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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

Final written submissions of the Common Legal Representative of the Victims of the Attacks following the confirmation of charges hearing

Source: **Office of Public Counsel for Victims**

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence
Mr Marc Desalliers
Ms Caroline Buteau
Ms Andrea Valdivia

Legal Representatives of Victims
Ms Sarah Pellet
Mr Franck Mulenda
Mr Mohamed Abdou

Mr Dmytro Suprun
Ms Chérine Luzaisu
Ms Ludovica Vetruccio

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. PROCEDURAL BACKGROUND

1. On 22 August 2006, Pre-Trial Chamber I, which the present case had originally been assigned to, issued the "Decision on the Prosecution Application for a Warrant of Arrest",[1] along with a corresponding warrant of arrest for Mr Bosco Ntaganda.[2]

2. On 15 March 2012, the Presidency re-assigned the situation in the Democratic Republic of the Congo to Pre-Trial Chamber II.[3]

3. On 13 July 2012, Pre-Trial Chamber II (the "Chamber") issued the "Decision on the Prosecutor's Application under Article 58",[4] issuing a second warrant of arrest against Mr Bosco Ntaganda.

4. On 28 May 2013, the Single Judge of the Chamber (the "Single Judge") issued the "Decision Establishing Principles on the Victims' Application Process"[5] in which she established, *inter alia*, a victims' application process and ordered the Registry to consult with applicants in relation to their preference for legal representation and to start identifying appropriate assistant to counsel with the involvement or in consultation with the Office of Public Counsel for Victims (the "OPCV" or the "Office").[6]

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[1] See the "Decision on the Prosecution Application for a Warrant of Arrest" (Pre-Trial Chamber I), No. ICC-01/04-02/06-l-US-Exp-tEN, 22 August 2006; a redacted version was filed in the record of the case on 6 March 2007 and the decision was made public on 1st October 2010, No. ICC-01/04-02/06-l-Red-tENG.
[2] See the "Warrant of Arrest", No. ICC-01/04-02/06-2-Anx-tENG, 22 August 2006; a corrigendum was filed into the record of the case on 7 March 2007, No. ICC-01/04-02/06-2-Corr-tENG-Red.
[3] See the "Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d'Ivoire situations" (Presidency), No. ICC-01/04-02/06-32, 15 March 2012.
[4] See the "Decision on the Prosecutor's Application under Article 58" (Pre-Trial Chamber II), No. ICC-01/04-02/06-36-Red, 13 July 2012.
[5] See the "Decision Establishing Principles on the Victims' Application Process" (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-67, 28 May 2013.
[6] *Idem*, p. 22.

5. On 2 December 2013, the Single Judge issued the "Decision Concerning the Organisation of the Common Legal Representation of Victims",[7] appointing two counsel from the Office as common legal representatives of the two groups of victims identified in the "Decision Requesting the VPRS and the OPCV to take steps with regard to the legal representation of victims in the confirmation of charges hearing and in the related proceedings".[8]

6. On 15 January 2014, the Single Judge rendered the "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings" (the "First Decision on Victims' Participation"),[9] admitting 825 victims applicants listed in annex C thereof and falling in Group 2 as victims of the attacks of UPC/FPLC troops in the confirmation of charges hearing and in the related proceedings[10] and deciding to appoint Mr Dmytro Suprun as the common legal representative of said group of the victims.[11]

7. On 7 February 2014, the Single Judge issued the "Second Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings" (the "Second Decision on Victims' Participation"),[12] admitting further 155 victims applicants falling in Group 2 as victims of the attacks of UPC/FPLC troops in the confirmation of charges hearing and in the related proceedings[13] and deciding that the appointment of Mr Dmytro Suprun as common legal representative

[7] See the "Decision Concerning the Organisation of the Common Legal Representation of Victims" (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-160, 2 December 2013.
[8] *Idem*, paras. 10, 23 and 25. See also the "Decision Requesting the VPRS and the OPCV to take steps with regard to the legal representation of victims in the confirmation of charges hearing and in the related proceedings" (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-150, 20 November 2013.
[9] See the "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings" (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-211, 15 January 2014 (the "First Decision on Victims' Participation").
[10] See the "Annex C to the Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings" (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-211-AnxC, 15 January 2014.
[11] See the First Decision on Victims' Participation, *supra* note 9, paras. 78, 79 and p. 37.
[12] See the "Second Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings", (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-251, 7 February 2014 (the "Second Decision on Victims' Participation").
[13] *Idem*, pp. 19-20.

of victims in Group 2 shall extent to the victims of the attacks admitted by the decision.[14]

8. From 10 until 14 February 2014, the Chamber held the confirmation of charges hearing in the present case.

9. At the hearing held on 14 February 2014, the Chamber invited the Prosecution and the common legal representatives of victims to submit written observations on matters discussed during the confirmation of charges hearing not later than 7 March 2014.[15] The Chamber also invited the Defence to file its written observations by 4 April 2014.[16] The Chamber granted the common legal representatives 50 pages to submit their written observations.[17]

10. Accordingly, the common legal representative of the group of victims of the attacks (the "Common Legal Representative") respectfully presents the following written submissions to the Chamber.

