPLC leaders to argue that: (a) there was no “ethnic policy”<sup>99</sup> to attack and expel the Lendu or *non-originaires* non-Hema civilian population; and (b) instead, the policy or objective of the organisation was to protect all civilians no matter what their ethnic origin.<sup>100</sup> The Defence further argues that the UPC/FPLC organisation was not Hema, but a multi-ethnic, organisation, so that there could not have been any policy to discriminate against non-Hema ethnic groups.<sup>101</sup>

57. This does not reflect reality: (1) as described above, the UPC/FPLC had an organisational policy to attack and expel Lendu and *non-originaires*; (2) the videos and documents relied upon by the Defence were created to disseminate UPC/FPLC political propaganda and run counter to the actions of the organisation regarding the “enemy” Lendu and *non-originaires* civilians; and (3) while the organisation’s motives for attacking the Lendu and *non-originaires* are not relevant for crimes against humanity -such that it is not necessary to prove that the UPC/FPLC was a predominantly Hema organisation, promoting largely Hema interests – in reality, it was.

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**0046:** EVD-PT-OTP-03501, at p.25, para.94; EVD-PT-OTP-07203, at p.52, l.7-p.53, l.21; **P-0315:** EVD-PT-OTP-00782, at pp.0843, 0834; EVD-PT-OTP-03975 at 0982; EVD-PT-OTP-00779, para 130; EVD-PT-OTP-00782, at 0843.

<sup>99</sup> ICC-01/04-02/06-T-9-Red-ENG WT, p.49, line 25 – p.50, line 1.

<sup>100</sup> ICC-01/04-02/06-T-9-Red-ENG WT, p.69, lines 21-25.

<sup>101</sup> ICC-01/04-02/06-T-10-CONF-ENG, p. 4, lines 14-15.

58. Even in the UPC/FPLC propaganda speeches and videos, it is apparent that Lendu were perceived and treated as both tribal and political enemies, allied with the enemy RCD-K/ML and their APC forces. For instance, in a press conference convened by the UPC/FPLC in June 2003, Thomas Lubanga explains openly how the “*Lendu group*” were viewed as the UPC/FPLC’s enemy, and he blames the Lendu for waging a “*tribal war*” and claims that they were used by the RCD-K/ML party of Mbusa Nyamwisi to wage a “*political war*” against the UPC.<sup>102</sup> In another political speech given in about April 2003, Thomas Lubanga brandishing a gun, called for the UPC/FPLC supporters to take up arms to avoid being exterminated and states that he told Joseph Kabila: “*je serais heureux de signer avec toi, parce que c’est toi qui nous fais massacrer par l’intermédiaire des Lendu, plutôt que de signer avec ces illétrés qui n’ont pas d’intelligence.*”<sup>103</sup> P-5 also confirmed that the Lendu were viewed by the UPC as being aligned with the UPC’s enemy, the RCD-K/ML President Mbusa Nyamwisi.<sup>104</sup>

59. [REDACTED] a number of the videos relied upon by the Defence,<sup>105</sup> [REDACTED]. [REDACTED].<sup>106</sup> [REDACTED].<sup>107</sup> [REDACTED].<sup>108</sup> [REDACTED] confirmed that they could not refuse [REDACTED] otherwise they would be viewed as a UPC enemy.<sup>109</sup>

60. Contrary to the claims made by the Defence, the journalist Mike Arereng (appearing in the Mongbwalu video) did not only work for Voice of America or ABC.<sup>110</sup> [REDACTED] Mike Arereng also worked for Radio Candip.<sup>111</sup> Arereng was a reporter for the local network that called itself RTNC Bunia, that was

<sup>102</sup> EVD-PT-OTP-02709, at p. 0070, line 143- p. 0071, line 159. See also e.g. EVD-PT-OTP-05577 at 00:59:11-01:13:00, EVD-PT-OTP-04032, ll.239-0381.

<sup>103</sup> EVD-PT-OTP-03809, ll.220-276; See video EVD-PT-OTP-01849, at 00:21:30 to 00:24:03 to 00:24:05.

<sup>104</sup> EVD-PT-OTP-04084, P-0005, p.17, para.78.

<sup>105</sup> [REDACTED].

<sup>106</sup> [REDACTED].

<sup>107</sup> [REDACTED].

<sup>108</sup> [REDACTED].

<sup>109</sup> [REDACTED].

<sup>110</sup> See also e.g. P-0002, EVD-PT-OTP-06264, at 1275, ll.6-7; EVD-PT-OTP-06474, paras.28-29.

<sup>111</sup> [REDACTED].

managed by Radio Candip.<sup>112</sup> In the interests of the manifestation of the truth, the Prosecution refers the Chamber to videos, in which Mike Arereng makes RTNC news announcements and is described as an RTNC reporter, disclosed to the Defence pursuant to rule 77 and/or article 67(2).<sup>113</sup>

61. [REDACTED] confirms that the local television network RTNC and Radio Candip were under UPC control whilst the UPC were in power (in Bunia) between August 2002 and March 2003; and the daily evening news was in fact UPC news and a type of “*propagande de l’UPC*”.<sup>114</sup> Similarly, P-0056 and P-0046 confirm that Radio Candip was used by the UPC to diffuse its propaganda.<sup>115</sup> And [REDACTED] for the UPC even after March 2003.<sup>116</sup>

62. [REDACTED] explains:<sup>117</sup> “*Selon ce qu’on peut observer aussi dans les videos qui sont commentées ci-dessous, dans leurs discours, les représentants de l’UPC répètent à plusieurs reprises qu’ils ne favorisent pas une ethnie contre les autres, et que l’UPC est un groupement composé de plusieurs ethnies. Personnellement, je pense que ce n’est pas vrai*

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<sup>112</sup> ICC-01/04-02/06-T-10-CONF-ENG, p. 58 ; EVD-PT-OTP-06338; EVD-PT-OTP-00814; EVD-PT-OTP-05957 at 0445, lines 1-3; EVD-PT-OTP-00815; EVD-PT-OTP-05965 at 0055, lines 67-68 and at 0100, lines 1675-1677; EVD-PT-OTP-00810; EVD-PT-OTP-05777 at 0028, lines 1-10; EVD-PT-OTP-03409; EVD-PT-OTP-05740 at 0589, para 44.

<sup>113</sup> See e.g. EVD-PT-OTP-05777, at 0028, ll.2-17 (video dated early 2003, before start of the work of the Ituri Pacification Commission in April 2003, see at p.0028, ll.15-18, p.0029, ll.46-48); EVD-PT-OTP-05950, at 0108, ll.49-57, (EVD-PT-OTP-05993 (duplicate) (video excerpt dated 28 March 2003, see at 0106, at 01078, ll.10-12, l.37; at 0108, ll.49-51); EVD-PT-OTP-05957, at 0446, ll.56-72 (video dated early 2003 prior to start of work of Ituri Pacification Commission in April 2003, see at 0445, ll.34-40); EVD-PT-OTP-05964, at 0345, ll.589-591; 0347, ll.673-679 (video dated early March 2003, at 0347, ll.689, before start of work of the Ituri Pacification Commission in April 2003).

<sup>114</sup> [REDACTED].

<sup>115</sup> P-0056, EVD-PT-OTP-03530, para.93; ; P-0046, EVD-PT-OTP-03501, at p.35, para.133. See also e.g. EVD-PT-OTP-03854 at 1047-1048, paras. 207-217; EVD-PT-OTP-03409 at 0589, paras. 44-45; EVD-PT-OTP-03746 at 0022-0023, para 66; EVD-PT-OTP-06187 at 5222, lines 1-5; EVD-PT-OTP-03501 at 0043-0044, para. 130; and EVD-PT-OTP-03530 at 0426, para 93. See also: DRC-OTP-0003-0424 at 0442; EVD-PT-OTP-03280 at 0212-0215; EVD-PT-OTP-06325 at 0008, para. 40; EVD-PT-OTP-03280 at 021 2-0215; EVD-PT-OTP-00736 at 0391, para. 47; EVD-PT-OTP-00102 at 0041, para. 3; EVD-PT-OTP-06207 at 6982, line 15, 6983, line 4; EVD-PT-OTP-00301 at 0159-0160; EVD-PT-OTP-03762 at 0237; EVD-PT-OTP-00097 at 0027, 0028, paras. 2 and 5; and EVD-PT-OTP-03420 at 0248.

<sup>116</sup> [REDACTED].

<sup>117</sup> [REDACTED].

*et qu'ils disaient cela pour satisfaire le public, mais que en réalité, certains d'entre eux étaient plutôt pro Hema [...].»<sup>118</sup>*

63. Referring specifically to Thomas Lubanga's speech in that video regarding pacification and claim that the UPC was a multi-ethnic movement and its enemy was not of any particular ethnicity, [REDACTED] states: *"la 'journée', c'est à dire en publique, on entendait des discours de ce genre qui semblaient tres positifs, tandis que la 'nuit', c'est-à-dire dans les coulisses ou sur le terrain, les chose étaient différentes. Thomas LUBANGA continue son discours en disant que, si l'on veut créer un parti politique ou une armée, il faut le faire en incluant toutes les ethnies pour proteger tous les Ituriens. [...] Dans la réalité, mon impression est que l'armée de l'UPC était composee a environ 85% de Hema, qui est la même ethnie que Thomas LUBANGA, et de quelques Lendu, Bira et Alur».*<sup>119</sup> [REDACTED] further states: *«je pense que les journalistes avaient raison de reporter l'UPC comme un mouvement rebelle Hema, car la plupart des victimes des attaques de l'UPC étaient des Lendu.»*<sup>120</sup>

64. P-105 comments on a video dated January 2003 in Lipri, relied upon by the Defence in the confirmation hearing. P-105 confirms that after this meeting, allegedly to discuss peace, the UPC forces coming from Centrale took them by surprise by entering Lipri and firing at the Lendu population. The incursion was brief but a few civilians were killed.<sup>121</sup> Moreover, by this time in January 2003, the UPC/FPLC had started their assault on other parts of Walendu Djatsi in addition to Lipri, attacking the predominantly Lendu areas of Nyangaray and surrounding areas and targeting civilians.<sup>122</sup> In the video, the Chief of Lipri refers to public statements made on Radio Candip by UPC/FPLC Commander Salongo, who had attacked Nyangaray, that they must *"chase the Lendu wherever they are"* and

<sup>118</sup> [REDACTED].

<sup>119</sup> [REDACTED].

<sup>120</sup> [REDACTED].

<sup>121</sup> EVD-PT-OTP-06325 at p.0005, paras.16-17. See Video EVD-PT-02708 at p.0005, paras.16-17. See Video EVD-PT-02708.

<sup>122</sup> See e.g. P-0055, DRC-OTP-2058-0548, II.402-848. See also DRC-OTP-0065-0003.



complains that there cannot be peace discussions at gunpoint.<sup>123</sup> P-55 explains that Commander Salongo was chastised and moved from Mongbwalu after this because these types of comments were not supposed to be made publicly on radio.<sup>124</sup> P-5 says that the UPC executive went to Lipri and Tinanzabo provided a report: “[i]l était interdit ou à tout le moins pas recommandé de mentionner dans les rapports, mêmes verbaux, que des massacres de populations civile avaient été commis par les militaires de l’UPC”.<sup>125</sup>

65. The Defence heavily relies on another UPC video filmed in Mandro in 2002, in which Kahwa states that the recruits should not commit crimes against civilians, including the Lendu, to refute the existence of a UPC/FPLC organisational policy to attack and expel the Lendu and instead to argue that the organisational policy was to protect all civilians no matter what their ethnicity as the UPC/FPLC was a peaceful organisation.<sup>126</sup> However, rather than speculating as to Kahwa’s actual views regarding the UPC/FPLC organisational policy towards the Lendu and *non-originares* by relying on political statements he made in a UPC propaganda video, in the interests of the manifestation of the truth, the Prosecution refers the Chamber to [REDACTED].<sup>127</sup> [REDACTED].<sup>128</sup> [REDACTED].<sup>129</sup> [REDACTED].<sup>130</sup>

66. [REDACTED].<sup>131</sup> [REDACTED].<sup>132</sup> [REDACTED].<sup>133</sup>

<sup>123</sup> EVD-PT-OTP-03806, ll.121-169. See video EVD-PT-OTP-02708, minutes 00:04:55 to 00:07:50.

<sup>124</sup> P-0055, EVD-PT-OTP-06510, at pp.0561-0574.

<sup>125</sup> P-0005, [EVD-PT-OTP-04084, para.306.

<sup>126</sup> ICC-01/04-02/06-T-9-Red-ENG, p.81.

<sup>127</sup> ICC-01/04-02/06-47, paras.22-23. The Prosecution observes that the “confirmation hearing” has not ended as the parties are still making their written submissions and a decision is due to be rendered. The Defence also has an opportunity to comment on these documents in their written submissions should they choose to do so.

<sup>128</sup> The Prosecution estimates that this video was probably filmed in about September 2002, as Kahwa refers in the video to the enemies being located in Zumbe and that they would first to deal with them with diplomacy, but if that did not work they would attack them. The most significant UPC-FPLC assault on Zumbe was on about 15-16 October 2002. See the presentation on contextual elements.

<sup>129</sup> [REDACTED].

<sup>130</sup> [REDACTED].

<sup>131</sup> [REDACTED].

<sup>132</sup> [REDACTED].

67. [REDACTED].<sup>134</sup> [REDACTED].<sup>135</sup> [REDACTED].<sup>136</sup>

68. Similarly, the Defence relies heavily on the video filmed in Mongbwalu a few days after the UPC/FPLC assault. It argues that the statements made during this UPC-commissioned video should be relied upon to conclude that the UPC/FPLC promoted peace and non-discrimination towards the Lendu and non-Hema. This video stands in stark contrast to the mass of evidence of intentional targeting of non-Hema, in particular the Lendu and *non-originaire* civilians, during the course of conduct of the attack perpetrated from about July 2002 until about December 2003, including the acts perpetrated at Mongbwalu itself.

69. The reality is that in the days following the UPC/FPLC take-over of Mongbwalu, according to the accounts of military insiders and survivors present and conclusions of independent observers, the UPC/FPLC were in fact engaged in a house to house search for Lendu and those found were executed. The video itself hints at this, for instance: (a) the nun seen at 01:15:10 confirms that Abbé Boniface (executed by Bosco NTAGANDA) had been taken away by the military; and (b) Bosco NTAGANDA is seen on the phone with a journalist trying to refute allegations already being made in relation to UPC/FPLC\_perpetrated killings (at 00:25:20).

70. A witness who spoke to P-0315 alleged that after the UPC/FPLC's takeover of Mongbwalu, the UPC/FPLC sought to operate the goldmines, realised that they needed experienced diggers, namely the Lendu and *non-originares*, so tried to convince them they would not be harmed if they returned. The witness explained that the person sent by the UPC/FPLC to these communities to bring them out

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<sup>133</sup> [REDACTED].

<sup>134</sup> [REDACTED].

<sup>135</sup> [REDACTED].

<sup>136</sup> [REDACTED].

from the bush, was later executed on his return for telling the population that the UPC/FPLC had looted their homes.<sup>137</sup>

*(vii) The UPC/FPLC – A predominantly Hema organisation*

71. The Defence claims that the UPC/FPLC was multi-ethnic and thus had no organisational policy to target non-Hema. To the contrary, witnesses consistently confirm that the UPC/FPLC was a predominantly Hema<sup>138</sup> organisation.

72. The Defence relies on the political speeches of Kahwa at Mandro in 2002 to argue the UPC/FPLC was a multi-ethnic organisation. However, again in the interests of manifesting the truth, the Prosecution refers to [REDACTED]<sup>139</sup>; [REDACTED]<sup>140</sup>; [REDACTED].<sup>141</sup>

73. P-2 and P-30, [REDACTED] confirm that the UPC/FPLC was in reality predominantly a Hema organisation largely promoting Hema interests. P-2 states that “*L’UPC etait un groupe monoethnique, dans lequel l’ethnie Hema a joué le rôle plus important* ».<sup>142</sup> Similarly, P-30 estimates that: [...] *l’UPC etait à 85% Hema*”.<sup>143</sup>

74. P-41, P-43 and P-5 confirm that the UPC was a predominantly Hema organisation that largely promoted Hema interests and that it was only the ethnic Hema-Gegere and ethnic Tutsi who had any power within the UPC party. P-5 estimates that about 80% of the UPC were Hema,<sup>144</sup> and that the lowest party level was

<sup>137</sup> EVD-PT-OTP-00782, at 0830.

<sup>138</sup> “Hema” including both the Hema North (also known as Gegere) and Hema South.

<sup>139</sup> [REDACTED].

<sup>140</sup> [REDACTED].

<sup>141</sup> [REDACTED].

<sup>142</sup> EVD-PT-OTP-00865, at 0150, paras.21-22.

<sup>143</sup> EVD-PT-OTP-03409, para.66.

<sup>144</sup> P-0005, EVD-PT-OTP-04084, p.42, para.221.

constituted exclusively of ethnic Hema.<sup>145</sup> He states that the UPC was considered as early as 2001 as a pro-Hema party, because the Hema self-defence forces were “*chapeautés plus ou moins officiellement par l’UPC*”.<sup>146</sup> P-5, [REDACTED] says that he was not consulted about his appointment into the UPC Executive. [REDACTED] notables recommended not accepting the nomination because the UPC was seen as a Hema movement.<sup>147</sup>

75. Moreover, a tract was circulating in Bunia since mid-2002 explaining that Ituri had to become a Hima-Tutsi empire governed by the Hema.<sup>148</sup> P-5 says the appointment of non-Hema was mere “*propaganda*”,<sup>149</sup> but that he had no choice but to join out of fear for his life.<sup>150</sup> P-41, [REDACTED] who was nominated as part of the UPC executive stated that he joined out of fear for himself and his family’s security, and that Lubanga gave positions to other ethnic communities with the aim of giving “*a good image to the movement*”.<sup>151</sup> P-41 confirmed that even though he was a member of the UPC executive, because he was [REDACTED] he could not attend all of their meetings.<sup>152</sup> He says that important affairs were discussed in restricted “mono-ethnic” meetings and that the non-Hema, including [REDACTED] and ethnic Lendu in the UPC did not know what happened.<sup>153</sup>

76. P-43, [REDACTED] states that the *non-originaires* included within the movement “*n’avaient en réalité aucun pouvoir*”.<sup>154</sup> [REDACTED] P-14 states that: “*under Thomas LUBANGA’s leadership, the non-Gegere members of the UPC had little or no influence in the organisation.*” He heard from non-Gegere UPC members that they decided to

<sup>145</sup> P-0005, EVD-PT-OTP-04084, p.33, para.158.

<sup>146</sup> P-0005, EVD-PT-OTP-04084, p.12, para.52.

<sup>147</sup> P-0005, EVD-PT-OTP-04084, p.28, paras.129-130.

<sup>148</sup> P-0005, EVD-PT-OTP-04084, p.12, para.130.

<sup>149</sup> P-0005, EVD-PT-OTP-04084, p.27, para.128.

<sup>150</sup> P-0005, EVD-PT-OTP-04084, p.12, paras.134-135; p.48, paras.255-256 ; p.42, para.222.

<sup>151</sup> P-0041, EVD-PT-OTP-03268, p18, para.103.

<sup>152</sup> P-0041, EVD-PT-OTP-03268, p.25, para. 150

<sup>153</sup> P-0041, EVD-PT-OTP-03268, paras.85, 91, 93, 101. See also e.g. P-0005, EVD-PT-OTP-04084, paras.165.

<sup>154</sup> P-0043, EVD-PT-OTP-02686, para.26.

remain UPC members primarily to protect themselves, their families and their property from the UPC.<sup>155</sup>

77. Whilst the FPLC armed wing was also predominantly Hema, there were non-Hema brought in because of their considerable experience, [REDACTED]. Moreover, in addition to senior Hema, ethnic Tutsi were also considered to have considerable influence within the organisation, such as Bosco Ntaganda and Rafiki. P-360, an expert on the historical context to the conflict, explains: “*the Wahema tried to identify themselves with the Rwandese Tutsi on the basis of spurious cultural identification. [...] [T]he Ngiti FRPI...[denounced] Kagame and Museveni as trying to ‘carry out ethnic purification of the Walendu in order to establish a Tutsi-Hima empire in the sub-region’*”.<sup>156</sup>

78. Other military insiders confirm that the FPLC was predominantly comprised of Hema. P-17 states “[o]n considerait que l’UPC ce sont des Hema”,<sup>157</sup> and after referring to the ethnic hatred states: “*Tous l’ennemi était considere carrément. C’était impossible de retrouver une personne de mon ethnie dans l’autre armée, par exemple. [...] Tout comme retrouver la personne de l’autre ethnie dans notre groupe, c’était presque impossible.*»

79. As regards UPC/FPLC motives for trying to project an image of a multi-ethnic organisation, P-57 states that Lubanga had national aspirations to be a Minister,<sup>158</sup> but that he refused to negotiate<sup>159</sup> and “*a toujours été le garant de la défense des intérêts Hema tant contre les Lendu que contre le Gouvernement de Kinshasa perçu comme proche des Lendu*».<sup>160</sup> Indeed, P-5 confirms that it was the hard core of the UPC, including the armed wing and the informal political advisers – Hema

<sup>155</sup> P-0014, EVD-PT-OTP-03854, para.12.

<sup>156</sup> P-0360, EVD-PT-OTP-04866, para.0108.

<sup>157</sup> P-0017, EVD-PT-OTP-04145, ll.545-546.

<sup>158</sup> P-0057, EVD-PT-OTP-03366, p.25, para.104. Compare e.g. P-0012, EVD-PT-OTP-05784, paras.313-314.

<sup>159</sup> P-0057, EVD-PT-OTP-03366, p.25, para.104.

<sup>160</sup> P-0057, EVD-PT-OTP-03366, p.24, para.101.

businessmen – who made the decisions.<sup>161</sup> P-16 confirmed that the Hema businessmen participated in the meetings and that even though [REDACTED] another non-Hema, did not have the right to participate in the military planning meetings because they were not from Ituri. The ethnic Hema and Tutsi held the key posts and attended the military planning meetings.<sup>162</sup>

80. P-41 was told that in a meeting in February 2003 it had been decided to eliminate all non-Hema from the UPC.<sup>163</sup>

81. P-16 states that although Lubanga did not publicly state his hatred towards the Lendu because his party wanted to present itself as being for all Congolese, he considered the Lendu were the enemy. Similarly he said that whilst Floribert Kisembo did not orally state his attitude publicly, he showed his attitude in that he only attacked Lendu villages.<sup>164</sup>

82. Another motivation for seeking to portray a positive image was the intense pressure from the international community. In this period of time, including from September 2002,<sup>165</sup> the UPC/FPLC was under significant pressure from the international community. P-5 states that there was general international community pressure, and the specific pressure from the UN MONUC began from about November 2002 including during meetings with Thomas Lubanga regarding the UPC/FPLC use of child soldiers.<sup>166</sup> P-57 also confirmed that Thomas Lubanga at this time tried to “seduce” the international community.<sup>167</sup> Like the UPC/FPLC propaganda statements regarding ‘peace’ towards Lendu and *non-originaires*, the UPC/FPLC similarly made false statements about

<sup>161</sup> **P-0005**, EVD-PT-OTP-04084, paras.152, 149.

<sup>162</sup> **P-0016**, EVD-PT-OTP-02701, paras.97, 174, 179-180.

<sup>163</sup> **P-0041**, EVD-PT-OTP-03268, para.92.

<sup>164</sup> **P-0016**, EVD-PT-OTP-02701, para.83.

<sup>165</sup> See e.g. **P-0046**, EVD-PT-OTP-03501 at para.57; EVD-PT-OTP-03424 at para.97; EVD-PT-OTP-06203, p.34, l.4-p.39, l.8.

<sup>166</sup> **P-0005**, EVD-PT-OTP-04084, p.54, paras.293-294.