II. SUBMISSIONS ON MATTERS RELATED TO THE CONFIRMATION OF CHARGES HEARING

11. The Common Legal Representative reiterates his submissions presented orally at the beginning and the end of the confirmation of charges hearing,[18] and he will develop in the present submissions only the matters which directly affect the interests of the victims he represents and not fully discussed during said hearing.

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[14] *Ibid*., p. 20.
[15] See the transcript of the confirmation of charges hearing session held on 14 February 2014, No. ICC-01/04-02/06-T-11-ENG ET, p. 11, lines 9-17.
[16] *Idem*, p. 11, lines 17-19.
[17] *Ibid*., p. 11, lines 20-24.
[18] See the transcript of the confirmation of charges hearing session held on 10 February 2014, No. ICC-01/04-02/06-T-7-ENG ET, p. 23, line 11 to p. 28, line 14; and the transcript of the confirmation of charges hearing session held on 13 February 2014, No. ICC-01/04-02/06-T-10-Red-ENG WT, p. 68, line 25 to p. 74, line 24.

1. Role of victims in the proceedings before the Court

12. As a preliminary matter, the Common Legal Representative submits that contrary to the Defence's assertion,[19] the role of the victims in the proceedings before the Court cannot be either compared or confused with the one of the Prosecution.

13. In this regard, article 68(3) of the Rome Statute provides victims in a clear and non-ambiguous manner with the right to participate through their legal representative in proceedings before the Court when their personal interests are affected. The analysis of the preparatory works preceding to the adoption of said provision leaves no doubt that victims may participate at all stages of the proceedings before the Court, including the confirmation of charges hearing and related proceedings.[20]

14. Indeed,

> "*that the personal interests of a victim are affected in respect of proceedings relating to the very crime in which that victim was allegedly involved seems entirely in line with the nature of the Court as a judicial institution with a mission to end impunity for the most serious crimes. This was evident throughout the negotiations leading up to the adoption of the Statute, during which most delegates "doubtless thought it morally right to provide to persons who have suffered serious violations of humanitarian law, the right to participate in the trial of the perpetrators of those violations and to ensure, during the course of the proceedings, that the Court is fully apprised of their personal sufferings*"."[21]

15. In accordance with the constant jurisprudence of the Court, "*the personal interests of victims are affected by the outcome of the pre-trial stage of the case insofar as this*

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[19] See the transcript of the confirmation of charges hearing session held on 14 February 2014, *supra* note 15, p. 3, lines 11-19.

[20] See, for instance, the Proposals submitted by France, UN Doc. PCNICC/1999/DP.2, 1st February 1999, p. 7; the Proposals submitted by Costa Rica, UN Doc. PCNICC/1999/WGRPE/DP.3, 24 February 1999; the Proposals submitted by Columbia, UN Doc. PCNICC/1999/WGRPE/DP.37, 10 August 1999. See also BITTI (G.) and FRIMAN (H.), "Participation of Victims in the Proceedings", in LEE (R.S.) (ed.), *The International Criminal Court: Element of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc. New York, 2001, pp. 456-474.

[21] See the "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-101, 10 August 2007, paras. 9-10.

is an essential stage of the proceedings which aims to determine whether there is sufficient evidence providing substantial grounds to believe that the suspect is responsible for the crimes with which he has been charged by the Prosecution."[22] In particular, "*the victims have a personal interest in the Pre-Trial Chamber's decision to either (i) confirm the charges against those responsible for perpetrating the crimes which cause them to suffer harm; or (ii) decline to confirm the charges for those not responsible for such crimes, so that the search for those who are criminally liable can continue.*"[23]

16. While victims' interests are to some extent common with the ones of the Prosecutor, victims undoubtedly have an independent role and voice in the Court's proceedings, including *vis-à-vis* the Prosecutor,[24] and, accordingly, their role cannot be either compared or confused with the one of the Prosecutor.[25] Indeed, the very interest of the Prosecutor in the proceedings before the Court is to bring evidence with the aim to prove that the suspect/accused is criminally responsible under the Rome Statute for the crimes charged.[26] In contrast, besides the interest to receive reparations[27], which is far from being the sole motivation of victims,[28] the core

[22] See the "Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I, Single Judge), No ICC-02/05-02/09-121, 29 September 2009, para. 4. See also, the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008, para. 45; the "Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-444, 6 February 2008, pp. 8 and 10; and the "Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation" (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-121, 6 February 2008, p. 6.

[23] *Idem*.

[24] See the "DECISION ON THE APPLICATIONS FOR PARTICIPATION IN THE PROCEEDINGS OF VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6" (Pre-Trial Chamber I), No. ICC-01/04-101-tEN-Corr, 17 January 2006, para. 51; and the "Decision on "Prosecutor's Application to attend 12 February hearing"" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-155, 9 February 2007, p. 4.

[25] See the "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'" (Appeals Chamber), No. ICC-01/04-01/06-824 OA7, 13 February 2007, para. 55.

[26] See "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008" (Appeals Chamber), No. ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para. 93.

[27] In this sense, see AMBOS (K.), "El Marco Juridico de la Justicia de Transición", Tenus, Bogota, 2008, notes 107-112. See also the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of

interest of victims in the proceedings is to effectively exercise their rights to truth and justice; these rights having been generally recognised by international human rights law,[29] doctrine[30] and the constant jurisprudence of the Court as essential for the persons directly affected by the crimes committed.[31]

17. In particular, Trial Chamber II held that

> "[a]*s a matter of general principle,* [the participation of victims through their legal representative] *must have as its main aim the ascertainment of the truth. The victims are not parties to the trial and certainly have no role to support the case of the Prosecution. Nevertheless, their participation may be an important factor in helping the Chamber to better understand the contentious issues of the case in light of their local knowledge and socio-cultural background*."[32]

International Humanitarian Law, adopted by the General Assembly of the United Nations in its resolution No. 60/147 in the 64th plenary meeting, UN Doc. A/RES/60/147, 16 December 2005, para. 21.

[28] See the Note prepared by the former Special Rapporteur of the Sub-Commission, Mr. Theo van Boven, in accordance with paragraph 2 of Sub-Commission resolution 1996/28, UN Doc. E/CN.4/1997/104, 16 January 1997, pp. 2-5. See also the Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Question of the impunity of perpetrators of human rights violations (civil and political), UN Doc. E/CN.4/Sub.2/1997/20, 26 June 1997, pp. 3-31. See also the "Decision on victims' participation" (Trial Chamber I), 18 January 2008, No. ICC-01/04-01/06-1119, para. 98.

[29] See IACHR, *La Cantuta v. Peru*, Judgment of 29 November 2006, Series C, No. 162, para. 222 ; *Vargas-Areco v. Paraguay*, Judgment of 26 September 2006, Series C, No. 155, paras. 153; *Almohacid-Arellano and al v. Chile*, Judgment of 26 September 2006, Series C, No. 154, para. 148; *Comumdad Monvana v. Suriname*, Judgment of 15 June 2005, Series C, No. 124, para. 204 ; and *Velasquez-Rodriguez v. Honduras*, Judgment of 29 July 1988, Series C, No. 7, paras. 162-166 and 174. See also ECHR, *Hugh Jordan v. UK*, Application No. 24746/94, 4 May 2001, paras. 16, 23, 157 and 160; *Selmouni v. France*, Application No. 25803/94, 28 July 1999, para. 79; *Kurt v. Turkey*, Application No. 24276/94, 25 May 1998, para. 140; *Selcuk and Asker v. Turkey*, Application No. 23184/94, 24 April 1998, para. 96; *Aydin v. Turkey*, Application No. 23178/94, 25 September 1997, para. 103; and *Aksoy v. Turkey*, Application No. 21987/93, 18 December 1996, para. 98.

[30] See DONAT-CATTIN (D.), "Article 68", in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Nomos, 1999, pp. 876-877; NAQVI (Y.), "The Right to the Truth in International Law Fact or Fiction 9", in (2006) *ICRC International Review*, No. 88, pp. 267-268; MENDEZ (J.), "The Right to Truth", in JOYNER (Ch.) (ed.), *Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights' Proceedings of the Siracuse Conference*, 17-21 September 1998, Eres, Toulouse, 1998, pp. 257; and AMBOS (K.), "El Marco Juridico de la Justicia de Transición", *op. cit. supra* note 27, pp. 42-44.

[31] See, for instance, the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", *supra* note 22, paras. 31-44.

[32] See the "Corrigendum Directions for the conduct of the proceedings and testimony in accordance with rule 140" (Trial Chamber II), No. ICC-01/04-01/07-1665-Corr, 1st December 2009, paras. 82-91.

18. In addition, "[t]*he object and purpose of article 68(3) of the Statute and rules 91 and 92 of the Rules* [of Procedure and Evidence] *is to provide victims with a meaningful role in the criminal proceedings before the Court (including at the pre-trial stage of a case) so that they can have a substantial impact in the proceedings*."[33] This means that the participation of victims in the proceedings before the Court shall be "*effective and significant as opposed to purely symbolic.*"[34]

19. The "fair trial" guarantees shall apply throughout the proceedings and in respect to all the parties and participants, including victims.[35] In the same vein, the requirements of the integrity of the proceedings shall apply to all the parties and the participants in the proceedings before the Court, and not only to the suspect/accused.[36]

20. Accordingly, as far as victims' participation constitutes an integral part of the concept of fair and impartial proceedings before the Court, the balance of said

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[33] See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", *supra* note 22, para. 157.

[34] See the "Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", *supra* note 26, para 97; the "Decision on victims' representation and participation" (Trial Chamber V), No. ICC-01/09-01/11-460, 3 October 2012, para. 10; the "Decision on victims' representation and participation" (Trial Chamber V), No. ICC-01/09-02/11-498, 3 October 2012, para. 9; the "Decision on common legal representation of victims for the purpose of trial" (Trial Chamber III), No. ICC-01/05-01/08-1005, 1st December 2010 (dated 10 November 2010), para. 9(a).

[35] In this regard, the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on 29 November 1985 calls for enabling victims to access to Justice and to obtain redress and for providing them with fair treatment in this regard. See the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on its 96th plenary meeting, UN Doc. A/RES/40/34, 29 November 1985, Principles 4 to 7. The document is available at the following address: http://www.un.org/documents/ga/res/40/a40r034.htm.