<sup>167</sup> **P-0057**, EVD-PT-OTP-04084, p.44, para.234.

demobilisation of child soldiers, when the reality on the ground was that they were actively recruiting children.<sup>168</sup>

83. In contrast to the UPC/FPLC public discourse promoting peace, witnesses confirm that the UPC/FPLC was obstructive during peace negotiations. [REDACTED] by Thomas Lubanga not to sign a peace agreement with Lendu in December 2002, because Thomas Lubanga said there was only one politico-military movement in Ituri.<sup>169</sup> P-12 confirms that all Ituri armed groups participated in the Ituri Pacification Commission ("IPC") except for the UPC;<sup>170</sup> and that Thomas Lubanga tried to convince other armed groups to sign an agreement for MONUC to leave and for the annulment of all the IPC resolutions.<sup>171</sup> P-57 recalls that Thomas Lubanga did not attend the IPC meetings and was only interested in militarily conquering Ituri.<sup>172</sup> P-41 heard Floribert Kisembo say on radio: *"la pacification ne se ferait que par les armes."*<sup>173</sup>

84. Kahwa himself is being prosecuted in the DRC for war crimes and crimes against humanity for crimes committed against civilians and protected objects in Zombe.<sup>174</sup> Following an initial annulment on procedural grounds regarding those charges, an arrest warrant was re-issued in 2008 regarding these alleged crimes perpetrated in Zombe.<sup>175</sup>

<sup>168</sup> See e.g. **P-0024**, EVD-PT-OTP-02698, paras.21-23, 42; **P-0056**, EVD-PT-OTP-03530, paras.46, 77; **P-0043**, EVD-PT-OTP-02686, p.10, para.47.

<sup>169</sup> [REDACTED].

<sup>170</sup> **P-0012**, EVD-PT-OTP-05784, p.51, para.271.

<sup>171</sup> **P-0012**, EVD-PT-OTP-05784, para.276.

<sup>172</sup> **P-0057**, EVD-PT-OTP-03366, para. 103. See also para.106.

<sup>173</sup> **P-0041**, EVD-PT-OTP-03268, para.94.

<sup>174</sup> EVD-PT-OTP-04375, at 0231-0232: *"Quant aux preventions de crime contre l'humanite, crime de guerre, assassinat et coups et blessures graves, dit irreguliere la saisine du premier juge, en consequence, statuant a nouveau, annule le jugement entrepris. Laisse au Parquet la latitude de regulariser la procedure quant a ces dernieres infractions qui sont imprescriptibles".*

<sup>175</sup> See e.g. media article 'Ituri : l'ancien chef milicien Yves Kawa attend depuis 5 ans un nouveau process', available at <http://www.digitalcongo.net/article/95722>.

*(viii) The Hema civilian supporters were under UPC/FPLC control*

85. The Prosecution alleges that Hema civilian supporters, under the effective command and control of Bosco Ntaganda, accompanied and assisted the UPC/FPLC forces during their attacks, including on Banyali-Kilo and Walendu-Djatsi, and committed crimes in a structured and systematic fashion.<sup>176</sup> The Defence contends that the Hema civilians were part of self-defence forces. Relying on D-0007's testimony in the *Lubanga* case, it argues that these forces were independent from the UPC/FPLC and did not fight with, or under, them.<sup>177</sup>

86. This argument should be dismissed. Not only is it based on supposition and has no grounding in the evidence of the assaults on Banyali-Kilo and Walendu-Djatsi, this contention is contradicted by evidence to the contrary.

87. *First*, the evidence shows that the Hema civilian supporters did not constitute a homogenous group, but was composed of Hema civilians recruited specifically for each assault. For the assault on Banyali-Kilo, P-38 states that some of the civilians used by the UPC/FPLC were from Mongbwalu, while others had been brought from Mabanga.<sup>178</sup> Some of these civilians were forced to assist the UPC/FPLC, while others did so voluntarily.<sup>179</sup> P-17 mentions the participation of civilians who were part of self-defence forces (“comité d'autodéfense”) commanded by a civilian coordinator who acted as the link between the population and the UPC/FPLC, including by providing the UPC/FPLC with

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<sup>176</sup> ICC-01/04-02/06-203-AnxA, paras. 5, 46, 54, 60, 77, 126, 142, 144-145, 148-150, 152, 154, 157-159, 162, 167-170 and 172-176.

<sup>177</sup> ICC-01/04-02/06-T-9-Red-FRA, p.80, line 21 to p.81, line 4; ICC-01/04-02/06-263-Conf-AnxA, p.80, line 21 to p.81, line 4.

<sup>178</sup> P-0038: EVD-PT-OTP-06236, at 0135, line 308 to 0136, line 334, and 0137, lines 365 to 381; EVD-PT-OTP-06240, at 0195, line 109 to 0195, line 150.

<sup>179</sup> P-0038: EVD-PT-OTP-06239, at 0171, lines 297 to 310.



recruits.<sup>180</sup> P-5 states that the Hema self-defence forces had been under the tutelage of the UPC since as early as 2001.<sup>181</sup>

88. *Second*, the Prosecution relies on evidence from UPC/FPLC military insiders that the UPC/FPLC used Hema civilians and instructed them to commit crimes. The UPC/FPLC's [REDACTED] P-55, describes a "system of war", known to everyone, in which the UPC engaged Hema civilians to come to captured areas or villages alongside the UPC/FPLC troops to pillage, take metal roofs from houses and burn the houses down.<sup>182</sup>

89. Bosco Ntaganda and UPC/FPLC commanders would brief Hema civilians and give them instructions before an assault.<sup>183</sup> P-55 [REDACTED] Bosco Ntaganda and his co-perpetrators, immediately prior to the assault on Walendu-Djatsi, during which Thomas Lubanga stated that the Hema civilians should be briefed about the assault.<sup>184</sup> P-38 confirms that Hema civilians participated in the assault on Kobu and some were injured.<sup>185</sup>

90. UPC/FPLC section commanders were instructed by their superiors to find Hema civilians to carry the ammunition and weapons before each assault.<sup>186</sup>

91. Prior to the assault on Banyali-Kilo, civilians were recruited in Mabanga.<sup>187</sup> These civilians accompanied the troops and carried their ammunitions and weapons. P-768 states that Bosco Ntaganda armed these Hema civilians<sup>188</sup> and, in

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<sup>180</sup> P-0017: EVD-PT-OTP-06107, at 0498, line 90 to 0499, line 142.

<sup>181</sup> EVD-PT-OTP-04084, p.12, para.52.

<sup>182</sup> P-0055: EVD-PT-OTP-06506, at 1072, line 330 to 1079, line 600.

<sup>183</sup> P-0055: EVD-PT-OTP-06506, at 1072, line 330 to 1079, line 600.

<sup>184</sup> P-0055: EVD-PT-OTP-06506, at 1076, line 484 to 1077, line 541.

<sup>185</sup> P-0038: EVD-PT-OTP-06239, at 0170, line 264 to 0171, line 288.

<sup>186</sup> P-0038: EVD-PT-OTP-06239, at 0172, lines 318 to 328.

<sup>187</sup> P-0038: EVD-PT-OTP-06239, at 0173, lines 347-356.

<sup>188</sup> P-0768: EVD-PT-OTP-06484, at 0519, lines 570 to 584.

Mongbwalu, he witnessed Bosco Ntaganda repeatedly ordering his troops and young Hema civilians to “eliminate all the Lendu”.<sup>189</sup>

92. P-17, P-38 and P-55 confirm that the UPC/FPLC used civilians during its assault on Banyali-Kilo. Witnesses P-17 and P-38 state that Hema civilians accompanied the UPC/FPLC during its assault, with the intention to pillage Mongbwalu, and were used to carry their ammunition, weapons and supplies.<sup>190</sup> This is corroborated by P-55 who, on a video recording of the assault shown to him by Bosco Ntaganda, saw Gegere civilians behind the troops, carrying the ammunition and weapons for the UPC/FPLC troops.<sup>191</sup> In addition to using them for logistical tasks, Hema civilians armed with machetes went from house to house and killed anyone suspected of being a Lendu fighter.<sup>192</sup>

93. P-17 and P-38 state that, after the fighting in Mongbwalu and Sayo, Hema civilians were forced by the UPC/FPLC to gather the bodies of the dead and dig a mass grave to bury them.<sup>193</sup> According to P-17, one of the reasons for the population to accompany the UPC/FPLC was to loot and they actively engaged in pillaging.<sup>194</sup> P-38 states that commanders instructed Hema civilians to pillage for them, after which they would share the booty.<sup>195</sup>

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<sup>189</sup> P-0768: EVD-PT-OTP-06483, at 0499, lines 845 to 863; EVD-PT-OTP-06484, at 0517, line 509 to 0518, line 546.

<sup>190</sup> P-0017: EVD-PT-OTP-06107, at 0496, line 14 to 0502, line 240; P-0038: EVD-PT-OTP-06236, at 0135, line 308 to 0136, line 334, and 0137, lines 365 to 381; EVD-PT-OTP-06240, at 0195, line 109 to 0195, line 150, EVD-PT-OTP-06239, at 0173, lines 347 to 364.

<sup>191</sup> P-0055: EVD-PT-OTP-06502, at 0963, lines 970 to 995.

<sup>192</sup> P-0017: EVD-PT-OTP-06107, at 0496, line 14 to 0502, line 240.

<sup>193</sup> P-0038: EVD-PT-OTP-06236, at 0135, line 308 to 0136, line 334, and 0137, lines 365 to 381; EVD-PT-OTP-06240, at 0195, line 109 to 0195, line 150; P-0017: EVD-PT-OTP-06107, at 0496, line 14 to 0502, line 240.

<sup>194</sup> P-0017: EVD-PT-OTP-06107 at 0496, lines 33 to 39.

<sup>195</sup> P-0038: EVD-PT-OTP-06239, at 0173, lines 347 to 364.

## II. Contextual Elements of War Crimes

### *A. Armed Conflict Not of an International Character*

94. The Prosecution has demonstrated substantial grounds to believe the contextual elements of war crimes existed during the period of the charges. The Defence takes issue with only the first contextual element related to the existence of a protracted armed conflict.<sup>196</sup> The Prosecution has provided ample evidence from which to conclude that there was a protracted armed conflict in Ituri and that this conflict occurred between organised armed groups.

### *B. Existence of a protracted armed conflict*

95. The Prosecution relies on the various assaults perpetrated by the UPC/FPLC in predominantly non-Hema areas as well as various assaults perpetrated by the other main parties to the conflict (in particular, the Lendu-Ngiti militia and their APC allies) to demonstrate the existence of the protracted armed conflict.

96. The Prosecution relies on the direct evidence of witnesses who wrote or contributed to reports based on the information collected from site visits and their records of the contemporaneous accounts of direct eyewitnesses, as well as other independent observers.<sup>197</sup> P-317, who was the Head of the Special Investigation Unit of the Human Rights Division of MONUC and travelled in the Ituri region during the relevant period, authenticates the conclusions in the *Special Report on*

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<sup>196</sup> ICC-01/04-02/06-263-AnxB, pp.1-5.

<sup>197</sup> P-0360: EVD-PT-OTP-04823 at 0038-0050.

*the events in Ituri, January 2002-December 2003*<sup>198</sup>. Similarly, P-315, a researcher with an international NGO, authenticates the two contemporaneous reports she researched.<sup>199</sup> The inter-ethnic conflict that existed in Ituri during the period of the charges is well-documented in these reports.<sup>200</sup>

97. This evidence establishes that the fighting between the armed groups was neither sporadic nor isolated. Rather, it spanned the period of the charges and was marked by periods of intensity.<sup>201</sup> No peaceful settlement was achieved prior to the end of the period of the charges despite the negotiation of ceasefire agreements in May and June 2003. The fact that MONUC was given a Chapter VII mandate by the Security Council on 28 July 2003 authorising it to use “all necessary means to fulfil its mandate in the Ituri district” is itself evidence of the on-going nature of this conflict after June 2003.<sup>202</sup> Of note, the MONUC mandate was extended on 1 October 2004, and authorisation was given to increase the personnel by 5,900, because the situation in the DRC continued “to constitute a threat to international peace and security in the region”.<sup>203</sup>

98. The absence of explicit reference to UPC-led assaults after May 2003 in the chronology attached to the *Special report on Ituri* does not prove that there was no longer a conflict, as the Defence asserts.<sup>204</sup> In fact, this chronology lists numerous attacks following the arrival of the Artemis forces in which the UPC/FPLC was

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<sup>198</sup> EVD-PT-OTP-06473 at 0289-0293, paras.19-37. In this statement, P-0317 authenticates DRC-OTP-0129-0267, a deteriorated version of EVD-PT-OTP-00779 [*Special report on the events in Ituri, January 2002-December 2003*] as only the deteriorated version of this report was shown to her during the interview. Both versions of the report are disclosed and differ only in that the last three pages are missing from the deteriorated version. P-0046, a UN investigator and Child Protection Officer who travelled to the Ituri region during the relevant period and contributed to EVD-PT-OTP-00779 also gives evidence about the inter-ethnic conflict: EVD-PT-OTP-03501 at 0019-0023 and 0034.

<sup>199</sup> P-0315: EVD-PT-OTP-06363; EVD-PT-OTP-06364.

<sup>200</sup> EVD-PT-OTP-00779 at 0425-0433, 0472-0483; EVD-PT-OTP-02800 at 0260-263; EVD-PT-OTP-00782 at 0823-0825; and EVD-PT-OTP-00781 at 0649-0688.

<sup>201</sup> EVD-PT-OTP-00779 at 0425-0433, 0472-0483; EVD-PT-OTP-02288 at 0378-0383.

<sup>202</sup> EVD-PT-OTP-02814 at 0171, para.26.

<sup>203</sup> EVD-PT-OTP-03484 at 0674-0675; *See also*: EVD-PT-OTP-03486 and EVD-PT-OTP-03487.

<sup>204</sup> ICC-01/04-02/06-263-Conf-AnxB, pp.3-4.

the target.<sup>205</sup> Indeed, the assaults perpetrated by both sides of the conflict are relevant for the purposes of assessing the existence of a protracted armed conflict, not only those military assaults instigated by the UPC.

99. Contrary to the Defence assertion, the Prosecution has provided ample evidence of UPC/FPLC and Lendu-Ngiti/APC assaults after June 2003 to demonstrate the existence of a protracted armed conflict, including: an assault by Lendu militia on Tchomia on 15 July,<sup>206</sup> on Nizi on 20 July,<sup>207</sup> and on Fataki on 19 and 20 July and then again on the 31 July 2003.<sup>208</sup> There is evidence of an assault by Lendu militia on civilians in Kasenyi on 23 July 2003<sup>209</sup> and of Hema civilians being killed by FAPC forces at Drodo on 26 July 2003.<sup>210</sup>

100. The Prosecution has also provided evidence of UPC/FPLC assaults on the villages of Ngongo and Gbodu and on Bambu-Mbau road in August 2003,<sup>211</sup> as well as a UPC/FPLC assault against a PUSIC stronghold in Mutumbi on 27 August 2003.<sup>212</sup> There is evidence of a UPC/FPLC assault on Tchomia on 31 October 2003, not only from political insider P-12, as suggested by the Defence,<sup>213</sup> but from a variety of sources, including a November 2003 MONUC report submitted pursuant to the Security Council resolution.<sup>214</sup> The Prosecution also

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<sup>205</sup> EVD-PT-OTP-00779 at 0449-0450, 0452, 0454-0455 and 0472-0483. See also: EVD-PT-OTP-04866 at 0110-0114.

<sup>206</sup> P-0012: EVD-PT-OTP-01890 at 0154-0155, paras. 378-381; and EVD-PT-OTP-00779 at 0449, para.87.

<sup>207</sup> EVD-PT-OTP-00779, para.104, at 0452; EVD-PT-OTP-06057, at 0460.

<sup>208</sup> EVD-PT-OTP-00779, pp.28-29, paras.91-92; EVD-PT-OTP-04866, at 0112; and EVD-PT-OTP-00779, at 0449-0450, paras.91-92.

<sup>209</sup> P-0012: EVD-PT-OTP-01890, at 0155, para.384; EVD-PT-OTP-00779, at 0449, para.90.

<sup>210</sup> EVD-PT-OTP-04866, p.59 at 0112.

<sup>211</sup> EVD-PT-OTP-02530 at 0828; EVD-PT-OTP-00059 at 0038; EVD-PT-OTP-00692 at 0012.

<sup>212</sup> EVD-PT-OTP-00692 at 1648.

<sup>213</sup> ICC-01/04-02/06-263-Conf-AnxB, p.4.

<sup>214</sup> EVD-PT-OTP-00776 at 0217, paras. 9-11; EVD-PT-OTP-02162 at 0286; EVD-PT-OTP-01554 at 0228 and 0241-0242; EVD-PT-OTP-01890 at paras. 349-354 ; EVD-PT-OTP-00254; EVD-PT-OTP-04791 at 1654-1655.

provided evidence of an assault by the UPC/FPLC on the Lendu village of Lingabo on 26 November 2003.<sup>215</sup>

101. Finally, there is evidence of an assault by the FNI on Nizi on 23 August 2003,<sup>216</sup> an FNI/FRPI assault on Kachele on 6 October 2003,<sup>217</sup> and an FNI/FRPI attack on a PUSIC camp in Tagaba on 16 January 2004.<sup>218</sup> The evidence demonstrates an assault against Alur civilians in Gobu by Lendu forces on 15 January 2004.<sup>219</sup>

102. The Prosecution refers to a series of assaults as evidence of the protracted armed conflict in the document containing the charges (“DCC”). The attacks mentioned therein are not meant to be exhaustive. As such, the evidence of the UPC/FPLC assault on the Lendu village of Lingabo on 26 November 2003 is properly in evidence to support the existence of the protracted armed conflict during the period of the charges.

### *C. Organised armed groups*

103. The various parties to the conflict in Ituri, in particular the UPC, the Lendu-Ngiti militia and their allies the APC, as well as PUSIC and the FAPC were organised armed groups capable of engaging in protracted armed violence.

104. There is no statutory definition of an “organised armed group” for the purposes of establishing a non-international armed conflict. The Pre-Trial Chamber in *Lubanga* held that the groups must have “some degree of organisation and the ability to plan and carry out sustained military

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<sup>215</sup> EVD-PT-OTP-04791 at 1658.

<sup>216</sup> EVD-PT-OTP-00779, para.104, at 0452.

<sup>217</sup> EVD-PT-OTP-04791 at 1652; EVD-PT-OTP-00779 at 0450, para. 93; EVD-PT-OTP-04866, at 0113.

<sup>218</sup> EVD-PT-OTP-04791 at 1662-1663.

<sup>219</sup> EVD-PT-OTP-00779, at 0427, para. 10.

operations”.<sup>220</sup> This test was developed by the Trial Chamber in *Lubanga*, which held that the armed groups “must have a sufficient degree of organisation, in order to enable them to carry out protracted armed violence.”<sup>221</sup>

105. The UPC/FPLC was an organised armed group throughout the period of the charges. The Defence asserts that the FPLC only became an armed group within the meaning of article 8(2)(f) after September 2002. The evidence shows otherwise.

106. The FPLC was *formally* established in September 2002, when Thomas Lubanga returned to Bunia.<sup>222</sup> However, the evidence shows that the UPC’s military wing *in fact* existed prior to that date.

107. The UPC’s own internal documents and decrees refer to UPC’s military wing, by reference to a 17 April 2002 UPC decree whereby the UPC leadership distances itself from the RCD/K-ML and declares itself a political-military movement.<sup>223</sup> Another UPC document states that the UPC had the political and military control of Ituri since 9 August 2002.<sup>224</sup> The fact that the UPC/FPLC took over Bunia and assumed military and administrative control of Ituri in August 2002 is evidence that the UPC/FPLC was an organised movement by this time, with the military capacity to dislodge the RCD-ML and oust Lopondi from power.

108. In addition to this documentary evidence, several witnesses state that they joined the UPC in a military capacity prior to September 2002. Defence witness D-0006 states that he joined the UPC towards the end of May 2002 in a military role.<sup>225</sup> Similarly, Defence witness D-0037 states that he joined the UPC, under the

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<sup>220</sup> ICC-01/04-01/06-803-tEn, para.233.

<sup>221</sup> Ibid.

<sup>222</sup> P-0012: EVD-PT-OTP-06125 at 0089, lines 18-21; P-0014: EVD-PT-OTP-06131 at 0664, line 25 to 0667, line 10.

<sup>223</sup> EVD-PT-OTP-00938; EVD-PT-OTP-01540; EVD-PT-OTP-02468; EVD-PT-OTP-03785, at 0070.

<sup>224</sup> EVD-PT-OTP-00414, at 0272, points 4, 6; EVD-PT-OTP-01628; EVD-PT-OTP-02560 at 0141, para.2.

<sup>225</sup> D-0006: EVD-PT-OTP-06606 at 0352, line 8.

military command of Bosco Ntaganda in the middle or the end of June 2002.<sup>226</sup> P-17 states that he joined the UPC in early August 2002, just before the UPC took over Bunia.<sup>227</sup> P-14 states that he visited the UPC headquarters (in Bunia) in July/August 2002 and saw troops engaged in military training.<sup>228</sup> He also saw Floribert Kisembo there at this time.<sup>229</sup> P-16, former UPC military insider, gave evidence that when he joined the UPC/FPLC two weeks after Lopondo left Bunia (in late August 2002), there was already a structure to its armed wing, the FPLC, with individuals assigned to different positions within the military hierarchy.<sup>230</sup>

109. The other armed groups involved in the conflict, including the Lendu/Ngiti militia and their allies the APC, as well as PUSIC, were capable of carrying out protracted armed violence and therefore were “organised armed groups”. Evidence of this capacity is demonstrated by the series of battles and assaults in which these armed groups were involved.

110. Several of these large-scale Lendu/Ngiti military offensives, sometimes in coordination with their APC allies, were set out in the submissions<sup>231</sup> including the attack on Nyakunde on 5 September 2002,<sup>232</sup> on Bogoro on 24 February 2003,<sup>233</sup> and the attacks on Tchomia, Kasenyi and Fataki in 2003.<sup>234</sup> The UPC/FPLC logbook also contains numerous entries about enemy attacks, including some that

<sup>226</sup> D-0037: EVD-PT-D18-00004, p.20, line 22, p.21, lines 8-12.

<sup>227</sup> P-0017: EVD-PT-OTP-06147 at 1936, lines 8-24, at 1952, lines 12-15.

<sup>228</sup> P-0014: EVD-PT-OTP-06129 at 0490, lines 21-24; 0493, lines 13-20; 0495, line 23 to 0496, line 3; 0512, lines 1-2; 0513, lines 6-17; EVD-PT-OTP-06135 at 0961, lines 8-13.

<sup>229</sup> P-0014: EVD-PT-OTP-03854 at 1015, paras.67-68.

<sup>230</sup> EVD-PT-OTP-06139 at 1348, line 9-11, and line 24 to 1349, line 13; EVD-PT-OTP-06141 at 1449, lines 5-11; at 1451, line 10-16.

<sup>231</sup> ICC-01/04-02/06-258-Conf-AnxA2, pages 39-40, para.79.

<sup>232</sup> Ibid; EVD-PT-OTP-00782, pp. 30, 31, 34; EVD-PT-OTP-00779, paras. 52, 56, 57; EVD-PT-OTP-06058, para. 413; EVD-OTP-00405 at 0017; EVD-OTP-00623, at 0470.

<sup>233</sup> EVD-PT-OTP-00779, p.22, para.65; EVD-PT-OTP-06473, p.7, para. 36, p.11, para.76. P-0317 refers to the document EVD-PT-OTP-00779 which is a deteriorated version to the document EVD-PT-OTP-00779 shown to her during the re-interview.

<sup>234</sup> ICC-01/04-01/06-2842, paras.544-546.



specifically refer to the APC and Lendu militia.<sup>235</sup> There is also evidence of the Lendu/Ngiti militia repelling UPC/FPLC assaults, such as in Mongbwalu in early November 2002 (shortly before the UPC's assault on Banyali-Kilo).<sup>236</sup>

### III. Individual Crimes Charged

#### *A. The non-Hema civilian population was forcibly displaced*

111. The Prosecution alleges that Bosco Ntaganda ordered the displacement of and forcibly transferred the non-Hema civilian populations of the Banyali-Kilo and Walendu-Djatsi *collectivités*.<sup>237</sup> The Defence claims that the civilian populations of the areas that the UPC/FPLC assaulted fled long before the arrival of their forces, thereby denying any link between the assaults and the transfer of civilians and contesting the forcible nature of their transfer.<sup>238</sup> This argument is factually and legally incorrect.

112. *First*, it is incorrect to suggest that, in order for a civilian population to be forcibly transferred, this population needs to be *actually* targeted or physically harmed. The Statute and the Elements of Crimes ("Elements"), as confirmed by this Chamber, make clear that

*[t]he term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological*

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<sup>235</sup> EVD-PT-OTP-00263, at 0036-0037, 0090, 0130, 0144 and 0146; EVD-PT-OTP-03975 at 0930-0931, 0984, 1024, 1038 and 1040.

<sup>236</sup> P-0804; EVD-PT-OTP-06391 at 1132, para.18; EVD-PT-OTP-00781, p.27; EVD-PT-OTP-00779, para.101.

<sup>237</sup> ICC-01/04-02/06-203-AnxA, page 60, counts 12 and 13.