[36] See the "Decision on the admission of material from the 'bar table'" (Trial Chamber I), No. ICC-01/04-01/06-1981, 24 June 2009, para. 42. See also in the same sense TRAPP (K.), *Excluding Evidence: The Timing of a Remedy*, non-published manuscript (1998), Faculty of Law, McGill University, Canada, p. 21; quoted in TRIFFTERER (O.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, Verlag C.H Beck, Munich, 2008, p. 1335, footnote 139. See also the "DECISION ON THE PROSECUTION'S APPLICATION FOR LEAVE TO APPEAL THE CHAMBER'S DECISION OF 17 JANUARY 2006 ON THE APPLICATIONS FOR PARTICIPATION IN THE PROCEEDINGS OF VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6" (Pre-Trial Chamber I), No. ICC-01/04-135-tEN, 20 April 2006 (dated 31 March 2006), para. 38.

proceedings cannot be affected by the participation of victims. On the contrary, taking victims' interests into consideration is one of the factors that help to balance the proceedings, particularly when it is the violation of the fundamental rights of the victims themselves that is involved. Thus, the participation of victims in the proceedings before the Court cannot prejudice the interests of the Defence.[37]

21. The participation of victims in the proceedings before the Court in an effective and efficient manner is a necessary mechanism to implement their right to justice and is an essential element of the full realisation of the other elements of that right, namely to know the truth and to obtain reparations.[38] Such participation can only be deemed meaningful, rather than purely symbolic, if victims are entitled to positively contribute to the search for the truth – not to retribution or punishment of given individuals. In this respect, any form of positive contribution from victims appears indispensable for the accomplishment of the Court's function.[39]

22. The Common Legal Representative submits that the possibility to tell their story and to share their difficult and painful experience with the judges constitutes one of the ways whereby the victims can positively contribute to the search for the truth. For the absolute majority of victims, except a very limited number of them enjoying the dual status of victim and witness, or appearing in person to present their views and concerns, the process of application for participation appears to be the only way to provide an account of their experience which might be of relevance for the search for the truth.

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[37] See DONAT-CATTIN (D.), "Article 68", *op. cit. supra* note 30, pp. 876-877: "*The victims' genuine wish is that the truth be established and the case solved.* […] *The second* [concept of due process for defendant] *is fair trial, which is comprehensive of, but not limited to, the respect for all the rights of the suspect/accused; it means equitable justice for defendants, victims and international society as such, the foundation of all procedural norms of the Statute.*"

[38] See DONAT-CATTIN (D.), "Article 68", in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Second Edition, 2008, p. 1279, 1290 and 1291.

[39] *Idem*, p. 1280.

23. Under the Rome Statute, victims have the right not only to tell their story but also to have their story heard by the judges. Indeed, "[i]*n the light of the core content of the right to be heard set out in article 68(3) of the Statute,* […] [said provision] *imposes an obligation on the Court* vis-à-vis *victims. The use of the present tense in the French version of the text ("la Cour permet") makes it quite clear that the victims' guaranteed right of access to the Court entails a positive obligation for the Court to enable them to exercise that right concretely and effectively. It follows that the Chamber has a dual obligation: on the one hand, to allow victims to present their views and concerns, and, on the other, to examine them.*"[40]

24. Given the abovementioned right of victims to tell their story and to have their story heard, as well as the obligation imposed upon the Court *vis-à-vis* victims, the Common Legal Representative submits that victims' statements contained in their applications for participation, in particular regarding the events occurred and the harm suffered, might be of relevance for the determination of the truth and, contrary to the Defence's assertion,[41] shall be duly considered and taken into account by the Chamber for the purpose of the current proceedings.

25. In this regard, the Common Legal Representative notes that the reliability of the victims' statements is supported by the statements of the witnesses the Prosecution relied upon during the confirmation of charges hearing. During said hearing, the Common Legal Representative presented the views and concerns of the victims of the attacks relying on the accounts provided in their application forms – which were transmitted to the parties well in advance – and on the conversations he had with them during the meetings held before the hearing.

[40] See the "DECISION ON THE APPLICATIONS FOR PARTICIPATION IN THE PROCEEDINGS OF VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6", *supra* note 24, para. 71.
[41] See the transcript of the confirmation of charges hearing session held on 14 February 2014, *supra* note 15, p. 3, line 20 to p. 4, line 9.

26. The Common Legal Representative wishes to emphasise in this respect that, contrary to the Defence's assertion,[42] the parts of the victims' applications for participation regarding the events occurred in the present case and the harm suffered by the victims were not redacted at all and, accordingly, are known to the Defence. Regarding the redactions retained in said applications, they were only applied with respect to the information that could lead to the identification of the victims and third persons at risk and for the only purpose of protecting the safety, the security and the well-being of said individuals. In this regard, the Common Legal Representative submits that "*protective measures are not favours but are instead the rights of victims, enshrined in article 68(1) of the Statute. The participation of victims and their protection are included in the same statutory provision, namely article 68 in its paragraphs 1 and 3, and to a real extent they complement each other.*"[43]

2. Common elements of war crimes

27. The Common Legal Representative submits that the Prosecution is better placed than the participating victims to address the issue of defining the terms "international armed conflict" and "armed conflict not of an international character" and to provide factual evidence to demonstrate the existence and the nature of the armed conflict pertaining to the instant case and the suspect's knowledge of the factual circumstances establishing the existence of an armed conflict.[44]