<sup>238</sup> ICC-01/04-02/06-T-10-CONF-FRA, p.11, line 22 to p.12 line 24; ICC-01/04-02/06-263-Conf-AnxB, pp.9-10.

*oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.*<sup>239</sup>

113. The Chamber, in the case of *Ruto et al.*, has found the crime of deportation and forcible transfer to be “an open-conduct crime” which requires the Prosecutor to demonstrate that “one or more acts that the perpetrator has performed produced the effect to deport or forcibly transfer the victim”.<sup>240</sup>
114. Accordingly, where civilians fled upon becoming aware of the imminence of a UPC/FPLC assault, especially in the context of a widespread or systematic attack against a civilian population, there is a clear link between the displacement or forcible transfer and the assault. Non-Hema civilians, aware of the UPC/FPLC’s pattern of criminal conduct and the context of “ethnic war”,<sup>241</sup> fled as a result of their legitimate fear that they would be targeted and become the victims of the UPC’s crimes, in the same way non-Hema civilians had been victimised by the UPC/FPLC in previous assaults.
115. *Second*, the Defence’s assertion is not factually supported by the evidence. Indeed, it is negated by a wealth of evidence demonstrating, to the contrary, that civilians gradually fled their homes between the moment they became aware of an imminent UPC/FPLC assault, by the massive arrival of displaced civilians from other villages, by the approaching sound of gun or artillery fire, or because the UPC/FPLC troops were targeting them.
116. With respect to Banyali-Kilo, the Defence suggests, solely on the basis of a video shot in Mongbwalu several days after the UPC/FPLC’s assault that the civilian population of Mongbwalu and Sayo had fled long before the arrival of the FPLC.<sup>242</sup> The Defence fails to specify how the video supports its assertion.

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<sup>239</sup> Rome Statute, articles 7(1)(d) and 7(2)(d); Elements of Crimes, p.6, footnote 12.

<sup>240</sup> ICC-01/09-01/11-373, para.244.

<sup>241</sup> See paras.19-91 of these submissions.

<sup>242</sup> ICC-01/04-02/06-263-Conf-AnxB, p.10, footnote 19.

117. In fact, the video confirms that the civilian population fled on the first day of the UPC/FPLC's assault. At 01:57:18, the journalist questions a Gegere (Hema North) woman who returned to Mongbwalu on her situation. The journalist notes that the women are exhausted after walking a long distance to come back to the city. One woman states that she had spent approximately six days in the bush.<sup>243</sup> Given that the video was shot three days after the end of the assault,<sup>244</sup> and that the assault took three days,<sup>245</sup> this woman fled the area on the first day of the assault.

118. The video also supports the Prosecution's allegation that the non-Hema civilian population of Mongbwalu was displaced. It shows Mongbwalu, a normally densely populated town, deserted by its inhabitants and confirms that the civilian population had fled as a result of the UPC/FPLC's assault. In Floribert Kisémbé's words: *"les habitants, [...] ils s'étaient enfuis très loin à cause de la peur"*.<sup>246</sup>

119. Moreover, the Prosecution's evidence demonstrates that Bosco Ntaganda ordered his troops to fire upon fleeing civilians. Throughout the assault on Banyali-Kilo, civilians were targeted and killed as they were running, while others, who could not flee, were captured and executed. Those who sought to return to their homes were also killed. P-768 was present on one such occasion, when two Lendu civilians tried to return to their houses, in Nzebi, and were shot and killed by Bosco Ntaganda's bodyguards, after Bosco Ntaganda ordered them to do so.<sup>247</sup>

120. An eyewitness met by P-315 was present in Pluto when the UPC/FPLC attacked: *"I fled from Pluto and ran to Mongbwalu [...] As I was running I saw people*

<sup>243</sup> EVD-PT-OTP-06338, at 01:57:18 to 01:58:43; EVD-PT-OTP-06511, at 1392, line 2069 to 1393, line 2113.

<sup>244</sup> EVD-PT-OTP-06338, at 00:05:32 to 00:06:09; EVD-PT-OTP-06511, at 1338, lines 84 to 91.

<sup>245</sup> P-0768; EVD-PT-OTP-06483, at 0492, lines 603-607; EVD-PT-OTP-06489, at 0620, lines 519-529.

<sup>246</sup> EVD-PT-OTP-06511, at 1356, lines 778-782.

<sup>247</sup> EVD-PT-OTP-06425, 1706-1707, ll.705-752

*being hit by bullets. Women and children were falling. Some people did not run and hid in their houses in Pluto. I heard afterwards that these people were all slaughtered.”*<sup>248</sup>

121. P-103 states that he was in Mongbwalu when he heard the UPC/FPLC attack the villages of Pili Pili and Pluto, North of Mongbwalu, with guns and mortars. He states that, the men then decided to send the majority of the women, children and elderly people to the surrounding forests, whilst they would stay to keep their goods. When the UPC/FPLC attacked Mongbwalu airport, in the East, he and many other civilians fled towards Kobu.<sup>249</sup> Witnesses P-804 was also among these civilians.<sup>250</sup> P-18, P-19, P-105, P-121, P-300, and P-792, all in Walendu-Djatsi at the time, witnessed the arrival of many refugees in the area between Kilo, Kobu, Nyangaray, Lipri, Mwanga and Gutsi.<sup>251</sup>

122. Other civilians fled towards the West, to Sayo.<sup>252</sup> P-17 testified that the civilian population of Mongbwalu had fled to Sayo and described how these civilians were targeted by UPC/FPLC troops: *“The[r]e were civilian people who were coming out from their houses. The soldiers who were there, they continued shooting and you could see people falling to the ground. People were running across the field. You’d shoot here, you’d shoot there, people kept falling.”*<sup>253</sup> As the UPC/FPLC advanced towards Sayo, the troops pursued and shot at the fleeing civilian population.<sup>254</sup> P-800 was among the civilians who were being shot at while fleeing Sayo.<sup>255</sup> P-17 refers to specific

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<sup>248</sup> EVD-PT-OTP-00782, 0828; EVD-PT-OTP-06363, at 0994, para.23

<sup>249</sup> P-0103: EVD-PT-OTP-01884, paras.16-24.

<sup>250</sup> P-0804: EVD-PT-OTP-06391, paras. 8-19;

<sup>251</sup> P-0018: EVD-PT-OTP-01816 at 0119, para.16; P-0019: EVD-PT-OTP-02447 at 0144, para.16; P-0105: EVD-PT-OTP-00736 at 0386, para. 24 and 0387, paras.28, 29; P-0121: EVD-PT-OTP-06611 at 0270, paras.22, 23, at 0271, paras.26, 27, at 0272, paras.28, 29; P-0300: EVD-PT-OTP-03362 at 0289 para.9, at 0290, para.10; EVD-PT-OTP-06265 at 1322, paras.38-41; P-0792: EVD-PT-OTP-06327 at 0145, paras.55, 56; at 0146, paras.57, 59; at 0147, para.65.

<sup>252</sup> P-0800: EVD-PT-OTP-06476 at 0642-0643.

<sup>253</sup> P-0017: EVD-PT-OTP-06149 at 2166, lines 5-8; EVD-PT-OTP-04137 at 1679, lines 853-858.

<sup>254</sup> P-0017: EVD-PT-OTP-06110, at 0571, lines 511 to 536.

<sup>255</sup> P-0800: EVD-PT-OTP-06476 at 0642-0643.

examples of civilians who were killed by the UPC/FPLC, including an old unarmed man<sup>256</sup> and a young girl.<sup>257</sup>

123. In Sayo, Bosco Ntaganda told P-17 to shoot in the direction of the fleeing civilians.<sup>258</sup> Later, when the UPC/FPLC troops reached the end of Sayo, Commander Kasangaki ordered P-17 to shoot with a grenade launcher on the population that was fleeing to the valley in the West of Sayo, towards Nzebi.<sup>259</sup>

124. With respect to the assault on Walendu-Djatsi, the Defence refers to specific portions of the statements of Prosecution witnesses, arguing that these portions demonstrate that the civilian population of Walendu-Djatsi fled long before the arrival of the UPC/FPLC troops. This evidence does not support the Defence's assertion. To the contrary, it supports the Prosecution's allegation that civilians were forcibly transferred as a result of the UPC/FPLC's assault.

125. By way of example, the Defence relies on P-17 and P-18, neither of whom support its position. P-17 confirms that the civilian population of Kobu fled when the UPC/FPLC attacked.<sup>260</sup> P-18 and her family fled [REDACTED] shots being fired in Kobu and learned from civilians who had fled Kobu that the UPC had attacked the village. The witness later fled to Buli, where she found innumerable people, a majority of whom were Lendu, who had fled the villages of Bambu, Lipri, Mpetsi, Enoka, Unza, Retzo and Mongbwalu as a result of the UPC/FPLC ongoing assault.<sup>261</sup> P-18 and her family were subsequently captured by UPC/FPLC troops in the bush, where they were hiding. She and other civilians were then taken to Sangi, where UPC/FPLC troops beat them, raped the women and killed several of

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<sup>256</sup> P-0017: EVD-PT-OTP-06110, at 0571, lines 512 to 516.

<sup>257</sup> P-0017: EVD-PT-OTP-06110, at 0572, lines 561 to 573.

<sup>258</sup> P-0017: EVD-PT-OTP-06150, at 2266, line 14 to 2267, line 13; 2268, lines 5-22.

<sup>259</sup> P-0017: EVD-PT-OTP-06110 at 0570, line 495 to 0573, line 528.

<sup>260</sup> ICC-01/04-02/06-263-Conf-AnxB, p.10; P-0017: EVD-PT-OTP-06286, at 0790, line 414.

<sup>261</sup> ICC-01/04-02/06-263-Conf-AnxB, p.10.

them. P-18 was raped, [REDACTED] and left for dead.<sup>262</sup> The evidence of these two witnesses fully supports the charges of forcible transfer.

126. The Defence's reliance on P-103 is equally puzzling. P-103 states that, when the UPC attacked Kobu, the population fled to Gutsi, Jonde, Tchubiliza, Buli, Bembu, Tshumbo and Bigalo.<sup>263</sup> He himself stayed in Gutsi and when the UPC/FPLC attacked surrounding villages, such as Balu, Thekpar and Batsobi, the population left Gutsi to sleep in the forest.<sup>264</sup>

127. Lastly, the Defence refers to P-127 who fled Petsy when he saw UPC/FPLC troops advance towards the village.<sup>265</sup> P-127 explains that each time the UPC/FPLC advanced, cases of assassinations were reported. In particular, he mentions the killing of a man who was shot from behind while fleeing, the killing of an old man in his field and the killing of a mentally disabled man whose body was thrown in the latrines of Lipri.<sup>266</sup> P-127 describes the assault as the "*opération de l'UPC de chasser les Lendu, brûler les villages et piller leurs biens*" and explains: "*Les déplacés reculaient chaque fois que l'UPC avançait. Quand nous sommes arrivés à Petsy, l'attaque s'était généralisée contre les villages Lendu.*"<sup>267</sup>

128. Contrary to the Defence's assertion, the evidence of these four witnesses, together with the statements of 13 other displaced civilians,<sup>268</sup> shows that the population fled their villages *upon being attacked by the UPC/FPLC*, only to find themselves trapped in pockets between UPC/FPLC positions. UPC/FPLC troops destroyed and burned entire villages, leaving civilians no other choice than to flee and live in the bush, where the UPC/FPLC hunted them down, killing any non-Hema

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<sup>262</sup> EVD-PT-OTP-01816, at 0120, para.24 to 0124, para.38.

<sup>263</sup> EVD-PT-OTP-01884, at 0174, para.24.

<sup>264</sup> EVD-PT-OTP-01884, paras.26-27.

<sup>265</sup> ICC-01/04-02/06-263-Conf-AnxB, page 10, footnote 20; EVD-PT-OTP-02687, para.32.

<sup>266</sup> EVD-PT-OTP-02687, paras.32-35.

<sup>267</sup> EVD-PT-OTP-02687, para.31.

<sup>268</sup> In addition to witnesses P-0018 P-0103 and P-0127, witnesses P-0019, P-0027, P-0100, P-0105, P-0106, P-0107, P-0108, P-0113, P-0121, P-0300, P-0792, P-0804 and P-0805 were among those who were forcibly displaced as a result of the UPC/FPLC's assault on Walendu-Djatsi.

civilian found, or killed them when they tried to return to their homes. Former [REDACTED] insider P-55 confirms that once an area was captured by the UPC no Lendu person could return or would be killed.<sup>269</sup>

129. The evidence cited above, along with other Prosecution evidence cited during the confirmation hearing and in the IDAC, supports the Prosecution's charge that the civilian population was forcibly transferred as a result of the UPC/FPLC assault on the *collectivité*. The civilian inhabitants were forced to displace due to the UPC/FPLC's threat of force and coercion, directly caused by fear of violence, duress, and physical violence against them.

130. The evidence also provides substantial grounds to believe that the displacement resulted from Bosco Ntaganda's orders. Bosco Ntaganda ordered P-768 to chase the Lendu away from Mongbwalu.<sup>270</sup> Bosco Ntaganda's orders to displace civilians were communicated down the chain of command during the Walendu-Djatsi attack. P-17's commanders ordered their troops to flatten the villages and to chase the population away.<sup>271</sup>

### ***B. Attacks were directed against the civilian population***

131. The UPC/FPLC attacked the non-Hema civilian populations of Banyali-Kilo and Walendu-Djatsi.<sup>272</sup> The Defence denies this allegation, arguing that these assaults had purely military objectives.<sup>273</sup>

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<sup>269</sup> P-0055: EVD-PT-OTP-06506, at 1070-1071, lines 269-309.

<sup>270</sup> P-0768: EVD-PT-OTP-06482 at 0469, ll. 759-760; EVD-PT-OTP-06482 at 0473, ll. 900-901.

<sup>271</sup> P-0017: EVD-PT-OTP-06149 at 2187, ll. 8-18. See also P-0038, EVD-PT-OTP-06236 at 0142-0143, ll. 593-603.

<sup>272</sup> ICC-01/04-02/06-203-AnxA, p.58, count 3.

<sup>273</sup> ICC-01/04-02/06-263-Conf-AnxA, pp.9 to 38.

132. The fact that the UPC/FPLC's assaults in Banyali-Kilo and Walendu-Djatsi may have had certain military objectives does not negate the existence of an attack against civilians. Even if the assaults involved combat against the Lendu, and possibly APC fighters in both areas, the UPC/FPLC could differentiate between these fighters and the civilians. The evidence shows that the UPC/FPLC deliberately targeted the civilian population without distinction.
133. Prosecution witnesses squarely explain how they *could* distinguish between the civilian population and combatants, yet they did not.
134. The Defence relies on P-17, P-38 and P-768 who participated in the assault on Banyali-Kilo. These witnesses described, *inter alia*: that the UPC/FPLC fought the APC and Lendu militia who were considered the enemy; that the objective was to chase the enemy and destroy their headquarters in Mongbwalu; that the UPC/FPLC first attacked the airport, then the Lendu military camp and finally Sayo, where the enemy was particularly strong; that the UPC/FPLC met a strong armed resistance. On the basis of this evidence, the Defence suggests that the UPC/FPLC carried out a purely military operation and did not intend to attack the civilian population of Banyali-Kilo.<sup>274</sup>
135. Yet, this assertion is denied by the very same witnesses. All three witnesses, one [REDACTED] and two soldiers who fought in distinct heavy weapons units during the assault, witnessed Bosco Ntaganda giving instructions to his commanders and troops to target and kill civilians.<sup>275</sup> During a military parade,

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<sup>274</sup> ICC-01/04-02/06-263-Conf-AnxA, pp.9 to 11.

<sup>275</sup> P-0017: EVD-PT-OTP-04138 at 1684, lines 17-41; EVD-PT-OTP-06149 at 2166, line 23 to 2167, line 23, at 2162, l.15-20; EVD-PT-OTP-06109 at 0538-0539, 0545-0546, 0548, 0550-0553, 0555-0556; EVD-PT-OTP-06110 at 0569, line 452 to 0571, line 529; P-0038: EVD-PT-OTP-03725 at 2473, 2477, line 530 to 2479, line 592, 2489, 2500, lines 1198-1209; EVD-PT-OTP-03728 at 2560, lines 827-846; EVD-PT-OTP-03743 at 3020, line 662 to 3021, line 674; EVD-PT-OTP-03734 at 2764-2767; EVD-PT-OTP-06234 at 0101, lines 424-436; EVD-PT-OTP-06235 at 0117, lines 291-310; EVD-PT-OTP-06235 at 0115, lines 196-201; EVD-PT-OTP-06240 at 0199, lines 256-261; P-0768: EVD-PT-OTP-06422 at 1632, line 818 to 1633, line 867; EVD-PT-OTP-06424 at 1671-1673; EVD-PT-OTP-06423 at 1645, lines 270-277; EVD-PT-OTP-06425 at 1709; EVD-PT-OTP-06428 at 1757-1758, lines 680-687 and 726-734; EVD-PT-OTP-06425 at 1696, line 350 to 1697,



prior to the assault, Bosco Ntaganda told his troops that everyone they would encounter in Mongbwalu was the enemy and ordered his troops to kill everyone.<sup>276</sup> During the assault he told his troops that all Lendu were the enemies, without making any distinction,<sup>277</sup> and instructed the heavy weapons units to fire in the direction of the population fleeing the UPC/FPLC's advance.<sup>278</sup> The same witnesses relied upon by the Defence also confirm that Bosco Ntaganda targeted and killed civilians himself.<sup>279</sup>

136. The Defence further refers to P-768 who states that some Lendu fighters were wearing uniforms while others were dressed in civilian clothes,<sup>280</sup> suggesting that the UPC/FPLC were unable to distinguish between civilians and fighters. Yet, the same witness states the contrary: *"we would recognise the combatants by the fact that they had weapons and they were also carrying fetishes whereas the civilians did not carry any weapons or did not wear anything"*.<sup>281</sup>

137. P-38 states that it was a "tribal war" of the UPC against the Lendu. No distinction was made between civilians and fighters. He states: *"[d]ans cette guerre, il n'y avait pas de prisonniers [...] [l']ordre, c'était que toute personne rencontrée [...] doit être exécutée"*.<sup>282</sup> P-17 confirms that he had never heard anyone in the UPC/FPLC

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line 386, at 1701, line 529 to 1702, line 678; EVD-PT-OTP-06429 at 1763; P-0804: EVD-PT-OTP-06391 at 1132, para. 19; P-0800: EVD-PT-OTP-06476 at 0643; EVD-PT-OTP-00781 at 0666, 0668; EVD-PT-OTP-00782 at 0828; P-0022: EVD-PT-OTP-01862-R01 at 0030, para. 22; P-0800, EVD-PT-OTP-06476 at 0644; P-0804: EVD-PT-OTP-06391 at 1132 at para 20.

<sup>276</sup> P-0038: EVD-PT-OTP-03725 at 2478, line 571 to 2480, line 681; EVD-PT-OTP-03728 at 2555, lines 647-714; EVD-PT-OTP-03728 at 2555, lines 571-618; EVD-PT-OTP-06234 at 0092, lines 111-126; EVD-PT-OTP-06234 at 0092-0093, lines 91-108, lines 130-136, at 0097, line 295 to 0101, line 446; EVD-PT-OTP-06181; EVD-PT-OTP-06235 at 0110; EVD-PT-OTP-03725 at 2500, lines 1198-1208.

<sup>277</sup> P-0768: EVD-PT-OTP-06425 at 1696, line 350 to 1697, line 386 .

<sup>278</sup> P-0017: EVD-PT-OTP-06149 at 2166, line 23 to 2167, line 23; EVD-PT-OTP-06110 at 0569, line 452 to 0571, line 529, at 0572, line 575 to 0573, line 626.

<sup>279</sup> P-0768: EVD-PT-OTP-06429 at 1763; EVD-PT-OTP-06423 at 1639-1642, 1644-1648, 1653, lines 545-588, 1658, lines 756-780; EVD-PT-OTP-06431 at 1836, line 889 to 1838, line 940; P-0804: EVD-PT-OTP-06391 at 1132, para 20; EVD-PT-OTP-00781 at 0669; P-0038: EVD-PT-OTP-06241 at 0217, lines 561-562; P-0017: EVD-PT-OTP-06107 at 0519-0521 and 0522, line 903 to 0523, line 1071.

<sup>280</sup> ICC-01/04-02/06-263-Conf-AnxA, page 11.

<sup>281</sup> EVD-PT-OTP-06492, at 0703, lines 793 to 0704, line 834.

<sup>282</sup> P-0038: EVD-PT-OTP-03734 at 2765-2767; EVD-PT-OTP-06234 at 0101, lines 426-436.

say that the troops had to distinguish between civilians and fighters.<sup>283</sup> He states that, in Mongbwalu, *“toute personne qui ouvrait une porte ou bien qui traversait la rue était considérée comme ennemie”*.<sup>284</sup> P-768 also describes how Bosco Ntaganda deployed his artillery and was *“shooting at everything that was moving”*.<sup>285</sup> In Sayo, he found many bodies of civilians in their houses, who had died as a result of artillery fire.<sup>286</sup> He also personally witnessed the execution of civilians and states that *“every civilian Lendu who would be on [Bosco Ntaganda’s] way, he would give the order to kill them”*.<sup>287</sup>

138. No distinction was made between civilians and fighters. On the contrary, UPC/FPLC troops were told to shoot at civilians and murder them, and so they did. When advancing towards Sayo, P-17 learned that a pregnant woman had been unable to flee, as she was giving birth. In Sayo, he found the new-born child lying on the ground outside the clinic and the dead body of the woman inside. She had been killed.<sup>288</sup> He saw UPC/FPLC troops kill a girl of less than eleven years old as she came out of a house in an attempt to escape.<sup>289</sup> On another occasion, in Sayo, he saw the UPC/FPLC troops riddle an unarmed elderly man in civilian clothes with bullets as he was running away.<sup>290</sup> P-38 confirms that the UPC/FPLC executed elderly people who did not have the physical strength to flee with the others.<sup>291</sup> In Mongbwalu, he saw the bodies of women, children and elderly people. They had been either shot or decapitated with machetes.<sup>292</sup> P-17 was also present when the UPC/FPLC troops tortured and decapitated a woman

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<sup>283</sup> P-0017: EVD-PT-OTP-04140 at 0039, line 1143 to 0040, line 1169.

<sup>284</sup> P-0017: EVD-PT-OTP-06107 at 0510, lines 551-552.

<sup>285</sup> P-0768: EVD-PT-OTP-06425 at 1703, lines 603-319.

<sup>286</sup> P-0768: EVD-PT-OTP-06425 at 1707, lines 700-773.

<sup>287</sup> P-0768: EVD-PT-OTP-06425 at 1704-1705, lines 620-684.

<sup>288</sup> P-0017: EVD-PT-OTP-06150 at 2264, lines 13-24; EVD-PT-OTP-06110 at 0570, lines 482-494, at 0586, lines 1094-1113.

<sup>289</sup> P-0017: EVD-PT-OTP-06110 at 0571-0572, lines 545-573.

<sup>290</sup> P-0017: EVD-PT-OTP-06110, at 0571, lines 512 to 516.

<sup>291</sup> P-0038: EVD-PT-OTP-06235 at 0115, lines 196-201

<sup>292</sup> P-0038: EVD-PT-OTP-06235 at 0117, lines 291-310.

who was detained in a UPC camp in Mongbwalu,<sup>293</sup> and states that many others were executed in this way.<sup>294</sup>

139. The evidence shows that the UPC/FPLC targeted civilians from the moment its troops entered the Banyali-Kilo *collectivité* until after it had captured it, by shooting at those attempting to flee, by shelling civilian areas, by conducting house-by-house searches and executing those who stayed behind or those who fell into the UPC/FPLC's hands. In light of evidence demonstrating the systematic and intentional targeting of civilians, the argument that the UPC/FPLC's assault on Banyali-Kilo was a purely military operation is untenable.

140. Likewise, the Defence's claim that the UPC/FPLC's assault on Walendu-Djatsi was essentially a military operation is negated by a wealth of evidence. This evidence demonstrates that, despite the presence of Lendu fighters in several villages, despite their attempts to resist the UPC's assault, and despite the UPC's objective to open the road from Mongbwalu to Bunia,<sup>295</sup> the UPC/FPLC intentionally targeted civilians and made no attempt to distinguish them from the fighters.

141. P-17 and P-38, who fought for the UPC/FPLC, and P-55, the UPC/FPLC's [REDACTED] who participated in the planning of the assault, confirm that civilians were intentionally targeted.

142. P-38 states that, prior to the attack on Kobu, the UPC/FPLC troops were ordered to shoot at everything that was moving.<sup>296</sup> In Kobu, UPC/FPLC Brigade Commander Salumu Mulenda ordered P-17 to fire heavy weapons on a nearby group of women and children.<sup>297</sup> P-38 describes that, during the assault, "*tout ce*

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<sup>293</sup> P-0017: EVD-PT-OTP-06107 at 0508 and 0509-0511, lines 485-486 and 546-591.

<sup>294</sup> P-0017: EVD-PT-OTP-06107 at 0511, lines 583-591.

<sup>295</sup> ICC-01/04-02/06-263-Conf-AnxA, pp.34 to 36.

<sup>296</sup> P-0038: EVD-PT-OTP-06236 at 0142, line 592 to 0143 line 626.

<sup>297</sup> P-0017: EVD-PT-OTP-06284 at 0745, line 524 to 0747, line 580 and at 0748, lines 624-668.

*qui est Lendu... que ce soit un militaire ou non, c'était l'ennemi"*,<sup>298</sup> *"un Lendu était automatiquement identifié comme ennemi. [...] armé ou pas, il est automatiquement identifié comme ennemi"*.<sup>299</sup> UPC/FPLC commanders told their troops to clean out the villages of Walendu-Djatsi, to comb through them and to flatten them. Civilians who fled and were forced to live in the bush were trapped between UPC/FPLC positions where they could not even light fires or cook, as the UPC/FPLC would fire heavy weapons wherever they saw fires in the valley below Kobu.<sup>300</sup> P-55 confirms with respect to the UPC/FPLC assault that: *"If you were a Lendu, then there is no way you could be saved"*.<sup>301</sup> UPC/FPLC troops would also conduct "sweep operations" to find and kill the Lendu where they were hiding.<sup>302</sup>

143. This evidence of the intentional targeting of the civilian population of Walendu-Djatsi is confirmed by the statements of 16 witnesses who were among the targeted civilians<sup>303</sup> as well as the findings of two UN employees who investigated the crimes committed during this assault.<sup>304</sup> The evidence demonstrates that civilians were not only targeted as the UPC/FPLC advanced through Walendu-Djatsi: their entire villages were burned down<sup>305</sup> and they were hunted down as the UPC/FPLC troops were ordered to patrol through the

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<sup>298</sup> P-0038: EVD-PT-OTP-06236 at 0143 lines 606-608.

<sup>299</sup> P-0038: EVD-PT-OTP-06289 at 0853, lines 268-269.

<sup>300</sup> P-0038: EVD-PT-OTP-06149 at 2187, lines 8-18; P-0017: EVD-PT-OTP-06287 at 0807, line 163 to 0808, line 182.

<sup>301</sup> P-0055: EVD-PT-OTP-04642, at 0772.

<sup>302</sup> P-0017: EVD-PT-OTP-06285, 0766-0767; EVD-PT-OTP-06285, 0770-0771; P-0038: EVD-PT-OTP-03730 at 2626-2627, lines 653-690; EVD-PT-OTP-03732 at 2726-2727, lines 889-924; EVD-PT-OTP-03743 at 3013, lines 430-450.

<sup>303</sup> P-0018, P-0019, P-0027, P-0100, P-0103, P-0105, P-0106, P-0107, P-0108, P-0113, P-0121, P-0127, P-0300, P-0792, P-0804 and P-0805.

<sup>304</sup> EVD-PT-OTP-03424 at 0286, para. 1, at 0287, para. 5, at 0292, para. 6, at 0293, para. 9 and at 0301, paras. 52-53; EVD-PT-OTP-00779 at 0444-0445, para. 70; P-0046: EVD-PT-OTP-06242 at 0226, paras. 34-37; P-0317: EVD-PT-OTP-06473 at 0295, para. 64; EVD-PT-OTP-04807.

<sup>305</sup> ICC-01/04-02/06-258-AnxA6.

captured areas, in search of those hiding in the bush.<sup>306</sup> Those who were found and captured were either killed on the spot, or were taken prisoner and brought to UPC/FPLC camps where they were interrogated, tortured, raped and executed.<sup>307</sup>

### *C. Recruitment and use of child soldiers*

*(i) Child soldiers under the age of 15 were recruited and used to participate actively in hostilities*

144. In the face of evidence from at least 20 witnesses, including military and political UPC/FPLC insiders and one child soldier and three of her family members, UN or NGO staff members, a cameraman for the UPC, a local journalist and a political insider from the PUSIC group, as well as documentary evidence on the recruitment and use of children under the age of 15, the Defence asserts that the Prosecution's evidence on these charges is insufficient.<sup>308</sup>

145. P-24 states that children who had been demobilised were re-recruited in 2002 after "the RCD had been ousted from Bunia by the new movement that took over Bunia, the UPC"<sup>309</sup> when Thomas Lubanga was UPC President.<sup>310</sup>

146. P-12 testified that he saw a "tiny child" that he estimated was about 12 years old<sup>311</sup> during the battle for Bunia in May 2003,<sup>312</sup> who belonged to the UPC.<sup>313</sup> He

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<sup>306</sup> P-0017: EVD-PT-OTP-06285, 0766-0767; EVD-PT-OTP-06285, 0770-0771; P-0038: EVD-PT-OTP-03730 at 2626-2627, lines 653-690; EVD-PT-OTP-03732 at 2726-2727, lines 889-924; EVD-PT-OTP-03743 at 3013, lines 430-450.

<sup>307</sup> P-0038: EVD-PT-OTP-03742 at 2731-2734; EVD-PT-OTP-03730 at 2627 lines 670-674; ICC-01/04-02/06-258-Conf-AnxA4; ICC-01/04-02/06-258-Conf-AnxA5; ICC-01/04-02/06-258-AnxA6.

<sup>308</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.19, lines 6-8.

<sup>309</sup> EVD-PT-OTP-06157, p.51, lines 5-6.

<sup>310</sup> EVD-PT-OTP-06157, p.51, lines 5-6.

<sup>311</sup> EVD-PT-OTP-06125, p.77, lines 6-12.

<sup>312</sup> EVD-PT-OTP-06125, p.76, line 19 to p.77, line 16.

<sup>313</sup> EVD-PT-OTP-06125, p.79, line 19 to p.80, line 15.

also saw many UPC child soldiers, including children under 15, at the front lines in battle in May 2003.<sup>314</sup>

147. P-14 and P-16 provide evidence that children under the age of 15 were recruited and trained in August-September 2003. P-14 witnessed the UPC provide military training to children under the age of 15 between 30 July to 20 August 2002 and states that recruitment continued thereafter.<sup>315</sup> As for P-16, 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.<sup>316</sup>

148.P-17 testified at length about child soldiers under the age of 15 in the UPC/FPLC at various locations and about how he could assess their age.<sup>317</sup> He visited the Mongbwalu camp where he saw between 380 and 420 recruits including both adults and children.<sup>318</sup> He saw children under 15 at the Mandro camp in late 2002.<sup>319</sup> He described a “kadogo unit” comprised of child soldiers.<sup>320</sup>

149.P-41, a UPC/FPLC political official, recalls that all UPC/FPLC officials used children between “13 or 10 to 22” as bodyguards, as did all UPC/FPLC commanders.<sup>321</sup> P-55 confirmed that all commanders in the UPC/FPLC main staff used child soldiers as bodyguards.<sup>322</sup>

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<sup>314</sup> EVD-PT-OTP-06125, p.73, line 8 to p.80, line 15.

<sup>315</sup> EVD-PT-OTP-06133, p.11, line 22 to p.12, line 7 and EVD-PT-OTP-06129, p.60, lines 10-20.

<sup>316</sup> EVD-PT-OTP-06143, p.13, line 11 to p.17, line 9 and p.57, lines 5-11; EVD-PT-OTP-06141, p.10, line 1 to p.11, line 6, and p.58, line 17-19.

<sup>317</sup> EVD-PT-OTP-06147, p.41, lines 14-25; EVD-PT-OTP-06151, p.26, lines 8-23 and EVD-PT-OTP-06154, p.58, lines 16-21.

<sup>318</sup> EVD-PT-OTP-06147, p.45, line 11 to p.46, line 3.

<sup>319</sup> EVD-PT-OTP-06147, p.40, line 16 to p.41, line 13.

<sup>320</sup> EVD-PT-OTP-06151, p.22, line 23 to p.23, line 9; EVD-PT-OTP-06151, p.26, lines 8-23; EVD-PT-OTP-06154, p.58, lines 19-25.

<sup>321</sup> EVD-PT-OTP-06187, p.54, line 15 to p.57, line 7.

<sup>322</sup> EVD-PT-OTP-06215, p.47, line 22 to p.48, line 24; p.50, line 14 to p.51, line 13.

150.P-31 speaks of the “massive presence of children in armed groups” in Ituri and that over 80% of approximately 168 children, between 9 and 17 years old, who went through his demobilisation centre, had been soldiers in the UPC/FPLC.<sup>323</sup>

151. A UPC/FPLC document provides further evidence that children under 15 were soldiers in the UPC/FPLC.<sup>324</sup> 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 Lubanga, referring to a demobilisation programme and referencing children between the ages of 10 to 15 or 16 years of age who are “willing” to return to civilian life.

152. P-768, P-17 and P-38 provide evidence of the use of child soldiers under the age of 15 in the UPC/FPLC as bodyguards and in combat.<sup>325</sup> P-290 gives evidence of children under the age of 15 being trained and later deployed in the UPC/FPLC in [REDACTED],<sup>326</sup> [REDACTED] active participation in hostilities.

153. The Defence challenges the credibility of P-758.<sup>327</sup> P-758 is a former child soldier in the UPC/FPLC. She was abducted on or about [REDACTED], raped and trained militarily.<sup>328</sup> Her father, mother and sister corroborate her account on her age and that she was abducted by the UPC/FPLC.<sup>329</sup>

154. At the [REDACTED] training camp, P-758 describes being taught songs,<sup>330</sup> eating maize once per day,<sup>331</sup> taking drugs,<sup>332</sup> being beaten<sup>333</sup> and raped.<sup>334</sup> The

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<sup>323</sup> EVD-PT-OTP-06171, p.25, line 2 to p.26, line6 and p.27, lines 1-8.

<sup>324</sup> EVD-PT-OTP-02545.

<sup>325</sup> P-0768: EVD-PT-OTP-06491 at 0658, lines 147-151 and 0662 lines 287-296; EVD-PT-OTP-06491 at 0665, line 408 to 0666, line 452; EVD-PT-OTP-06425 at 1695, lines 304-321; P-0290: EVD-PT-OTP-04028 at 0311, para.28; EVD-PT-OTP-04028 at 0318-0319, paras.76 and 78; EVD-PT-OTP-04028 at 0312, para.33; EVD-PT-OTP-06181, at 4736-4738, 4744-4745, 4751-4752; EVD-PT-OTP-06183, at. 4850, 4858-4562, 4868; EVD-PT-OTP-06151, at 2307, 2309-2319, 2322, 2335, 2357; EVD-PT-OTP-06147, at 1949, 1983, 2002-2003.

<sup>326</sup> P-0290: EVD-PT-OTP-04028 at 0307-0308, paras 7, 8, 13-14 and at 0309-0310, paras 18, 24.

<sup>327</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.19, line 13 to p.22, line 2.

<sup>328</sup> EVD-PT-OTP-06335 at paras.7-28 and EVD-PT-OTP-06223 at paras.12-13.

<sup>329</sup> P-0761 (P-0758's father): EVD-PT-OTP-06223 at paras.12-21; P-0773 (P-0758's mother): EVD-PT-OTP-06309 at paras.14-19; P-0806 (P-758's sister): EVD-PT-OTP-06379, paras.13-18.

<sup>330</sup> EVD-PT-OTP-06335 at para.28

recruits were divided into mixed groups for training.<sup>335</sup> The training consisted of jogging early in the morning,<sup>336</sup> then being taught how to crawl, march, stand, do military drills and use wooden guns for shooting exercises.<sup>337</sup>

155. The details of P-758's training are corroborated by military insiders P-55, P-38, P-17, P-16 and P-10 who describe UPC/FPLC military training. These military insiders explain that the UPC/FPLC military training included a general introduction to military life,<sup>338</sup> weapons training,<sup>339</sup> marching<sup>340</sup> and saluting.<sup>341</sup> The recruits were taught to sing military songs.<sup>342</sup> P-10 describes that recruits were up at 4:00 a.m. to run, then they were instructed to crawl, do push-ups and jump into holes.<sup>343</sup> In the evening, they sang songs until 11:00 pm.<sup>344</sup>

156. P-38 recalls that children under the age of 15 received the same training as older recruits.<sup>345</sup> He describes a typical day at the Mongbwalu training camp: *"We got up every morning at 4:00 a.m., and we had to run around the centre because it was very big, and we would run from 7:00 to 9:00 a.m., running all the time and singing military songs as we run"*.<sup>346</sup> P-16 states that recruits practiced shooting using a piece of wood rather than a real weapon.<sup>347</sup> P-17 referred to the suffering of the soldiers *"because there was no food"*.<sup>348</sup> P-38 describes the use of drugs.<sup>349</sup> P-16

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<sup>331</sup> EVD-PT-OTP-06335 at para.43.

<sup>332</sup> EVD-PT-OTP-06335 at para.30.

<sup>333</sup> EVD-PT-OTP-06335 at para.45.

<sup>334</sup> EVD-PT-OTP-06335 at para.30.

<sup>335</sup> EVD-PT-OTP-06335 at para.38.

<sup>336</sup> EVD-PT-OTP-06335 at para.38.

<sup>337</sup> EVD-PT-OTP-06335 at para.39.

<sup>338</sup> EVD-PT-OTP-06181, p.40, line 22 to p.41, line 4; EVD-PT-OTP-06215, p.24, lines 21-23, p.25, lines 14-20.

<sup>339</sup> EVD-PT-OTP-06215, p.24, lines 24-25.

<sup>340</sup> EVD-PT-OTP-06215, p.24, line 24.

<sup>341</sup> EVD-PT-OTP-06183, p.7, lines 17-18.

<sup>342</sup> EVD-PT-OTP-06181, p.66, lines 13-16.

<sup>343</sup> EVD-PT-OTP-06257, p.21, line 12 to p.23, line 5.

<sup>344</sup> EVD-PT-OTP-06257, p.23, lines 2-4.

<sup>345</sup> EVD-PT-OTP-06183, p.10, line 15 to p.11, line 14.

<sup>346</sup> EVD-PT-OTP-06181, p.65, line 24 to p.66, line 5.

<sup>347</sup> EVD-PT-OTP-06141, p.40, line 14 to p.41, line 25.

<sup>348</sup> EVD-PT-OTP-06151, p.22, lines 3-7.



described different types of punishment at the Mandro camp, and that some recruits died as a result.<sup>350</sup> P-17 confirmed it was common in the UPC for individuals to be whipped.<sup>351</sup> P-16 witness confirmed the rape of girl child soldiers in the training camps;<sup>352</sup> P-38 states that the commanders particularly treated the girls as if they were their women or their wives.<sup>353</sup>

157. P-758 states that after training, she was issued with a gun and fought in battles. Military insiders corroborate that after training, the recruits “*would be ready for combat*”,<sup>354</sup> given a weapon and a military uniform,<sup>355</sup> and deployed. P-38 and P-768 confirm that child soldiers under the age of 15 participated in combat.<sup>356</sup>

158. P-758’s account of her experience in the UPC/FPLC is credible and reliable, and is corroborated by the experiences of other military insiders. Any inconsistencies in her account should be left for a full review by the Trial Chamber when she is called to testify. The Defence challenge to her evidence should be rejected.

159. The Defence also challenges the evidence of P-10, primarily on the basis that she gives an inconsistent account of her date of birth and the circumstances of her enlistment.<sup>357</sup> The Prosecution is not relying on this witness as a child soldier, but rather as a UPC/FPLC insider, a fact that cannot seriously be in issue since she is depicted in uniform and carrying a weapon alongside Bosco Ntaganda, Thomas Lubanga, Rafiki and other senior UPC/FPLC commanders [REDACTED].<sup>358</sup>

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<sup>349</sup> EVD-PT-OTP-06183, p.85, lines 16-24.

<sup>350</sup> EVD-PT-OTP-06141, p.44-47.

<sup>351</sup> EVD-PT-OTP-06151, p.31, lines 20-21.

<sup>352</sup> EVD-PT-OTP-06145, pp.15, 30-31.

<sup>353</sup> EVD-PT-OTP-06183, p.23, lines 18-19.

<sup>354</sup> EVD-PT-OTP-06215, p.26, lines 11-14.

<sup>355</sup> EVD-PT-OTP-06181, p.44, lines 8-12; EVD-PT-OTP-06183, p.12, lines 15-24.

<sup>356</sup> EVD-PT-OTP-06181, p.37, lines 14-18, p.44, line 21 to p.46, line 5, p.51, line 22 to p.53, line 3; EVD-PT-OTP-06183, p.17, line 7 to p.18, line 4.

<sup>357</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.22, line 3 to p.25, line 20.

<sup>358</sup> [REDACTED].

160. The Defence's challenge to the overall credibility of this witness lacks factual foundation and cannot be sustained. She gives direct evidence of the training and use of child soldiers in the UPC/FPLC,<sup>359</sup> her deployment as a bodyguard to Bosco Ntaganda,<sup>360</sup> his activities and whereabouts,<sup>361</sup> crimes committed during UPC/FPLC assaults<sup>362</sup> and of the rape and sexual slavery of girl soldiers of all ages, including herself, by Bosco Ntaganda and other senior military commanders.<sup>363</sup> This evidence is corroborated by other UPC/FPLC insiders.<sup>364</sup>

*(ii) There is reliable evidence of the age of the child soldiers*

161. On the issue of the age of these child soldiers, the Defence's position in essence is that witness accounts cannot be used to prove that a child recruited and used by the UPC/FPLC was under 15 at the relevant time.<sup>365</sup> The Defence asserts that only "objective" elements can prove age to the requisite standard.<sup>366</sup> This position is contradicted by the jurisprudence of Trial Chamber I in the *Lubanga* case and Special Court for Sierra Leone ('SCSL'), two of the international criminal tribunals to address the crimes of child soldier recruitment and use.

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<sup>359</sup> EVD-PT-OTP-06259 at 0732, lines 3-14 ; EVD-PT-OTP-04553 at 0537, line 169 to 0538, line 203; EVD-PT-OTP-06257 at 0572, lines 19-21, and at 0600, lines 13-16; EVD-PT-OTP-02690 at 0129, para 33 and at 0131, para 41.

<sup>360</sup> EVD-PT-OTP-06257 at 0602, lines 10 to 0603, line 13; EVD-PT-OTP-04540 at 0230, lines 77-81; EVD-PT-OTP-04553 at 0535, lines 89-93; EVD-PT-OTP-02690 at 0135, para 54.

<sup>361</sup> EVD-PT-OTP-06183 at 4868, lines 19-23 and at 4918, lines 1-3; EVD-PT-OTP-06257 at 0603, lines 10-25, at 0607, lines 14-16, at 0617, lines 4-25 and at 0622, lines 5-12; EVD-PT-OTP-02690, at 0135, para 54 and at 0139, para 68; EVD-PT-OTP-04540, at 0229, lines 80-85 and at 0246, lines , 693-696.

<sup>362</sup> EVD-PT-OTP-06259 at 0787, lines 1-8; EVD-PT-OTP-04540 at 233, lines 194-207; EVD-PT-OTP-02690, at 0131-132, para.43.

<sup>363</sup> EVD-PT-OTP-06259 at 0787, lines 1-8; EVD-PT-OTP-06257 at 0593-0595; EVD-PT-OTP-06259 at 0714-0715; EVD-PT-OTP-06259 at 0716, lines 14-23; EVD-PT-OTP-06259 at 0787, lines 14-24; EVD-PT-OTP-04540 at 0253, lines 959-974; EVD-PT-OTP-02690 at 0130-0131 para.38 and at 0135, para.53.

<sup>364</sup> P-0758: EVD-PT-OTP-06335 at 0197-0198, para.17, at 0200-0201, paras.30, 33, 34, at 0203, paras.49, 50, 53 and at 0204, para. 54; P-0038: EVD-PT-OTP-06241 at 0204; P-0038: EVD-PT-OTP-06183 at 4867, lines 12 to 4869 line 14, and at 4927; P-0017: EVD-PT-OTP-04140 at 0021; P-0017: EVD-PT-OTP-06147 at 1949; P-0016: EVD-PT-OTP-06145 at 1795, line 15 to 1797, line 12 and at 1810, lines 4 to 1811, line 8; P-0016, EVD-PT-OTP-06141 at 1472, lines 11-12 and 1473, lines 9-10; P-0768: EVD-PT-OTP-06485 at 0549, lines 759-791.

<sup>365</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.16, lines 22-24.

<sup>366</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.14, lines 5-11.

162. First, Trial Chamber I in *Lubanga* accepted the evidence of witnesses on a child's age based on their assessments of physical appearance by a comparison with other children, the individual's general physical development (whether a girl had developed breasts, and factors such as height and voice) and the child's overall behavior.<sup>367</sup> The Chamber 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".<sup>368</sup>
163. Second, the Trial Chambers at the SCSL exercised caution when considering age assessments based on physical appearance 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.<sup>369</sup>
164. The witnesses are able to accurately assess age. P-46 met with numerous children from Ituri armed groups, including from the UPC/FPLC. P-46's professional history and personal experience with the children she interviewed enabled her to provide realistic age estimates. The same applies to P-24 and P-31. The military insiders worked with these children, or trained them, and are also able to give reliable evidence on the age of these child soldiers.
165. Moreover, the Prosecution has presented birth certificates<sup>370</sup> to corroborate P-758's age, in addition to her own statement and those of her father, mother and sister regarding her age ([REDACTED]).<sup>371</sup>
166. The Defence challenges the Chamber's ability to assess the age of individuals in videos.<sup>372</sup> Video images are admitted as evidence in international tribunals because "the video footage contained therein will usually speak for itself".<sup>373</sup>

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<sup>367</sup> ICC-01/04-01/06-2842, para.641.

<sup>368</sup> ICC-01/04-01/06-2842, para.643.

<sup>369</sup> SCSL *Taylor* Judgment, paras.1358-1361; SCSL *RUF*, Judgment, paras.1627-1628.

<sup>370</sup> EVD-PT-OTP-06074 and EVD-PT-OTP-06224.

<sup>371</sup> P-0761 (P-0758's father): EVD-PT-OTP-06223 at para.8; P-0773 (P-0758's mother): EVD-PT-OTP-06309 at para.9; P-0806 (P-758's sister): EVD-PT-OTP-06379, para.8.

167. Judges in national jurisdictions have considered video evidence to be at least as reliable as eyewitness testimony.<sup>374</sup> For instance, the U.S. Supreme Court held that it will assign greater weight to video evidence that directly contradicts the party's claim.<sup>375</sup> The Supreme Court of Canada upheld convictions based solely on video evidence.<sup>376</sup> 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.<sup>377</sup>

168. 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:

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.<sup>378</sup>

169. Thus, there "is no requirement that expert testimony be presented in child pornography cases to establish the age of the children in the pictures."<sup>379</sup> 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

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<sup>372</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.17, lines 18-25.

<sup>373</sup> *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. See also, *Krstic* Trial Judgment, paras.354, 409, 410; *Taylor* Trial Judgment, para. 168; *Akayesu* Trial Judgment, paras.161-168.

<sup>374</sup> *R. v. Nikolovski*, [1996] 3 S.C.R. 1197; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, pp.768 and 774.

<sup>375</sup> *Scott v. Harris*, 550 U.S. 372 (2007); *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011) ("Although we review evidence in the light most favorable to the non-moving party, we assign greater weight, even at the summary judgment stage, to the facts evident from video recordings taken at the scene.").

<sup>376</sup> *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).

<sup>377</sup> *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).

<sup>378</sup> *U.S. v. Katz*, 178 F.3d 368, 373 (5th Cir. 1999).

<sup>379</sup> *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).

of eighteen.<sup>380</sup> The courts have found that “[c]ommon knowledge and experience is generally sufficient to identify a minor as prepubescent.”<sup>381</sup> 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.<sup>382</sup> Testimony from lay witnesses is appropriate to assess age: “age 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.”<sup>383</sup> 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.<sup>384</sup>

170. In support of the presence of child soldiers in videos, P-30, [REDACTED] regularly saw children under the age of 15 standing guard to protect the

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<sup>380</sup> *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).

<sup>381</sup> *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).

<sup>382</sup> *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 photographs depicted young females, one of whom wore braces, and the other appeared “diminutive in all her bodily proportions”).

<sup>383</sup> *U.S. Yazzie*, 976 F.2d 1252, 1256 (9th Cir.1992).

<sup>384</sup> *U.S. v. Davis*, 41 Fed.Appx. 566, 571 (3rd Cir. 2002).