28. In this regard, in accordance with the constant jurisprudence of the Court, for the existence of an armed conflict of a non-international character, resort to violence must be "*protracted*" and "*reach a certain level of intensity which exceeds that of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature*",[45] between a State and "*organized armed groups*" under a responsible

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[42] *Idem*.
[43] See the "Decision on victims' participation", *supra* note 28, para. 129.
[44] See the "Prosecution submission of its presentation of evidence at the confirmation of charges hearing", No. ICC-01/04-02/06-258-Conf-AnxA2, 14 February 2014, pp. 37-44.
[45] See the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo" (Pre-Trial Chamber II), No. ICC-01/05-01/08-424, 15

command capable of imposing discipline, which have the ability to plan and carry out military operations for a prolonged period of time, for instance, by their control of a part of the territory.[46]

29. The Common Legal Representative confines himself to noting that in the *Lubanga* case, Trial Chamber I found in its judgment of 14 March 2012[47] that the armed conflict between the UPC/FPLC and other armed groups between September 2002 and 13 August 2003 was not of an international character.[48] Although the judgment of 14 March 2012 was appealed by the Defence and the appeal is still pending, Trial Chamber I's finding regarding the characterisation of the nature of the

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June 2009 (the "Bemba Confirmation Decision"), paras. 225, 231 and 235. See also the "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" (Pre-Trial Chamber I), No. ICC-01/04-02/06-20-Anx2, 10 February 2006, para. 97; the "Decision on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-01/04-01/06-803-tENG (the "Lubanga Confirmation Decision"), para. 232; the "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga" (Pre-Trial Chamber I), No. ICC-01/04-01/07-55, 6 July 2007, para. 29; the "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui" (Pre-Trial Chamber I), No. ICC-01/04-01/07-262, 6 July 2007, para. 30; the "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo" (Pre-Trial Chamber III), No. ICC-01/05-01/08-14-tENG, 10 June 2008, para. 53; the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" (Pre-Trial Chamber I), No. ICC-02/05-01/09-3, 4 March 2009, para. 59; the "Decision on the Prosecutor's Application under Article 58" (Pre-Trial Chamber I), No. ICC-02/05-02/09-1, 7 May 2009, para. 9; and the "Decision on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-01/04-01/10-465-Red, 16 December 2011 (the "Mbarushimana Confirmation Decision"), para. 103.

[46] See the Bemba Confirmation Decision, *supra* note 45, paras. 233-234 and 236. See also the "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", *supra* note 45, para. 97; the Lubanga Confirmation Decision, *supra* note 45, para. 232; the "Decision on the Prosecution Application under Article 58(7) of the Statute" (Pre-Trial Chamber I), No. ICC-02/05-01/07-1-Corr, 27 April 2007, paras. 34-35; the "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga", *supra* note 45, para. 29; the "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui", *supra* note 45, para. 30; the "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo", *supra* note 45, para. 54; the "Decision on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-01/04-01/07-717, 30 September 2008 (the "Katanga and Ngudjolo Confirmation Decision"), para. 239; the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", *supra* note 45, paras. 59-60; the "Decision on the Prosecutor's Application under Article 58", *supra* note 45, para. 9; the "Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana" (Pre-Trial Chamber I), No. ICC-01/04-01/10-1, 20 September 2010, paras. 17-18; and the Mbarushimana Confirmation Decision, *supra* note 45, para. 103.

[47] See the "Judgment pursuant to Article 74 of the Statute" (Trial Chamber I), No. ICC-01/04-01/06-2842, 14 March 2012 (the "Lubanga Judgment").

[48] *Idem*, para. 567.

conflict in Ituri was not subject of the Defence's appeal[49] and, consequently, is of relevance for the proceedings in the present case. In the *Katanga* case, Trial Chamber II also found that the conflict in Ituri between August 2002 and May 2003 was of not an international character.[50] The constituent elements of the war crimes relevant for the interests of the participating will be addressed *infra*.[51]

3. Contextual elements of crimes against humanity

30. The relevant provisions of the legal texts of the Court governing the contextual elements of crimes against humanity read as follows:

> Article 7(1) of the Rome Statute
> "*1. For the purpose of this Statute, "'crimes against humanity'" means any of the following acts when committed as part of widespread or systematic attack directed against any civilian population, with knowledge of the attack:* […]"
>
> Article 7(2) (a) of the Rome Statute
> "*2. For the purpose of paragraph 1:*
> *(a) "'Attack directed against any civilian population'" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack*"
>
> Article 7 Introduction (3) of the Elements of Crimes
> "*Introduction*
> *3. "'Attack directed against a civilian population'" in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that "'policy to commit such attack'" requires that the State or organization actively promote or encourage such an attack against a civilian population [Footnote 6: A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack.*

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[49] See the "Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre du « Jugement rendu en application de l'Article 74 du Statut » rendu le 14 mars 2012", No. ICC-01/04-01/06-2948-Red A5, 3 December 2012.
[50] See the "Jugement rendu en application de l'article 74 du Statut" (Trial Chamber II), No. 01/04-01/07-3436, 7 March 2014, para. 1229 (the "Katanga Judgment").
[51] See *infra* paras. 80-83.