President and his offices.<sup>385</sup> The youngest guard was 9 or 10 years old.<sup>386</sup> P-30 [REDACTED]:

Q. But concerning the kadogos, to use the term you used during your meeting with the investigators, concerning the kadogos you saw at the headquarters – I understood that you hadn't seen them all – but with regard to those you had seen, is that assessment, 14 or 15 years of age, consistent with what you remember?

A. Well, I can say, I can justify myself, but the images also speak. *If you doubt what I say, I think that by looking at the image that the image can help you see that there were kadogos.*<sup>387</sup>

*(iii) Enlistment and conscription can be considered together*

171. While enlistment and conscription are two separate crimes under the Statute, they are continuous in nature and end only when the child reaches the age of 15 or leaves the armed force or group.<sup>388</sup> Chambers are free to assess the evidence of these crimes together.<sup>389</sup>

*(iv) Definition of "use to participate actively in hostilities"*

172. The Defence's argument that a definition of "use to participate actively in hostilities" that includes activities beyond active participation in combat violates article 22(2)<sup>390</sup> lacks merit and foundation. Chambers of this Court and of the SCSL have examined the scope of active participation in hostilities. Pre-Trial Chamber I in the *Lubanga* case held that "[a]ctive participation in hostilities means not only direct participation in hostilities, combat in other words, but also covers active participation in combat-related activities such as scouting, spying, sabotage and the use of children as decoys, couriers or at military check-

<sup>385</sup> EVD-PT-OTP-06161, p.21, line 6 to p.23, line 2; EVD-PT-OTP-06167, p.6, line 23 to p.9, line 9.

<sup>386</sup> EVD-PT-OTP-06161, p.21, lines 3-4.

<sup>387</sup> EVD-PT-OTP-06167, p.8, line 2 to p.9, line 9 (emphasis added).

<sup>388</sup> ICC-01/04-01/06-2842, para.618, citing ICC-01/04-01/06-803-tEN, para.248 and ICTR, *Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A*, Appeals Chamber, Judgment, 28 November 2007, para.721.

<sup>389</sup> ICC-01/04-01/06-2842, para.618.

<sup>390</sup> ICC-01/04-02/06-T-10-CONF-ENG, p.18, line 18 to p.19, line 5.

points”.<sup>391</sup> Trial Chamber I in the *Lubanga* case held that “the expression ‘to participate actively in hostilities’ [...] was clearly intended to import a wide interpretation to the activities and roles that are covered by the offences of using children under the age of 15 actively to participate in hostilities”.<sup>392</sup> It concluded that the decisive factor is “whether the support provided by the child to the combatants exposed him or her to real danger as a potential target”.<sup>393</sup>

173. The Trial Chamber in the AFRC case at the SCSL determined that the use of children to participate actively in hostilities is not restricted to children directly involved in combat, noting:

An armed force requires logistical support to maintain its operations. Any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation. Hence carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields are some examples of active participation as much as actual fighting and combat.<sup>394</sup>

174. Accordingly, contrary to the Defence assertions,<sup>395</sup> there is no ambiguity triggering the provisions of article 22(2).

175. Moreover, as set out above and in the Prosecution’s presentation of its evidence and in the IDAC, there is copious evidence on the use of children under the age of 15 by the UPC/FPLC to participate actively in hostilities.

*(v) The demobilisation orders were shams*

176. The Prosecution’s position is that the purported UPC/FPLC demobilisation orders<sup>396</sup> were prepared as a result of pressure from international actors but were

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<sup>391</sup> ICC-01/04-01/06-803-tEN, para.261.

<sup>392</sup> ICC-01/04-01/06-2842, para.627.

<sup>393</sup> ICC-01/04-01/06-2842, para.628.

<sup>394</sup> SCSL, *AFRC Trial Judgment*, para.737.

<sup>395</sup> ICC-01/04-02/06-T-10-CONF-ENG, p.18, lines 23-25.

<sup>396</sup> EVD-PT-OTP-02612.

never meant to be implemented. These orders do, however, prove that Bosco Ntaganda knew that there were children under the age of 15 in the UPC/FPLC.

177. The first such order, allegedly issued in late October 2002, refers to the assistance of the NGO [REDACTED] for this project. P-24, who was working for this NGO at the time, does not recall that the NGO was involved in any demobilisation initiatives with the UPC of this kind.<sup>397</sup>

178. The second such order was purportedly issued in January 2003. P-768 never heard Bosco Ntaganda give an order to demobilise child soldiers while he was with the UPC/FPLC at this time.<sup>398</sup> Nor had P-55 heard of this order, and he did not have any discussions with Bosco Ntaganda, Floribert Kisembo, or Thomas Lubanga on the issue.<sup>399</sup> P-46 stated that UPC demobilisation efforts were not genuine. She described these orders as “a masquerade”.<sup>400</sup> P-24 described them as “a sham”.<sup>401</sup> There was no sustained program to demobilise children from the UPC/FPLC. The leaders of the UPC, including Bosco Ntaganda, simply did not want to do that.

179. Moreover, P-31 confirms that child soldier recruitment in the UPC after October 2002 was on the rise, not on the decline.<sup>402</sup>

180. Critically, Bosco Ntaganda’s intention to demobilise child soldiers from the UPC/FPLC is completely contradicted by his visit to the Rwampara training camp on 12 February 2003, with other co-perpetrators, in order to encourage the recruits in their training and by telling them that they would be armed after the completion of their training and that they would be useful soldiers. Some of

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<sup>397</sup> EVD-PT-OTP-06157, p.54, lines 12-17.

<sup>398</sup> EVD-PT-OTP-06491, at 0661-0662, lines 253-289.

<sup>399</sup> EVD-PT-OTP-06215-ENG, p.56, lines 1-10; EVD-PT-OTP-06215-ENG, p.56, lines 11-13 and p.56, line 22 to p.57, line 10.

<sup>400</sup> EVD-PT-OTP-06193 at 5850, lines 2-13.

<sup>401</sup> EVD-PT-OTP-06157 at 2651, lines 3-21.

<sup>402</sup> EVD-PT-OTP-06171, pp. 38-40.



these recruits look manifestly under the age of 15, and certainly under the age of 18. P-30 states that the youngest of the recruits must have been around nine.<sup>403</sup> P-10 identified children under the age of 15 in the video.<sup>404</sup> This visit to the Rwampara training camp is wholly incompatible with a genuine intention to demobilise children from the UPC/FPLC.

181. The third such order was issued in June 2003. The Defence relies on D-0011 who testified in the Lubanga proceedings that the June 2003 decree was implemented. It is important to note that Trial Chamber I found on this point in his evidence that *“Given D-0011’s general lack of credibility on the recruitment and use of child soldiers as discussed above, the Chamber has disregarded his testimony on the implementation of the demobilization decree”*.<sup>405</sup>

#### ***D. Rape and Sexual Slavery of Child Soldiers***

##### *(i) No infringement of article 22 (2)*

182. The UPC/FPLC’s rape and sexual slavery of its own child soldiers are war crimes under article 8(2)(e)(vi).

183. Contrary to the Defence contention, the Prosecution’s interpretation entails no infringement of article 22(2). Rather, it is the result of a purposive or teleological interpretation of article 8(2)(e)(vi), consistent with the protective rules applicable to children during warfare under international humanitarian law (“IHL”). The Defence’s claim is based on an erroneous interpretation both of the principle enshrined in article 22(2) and of the legal position advanced by the Prosecution.

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<sup>403</sup> EVD-PT-OTP-06161-Red2-ENG, p. 48, lines 11-14.

<sup>404</sup> EVD-PT-OTP-06259, p.10, line 14 to p.26, line 14.

<sup>405</sup> ICC-01/04-01/06-2842, para.1332.

184. The prohibition of analogy bars the use of analogy “as a basis for imposing criminal responsibility in what amount to substantially new crimes”.<sup>406</sup> This principle (also called prohibition of *analogia legis*)<sup>407</sup> does not, however, bar *all* use of analogy in the process of interpretation.<sup>408</sup> In particular, “[i]t does not bar the regulation of a matter not covered by a specific provision or rule, by *resorting to general principles of ICL*, or to general principles of criminal justice, or to principles common to the major legal systems of the world (so called *analogia juris*)”.<sup>409</sup>

185. Similarly, the principle of strict interpretation, which aims at providing individuals with fair notice of the potential criminal consequences of a given conduct, “does not stand in the way of progressive judicial clarification of the contents of an offence”.<sup>410</sup> For instance, the European Human Rights Commission stated that it was not “objectionable that the existing elements of the offence are clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence”.<sup>411</sup> In turn, the European Court of Human Rights has also clarified that the principle “cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case”.<sup>412</sup>

186. This suffices to demonstrate that the Defence’s arguments are inapposite: the Prosecution is neither seeking the jurisprudential creation of a new crime, nor impermissibly expanding the contours of an existing one. It is merely advancing what it considers to be a proper interpretation of an existing statutory provision on the basis of its specific protective purpose and the applicable IHL rules.

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<sup>406</sup> B. Broomhall, Commentary to Article 22 in Triffterer (ed.), Commentary to the Rome Statute of the International Criminal Court (2<sup>nd</sup> edition), p.725.

<sup>407</sup> A. Cassese, International Criminal Law (2<sup>nd</sup> edition), p.49.

<sup>408</sup> *Ibid.*

<sup>409</sup> *Ibid.* (emphasis in the original)

<sup>410</sup> Broomhall, p.724.

<sup>411</sup> B. Emmerson, A. Ashworth, A. MacDonald (eds), Human Rights and Criminal Justice (2<sup>nd</sup> edition), p.395.

<sup>412</sup> Broomhall, p.724, fn.59.

*(ii) Article 8(2)(e)(vi) and international humanitarian law support  
the Prosecution's position*

187. While it is generally the case that IHL regulates conduct directed towards those external to a military force rather than to those internal to a military force, this general proposition does not constitute an irrebuttable presumption. Indeed, the prohibition on conscripting or enlisting child soldiers or allowing children to directly participate in hostilities is an exception to the general proposition precisely in order to provide non-derogable protections for children as a particularly vulnerable group. Critically, these war crimes can only be perpetrated by members of a military force against victims which are from the same military force.

188. The protections attached to children continue to apply during armed conflict: while soldiers may forfeit protection from attack by directly participating in hostilities, this does not impact on their other legal protections. This includes their protection against being subjected to sexual violence - a position supported by customary practice.<sup>413</sup> The ICRC customary IHL study provides that special protections continue to apply when a child participates in hostilities.<sup>414</sup>

189. Treaty law also provides continuing protections for children. Article 4(3) of Additional Protocol II applicable in non-international armed conflict provides that “[c]hildren shall be provided with the care and aid they require”. Article 4(3)(d) provides continuing protections for children even when the prohibition on recruiting child soldiers in article 4(3)(c) is breached and children actively

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<sup>413</sup> See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law vol 1: Rules* (International Committee of the Red Cross, Cambridge University Press, 2005) Rule 93, p.323 and Rule 137, p.487 – ‘None of the rules which identify such special protections, such as the prohibition on sexual violence ... provide an exception in the event that the children have taken part in hostilities. In addition, none of the practice supporting the prohibition of the participation of children in hostilities provides that they should be deprived of their special protection if they do participate in hostilities.’

<sup>414</sup> *Ibid*, rule 137, p.487.

participate in hostilities. The Defence argument –that the protection under article 4 applies only if a child soldier is captured by the opposing party<sup>415</sup>– is an excessively narrow reading of the text of article 4(3)(d) that does not take into account the aim of the provision and the intention of the drafters, all of which highlights the particular importance of the protection of children in armed conflict.

190. Though article 4(3)(d) stipulates that the special protections are contingent on the capture of the child, the motivation for this provision – the protection of children as a vulnerable group - is clear.<sup>416</sup> The ICRC commentary on article 4(3)(d) clearly notes the protective aim of the provision:

It should be recalled that the aim of this provision is to guarantee children special protection in the turmoil caused by situations of conflict. For this reason it seemed useful to specify in this sub-paragraph that children will *continue to enjoy privileged rights* in case the age limit of fifteen years laid down in subparagraph (c) is not respected.<sup>417</sup> (Emphasis added)

191. The ICRC commentary goes on to say that “[i]n this case making provision for the consequences of any possible violation tends to strengthen the protection.”<sup>418</sup> Accordingly, the intention behind this provision was to strengthen the protection for children, should there be a violation of the prohibition on recruiting children.

192. This interpretation is supported by the Commentary to article 4(3) which recognizes that children are ‘particularly vulnerable [and] they require privileged treatment in comparison with the rest of the civilian population.’<sup>419</sup> The first line of article 4(3) further supports this interpretation. The use of the words ‘in particular’, as noted by the ICRC Commentary, indicates that the list in (a) – (e) is illustrative and without prejudice to other measures which may be taken.<sup>420</sup>

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<sup>415</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.27, lines 10-11.

<sup>416</sup> Sandoz, Swinarski and Zimmerman, above n 8, para.4559.

<sup>417</sup> *Ibid*, 4559.

<sup>418</sup> *Ibid*, 4559.

<sup>419</sup> *Ibid*, para. 4544.

<sup>420</sup> *Ibid* 4545.

193. As article 4(3) focuses on ensuring protection for children because they are vulnerable, it is illogical that the existence of article 4(3)(d) should lead to the conclusion that children *only* retain their special protections if they are captured, but lose those protections if they participate directly in hostilities and are *not* captured. This is the effect of the Defence argument. Such an interpretation would undermine the purpose of the special protections for children under article 4(3) and under IHL more generally.

### *E. Rape and Sexual Slavery of Civilians*

194. Through the submission of evidence in the IDAC, and during its presentation at the confirmation hearing, the Prosecution demonstrated how its evidence establishes each of the legal elements of the crimes to the required standard.<sup>421</sup>

195. The core of the Prosecution's evidence demonstrating that UPC/FPLC soldiers committed rape and sexual slavery during the two assaults consist of: four witnesses who are direct victims of these crimes (P-18, P-19, P-22 and P-113); two UPC/FPLC military insiders involved in these assaults (P-17 and P-38); two high level UPC/FPLC military insiders (P-55 and P-768); crime base witness (P-105<sup>422</sup>) and UN researcher (P-46<sup>423</sup>).

196. Further, five military insiders (P-16, P-55, P-17, P-38 and P-758) provide context and pattern evidence of the UPC's commission of sexual violence crimes against civilians: how it occurred at every UPC/FPLC operation because it was just another weapon to victimise the Lendu and non-Hema; how it was authorized and condoned as legitimate "spoils of war" under the "*Kupiga Na Kuchaji*" order; how named UPC/FPLC commanders were notorious for raping; and how the co-perpetrators, including Bosco Ntaganda, who were aware of

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<sup>421</sup> ICC-01/04-02/06-T-8-CONF-ENG, pages 17-42; ICC-01/04-02/06-258-Conf-AnxA5 ; ICC-01/04-02/06-217-Conf-AnxC, pp.316-340.

<sup>422</sup> EVD-PT-OTP-06325 at paras.41, 49-50; EVD-PT-OTP-00736, para.46.

<sup>423</sup> EVD-PT-OTP-06242 at 0224 and 0226, 24-25, 37; EVD-PT-OTP-00779, para.52.

sexual violence failed to take all reasonable and necessary measures to prevent or repress the commission of such crimes or to punish the perpetrators.

197. UN and NGO researchers P-46,<sup>424</sup> and P-315<sup>425</sup> provided pattern evidence relevant to show the widespread nature of UPC's rapes and sexual enslavement.

198. Critically, FPLC communications,<sup>426</sup> including a message sent by Bosco Ntaganda to all FPLC units,<sup>427</sup> recorded in its radio communications logbook, also shows that the UPC/FPLC troops committed rapes and sexual slavery and that the UPC/FPLC leadership knew about it.

*(i) Deceased witness P-0022's statement is admissible*

199. The Prosecution has responded by way of a separate filing to the Defence's challenge on admissibility of the statements of deceased witnesses at the confirmation hearing stage.<sup>428</sup> It integrates by reference its submissions on that point.<sup>429</sup> The statement is admissible and establishes that the UPC/FPLC troops committed rape and sexual slavery in Kilo at the beginning of December 2002.

*(ii) The protective measures for P-0018, P-0019 and P-0113 are appropriate*

200. The Defence contends that the non-disclosure of the identity of P-18, P-19 and P-113 precluded its investigations into the truthfulness of their evidence. Anonymity of witnesses at this stage of the proceedings is permitted under the

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<sup>424</sup> EVD-PT-OTP-06242 at 0233-0234, 0237, paras. 79-81, 98; EVD-PT-OTP-00779, paras.105-112.

<sup>425</sup> EVD-PT-OTP-06064, at 0663-0664, 0518-0519; EVD-PT-OTP-06363 at 1015.

<sup>426</sup> EVD-PT-OTP-03975 at 0960; EVD-PT-OTP-00258.

<sup>427</sup> EVD-PT-OTP-03975 at 1019; EVD-PT-OTP-06510 at 1180-1180.

<sup>428</sup> ICC-01/04-02/06-250-Conf, paras.20-28.

<sup>429</sup> ICC-01/04-02/06-269-Conf, paras.46-58.

Statute and the Rules of Procedure and Evidence (“Rules”) and was approved by the Single judge for protection reasons pursuant to article 68(3) of the Statute. The redacted versions of the statements disclosed to the Defence contain the detailed accounts of those witnesses and allow it to challenge their reliability, intrinsic coherence or compatibility with other evidence.

201. Because of the limited scope of the confirmation hearing, the Prosecution may rely on summary evidence and anonymous witnesses in order to show that there is sufficient evidence to establish substantial grounds to believe that the person committed the crimes charged. Appeal Chambers of this Court have held that this threshold can be reached even if the reliability cannot be fully tested<sup>430</sup>; and that the use of summary or anonymous witnesses is not necessarily prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>431</sup> In the *Kenyatta* case, Pre-Trial Chamber II stated: *“it is an inherent consequence of protective measures under rule 81(4) of the Rules that in individually justified cases, the Defence’s ability to raise, and the Chamber’s ability to address in its decision, certain questions pertaining to the reliability of witnesses are limited.”*<sup>432</sup>

202. In its First Decision on redactions,<sup>433</sup> the Single Judge held that the non-disclosure of the identity of P-18, P-19 and P-113 *“is justified as disclosing their identity to the Defence, at this stage, may put them at risk. The Single Judge furthermore believes that, in light of the limited scope of the confirmation hearing, the anonymity is necessary and not prejudicial to or inconsistent with the rights of the suspect and a fair and impartial proceedings as the Defence will have access to the relevant information contained in the witness statements and have the possibility to challenge them.”* The Defence has never requested that the redactions be lifted.

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<sup>430</sup> ICC-01/04-01/06-774, para.47.

<sup>431</sup> ICC-01/04-01/06-773, para.50; ICC-01/04-01/07-475, para.68.

<sup>432</sup> ICC-01/09-02/11-382-Red, para.94.

<sup>433</sup> ICC-01/04-02/06-117-Conf-Red, paras.33-37.

203. The fact that the identity of the witnesses is not known to the Defence does not prevent it to test the credibility of their evidence. The versions of the statements communicated to the Defence contain all the necessary underlying facts, characterized by the Prosecution as rape and sexual slavery. The detailed accounts reveal the time frame and locations of the facts alleged and the identification of the perpetrators, sometimes even by name. Therefore, the Defence is in a position to contest the accounts and their coherence or reliability. The redacted versions of the statements allow the Defence to properly exercise its rights at this stage of the proceedings.

*(iii)P-0018, P-0019 and P-0113's accounts of rape and sexual slavery are reliable*

204. The fact that P-18, P-19 and P-113 did not mention their rapes and sexual enslavement by UPC/FPLC troops during their first interview with the Prosecution in 2005 does not cast doubt over the credibility of their accounts. As submitted in the Prosecution's presentation at the confirmation hearing,<sup>434</sup> the delayed reporting of sexual abuse is common for this type of victimisation. The delay is thoroughly explained by the witnesses and further clarified by the clinical psychologist who examined them.

205. From the first interview and all the subsequent interviews, the witnesses described in great detail how the prisoners detained with them were sexually exploited and beaten; the recent account of their own abuse that occurred in the same circumstances is credible.<sup>435</sup>

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<sup>434</sup> ICC-01/04-02/06-T-8-CONF-ENG, pp.26-27; ICC-01/04-02/06-258-Conf-AnxA5, pp.15-16.

<sup>435</sup> P-0018's statements: EVD-PT-OTP-01816; EVD-PT-OTP-06083; Photographs of P-0018's wounds: EVD-PT-OTP-01818 to 01830, Forensic analysis of photographs of P-0018's wounds [EVD-PT-OTP-01790], Expert's physical clinical assessment of P-0018: EVD-PT-OTP-06444 and Expert's psychological assessment of P-0018: EVD-PT-OTP-06439; P-0019's statement: EVD-PT-OTP-03978; EVD-PT-OTP-



*(iv) Corroboration is not required*

206. First, contrary to the Defence's contention,<sup>436</sup> rule 63(4) of the Rules explicitly states that corroboration is not required, in particular for sexual violence.
207. Second, the statements are not the only evidence the Prosecution relies upon to prove those charges and they should not be assessed in isolation.
208. P-22 provides evidence of how UPC soldiers abducted her in Kilo, then raped and sexually enslaved her, keeping her in a pit in a camp.<sup>437</sup> Military insider P-17, involved in the UPC/FPLC assault on the Banyali-Kilo *collectivité* states that, in Kilo, the population had no choice but to endure the sexual exploitation inflicted by UPC troops and that women were sexually abused in UPC camps, including by commanders.<sup>438</sup>
209. P-18, P-19, P-113 corroborate each other when describing the same systematic abuse inflicted by UPC/FPLC soldiers at the same dates and in the same villages/areas of the Walendu-Djatsi *collectivité*. UPC/FPLC soldiers detained all three women along with other non-Hema civilians on or about 25 and 26 February, following the capture of the pacification delegation and the launch of a *ratissage* operation in the surrounding areas. Although detained in different groups, the witnesses' detailed accounts shed light on the pattern of victimization

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06123; EVD-PT-OTP-06124; Photographs of P-0019's wounds: EVD-PT-OTP-02448 to 02463; Forensic analysis of photographs of P-0019's wounds: EVD-PT-OTP-01883; Expert's physical clinical assessment of P-0019: EVD-PT-OTP-06443; Expert's psychological assessment of P-0019: EVD-PT-OTP-06441; Statement of P-0113: EVD-PT-OTP-01793; EVD-PT-OTP-06099; EVD-PT-OTP-06378; Expert psychological assessment of P-0113: EVD-PT-OTP-06440.

<sup>436</sup> ICC-01/04-02/06-T-10-CONF-FRA, pages 30; ICC-01/04-02/06-263-Conf-AnxB, pages 34-35.

<sup>437</sup> P-0022's statement: EVD-PT-OTP-01862; Photographs of P-0022's wounds: EVD-PT-OTP-01863 to 01876; Forensic analysis of photographs of P-0022's wounds: EVD-PT-OTP-00867.

<sup>438</sup> EVD-PT-OTP-06112 at 0615 and 0618.

of the prisoners: detention in Sangi and Kobu, beatings, verbal abuse, rapes, use as porters and as sexual slaves, murders and attempted murder.

210. Moreover, UPC/FPLC military insiders P-17 and P-38, present during that operation, also corroborate the witnesses as they confirm that UPC soldiers raped women prisoners in Kobu during the same events. The occurrence of rapes committed by the UPC/FPLC during the Walendu-Djatsi assault was reported to senior UPC/FPLC insider P-55 through the UPC/FPLC communication system.<sup>439</sup>

211. The Prosecution submits that the evidence establishing counts 1-3, 4-5, 7-8, 11-13, 17-18 of the charges also establish charge of persecution under count 10. In addition, the evidence presented in support of the crime of sexual slavery under counts 7-8, also establish the crime of rape under counts 4-5. The Chamber should confirm all these charges to convey the full range of victimization and criminal conduct that occurred.

212. The crimes may all be charged because they are distinct as they contain at least one element that the others do not require. This practice enhances the rights of the accused and expeditiousness of the proceedings by providing early notice of all applicable crimes; thereby reducing the need to resort to an onerous legal recharacterization of facts later at Trial. To the extent that the underlying conduct that violates these multiple statutory provisions is the same, that issue should be addressed at conviction and sentencing.

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<sup>439</sup> EVD-PT-OTP-06241 at 0205-0207, lines 77-160; EVD-PT-OTP-06286 at 0798, line 742 to 0800-0802, line 814-882; EVD-PT-OTP-06505 at 1029, lines 356-368.

*(v) P-0017 and P-0038 were not prompted to give evidence on sexual violence committed by UPC/FPLC troops*

213. The Defence alleges that UPC/FPLC military insiders P-17 and P-38<sup>440</sup> provided evidence on sexual violence committed by UPC/FPLC troops following suggestions and pressure by Prosecution investigators. This allegation is entirely unfounded.

214. A review of P-38's interview dispels any such argument. The first question relating to sexual violence is the following: « *Au sujet des prisonniers, lors de votre audition en 2006, je crois que vous avez parlé des ... on vous a parlé ... vous avez discuté des femmes, des filles qui ont été faites prisonnières. Est-ce que vous pouvez en parler de plus ?* » P-38 answers : « *Des filles, femmes qui ont été prisonnières ? Non, il y a des femmes qui étaient prisonnières, qui étaient violées avant d'être tuées.* ».<sup>441</sup> This could hardly be characterized as prompting.

215. Thereafter, the investigator continues to explore the allegations of the witness by asking whether or not he witnessed rape being committed by the UPC in Mongbwalu. P-38 answers that he did not; but that he routinely heard UPC soldiers bragging about raping civilians. The witness raised the issue of sexual violence on his own, he was not pressured into giving evidence that he witnessed rape and follow-up questions were aimed at establishing the basis of his knowledge, the location of the crime, the status of the victims and the involvement and knowledge of the UPC commanders.<sup>442</sup> The questions were not leading and the detailed and substantiated answers of the witness - who does not overstate his knowledge - demonstrate the credibility of his account.

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<sup>440</sup> ICC-01/04-02/06-T-10-CONF-FRA, pages 31; ICC-01/04-02/06-263-Conf-AnxB, pages 36.

<sup>441</sup> EVD-PT-OTP-06235 at 0121.

<sup>442</sup> EVD-PT-OTP-06235 at 0121-0126; EVD-PT-OTP-06237 at 0156-0157; EVD-PT-OTP-06241 at 0202-0206.

216. Moreover, the witness's evidence on sexual violence committed by UPC/FPLC troops did not arise for the first time during the 2013 interview, contrary to the Defence's suggestion. During the Prosecution's first interview of P-38 in 2006, the witness already gave evidence on UPC troops raping civilians.<sup>443</sup>

217. As for P-17, the investigator first asks the witness about his knowledge on rape committed specifically in Sayo. P-17 answers: *«il y a des histoires que j'ai vues ou bien des autres par après qu'on a racontées ou quoi, mais les viols que moi j'ai vus à SAYO ... je n'ai pas vu »*.<sup>444</sup> In that response, the witness specifies that he did not see rapes in Sayo but that he heard of it. Legitimately, the investigator further enquires to explore what exactly the witness heard about these crimes. This is not leading, nor can it be characterized as exerting pressure on the witness.

218. When the witness is asked if he knows about rape committed by UPC troops, he answers : *« c'est lorsque MONGBWALU est prise maintenant, et c'est là que les militaires ont commencé maintenant à faire leurs rondes.»[...] " C'était ce pillage global, c'était à ce moment que les militaires ont commencé à faire ce qu'ils voulaient maintenant. »*. P-17 states that UPC soldiers committed rape *« au quotidien »*.<sup>445</sup>

219. The Defence surprisingly further criticizes the investigator for asking the witness: *"êtes-vous sûr de cela"* –P-17 answers *"Oui"* – investigator : *"Parce qu'on a mis un peu de ... ou beaucoup de pression, maintenant... oui, et on a poursuivi ces questions. On ne veut pas que vous nous donniez de réponse juste pour finir ce sujet. Vous comprenez?"* ». Then the investigator asks the witness to justify his basis of knowledge and to provide detailed account of occurrences of UPC committing rape, which P-17 does.<sup>446</sup>

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<sup>443</sup> EVD-PT-OTP-03743 at 3024.

<sup>444</sup> EVD-OTP-PT-06107 at 512.

<sup>445</sup> EVD-OTP-PT-06107 at 515.

<sup>446</sup> EVD-OTP-PT-06107 at 512-518.

220. This course of questioning demonstrates that the investigator was thoroughly testing the answers of the witness - who had provided incriminating information - to establish the credibility of his account and to further remind the witness of the obligation to give truthful information. P-17 provides substantiated and detailed accounts of specific occurrences of rapes during UPC/FPLC offensives and sexual slavery of women in UPC camps, including by named UPC/FPLC commanders.<sup>447</sup> This establishes his basis of knowledge and lends significant credibility to his account that the UPC/FPLC committed rape and sexual slavery.

221. The Defence also asserts, in only general terms, that the Prosecution's investigative methods exert pressure on witnesses or suggest expected answers.<sup>448</sup> As demonstrated above in relation to the interviews of P-17 and P-38, these claims are baseless. The Prosecution was neither aggressive nor coercive in its manner of questioning witnesses.

222. Also without merit is the Defence complaint that recent re-interviews were structured impermissibly by reviewing parts of the witness's prior statements and then asking supplementary questions. Directing a witness's mind to an area of evidence, based on the evidence already given, and then proceeding to ask non-leading follow-up questions is an appropriate way to ask questions. This is particularly so where witnesses gave voluminous prior statements (audio recorded interviews under article 55(2)) many years ago, as is the case here. Proceeding in this manner is fairest to the witness in recalling the information he or she gave previously and promotes judicious use of time. The same principle applies even during a first interview that runs over several hours or days: if the witness gave evidence on the first day of the interview, it is perfectly proper to direct the witness back to the evidence he or she already gave, to indicate that the

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<sup>447</sup> EVD-OTP-PT-06107 at 512-518.

<sup>448</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.46, lines 12-20.

examiner would like to ask supplementary questions on that topic, and then to ask non-leading questions to elicit additional details or clarification.<sup>449</sup>

223. Moreover, the Defence provides no references to any passages in interviews of other witnesses for whom it claims the investigative methods tainted the evidence. Should the Defence, for the first time in its written observations on 4 April 2014, provide such references, the Prosecution reserves its right to seek leave to reply. The transcripts of military insiders' interviews total hundreds of pages per witness, making it impossible for the Prosecution to anticipate which passages the Defence may challenge, if not already properly identified.

#### ***F. Attack on Protected Objects, Pillaging and Destruction of Property***

*(i) There is sufficient notice of the specific UPC/FPLC attacks against protected objects*

224. The Defence contends that the only attack on protected object specifically referred to in the DCC is the attack on the Bambu hospital.<sup>450</sup> That is not correct. The DCC, the list of evidence, the IDAC and the confirmation hearing presentation set out the specific facts charged and the evidence in support:<sup>451</sup> the UPC/FPLC attacked the church and the health centre in Sayo,<sup>452</sup> the church and the hospital in Mongbwalu<sup>453</sup> - both on or about 21 November 2002 - and the hospital in Bambu,<sup>454</sup> during the assault on or about 19 February 2003.

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<sup>449</sup> EVD-PT-OTP-06125, p.31, line 5 to p.32, line 11: "Presiding Judge Fulford: I think it is a matter of looking at what he's said, and then on the main issues taking him back, perhaps at that stage getting him to be a bit more succinct and clarify."

<sup>450</sup> ICC-01/04-02/06-263-Conf-AnxB, pp.37-42.

<sup>451</sup> ICC-01/04-02/06-203-AnxA, paras.69, 71, 72, 78, 81.

<sup>452</sup> ICC-01/04-02/06-203-AnxA, p.27 para.72; p.26 para.69; ICC-01/04-02/06-258-AnxA6 p.10.

<sup>453</sup> ICC-01/04-02/06-203-AnxA, p.27 para.72; page 26 para.69; ICC-01/04-02/06-258-AnxA6 p.9.

<sup>454</sup> ICC-01/04-02/06-203-AnxA p.29 para.78; ICC-01/04-02/06-258-AnxA6 p.15.

(ii) *Protected objects were the intended targets of the attacks*

225. The evidence demonstrates that protected objects were the intended objects of the attacks, as required by the elements of article 8(2)(e)(iv).<sup>455</sup>

226. First, article 49(1) of Additional Protocol I to the Geneva Conventions defines “attacks” as: “acts of violence against the adversary”. As such, the extraction and execution of a civilian who had taken refuge in the Sayo church, and the subsequent pillaging of the church qualifies as an “attack” on protected objects.

227. Second, the health centres and churches were the object of the attack when they were looted and destroyed, which is supported by the evidence of the motive of the attacks, the sequence of events and the UPC/FPLC pattern of conduct.

228. The UPC/FPLC troops intended their attacks on schools, hospitals and churches to reduce the ability of the non-Hema population to live in the areas overtaken by the UPC. As explained by P-46, the aim of the destruction of the Bambu hospital was to: “*completely eliminate all chances for the population of the region to have social assistance*”.<sup>456</sup>

229. In Sayo, Bosco Ntaganda and his troops surrounded the church, pulled out and executed a man who took refuge inside, and thereafter looted the church.<sup>457</sup> The health centres in Mongbwalu,<sup>458</sup> Sayo<sup>459</sup> and Bambu<sup>460</sup> were extensively and systematically looted. In Bambu, the medical equipment was destroyed.<sup>461</sup> In

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<sup>455</sup> ICC-01/04-02/06-258-AnxA6, pp. 9-12 ; 16.

<sup>456</sup> EVD-PT-OTP-06242, at 0229, paras.54-55; EVD-PT-OTP-03424, para.64 at 0303-0304.

<sup>457</sup> EVD-PT-OTP-06484 at 0515.

<sup>458</sup> EVD-PT-OTP-06110 at 0558- 0562; EVD-PT-OTP-06476 at 0644; EVD-PT-OTP-06491 at 0670-0674.

<sup>459</sup> EVD-PT-OTP-06476 at 0644.

<sup>460</sup> EVD-PT-OTP-06242, at 0229, paras.54-55; EVD-PT-OTP-03424, para.64; EVD-PTOTP-06473, para.48; EVD-PT-OTP-03424, para.6-9; EVD-PT-OTP-02798 at 0458; EVD-PT-OTP-03304 at 0437.

<sup>461</sup> EVD-PTOTP-06473, para.48.

Sayo, UPC/FPLC troops fired at the health centre, entered it and killed patients.<sup>462</sup> Any argument that the attacks were simply indiscriminate or disproportionate cannot be sustained. The UPC's pattern of attacking protected objects prior to those attacks is indicative of its knowledge and intent.<sup>463</sup>

230. Third, the UPC's intentional targeting of these protected objects is demonstrated by the fact that the perpetrators were aware of the nature and purpose of the structures they attacked.<sup>464</sup> The churches and hospitals were easily identifiable, in particular once the UPC's attacks were under way. The UPC/FPLC troops could not have failed to recognise their nature and purpose as they were targeting these structures. Critically, the UPC/FPLC troops pillaged goods from churches and hospitals; the unique nature of these goods can leave no doubt as to the protected status of the objects.

*(iii) Evidence in support of the UPC/FPLC attack on the Bambu hospital*

231. The Defence argues that the Prosecution's evidence of this attack relies on a single source, and is too general. This is incorrect.

232. First, P-46, a UN researcher, was part of the UN team carrying out investigations into, *inter alia*, the UPC/FPLC assault in Walendu-Djatsi in February-March 2003. She visited Bambu two months after the UPC/FPLC operation and personally saw the looted and destroyed hospital in Bambu. P-46 also interviewed victims in Bambu who confirmed that the UPC attacked the hospital.<sup>465</sup>

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<sup>462</sup> EVD-PT-OTP-06476, at 0644.

<sup>463</sup> EVD-PT-OTP-06491 at 0670.

<sup>464</sup> ICTY, *Prosecutor v Blaskic*, IT-95-14-T, *Judgement*, (3 March 200), para.185; Dörmann, *Elements of War Crimes*, pp.227-228. It does not require that the perpetrator knew that the objects had a protected status under international law, see where it is explicitly required, as in article 8(2)(e)(iii).

<sup>465</sup> EVD-PT-OTP-06242, at 0229, paras.54-55,59.



233. Second, the UN Special Report on Ituri, drafted by P-317 and P-46, corroborates that the UPC attacked the Bambu hospital.<sup>466</sup> The report was based on P-46 and P-317's assessment missions and other sources collecting independent data. These other sources include field missions conducted by various UN investigators, military observer reports and additional UN reports.<sup>467</sup> In addition to the two witnesses, the UPC's attack on the Bambu hospital is corroborated by several UN and Governmental reports.<sup>468</sup> This evidence describe the attack on the hospital, location, time frame, perpetrators, material looted and extend of destruction.

*(iv) The owners of the pillaged goods need not be "adversaries"*

234. The Defence contends that the victims of pillaging must be "*adversaries*", that is, individuals who supported the armed groups opposed to the UPC. First, this requirement does not appear in the elements of this crime as set out in article 8(2)(e)(v) of the Elements. Second, the jurisprudence relied upon by the Defence does not provide for such a requirement. Pre-Trial Chamber II expressly discarded any such requirement.<sup>469</sup> While Pre-Trial Chamber I acknowledged that there may be some support for this view, it did not apply that test.<sup>470</sup>

235. In any event, the evidence satisfies either test.<sup>471</sup> Through the crime of pillaging, the UPC/FPLC targeted non-Hema civilians in furtherance of the common plan. Pillaging was promised and ordered by UPC/FPLC commanders<sup>472</sup>

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<sup>466</sup> EVD-PT-OTP-02798 at 0444, para.69; EVD-PT-OTP-06473, para.48.

<sup>467</sup> EVD-PT-OTP-06242, at 0229, para.59-60.

<sup>468</sup> EVD-PT-OTP-03424, para.6; EVD-PT-OTP-03304 at 0438; EVD-PT-OTP-00299, at 0121.

<sup>469</sup> ICC-01/04-01/10-465, para.176.

<sup>470</sup> Pre-Trial Chamber I considered that what was at stake was not the fact that the looted goods belonged to the ethnicity considered as enemy but rather the fact that properties in the attacked village were pillaged, with the intention (i) to destroy the village, (ii) to deprive the owners of their properties, (iii) to displace the persons that lived there and (iv) to appropriate of the villagers belongings for private or personal use. ICC-01/04-01/07-717, para.329.

<sup>471</sup> ICC-01/04-02/06-258-AnxA6, pp.3-7, 12-13.

<sup>472</sup> EVD-PT-OTP-06111 at 0609- 0610; EVD-PT-OTP-03732 at 2707; EVD-PT-OTP-03730 at 2634; EVD-PT-OTP-06236 at 0143; EVD-PT-OTP-06506 at 1074-1077; EVD-PT-OTP-06058, para.639.

including Bosco Ntaganda.<sup>473</sup> P-17 explains that pillaging was a means to target the non-Hema population and drive it away from the attacked areas.<sup>474</sup>

236. The UPC/FPLC troops committed pillaging during its assaults in areas inhabited by Lendu and non-Hema,<sup>475</sup> during which forcible displacement, destruction and destruction of property were ordered and committed by UPC/FPLC troops.<sup>476</sup> Crime base witnesses whose goods were pillaged – or who were used as porters of looted goods taken from non-Hema areas – are themselves non-Hema were the (for example, P-804, P-19, P-100, P-107 and P-113).<sup>477</sup>

237. Bosco Ntaganda told senior UPC/FPLC military insider P-768 to tell the soldiers to go and pillage in Mongbwalu: *“he was saying (...) these were (...) the goods from the enemy (...) so they have to be pillaged”*.<sup>478</sup>

238. Contrary to article 8(2)(e)(v), article 8(2)(e)(xii) explicitly requires that destroyed property belongs to the “adversary”. The evidence presented by the Prosecution establishes that the UPC/FPLC destroyed non-Hema civilian property with the awareness that the property belonged to these civilians. This is demonstrated by the fact that UPC/FPLC commanders ordered the destruction of civilian areas<sup>479</sup> which was comprehensively executed by UPC/FPLC soldiers, notably by shelling<sup>480</sup> or burning down<sup>481</sup> villages,<sup>482</sup> for the purpose of ousting the non-Hema civilian population from the areas they attacked.

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<sup>473</sup> EVD-PT-OTP-06234 at 0094; EVD-PT-OTP-06107 at 0503- 0504; EVD-PT-OTP-06149 at 2161, 2172; EVD-PT-OTP-06234 at 0093- 0094; EVD-PT-OTP-06485 at 0532.

<sup>474</sup> EVD-PT-OTP-06285 at 07690771.

<sup>475</sup> EVD-PT-OTP-00779 at 0451-0452, paras.98-102; EVD-PT-OTP-06476, at 0644; EVD-PT-OTP-06512; EVD-PT-OTP-06265; EVD-PT-OTP-06325.

<sup>476</sup> ICC-01/04-02/06-258-AnxA6.

<sup>477</sup> ICC-01/04-02/06-258-AnxA6, p.13.

<sup>478</sup> EVD-PT-OTP-06484 at 0515.

<sup>479</sup> EVD-PT-OTP-03732, at 2707; EVD-PT-OTP-06149 at 2187.

<sup>480</sup> EVD-PT-OTP-06486 at 0569; EVD-PT-OTP-06391 at 1132, para. 18; EVD-PT-OTP-06363, at 1015 EVD-PT-OTP-00779; EVD-PT-OTP-03304; EVD-PT-OTP-06110 at 0562-0563.

(v) *The UPC/FPLC forces pillaged in Mongbwalu*

239. No less than ten Prosecution witnesses concur that UPC/FPLC troops pillaged on a large scale during the Mongbwalu assault. These witnesses are: soldiers deployed on the ground (P-17 and P-38), Senior FPLC insiders (P-768, P-16, P-55), other UPC/FPLC soldiers (P-290), an NGO researcher who conducted missions on the ground after the assault (P-315); an individual who was present on the ground (P-2) and crime base witnesses (P-804 and P-800).<sup>483</sup>

240. The evidence demonstrates that pillaging occurred systematically, and that Bosco Ntaganda and his commanders ordered UPC/FPLC troops to pillage in the briefing of the troops in Mabanga; that Bosco Ntaganda himself pillaged and that his looted goods were sent back to Bunia by plane; and that pillaging was not punished.<sup>484</sup>

(vi) *The looted goods are described sufficiently*

241. The Defence contends that the Prosecution presented evidence on pillaging *in abstracto* – referring to a pillaging culture, rather than to the charged assaults. On the contrary, in the DCC, the Prosecution alleges that the UPC/FPLC committed

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<sup>481</sup> EVD-PT-OTP-06476, at 0644; EVD-PT-OTP-06236 at 0134; EVD-PT-OTP-06286 at 0785; EVD-PT-OTP-04138 at 1703, lines 732-754; EVD-PT-OTP-06506 at 1071-1074-1077; EVD-PT-OTP-01793, paras.33-36; EVD-PT-OTP-01794 at 0049; EVD-PT-OTP-06378, para.38; EVD-PT-OTP-0639, para.44; EVD-PT-OTP-06473, para.46; EVD-PT-OTP-03424, paras. 49,59; EVD-PT-OTP-03424, paras.58-59.

<sup>482</sup> EVD-PT-OTP-06289 at 0857, lines 412-426; EVD-PT-OTP-06118; P-0768 EVD-PT-OTP-06486, at 0568-0572, lines 508-636, EVD-PT-OTP-06110-, at 0562-0563; EVD-PT-OTP-01884 at 0174, para 19; EVD-PT-OTP-06363, paras.136; EVD-PT-OTP-00781at 0665-0666; EVD-PT-OTP-00779 at 0452 para.102; EVD-PT-OTP-06473 at 0293, para.36; EVD-PT-OTP-06236at 0134; EVD-PT-OTP-01816, paras.25-27; EVD-PT-OTP-06083, paras.51-54; EVD-PT-OTP02447, para.31; EVD-PT-OTP-01792 at 0024-0025, paras.20-26; EVD-PT-OTP-06325, para.25; EVD-PT-OTP-00736, para.52; EVD-PT-OTP-01801 at 0081, para.31; EVD-PTOTP-01793, para. 41; EVD-PT-OTP-01794 at 0049-0050; EVD-PT-OTP-01793, paras.33-36; EVD-PTOTP-06378,paras.38, 41, EVD-PT-OTP-01793, paras.22-23; EVD-PT-OTP-03358 at 0259-0260; EVD-PT-OTP-02687 at 0115, para.42, EVD-PT-OTP-06267 at 1339, para.81; EVD-PT-OTP02687, at 0112-0113, paras.30-32; EVD-PT-OTP-06267 at 1335, paras.44-48; EVD-PT-OTP06265, para.48; EVD-PT-OTP-02798, para.458; EVD-PT-OTP-06473, para.46; EVD-PT-OTP03424, para.59; EVD-PT-OTP-06242, at 0225- 0228.

<sup>483</sup> ICC-01/04-02/06-258-AnxA6, pp.3-7.

<sup>484</sup> *Ibid*

pillaging in the two main assaults. The insider and crime base evidence presented refers to specific items looted by the UPC: clothing and vehicles<sup>485</sup>, computers, TV and DVDs,<sup>486</sup> the chalice from the Sayo church and beer during the Banyali-Kilo assault. The UPC/FPLC pillaged cattle, crops, clothes, mattresses, cutlery and bicycles<sup>487</sup>, roof<sup>488</sup> and hospital beds<sup>489</sup> during the Walendu-Djatsi assault.

242. The nature of the pillaged goods is evidence of their private use by UPC/FPLC troops. The wholesale nature of the pillaging demonstrate that it was not committed out of necessity and does not meet the *Kubura* test cited by the Defence.<sup>490</sup> Critically on this point, pillaging was promised as “spoils of war” to the UPC/FPLC soldiers before each assault and it was one of the crimes intended to drive the non-Hema away.<sup>491</sup> The UPC/FPLC pattern was for all commanders and soldiers, including Bosco Ntaganda, to loot everything. Systems were even designed to carry all the spoils: planes and looted vehicles were used to carry

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<sup>485</sup> ICC-01/04-02/06-258-AnxA6, p.3: EVD-PT-OTP-06107 at 0505-0506; EVD-PT-OTP-06235 at 0118; EVD-PT-OTP-06474 at 0005; EVD-PT-OTP-06485 at 0534; EVD-PT-OTP-06485 at 0532-0535.

<sup>486</sup> EVD-PT-OTP-06107 at 0505-0507 at 0512, at 0515; EVD-PT-OTP-06110 at 0558-561; EVD-PT-OTP-04145 at 0118.

<sup>487</sup> ICC-01/04-02/06-258-AnxA6, p.12: EVD-PT-OTP-01792 at 0027, para.33; EVD-PT-OTP-00736, at 0392, para.52; EVD-PT-OTP-01814, at 106, para.30; EVD-PT-OTP-03358 at 0259-0260; EVD-PT-OTP-00094, EVD-PT-OTP-01816, para.27.

<sup>488</sup> EVD-PT-OTP-03730 at 2635 ; EVD-PT-OTP-06506, at 1071-1077; EVD-PT-OTP-01792, at 0024-0025, paras.20-26; EVD-PT-OTP-00736, para.52; EVD-PT-OTP-00691, at 0004-0005; EVD-PT-OTP-01801 at 0081, para.31; EVD-PT-OTP-06380, para.44; EVD-PT-OTP-06506 at 1071; EVD-PT-OTP-06473, para.46; EVD-PT-OTP-06268 at 1351.

<sup>489</sup> EVD-PT-OTP-06242, at 0229, paras.54-55; EVD-PT-OTP-03424, para.64; EVD-PT-OTP-06473, para.48; EVD-PT-OTP-03424, para.6, 9; EVD-PT-OTP-02798 at 0458; EVD-PT-OTP-03304 at 0437.

<sup>490</sup> ICTY, *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 53: “in the context of an actual or looming famine, a state of necessity may be an exception to the prohibition on the appropriation of public or private property. Property that can be appropriated in a state of necessity includes mostly food, which may be eaten *in situ*, but also livestock. To pleas a defence of necessity and for it to succeed, the following conditions must be met: (i) there must be a real and imminent threat of severe and irreparable harm to life existence; (ii) the acts of plunder must have been the only means to avoid the aforesaid harm; (iii) the acts of plunder were not disproportionate and (iv) the situation was not voluntarily brought about by the perpetrator himself”.

<sup>491</sup> EVD-PT-OTP-06285 at 0769, lines 736 - 0771.

more pillaged property in Mongbwalu and Sayo.<sup>492</sup> In Walendu-Djatsi, the UPC/FPLC used civilians to carry the looted goods back to the military bases.<sup>493</sup>

#### IV. Other Defence Challenges

##### *A. The Charges Are Specifically Pleaded*

243. The Defence challenges the specificity of the charges on grounds related to their temporal and geographic scope in relation to the assaults on the *collectivités* of Banyali-Kilo and Walendu-Djatsi,<sup>494</sup> and the particulars of the recruitment and use of children under the age of 15 to participate actively in hostilities.<sup>495</sup> The Defence further claims that the analysis of the evidence in the IDAC is of no assistance.<sup>496</sup> These arguments are unfounded, both legally and factually.