The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.]."

31. In accordance with the constant jurisprudence of the Court, in order to constitute crimes against humanity, the alleged conduct has to fulfil five contextual elements: (i) there must have been an attack directed against any civilian population; (ii) following a State or organizational policy; (iii) said attack has to be of a widespread or systematic nature; (iv) a nexus must exist between the individual act and the attack; and (v) the perpetrator must have knowledge of the attack.[52]

32. The Common Legal Representative contends that said requirements are met in the present case and that the evidence adduced at the confirmation of charges hearing is sufficient at this stage of the proceedings to commit the suspect for trial.[53]

a. Existence of an inter-ethnical conflict between Hemas and Lendus in Ituri during the period of the charges

33. While acknowledging the existence of serious ethnic tensions in Ituri, the Defence denied the implication of the armed forces of the UPC/FPLC in carrying out attacks against the civilian population on ethnic grounds.[54]

34. The Common Legal Representative submits that the inter-ethnic nature of the conflict which took place in Ituri during the period of the charges and more specifically the inter-ethnic nature of the conflict between the Hemas and the Lendus

[52] See the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya" (Pre-Trial Chamber II), No. ICC-01/09-19-Corr, 31 March 2010, para. 79. See also, the Bemba Confirmation Decision, *supra* note 45, paras. 73-88; and the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire" (Pre-Trial Chamber III), No. ICC-02/11-14-Corr, 3 October 2011, para. 29. In particular, in its decision, Pre-Trial Chamber III provided an analysis of the requirement of a State or organizational policy within the context of "attack directed against any civilian population" by reference to Pre-Trial Chamber II's decision in the Kenya situation. See also the Katanga Judgment, *supra* note 50, paras. 1096-1100.

[53] See the "Prosecution submission of its presentation of evidence at the confirmation of charges hearing", *supra* note 44, pp. 2-37.

[54] See the transcript of the confirmation of charges hearing session held on 14 February 2014, *supra* note 15, p. 3, lines 1-5.

was recognised by Trial Chamber I in its judgment of 14 March 2012 issued in the *Lubanga* case.[55] In this regard, Trial Chamber I relied on numerous evidence both documentary and witnesses' accounts.[56] Although the judgment of 14 March 2012 was appealed by the Defence and the appeal is still pending, Trial Chamber I's finding regarding the inter-ethnic nature of the conflict between the Hemas and the Lendus in Ituri was not subject of the Defence's appeal[57] and, consequently, is of relevance for the proceedings in the present case.

35. Moreover, the inter-ethnic nature of the conflict in Ituri during the period of the charges is generally recognised and in particular by numerous reports established both by the United Nations and the different NGOs working in human rights area.[58] It is also corroborated by numerous witnesses' accounts, including those presented by the Prosecution during the confirmation of charges hearing in the present case.[59]

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[55] See the Lubanga Judgment, *supra* note 47, paras. 67-91.

[56] *Idem*.

[57] See the "Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre du « Jugement rendu en application de l'Article 74 du Statut » rendu le 14 mars 2012", *supra* note 49.

[58] See the United Nations Organization Mission in the Democratic Republic of the Congo "Special report on the events in Ituri, January 2002-December 2003", UN Doc. S/2004/573, 16 July 2004, p. 6 para. 12. The document is available at the following address: http://reliefweb.int/sites/reliefweb.int/files/resources/93F81A37C5B409E785256EEC00679CE1-unsc-drc-16jul.pdf. See also the "United Nations Human Rights Office of the High Commissioner, Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003", August 2010, pp. 221-231. The document is available at the following address: http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf. See also the Human Rights Watch Report, "Ituri: Covered in Blood – Ethnically Targeted Violence in North-eastern DR Congo", Vol. 15, No. 11(A), July 2003, p. 12. See also in this sense VLASSENROOT (K.) AND RAEYMAEKERS (T.), *The politics of rebellion and intervention in Ituri: the emergence of a new political complex?*, in *African Affairs*, 103/412, 385–412, p. 390.

[59] See the "Prosecution submission of its presentation of evidence at the confirmation of charges hearing", *supra* note 44, pp. 3-7.

b. Armed forces of the UPC/FPLC launched attacks against the non-Hema civilian population

36. The Defence argued that the objective of the UPC/FPLC was not to attack the non-Hema civilian population but rather to neutralise the combined armed forces of the APC and the Lendu combatants.[60]

37. In accordance with the *chapeau* of article 7(1) of the Rome Statute, an "attack directed against any civilian population" is understood to cover "*a course of conduct involving the multiple commission of acts, enumerated in article 7(1) of the Statute, against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack*".[61] In addition, "[t]*he commission of the acts referred to in article 7(1) of the Statute constitute the 'attack' itself and, besides the commission of the acts, no additional requirement for the existence of an 'attack' should be proven*".[62]

38. In this regard, the *ad hoc* tribunals have clarified that an "*attack*" as the contextual element of crimes against humanity refers to the perpetration against the civilian population of a "*series of acts of violence, or of the kind of mistreatment referred to in* [the ICTY/ICTR Statutes]",[63] "*the event in which the enumerated crimes must form part*",[64] and that the scope of said "*attack*" may be broader than a related armed