244. First, the DCC provides a very precise, narrow temporal and geographic scope for the crimes it alleges Bosco Ntaganda is criminally responsible: (a) on or about 15 November to on or about 15 December 2002 in the Banyali-Kilo *collectivité*, which the Prosecution states includes the villages surrounding Mongbwalu, including Pluto, Nzebi, Sayo and Kilo;<sup>497</sup> and (b) on or about 16 February to on or about 3 March 2003 in the Walendu-Djatsi *collectivité*, which the Prosecution states includes a 15-km radius around Lipri, Bambu and Kobu and includes over 40 villages of which the Prosecution names 28 villages.<sup>498</sup> The Prosecution provides specific detail of the crimes it says took place in a number of these named villages

<sup>492</sup> ICC-01/04-02/06-258-AnxA6 pages 3-7; EVD-PT-OTP-06107 at 0514-0515; EVD-PT-OTP06149 at 2172; EVD-PT-OTP-06391 at 1132; EVD-PT-OTP-00782 at 0829.

<sup>493</sup> EVD-PT-OTP-01816, paras.25-27; EVD-PT-OTP-06083, paras.51-54; EVD-PT-OTP02447 at 0148, paras.30-31; EVD-PT-OTP-01792, at 0027, para.33; EVD-PT-OTP-01815; EVD-PT-OTP-01794 at 0049; EVD-PT-OTP-01814, at 106-0109, paras.30-42; EVD-PT-OTP-01793, paras.33-36.

<sup>494</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.9, line 4 to p.11, line 17.

<sup>495</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.13, lines 11-24.

<sup>496</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.13, lines 16-18

<sup>497</sup> ICC-01/04-02/06-203-AnxA, paras.63-75, 157-162.

<sup>498</sup> ICC-01/04-02/06-203-AnxA, paras 63-75, 157-162 and footnote 11.

within the confined geographic areas specified.<sup>499</sup> Moreover, the forced displacement of the population is a crime that took place throughout this defined geographic territory. The Defence's contention that the DCC does not make specific reference to Nzebi<sup>500</sup> is incorrect.<sup>501</sup>

245. The restricted geographic and temporal scope of these charges provides sufficient notice to Bosco Ntaganda of the charges against him. Chambers of this Court have found it permissible to refer to "surrounding areas" where crimes were committed:

"Busurungi and surrounding villages" and "Busurungi and neighbouring villages", the Chamber finds the description of the location in question to be sufficiently precise, particularly given the relatively narrow geographic area involved and the fact that the relevant details as to the wider locations surrounding Busurungi are to be found when the DCC is read in conjunction with the LoE.<sup>502</sup>

246. The Pre-Trial Chambers in *Lubanga* and in *Katanga and Ngudjolo* also found that the DCC must be read in conjunction with the Prosecution's list of evidence.<sup>503</sup> Even if some terms contained in the DCC appear to be vague, any such ambiguity could be clarified if read together with the list of evidence.<sup>504</sup> This is even more so where the Prosecution has prepared an IDAC.

247. At the ICTY, Chambers have held that whether an indictment is pled with sufficient particularity depends on whether it sets out the material facts of the

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<sup>499</sup> Pluto and Nzebi (DCC, paras.62 and 69); Mongbwalu (DCC, paras.62, 65, 67-73); Sayo (DCC, paras.62, 69-73); Kilo (DCC, paras.62, 65, 74); Nyangaray and Mwanga (DCC, para.76); Lipri (DCC, paras.76, 77, 79, 87); Bambu (DCC, paras.77, 78, 81, 87); Kobu (DCC, paras.77, 78, 80, 84, 85, 87, 89, 90); Tsili and Ngongo (para.79), Petsy and Gutsi (para.81); Sangi (DCC, paras.83-85); Jitchu (DCC, paras.84-86, 88); Buli (paras.85-86); Mindjo, Goy, Langa, Dyalo, Wadda, Gola, Gogo (DCC, para.86).

<sup>500</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.9, lines 18-19.

<sup>501</sup> Nzebi (DCC, paras.62 and 69).

<sup>502</sup> ICC-01/04-01/10-465-Red, para. 84.

<sup>503</sup> ICC-01/04-01/06-803-tEN, 29 January 2007, para. 150; ICC-01/04-01/07-648, 25 June 2008, para. 25.

<sup>504</sup> See ICC-01/04-01/07-648, 25 June 2008, para. 25: "Moreover, although, as claimed by both Defences, the reference to "other" FNI and FRPI commanders in paragraphs 63 and 95 of the Prosecution's Amended Charging Document appears *prima facie* to be "too vague", the Single Judge considers that, when read in light of the parts of the Prosecution's Amended Charging Document and the evidence referred to in the previous paragraph, the Defences' claim has no merit."

Prosecution's case with enough detail to inform the accused clearly of the charges against him or her so that the accused person may prepare a defence.<sup>505</sup> The Prosecution submits that in this case, there are sufficient particulars of the dates and places of the alleged crimes for the Defence to be fully informed of the nature of the charges against Bosco Ntaganda.

248. In this regard, and particularly on point to the current Defence challenge, the Trial Chamber in the Special Court for Sierra Leone held that:

*It is inaccurate to suggest that the phrases "various locations" and "various areas including" in the relevant counts are completely devoid of details as to what is being alleged. Whether they are permissible or not depends primarily upon the context. For example, paragraphs 41, 44, 45 and 51 allege that the acts took place in various locations within those districts, a much narrower geographical unit than, for example "within the Southern or Eastern Province" or "within Sierra Leone." This is clearly permissible in situations where the alleged criminality was of what seems to be cataclysmic dimensions. By parity of reasoning, the phrases "such as" and "including but not limited to" would, in similar situations, be acceptable if the reference is, likewise, to locations but not otherwise. It is therefore the Chamber's thinking that taking the Indictment in its entirety, it is difficult to fathom how the Accused is unfairly prejudiced by the use of said phrases in the context herein. In the ultimate analysis, having regard to the cardinal principle of the criminal law that the Prosecution must prove the case against an accused beyond reasonable doubt, the onus is on the Prosecution to adduce evidence at the trial to support the charges, however formulated.<sup>506</sup> (Emphasis added)*

249. With respect to the Defence's challenge on the specificity of the charges of enlistment and conscription of children under 15 and their use to participate actively in hostilities, the very nature of the crimes will affect the degree of specificity with which the Prosecution has to plead the acts alleged in the indictment. As recognised by the ICTY Appeals Chamber in *Kupreškić*

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<sup>505</sup> *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 23; *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para.20

<sup>506</sup> *Prosecutor v. Sesay*, Case No. SCSL-2003-05-PT, *Decision and Order on Defence Preliminary Motion For Defects in the Form of the Indictment*, 13 October 2003, para.23.

“[t]here 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’.”<sup>507</sup>

250. In the *Taylor* case at the SCSL, the Prosecution’s indictment charged that:

“[b]etween about 30 November 1996 and about 18 January 2002, throughout the Republic of Sierra Leone, members of RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the Accused, routinely conscripted, enlisted and/or used boys and girls under the age of 15 to participate in active hostilities”. The Accused is thus charged with conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities (“conscripting, enlisting or using child soldiers”), an ‘other serious violation of international humanitarian law’, punishable under Article 4(c) of the Statute.<sup>508</sup>

251. The *Taylor* Trial Chamber held that the non-pleading of specific locations for the continuous crime of enlisting/conscripting was permissible:

[...For example, with respect to the crimes of sexual slavery and the enlistment, conscription and use of child soldiers, the Prosecution has not pleaded any locations...]

However, notwithstanding this inconsistency, the Trial Chamber, in accordance with the AFRC Trial Judgement, considers that the prolonged nature of these crimes, especially in the context of the Sierra Leone conflict where the perpetrators were often on the move between villages and districts over a significant period of time, may make pleading particular locations sometimes impracticable. Therefore, while it is the Prosecution’s duty to provide any material facts on the alleged crimes within its possession so as to enable the Accused to prepare a defence, nevertheless in the present case a significant amount of evidence has been adduced in respect of each of these crimes over the course of a lengthy trial. Moreover, the Defence has not specifically objected to the lack of specificity...<sup>509</sup>

252. In *Lubanga*, the Defence challenged the ‘factual and legal vagueness’ of the charges in the DCC. The DCC charged the geographical area to be Ituri, and did mention the specific camps of Sota, Mandro, Rwampara, Centrale, Irumu and Bule.<sup>510</sup> The *Lubanga* DCC also gave specific examples of the use of child soldiers

<sup>507</sup> *Prosecutor v. Kupreškić*, Case No. IT-95-16-A, *Appeal Judgment*, 23 October 2001, paras. 89-90; *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-T, *Judgment and Sentence*, Trial Chamber II, 1 November 2010, para. 32.

<sup>508</sup> *Prosecutor v Taylor*, SCSL-03-01-T, *Judgement*, (18 May 2012), para. 1355.

<sup>509</sup> *Prosecutor v Taylor*, SCSL-03-01-T, *Judgement* (18 May 2012), paras. 118-119 and 1357. *See also*, *Prosecutor v Brima et al.*, SCSL-04-16-T, *Judgement* (20 June 2007), paras 39-40.

<sup>510</sup> ICC-01/04-01/06-356-Conf-Anx1, para. 34.



in hostilities.<sup>511</sup> The Chamber held that the DCC met the criteria set forth in regulation 52, and was a 'detailed description' of the charges. It recalled that the DCC is to be read in conjunction with the list of evidence.<sup>512</sup>

253. In this present case, the DCC alleges that the UPC/FPLC conducted recruitment campaigns throughout Ituri between 2 July 2002 and 31 December 2003.<sup>513</sup> It thereafter refers to the training camps to which children were taken for military training including at Centrale, Mandro, Mahabusu, Lingo, Rwampara, Bule, Bogoro, Sota, Mongbwalu, Bunia, Fataki, Khari and Kilo.<sup>514</sup>

254. The DCC further states that child soldiers fought in combat in numerous specific locations with specific dates the attacks on Bunia (6-9 August 2002); Songolo (31 August 2002); Zumbe (16 October 2002); Libi (October 2002); Mbau (October-November 2002); Kpandroma (October 2002); Mambasa, Komanda and Eringeti (between October and December 2002); Mongbwalu (18-23 November 2002) Mabanga (May or June 2003); Lonyo (May or June 2003); Lipri, Kobu and Bambu (16 February to 3 March 2003); Bunia (6 March, 6 May 2003).<sup>515</sup>

255. Further, paragraph 65 of the DCC explicitly describes the enlistment of children in Kilo and their use in combat in Mongbwalu.<sup>516</sup>

256. Moreover, there is significant evidence in the Prosecution's list of evidence and in the IDAC pertaining to the UPC/FPLC's enlistment, conscription, training and use of children under the age of 15 to participate actively in hostilities, contained in pages 454-607.

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<sup>511</sup> ICC-01/04-01/06-356-Conf-Anx1, paras. 41-84.

<sup>512</sup> ICC-01/04-01/06-803-tEN, paras. 149-150.

<sup>513</sup> ICC-01/04-02/06-203-AnxA, paras. 93-94.

<sup>514</sup> ICC-01/04-02/06-203-AnxA, para. 95.

<sup>515</sup> ICC-01/04-02/06-203-AnxA, para. 98.

<sup>516</sup> ICC-01/04-02/06-203-AnxA, para. 65.

257. The Defence also complains of the lack of named individual child soldier victims.<sup>517</sup> In its confirmation decision in the *Bemba* case, in determining whether the legal requirements of the act of murder as a crime against humanity are met, Pre-Trial Chamber II pointed out the Prosecutor's obligation to give particulars in the DCC when seeking to prove that the perpetrator killed specific individuals.<sup>518</sup> Citing ICTY jurisprudence,<sup>519</sup> the Chamber held that bearing in mind the threshold of "substantial grounds" and "*the fact in case of mass crimes, it may be impractical to insist on a high degree of specificity*".<sup>520</sup>

258. 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.<sup>521</sup>

259. In the *Lubanga* case, the Prosecution charged Lubanga with a policy and pattern of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities while listing several individual cases as representative examples only.<sup>522</sup> In its confirmation decision, Pre-Trial Chamber I observed in respect of the charges of conscription and enlistment that recruitment of children under the age of 15 years was a systematic practice in several localities in Ituri.<sup>523</sup>

260. Furthermore, in the *Katanga and Ngudjolo* case the Defence challenged the lack of specificity as to the identity of the victims and the insufficiency of the factual allegations contained in the Prosecution's Amended Charging Document with

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<sup>517</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.13, lines 15-16.

<sup>518</sup> *The Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10 & ICTR-96-17-T, *Judgement and Sentence*, Trial Chamber I, 21 February 2003, para. 49; see also W. A. Schabas, *The UN International Criminal Tribunals, The former Yugoslavia, Rwanda and Sierra Leone*, (CUP, 2006), pp.360-361.

<sup>519</sup> ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para.17.

<sup>520</sup> ICC-01/05-01/08-424, para.134.

<sup>521</sup> ICC-01/05-01/08-424, para.134.

<sup>522</sup> ICC-01/04-01/06-356-Anx2, para.41-84.

<sup>523</sup> ICC-01/04-01/06-803-tEN, paras.250-251.

regard to the charge of the use of children under the age of 15 to participate actively in hostilities. The Single Judge rejected these claims and considered the information provided in relevant paragraphs of the Amended Charging Document and the related evidence sufficient to satisfy the requirements of articles 61(3) and 67(1)(a) and (b) of the Statute, rule 121(3) of the Rules and regulation 52 of the Regulations of the Court.<sup>524</sup>

### ***B. Challenges to the Modes of Liability***

#### *(i) Alternative modes of liability are properly charged*

261. The Defence asserts that the Prosecution has failed to take a clear position regarding Bosco Ntaganda's responsibility because it has presented various modes of liability.<sup>525</sup> It complains that the Prosecution failed to identify "the appropriate" mode of liability and that it "did not choose any position".<sup>526</sup> It argues, moreover, that the Prosecution's approach to regulation 55 is defective.<sup>527</sup>

262. The Defence's attacks on the Prosecution's request for the Chamber to confirm all of the alternative modes of liability<sup>528</sup> should be dismissed. As stated by the ICTY Appeals Chamber, in the context of cumulative charging based on the same facts, which by extension is applicable to alternative charging, the practice

*is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition,*

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<sup>524</sup> CC-01/04-01/07-648, paras.32-38.

<sup>525</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.34, l.20 to p.35, l.25; ICC-01/04-02/06-263-AnxC, pp.1-3.

<sup>526</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.35, ll.6-10, p.36, ll.8-17; ICC-01/04-02/06-263-AnxC, p.2.

<sup>527</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.36, ll.1-7; ICC-01/04-02/06-263-AnxC, p.3.

<sup>528</sup> ICC-01/04-02/06-203-AnxA, para.110.

*cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.*<sup>529</sup>

263. In *Ruto et al*, the Defence raised a similar argument in the context of an application for the Chamber to give notice pursuant to regulation 55(2) instead of at the pre-trial stage. The Defence argued that where the Prosecution seeks to proceed with “*all forms of participation under Article 25*”, the result is “*inappropriate uncertainty as to the charges*”.<sup>530</sup> The Defence further argued that such “*unfocused and general*” notice cannot be fair to the accused.<sup>531</sup> The Defence’s arguments failed. The Trial Chamber held that regulation 55(2)

*imposes no limitations on the number of potential recharacterisations which may appear to the Chamber, nor does it require the Prosecution to establish the insufficiency of existing legal characterisations before Regulation 55(2) Notice may be given.*<sup>532</sup>

The Chamber found the Prosecution’s request to include various modes of liability to be “*sufficiently concrete that it can be granted in full conformity with the rights of the accused*”.<sup>533</sup>

264. Recent developments in the Court’s trial proceedings illustrate the benefits –in terms of the rights of the accused and of judicial efficiency and expeditiousness of the proceedings– of making alternative modes of liability available to the Trial Chamber. In *Bemba* and *Katanga*, both cases in which a single mode of liability was available at the start of the trial, the Trial Chambers gave notice to the parties that the legal characterisation of the facts may be subject to change, to accord with

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<sup>529</sup> *Prosecutor v. Delalic*, Case No IT-96-21-A, Appeals Judgment, 20 February 2001, para.400. See also ICC-01/04-01/06-1399-Corr, para.24, where Trial Chamber I acknowledged –in the context of the admissibility of evidence– that in the types of cases that come before the Court there may be instances in which witnesses have been killed or wounded, untraceable or unwilling to give evidence for credible reasons. For the same reasons, the evidence at the confirmation hearing stage may change at the trial stage and alternative charging of modes of liability give the Trial Chamber a full range of options when assessing the individual criminal responsibility of the accused.

<sup>530</sup> ICC-01/09-01/11-1122, para.34, quoting ICC-01/09-01/11-442, para.36.

<sup>531</sup> See ICC-01/09-01/11-1122, para.34, ICC-01/09-01/11-985, paras.17-19.

<sup>532</sup> ICC-01/09-01/11-1122, para.40.

<sup>533</sup> ICC-01/09-01/11-1122, para.41.

new or alternative forms of participation.<sup>534</sup> In *Ruto et al.*, Trial Chamber V(A) granted the Prosecution's request and gave notice that the legal characterisation of facts may be subject to change to accord with liability under three modes of liability.<sup>535</sup> The effect of these decisions is that the possibility of a change to the legal characterisation of the facts has been announced in three of the cases presently at trial. As noted by Trial Chamber II and confirmed by the Appeals Chamber, it may only be possible for the Trial Chamber to decide to change the legal characterisation after hearing the evidence at trial.<sup>536</sup> The Appeals Chamber has held, however, that although notice of the possibility of a recharacterisation may also be given "*at any time during the trial*",<sup>537</sup> it is preferable that it "*should always be given as early as possible*".<sup>538</sup> Trial Chamber V(A) has also stated that it is best to assess the need for the legal recharacterisation of facts as early as possible "*particularly in circumstances in which the Prosecution has made an early application for this notice on the basis of the facts and circumstances pleaded in the charging document*".<sup>539</sup>

265. Giving early notice of all potentially applicable modes of liability will "*ensure that the trial is fair*".<sup>540</sup> It will enable the parties to present their evidence and examine witnesses with all possibilities in mind. It will enable the accused to

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<sup>534</sup> ICC-01/05-01/08-2324, paras.5-7; ICC-01/04-01/07-3319-tENG/FRA, para.7.

<sup>535</sup> ICC-01/09-01/11-1122, para.44, p.20.

<sup>536</sup> "...**recharacterisation** customarily occurs when the judges are in possession of all the evidence tendered, the written submissions of the parties and participants constituting a useful and final analysis of their respective positions and the statements made during their final oral submissions..." (emphasis added). ICC-01/04-01/07-3319-tENG/FRA, para.17. "...a study of ECHR judgments on this subject...shows that in the context of national jurisdictions, **recharacterisation is decided** for the most part at the deliberations stage..." (emphasis added). ICC-01/04-01/07-3319-tENG/FRA, para.18. "The Appeals Chamber observes that **changing** the legal characterisation of the facts may become necessary not only in the course of the hearing of evidence... but also thereafter. At that latter stage, the Trial Chamber may realise, upon carefully analysing the material and evidence that was presented in its totality, that the legal characterisation on the basis of which the charges were confirmed may be subject to change. That this may be necessary at the deliberations stage is particularly the case in light of the length, complexity and evidentially voluminous nature of the proceedings that come before this Court" (emphasis added). ICC-01/04-01/07-3363, para.22.

<sup>537</sup> ICC-01/04-01/07-3363, para.17.

<sup>538</sup> ICC-01/04-01/07-3363, para.24.

<sup>539</sup> ICC-01/09-01/11-1122, para.27.

<sup>540</sup> Article 64(2).

prepare his defence with full knowledge of the possible statutory provisions under consideration by the Chamber.

266. Advance notice –from the outset– will avoid delays. As stated by Judge Tarfusser in his *dissenting* opinion in the appeal against the decision giving notice under regulation 55 in the *Katanga* case,

*[i]t is beyond controversy that the triggering of regulation 55 of the Regulations of the Court and of the subsequent procedural steps mentioned in its sub-regulations (2) and (3) will result in delaying the proceedings.*<sup>541</sup>

Notice from the pre-trial stage will make adjournments –such as those envisaged in regulation 55(3)(a) – and the recall of witnesses –envisaged in regulation 55(3)(b) – unnecessary.

267. Overall, early notice of all the applicable modes of liability can only enhance the fairness of the *trial* and the expeditiousness of the proceedings. As held by Trial Chamber V(A),

*Despite any additional preparation time which comes from giving Regulation 55(2) Notice, waiting to give such notice increases the chances of prejudice to the Defence. The remediation of this prejudice may involve pressures either to reopen the case in certain respects, recall witnesses that have already testified or, out of respect for the rights of the accused, to forego legal recharacterisation that might otherwise have been in the interests of justice in the case. Such pressures are highly undesirable, and if earlier notice is given then they are avoidable.*<sup>542</sup>

268. A decision confirming the charges against Bosco Ntaganda on fewer modes of liability where the facts support the alternative forms of participation will give rise to the prospect of a regulation 55(2) application prior to or at the outset of the trial. The Prosecution urges the Pre-Trial Chamber to assess the sufficiency of the evidence to establish substantial grounds to believe in relation to each alternative *mode* of liability, in accordance with article 61(7). This will allow the trial to

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<sup>541</sup> ICC-01/04-01/07-3363, Dissenting opinion of Judge Cuno Tarfusser, para.6.

<sup>542</sup> ICC-01/09-01/11-1122, para.27.

proceed in a more efficient fashion, and in particular it will ensure that all potentially applicable modes of liability are spelled out from the outset.

269. The Prosecution submits that, although regulation 55 is only applicable at the trial stage, if a trial chamber is bound to give notice as soon as it “*appears*” to it that the legal re-characterisation of the facts “*may*” be possible,<sup>543</sup> so the Pre-Trial Chamber ought to ensure that the suspect is on notice of all applicable modes of liability in relation to which, in the Chamber’s assessment, there is “*sufficient evidence to establish substantial grounds to believe*”.<sup>544</sup>

270. The Prosecution now turns to the Defence’s contention that article 25(3)(d) cannot be pleaded as an alternative mode of liability to article 25(3)(a) because the contributions required by each one make the two provisions incompatible.<sup>545</sup> In support of its position, the Defence relies on decisions in *Kenyatta et al.*, *Lubanga* and *Mbarushimana*. The paragraphs of these decisions specifically relied on by the Defence restate the requirements of article 25(3)(d) and contrast it with 25(3)(a) but do not refer to the possibility of *charging* (a) and (d) in the alternative. They do not, thus, support the Defence’s main proposition.

*(ii) Article 25(3)(f) applies to direct and indirect perpetrators*

271. The Defence asserts that article 25(3)(f) only applies to individuals who “commit” a crime as opposed to those who “participate” in its commission. In support of this proposition, the Defence cites paragraph 998 of the *Lubanga* Judgment<sup>546</sup> which reads: “...Only those individuals who attempt “to commit” a crime, as opposed to those who participate in a crime committed by someone else, can be held liable under that provision”.

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<sup>543</sup> Regulation 55(2).

<sup>544</sup> Article 61(7).

<sup>545</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.36, l.18 to p.38, l.8 ; ICC-01/04-02/06-263-AnxC, pp.4-5.

<sup>546</sup> ICC-01/04-02/06-263-AnxC, p. 6, quoting ICC-01/04-01/06-2842, para. 998.

272. The Prosecution concedes that the word “commits” in article 25(3) sub-paragraph (a) must be taken to have the same technical meaning as the word “commit” in sub-paragraph (f). Given that sub-paragraph (f) refers to persons who attempt to “commit” a crime, and does not use the wording of sub-paragraphs (b), (c) or (d),<sup>547</sup> its primary scope of application will be those individuals who, save for circumstances independent of their intentions, would have “committed” a crime in the sense of sub-paragraph (a).

273. This, however, does not detract from the possibility of sub-paragraph (f) also constituting a proper ground of liability for *other* forms of participation. All forms of liability described in sub-paragraphs (b) to (d) of article 25 refer to the commission or attempted commission of a crime. In turn, the definition of “attempt” is codified in sub-paragraph (f). So in order to find a participant other than a perpetrator responsible for his or her contribution to the attempted commission of a crime, a Chamber will necessarily have to resort to two separate sub-headings within article 25, namely the one specifying the relevant mode of liability and sub-paragraph (f), and can properly determine in its decision that criminal responsibility is based on both headings.