[60] See the transcript of the confirmation of charges hearing session held on 12 February 2014, No. ICC-01/04-02/06-T-9-Red-ENG WT, p. 48, lines 13-15.
[61] See the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, para. 392. See also the Bemba Confirmation Decision, *supra* note 45, paras. 75 and 84-86; the "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" (Pre-Trial Chamber II), No. ICC-01/09-01/11-373, 23 January 2012 (the "Ruto *et al*. Confirmation Decision"), para. 164; and the "Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya" (Pre-Trial Chamber II), No. ICC-01/09-19-Corr, 31 March 2010, paras. 77-99. See also the Katanga Jugement, *supra* note 50, para. 1101.
[62] See the Bemba Confirmation Decision, *supra* note 45, para. 75.
[63] See ICTY, *The Prosecutor v. Kunarac, Kovac and Vuković*, Case No. IT-96-23 and IT-96-23/1-A, Judgement (Appeals Chamber), 12 June 2002, para. 89; and ICTR, *The Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-A, Judgement (Appeals Chamber), 28 November 2007, para. 918.
[64] See ICTR, *The Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment (Trial Chamber II), 21 May 1999, para. 122.

conflict.[65] Against this background, the "*acts*" of the suspect are only required to be related to or constitute "*a part of*" said "*attack*".[66] As emphasised by the ICTY Appeals Chamber, "*the acts of the accused need only be a part of this attack* [against the civilian population] *and, all other conditions being met* [the attack being widespread or systematic], *a single or relatively limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random*".[67] The *ad hoc* tribunals further determined that the "*acts*" of a person allegedly responsible for the commission of crimes against humanity need only form part of an "*attack*" on some essential level.[68] Accordingly, the required connection between the "*acts*" of the suspect and the "*attack*" which they are part of has been found to exist in temporal or geographical terms alone or even where the "*acts*" of the person were not committed against the same population as the broader "*attack*".[69]

39. The term "attack" is not restricted to a '*military attack*'[70] and refers to "*a campaign or operation carried out against the civilian population*",[71] which involves the

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[65] See ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement (Appeals Chamber), 15 July 1999, para. 251; and ICTY, *The Prosecutor v. Kunarac, Kovac and Vuković*, Case No. IT-96-23 and IT-96-23/1-A, Judgement (Appeals Chamber), 12 June 2002, para. 86. See also ICTY, *The Prosecutor v. Šešelj*, Case No. IT-03-67-AR72.1, Decision on the Interlocutory Appeal Concerning Jurisdiction (Appeals Chamber), 31 August 2004, para. 13.

[66] See ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement (Appeals Chamber), 15 July 1999, para. 271; ICTY, *The Prosecutor v. Kunarac, Kovac and Vuković*, Case No. IT-96-23&IT-96-23/1-A, Judgement (Appeals Chamber), 12 June 2002, para. 99; ICTY, *The Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement (Appeals Chamber), 29 July 2004, para. 101; ICTR, *The Prosecutor v. Gacubmitsi*, Case No. ICTR-2001-64-A, Judgement (Appeals Chamber), 7 July 2006, para. 102; and ICTY, *The Prosecutor v. Mrkšić and Šljivančanin*, Case No. IT-95-13/1-A, Judgement (Appeals Chamber), 5 May 2009, para. 41.

[67] See ICTY, *The Prosecutor v. Kunarac, Kovac and Vuković*, Case No. IT-96-23&IT-96-23/1-A, Judgement (Appeals Chamber), 12 June 2002, para. 96; and ICTY, *The Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement (Appeals Chamber), 29 July 2004, para. 101.

[68] See ICTR, *The Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence (Trial Chamber III), 15 May 2003, para. 326 ("[a]*lthough the act need not be committed at the same time and place as the attack or share all of the features of the attack, it must, by its characteristics, aims, nature, or consequence objectively form part of the discriminatory attack*").

[69] See ICTR, *The Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence (Trial Chamber III), 15 May 2003, para. 330; and ICTR, *The Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-A, Judgement (Appeals Chamber), 8 May 2012, para. 62.

[70] See the Elements of Crimes, Introduction to article 7 of the Statute, para. 3.

[71] See the Bemba Confirmation Decision, *supra* note 45, para. 75; the "Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", *supra* note 61, para. 80; the "Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of

multiple commission of acts referred to in article 7(1) of the Rome Statute against the whole population "*of any nationality, ethnicity or with another common distinguishing feature*",[72] including its (perceived) political affiliation.[73] Accordingly, the existence of an armed conflict is not necessary to determine the commission of a crime against humanity under the Rome Statute.[74]

40. The definition of "*attack*" in article 7(2)(a) of the Rome Statute does not refer to a singular incident, but it does not imply either that a singular act may not be considered part of a larger "*campaign*", "*operation*" or "*use of force*" against a civilian population. Accordingly, the drafters did not envisage the need to address the question as to whether each proven incident in a case must be "*taken together*" to amount to an "*attack*". To the contrary, the drafters adopted the determination by the ICTY according to which "[a]*s long as there is a link with the widespread or systematic attack against a civilian population, a single act could quality as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above*".[75]

Côte d'Ivoire'", *supra* note 52, para. 31; the Ruto *et al.* Confirmation Decision, *supra* note 61, paras. 162 and 164; and the "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" (Pre-Trial Chamber II), No. ICC-01/09-02/11-382-Red, 23 January 2012 (the "Muthaura *et al.* Confirmation Decision"), para. 109.