274. The Defence also asserts that article 25(3)(f) “*can only raise the liability of a **direct** perpetrator of a crime and not the commission of a crime **through the acts of another** person*”<sup>548</sup> (emphasis added). The Prosecution submits that this reading of article 25(3) sub-paragraph (f) is incorrect. First, it is not supported by a plain reading of sub-paragraph (f). Second, it is also not supported by a contextual interpretation of sub-paragraph (f) in the light of sub-paragraph (a) and the latter’s prevailing

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<sup>547</sup> In the Court’s decisions, sub-paragraphs (b), (c) and (d) have been referred to as forms of “participation” in the commission of a crime. See ICC-01/04-01/06-2842, para. 998. Against that background, the Prosecution agrees that article 25(3)(f) does not apply to persons who “participate” in the commission of a crime by someone else.

<sup>548</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p. 37, ll. 9-15, esp. 13-15. Apart from quoting paragraph 998 of the *Lubanga* Judgment, the Defence provided no support for its position. ICC-01/04-02/06-263-AnxC, p. 6.



interpretation. Moreover, the decisions of the Court provide a precedent for relying on sub-paragraph (f) to characterise the conduct of persons other than the direct or physical perpetrators of the crime.

275. The wording of sub-paragraph (f) makes no distinction between persons who attempt to “commit” a crime individually and persons who attempt to “commit” it jointly with another or through another person.

276. A reading of sub-paragraph (f) as applying to direct perpetrators only is also inconsistent with the plain reading and prevailing interpretation of sub-paragraph (a). According to both, a person can “commit” a crime individually, jointly with another or through another person. In the *Lubanga* Judgment, from the outset of its analysis of the requirements of article 25(3)(a) liability and specifically of the objective requirements of co-perpetration<sup>549</sup> (commission jointly with another person), the Majority of Trial Chamber I used the word “committing” to introduce *all three* variants of sub-paragraph (a), consistent with the wording of that article.<sup>550</sup> The Majority held that co-perpetration is “*not limited to those who physically carry out the objective elements of the offence*”<sup>551</sup> and that it is unnecessary for the Prosecution to prove “*a direct or physical link between the accused’s contribution and the commission of the crimes*” in cases of co-perpetration.<sup>552</sup> This confirms the view that persons other than the physical or direct perpetrator – who commits the crime “individually” – can also “commit” a crime in the sense of sub-paragraph (a). Consistent with the view, expressed above, that “commits” and “commit” in sub-paragraphs (a) and (f) must have the same technical meaning, and in line with the existing interpretation of the term “commit” in the context of sub-paragraph (a), the Prosecution submits that sub-paragraph (f) does

<sup>549</sup> ICC-01/04-01/06-2842, paras. 989 ss, esp. 994 ss.

<sup>550</sup> ICC-01/04-01/06-2842, para. 977.

<sup>551</sup> ICC-01/04-01/06-2842, para. 1003, quoting the Pre-Trial Chamber’s decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, para. 330.

<sup>552</sup> ICC-01/04-01/06-2842, para. 1004.

not exclude liability for those who attempt to commit a crime jointly with another or through another person.

277. Against this background, the Prosecution reads the text of paragraph 998 of the *Lubanga* Judgment relied on by the Defence<sup>553</sup> as a holding that sub-paragraph (f) only applies to individuals who would bear principal liability under sub-paragraph (a), *in all of its forms*, as opposed to those who would only bear accessory liability under sub-paragraphs (b), (c) or (d).<sup>554</sup> The Prosecution submits that the more accurate reading of the section of paragraph 998 is that anyone who could be held responsible for the commission of a crime – whether as an individual, jointly with another or through another person – where the commission of the crime is completed, may also be liable under sub-paragraph (f) where the crime is not completed, so long as the requirements of that mode of liability, as summarised in *Katanga and Ngudjolo*,<sup>555</sup> are met; that is, if the person acting as an individual, jointly with another or through another person has the *mens rea* required to commit the crime and begins its execution, but the commission of the crime is interrupted by circumstances independent of the person's intentions.<sup>556</sup>

278. The applicability of article 25(3) sub-paragraph (f) to the conduct of individuals other than the direct or physical perpetrators can be inferred from the decision on the confirmation of charges in *Katanga and Ngudjolo* and Judge

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<sup>553</sup> "...Only those individuals who attempt "to commit" a crime, as opposed to those who participate in a crime committed by someone else, can be held liable under that provision". ICC-01/04-01/06-2842, para. 998. The Prosecution reads this statement as referring to cases where liability is based *solely* on sub-paragraph (f).

<sup>554</sup> In these sub-paragraphs, the word "attempted" refers to the conduct of the accessory, not to the conduct of the principal. In contrast, in sub-paragraph (f), it is the principal who "attempts" to commit the crime, be it as an individual, jointly with another or through another person.

<sup>555</sup> ICC-01/04-01/07-717, para. 460: "...the attempt to commit a crime is a crime in which the objective elements are incomplete, while the subjective elements are complete".

<sup>556</sup> The Prosecution emphasizes that although sub-paragraphs (a) and (f) can apply to the same individuals, depending on whether the objective elements of the *crime* are complete, each *mode of liability* has distinct objective and subjective requirements.

Ušacka's partly dissenting opinion. In that case, the Prosecution charged the two suspects with the crime against humanity of inhumane acts on the basis of the indiscriminate attacks on civilians by combatants acting under their command using machetes, firearms and heavy weapons. In declining to confirm it, the Majority of Pre-Trial Chamber I suggested that the charge against the suspects would have been more properly brought under articles 7(1)(a) and 25(3)(f) – attempted murder – than under articles 7(1)(k) and 25(3)(a) – co-perpetration of inhumane acts. Alluding to the requirements of article 25(3)(f), the Majority endorsed the doctrine *“that the attempt to commit a crime is a crime in which the objective elements are incomplete, while the subjective elements are complete”*.<sup>557</sup> It referred to all of the elements of liability under article 25(3)(f) as having been established: *“the combatants”* who attacked civilians with deadly weapons *“had the specific intent to kill such civilians”* (complete subjective element); the combatants *“commenced the execution of the conduct of killing civilians by means of a substantial step toward the killing of one or more persons”*, and *“did not achieve the act because of circumstances independent of the perpetrator's intent”* (incomplete objective element).<sup>558</sup> Having addressed the relevance of the evidence to article 25(3)(f), the Majority rejected the charge brought under article 25(3)(a). In her partly dissenting opinion, Judge Ušacka stated that the better course of action would have been for the Chamber to adjourn the confirmation hearing and request the Prosecutor to consider amending the charge.<sup>559</sup> Neither the Majority nor Judge Ušacka referred to any impediment in proceeding in the manner suggested by the

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<sup>557</sup> ICC-01/04-01/07-717, para. 460.

<sup>558</sup> ICC-01/04-01/07-717, para. 458. The Majority declined to confirm the charge of inhumane acts because the Prosecution had *“not tendered sufficient evidence to establish substantial grounds to believe that the combatants (...) had the intent to only cause serious injury to body or to mental or physical health of the civilian population of Bogoro”*. ICC-01/04-01/07-717, para. 464, emphasis added. It held that the *“clear intent to kill”* established by the evidence (ICC-01/04-01/07-717, para. 458) could not *“be transformed into intent to severely injure persons by means of inhumane acts solely on the basis that the result of the conduct was different from that which was intended and pursued by the perpetrators”*. ICC-01/04-01/07-717, para. 463.

<sup>559</sup> ICC-01/04-01/07-717, Partly Dissenting Opinion of Judge Anita Ušacka, para. 36.

Majority, notwithstanding the fact that the two suspects were not the direct perpetrators of the attempted murders.

279. The applicability of article 25(3)(f) to the conduct of individuals other than the direct or physical perpetrators can also be inferred from the decision on the confirmation of charges in *Banda and Jerbo*, in which Pre-Trial Chamber I confirmed the charge of the attempted murder of AMIS peacekeepers by rebels under the two suspects' joint command and control<sup>560</sup> pursuant to articles 8(2)(c)(i) and 25(3)(f).<sup>561</sup>

280. In sum, the Prosecution submits that a plain reading of sub-paragraph (f) on its own and in the context of the plain meaning and prevailing interpretation of sub-paragraph (a) does not exclude liability for Bosco Ntaganda for the attempted commission of crimes through his subordinates. Moreover, the decisions on the confirmation of charges in the *Katanga and Ngudjolo* and *Banda and Jerbo* cases are prior examples of the relevance of sub-paragraph (f) to the conduct of persons other than the direct or physical perpetrators.

281. In the absence of legal impediments to the applicability of article 25(3)(f) to the facts of the present case, the Prosecution submits that in deciding whether to confirm the charges brought, in the alternative, under this mode of liability, the Chamber ought only be guided by an analysis of whether the evidence provides substantial grounds to believe that (a) Bosco Ntaganda had the *mens rea* required to commit the crime of murder during the attacks on Banyali-Kilo and Walendu Djatsi *collectivités*; and (b) the commission of the crime was interrupted by circumstances independent of his intentions.

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<sup>560</sup> ICC-02/05-03/09-79-Red, paras. 100-102, 120 ss.

<sup>561</sup> ICC-02/05-03/09-121-Corr-Red, paras. 100, 109 and p. 74.

282. There are substantial grounds to believe that, as alleged,<sup>562</sup> Bosco Ntaganda is responsible pursuant to articles 7(1)(a), 8(2)(c)(i) and 25(3)(f) for the attempted murder of P-800, P-22, P-18 and P-19. His orders<sup>563</sup> for his troops to treat all Lendu as enemies and eliminate them, civilians and fighters alike, to fire heavy weapons into civilian areas, and to target civilians including those attempting to flee all reveal a clear intent to commit murder. His high-ranking position as Deputy Chief of Staff in charge of Operations and Organisation coupled with the UPC's nature as a structured armed group with soldiers trained to follow orders and strict chains of command assured Bosco Ntaganda that his orders would be complied with. He was therefore aware that civilians would be killed during the UPC's attacks in the ordinary course of events as a result of his orders. Bosco Ntaganda had the *mens rea* required for the commission of murder.

283. UPC/FPLC soldiers under Bosco Ntaganda's orders and within his effective control attempted to murder P-800,<sup>564</sup> P-22,<sup>565</sup> P-18<sup>566</sup> and P-19.<sup>567</sup> The victims survived the attempted murders for reasons independent of Bosco Ntaganda's and the direct perpetrators' intentions. Article 25(3)(f) is applicable to the facts of the case.

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<sup>562</sup> ICC-01/04-02/06-203-AnxA, paras.67-69, 71, 74, 84, and counts 1 and 2; ICC-01/04-02/06-T-7Bis-ENG ET, p.57, l.18 to p.58, l.5; ICC-01/04-02/06-T-9-CONF-ENG ET, p.41, ll. 15-19; and ICC-01/04-02/06-217-Conf-AnxC, pp.57 (bottom entry), 264 (first full entry), 354 (second entry), 1105-1108.

<sup>563</sup> **P-0010**: EVD-PT-OTP-02690 at 0130, para.37, EVD-PT-OTP-02690 at para.43, EVD-PT-OTP-02690 at para.47; **P-0038**, EVD-PT-OTP-06234 at 0099-0101, ll. 352-446, esp. ll. 443-445; **P-0768**: EVD-PT-OTP-06486 at 0564-0567, ll. 350-462; **P-0768**: EVD-PT-OTP-06484 at 0517-0518, ll.509-541, EVD-PT-OTP-06485 at 0544, l.583 to 0545, l.623; **P-0038**: EVD-PT-OTP-06234 at 0097, ll.288-306, and at 0099-0100, ll.362-392, EVD-PT-OTP-03725 at 2478, l.598 to 2479, l.602, EVD-PT-OTP-03728 at 2555, ll.647-687, EVD-PT-OTP-06484 at 0517, ll. 509-530.

<sup>564</sup> P-0800: EVD-PT-OTP-06476 at 0643: "*Ils m'ont poursuivi en tirant mais les balles ne m'ont pas touché*".

<sup>565</sup> P-0022: EVD-PT-OTP-01862 at 0034, paras.41-42.

<sup>566</sup> P-0018: EVD-PT-OTP-01816 at 0123-0124, para.38; EVD-PT-OTP-06083 at 0185, para.90.

<sup>567</sup> P-0019: EVD-PT-OTP-02447 at 0149, para.37.

(iii) *Challenge to Objective Elements*

284. The Defence argues that there was no plan to take land from the non-Hema civilian population and expel them, in that the UPC was not only a Hema organisation and that the alleged objective of the organisation was instead to protect the entire population and all ethnic groups and put an end to the abuses. The Defence is essentially repeating the same arguments it makes regarding the organisational policy for crimes against humanity. First, the Prosecution observes that this does not fully reflect the Prosecution's articulation of the common plan pursuant to article 25(3)(a), which was: to assume the military and political control of Ituri, occupy the non-Hema dominated areas in Ituri and expel the non-Hema civilian population, namely the Lendi, Ngiti and *non-originaires* viewed as enemies – and their areas – by means which included the commission of the crimes as charged. The Prosecution further submits that this argument must fail, for the reasons set out herein in section I.C (Organisational Policy).

(iv) *Challenge to Subjective Elements*

285. The Defence asserts that the Prosecution may not rely on evidence of Bosco Ntaganda's conduct prior and subsequent to the two main attacks<sup>568</sup> and to period of the charges as proof of his *mens rea*.<sup>569</sup> As set out herein in paragraphs 12 and 13 and in the Prosecution's response to the Defence's challenge to the admissibility of documents,<sup>570</sup> this proposition is legally incorrect.

286. The Defence disputes that there are substantial grounds to believe that Bosco Ntaganda intended to commit the crimes charged on the basis of video evidence.

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<sup>568</sup> As set out herein in section A.i, the "attack" alleged in this case is comprised of eight assaults. The six non-charged assaults are within the scope of the charges.

<sup>569</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, pp. 39, 1.18 to p.40, 1.10; ICC-01/04-02/06-263-AnxC, p.8-9.

<sup>570</sup> ICC-01/04-02/06-269-Conf, paras.15-20.

The Prosecution has thoroughly addressed these untenable arguments in paragraphs 57 to 71 and 79 to 81 herein.

287. The Defence asserts that, for the purposes of establishing intent under article 30(2)(b), the Prosecution must show that Bosco Ntaganda was aware that the commission of the crimes was a virtual certainty or almost inevitable consequence of the implementation of the common plan.<sup>571</sup> The Prosecution disputes that this is the correct standard. In the confirmation of charges decision in *Bemba*, the Chamber held that in the second alternative of article 30(2)(b), the volitional element decreases substantially and is overridden by the cognitive element so that the person is aware that the material elements of the crime will be “*the almost inevitable outcome of his acts or omissions*”.<sup>572</sup>

288. In the *Lubanga* article 74 Judgment, no requirement of virtual certainty or inevitability was read into the provision. Despite the Defence’s arguments in that case that the alleged crimes were not a virtually certain consequence of the creation and use of the UPC,<sup>573</sup> Trial Chamber I explained the second sentence of article 30(2)(b) by reference to the words “possibility”, “probability”, “risk” and “danger”, without qualifying them further. It did not impose an additional requirement for the Prosecution to show that the crimes were a virtual certainty of the implementation of the common plan.<sup>574</sup>

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<sup>571</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.38, l.25 to p.39, l.14, p.40, ll.11-14; ICC-01/04-02/06-263-AnxC, pp.8, 9.

<sup>572</sup> ICC-01/05-01/08-424, paras.359, 362-363, 369.

<sup>573</sup> ICC-01/04-01/06-2842, paras.1276.

<sup>574</sup> ICC-01/04-01/06-2842, paras.986, 1012, 1272 ss.

### *C. Allegation of Third-Party Interference in Investigations*

*(i) P-0005, P-0020 and P-0038 are credible and reliable*

289. The Defence makes general allegations regarding “the risk” of third parties interfering in the Prosecution’s investigations. It then refers to one witness (D-18-0001, a former Prosecution witness in the *Lubanga* trial) who states that he and P-316 colluded to make false statements to the Prosecution for money.<sup>575</sup> The Defence “questions” the validity of other Prosecution witnesses who had contact with P-316<sup>576</sup> and makes specific reference to P-5, P-20 and P-38.<sup>577</sup>

290. The Defence’s challenge to the credibility of P-5, P-20 and P-38 must fail for two reasons. First, the Defence does not refer to a single piece of evidence that these witnesses gave false or inaccurate information to the Prosecution. The arguments are purely supposition and must be disregarded.

291. Second, to the extent that the Defence is asking the Chamber to find that these three witnesses provided false information on the basis of D-18-0001’s statement that he knows of unspecified, “other persons” who colluded with P-316 to lie to the Prosecution, (a) this is a completely insufficient evidentiary basis on which to base such a conclusion, and (b) D-18-0001’s own credibility is in doubt, given that he admitted under oath to lying for financial gain. He also now states that he

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<sup>575</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.43, lines 16-20.

<sup>576</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.44, lines 14-18.

<sup>577</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.43, lines 10-12.



knows of others who lied to the Prosecution, yet when directly questioned on this point *under oath* he denied it.<sup>578</sup>

*(ii) P-0055 and P-0012 are credible and reliable*

292. [REDACTED]. [REDACTED].<sup>579</sup> [REDACTED].<sup>580</sup>

293. [REDACTED]. [REDACTED].<sup>581</sup> [REDACTED].

294. The Defence makes no particular argument as to how these unsubstantiated, anonymous claims could impact the corroborated evidence of the witnesses in this case. There is simply no evidence of third party interference of P-5, P-20, P-38, P-55 or P-12 or any other Prosecution witness. These unfounded assertions by the Defence are speculative and should be rejected.

### *G. The Prosecution's Insider Witnesses are Credible and Reliable*

295. The Defence contends that the Prosecution's witnesses who were part of the UPC/FPLC political and military structure provided statements in exchange for immunity from prosecution and in exchange for assistance from the Court.<sup>582</sup> The Defence cites no evidence in support of these propositions. The witness's accounts were not given in exchange for immunity or assistance from the Court. Indeed, many insiders are interviewed under article 55(2) of the Statute precisely because they may have committed crimes under the jurisdiction of the Court; they are entitled to additional safeguards before being interviewed by the Prosecution for the very reason that they can be prosecuted. Nor has the Defence

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<sup>578</sup> EVD-OTP-06692, p.11, line 19 to p.15, lines 5-12.

<sup>579</sup> EVD-PT-OTP-05574.

<sup>580</sup> EVD-PT-OTP-05574 at 05575.

<sup>581</sup> EVD-PT-OTP-05574 at 05576.

<sup>582</sup> ICC-01/04-02/06-T-11-ENG ET WT, p.9, line 20 to p.10, line 1.

specified what assistance it asserts these witnesses obtained from the Court in exchange for statements, nor critically, provided any evidence that the Prosecution's insider witnesses provided inaccurate information or had any motive to do so. These speculative, unfounded arguments should be dismissed.

296. Notably, the Defence relies on the *Ntagerura* Trial Judgment for the proposition that insider evidence must be approached with caution. The Prosecution acknowledges this point but does not accept that it leads to the automatic exclusion of evidence. Importantly, on appeal, the *Ntagerura* Appeals Chamber explicitly held that insider testimony is not *per se* unreliable;<sup>583</sup> a Chamber must carefully consider the totality of the circumstances in which it was tendered.<sup>584</sup> The Appeals Chamber in *Kordic* held that "it is essentially a matter of common sense that a witness with an interest to serve (particularly an interest to get his sentence reduced) may seek to inculcate others and exculpate himself. *On the other hand, it does not follow that such a witness is incapable of telling the truth. In each case it is necessary to consider the witness's evidence and all the circumstances, particularly the extent to which evidence is confirmed*".<sup>585</sup> [Emphasis added]

297. Numerous chambers of the ICTR have relied on accomplice evidence, finding it to be admissible, but considered with caution.<sup>586</sup> It need not be corroborated.<sup>587</sup>

298. The SCSL Trial Chamber in the *Taylor* case stated:

*In assessing the reliability of accomplice evidence, the main consideration for the Trial Chamber is whether or not the accomplice has an ulterior motive to testify as he did.*

<sup>583</sup> *Prosecutor v Ntagerura et al.*, Case No. ICTR-99-46-A, *Appeals Judgement* (7 July 2006), para. 204.

<sup>584</sup> *Prosecutor v Ntagerura et al.*, Case No. ICTR-99-46-A, *Appeals Judgement* (7 July 2006), para. 204.

<sup>585</sup> *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at paras. 628-629.

<sup>586</sup> *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 98; *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 305; *Kanyarukiga v Prosecutor*, No. ICTR-02-78-A, *Judgement* (8 May 2012) at para. 181.

<sup>587</sup> *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 48; *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 263; *Muvunyi v Prosecutor*, No. ICTR-2000-55A-A, *Judgement* (1 April 2011) at para. 38; *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 251.

*The Trial Chamber has generally looked for corroboration in such circumstances, but it notes that it may convict on the basis of the evidence of a single witness, even an accomplice, provided such evidence has been viewed with caution.*<sup>588</sup>

299. In the *Mbarushimana* confirmation decision, the Pre-Trial Chamber, relying on the evidence of insider witnesses,<sup>589</sup> notes that it

*will assess the information contained in these statements in light of the evidence presented as a whole and, mindful of the risks that attach to the statements of insider witnesses, will exercise caution in using such evidence to support its findings.*<sup>590</sup>

300. Similarly, Pre-Trial Chamber II in the *Bemba* pre-trial proceedings stated that it would “not automatically reject evidence solely because the witness might be politically or otherwise motivated, but assesses the witness’s credibility on each issue to be decided upon and in light of the evidence as a whole”.<sup>591</sup> In the *Katanga* and *Lubanga* confirmation decisions, Pre-Trial Chamber I relied on the evidence of insider witnesses.<sup>592</sup>

301. The Prosecution submits that the evidence of witnesses who were inside the UPC/FPLC at the relevant time is credible, reliable and probative of facts in issue. Their evidence is corroborated by other evidence, is internally consistent and, assessed in light of the evidence as a whole, is worthy of belief.

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<sup>588</sup> *Prosecutor v Taylor*, SCSL-03-01-T, *Judgement* (18 May 2012), para.183.

<sup>589</sup> ICC-01/04-01/10-465-Red, paras.173, 214.

<sup>590</sup> ICC-01/04-01/10-465-Red, para.50. See also *Banda & Jerbo*: ICC-02/05-03/09-121-Corr-Red, para.42.

<sup>591</sup> ICC-01/05-01/08-424, paras.57 and 59.

<sup>592</sup> ICC-01/04-01/07-717, fn 337, 524, 527, 528, 529; ICC-01/04-01/06-803-tENG, paras.173, 175, 181-182, 184-185, 189-192, 375 and 381 (relying on the evidence of Floribert Kisembo and Jean Tinanzabo – UPC/FPLC Chief of Staff and Secretary General, respectively).

## *H. Lubanga Trial Judgment*

302. The Defence argues that the Chamber cannot rely on the legal and factual conclusions of Trial Chamber I in the *Lubanga* case.<sup>593</sup> To the contrary, on legal determinations, Chambers can, and regularly do, rely on the legal findings of other Chambers as persuasive authority and precedent.

303. The Prosecution does not dispute that this Chamber must base its determination on whether there a substantial grounds to believe that Bosco Ntaganda is responsible for the crimes charged on the basis of the evidence before it. However, the Prosecution submits that the authoritative findings made by Trial Chamber I further confirm the existence of the crimes alleged and the responsibility of those holding the highest positions in the UPC/FPLC political and military apparatus, including Bosco Ntaganda.

304. Curiously, the Defence itself makes use of the *Lubanga* trial proceedings in its attempt to undermine the credibility of P-10: *“Let us now move to P-010 [...] This witness gave testimony before Trial Chamber I in the Lubanga case. During that case she was depicted as a child under the age of 15. But I think the conclusions of Trial Chamber I in Lubanga count here [...]”*.<sup>594</sup>

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<sup>593</sup> ICC-01/04-02/06-T-11-ENG ET WT, p.10, lines 2-12.

<sup>594</sup> ICC-01/04-02/06-T-10-CONF-ENG ET, p.22, lines 3-8. (emphasis added)

## CONCLUSION

305. The Prosecution has established substantial grounds to believe that Bosco Ntaganda committed the crimes against humanity and war crimes alleged in the DCC. The Prosecution requests that the Chamber confirm all 18 charges.



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Fatou Bensouda,  
Prosecutor

Dated this 24<sup>th</sup> day of March 2014  
At The Hague, The Netherlands