[72] See the Bemba Confirmation Decision, *supra* note 45, para. 76, and the "Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire'", *supra* note 52, para. 32. See also Katanga and Ngudjolo Confirmation Decision, *supra* note 46, para. 399; the "Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", *supra* note 61, para. 81; the Ruto *et al.* Confirmation Decision, *supra* note 61, para. 162; and the Muthaura *et al.* Confirmation Decision, *supra* note 71, para. 110.

[73] See the Ruto *et al.* Confirmation Decision, *supra* note 61, para. 164; and the Muthaura *et al.* Confirmation Decision, *supra* note 71, para. 110.

[74] See the Bemba Confirmation Decision, *supra* note 45, para. 75.

[75] See ICTY, *The Prosecutor v. Mskšić, Radić and Šljivančanin*, Case No. IT-95-13-R61, Review of Indictment Pursuant to Rule 61 (Trial Chamber I), 3 April 1996, para. 649 as referred to in the International Commission of Jurists, ICJ Brief No. 1 to the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998), "Definition of Crimes", June 1998, pp. 12-13. See also the Katanga Judgment, *supra* note 50, para. 1101.

41. The term "civilian population" in article 7 of the Rome Statute refers to "*all persons who are civilians, as opposed to members of armed forces and other legitimate combatants*".[76] According to the ICTY Trial Chamber's judgement in the *Tadić* case, "*civilian population*" means distinguishing civilians and combatants and showing that the civilian character cannot be understood as a homogeneous status, while the reference to population indicates that the attack shall be directed against the group, not against specific individuals.[77] Such statement of law was re-affirmed by the ICTR Trial Chamber in the *Semanza* judgement, as follows:

> "*A civilian population must be the primary object of the attack. A population remains civilian in nature even if there are individuals within it who are not civilians and even if the members of the population at one time bore arms, so long as the population is 'predominantly civilian'. The term 'population' does not require that crimes against humanity be directed against the entire population of a geographic territory or area. The victim(s) of the enumerated act need not necessarily share geographic or other defining features with the civilian population that forms the primary target of the underlying attack, but such characteristics may be used to demonstrate that the enumerated act forms part of the attack*".[78]

42. The "civilian population" element is therefore clarified as referring to a group of non-combatants collectively targeted by the attack in its widespread or systematic context.[79]

43. The Common Legal Representative submits that the victims participating in the present case were not active in any armed conflict either in Ituri or in other region of the Democratic Republic of the Congo during the whole timeframe referred to in the charges. The victims were not "combatants" because they were not involved in

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[76] *Idem*, para. 78. See also the "Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", *supra* note 61, para. 82; the Ruto *et al.* Confirmation Decision, *supra* note 61, para. 162; and the Muthaura *et al.* Confirmation Decision, *supra* note 71, para. 109. See also the Katanga Judgment, *supra* note 50, para. 1102.

[77] See ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgement (Trial Chamber), 7 May 1997, paras. 636-644.

[78] See ICTR, *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement (Trial Chamber), 15 May 2003, para. 330.

[79] See the Katanga Judgment, *supra* note 50, paras. 1104-1105.

any hostilities. The victims participating in this case were instead part of a "civilian population" and not members of the armed forces or other legitimate combatants. This is true for all the victims currently participating in the present proceedings. The victims' account of events provided in their applications for participation reveals that they were unarmed men, women and children who were attacked by armed forces of the UPC/FPLC at the localities wherein they lived, and in particular in Mongbwalu, Sayo, Lipri, Bambu, Kobu, Kilo and surrounding villages.[80]

44. All the victims participating in the present case have clearly indicated in their application forms that they were attacked by the armed forces of the UPC/FPLC at the localities they lived within the period of the charges and specifically referred to the suspect as commander-in-chief of said forces. They have all stressed on premeditate and cruel character of the acts committed within said attacks. Out of 980 victims of the attacks admitted to participate in the present case 742 are Lendus and only 12 of them are Hemas, the remaining being of other ethnicities, but in any case non-Hema. The accounts of the participating victims corroborate the evidence produced by the Prosecution during the confirmation of charges hearing that aim to demonstrate that the attacks carried out by the armed forces of the UPC/FPLC in Mongbwalu, Sayo, Lipri, Bambu, Kobu, Kilo and surrounding villages within the period of the charges targeted the civilian population, and in particular the non-Hema population.[81] The Defence presented no evidence that would somehow explain the fact that the quasi-entirety of the victims of the events within the charges were of non-Hema ethnicities.

[80] See, *inter alia*, a/00366/13; a/00359/13; a/00559/13; a/00546/13; a/00562/13; a/00570/13; a/00893/13 and a/00925/13.
[81] See, *inter alia*, a/00999/13; a/01016/13; a/00846/13; a/00865/13; a/00885/13; a/00969/13; a/00461/13; a/00490/13; a/01273/13 and a/00550/13.

c. Attacks launched by the armed forces of the UPC/FPLC against the non-Hema civilian population were widespread and systematic

45. The *chapeau* of article 7(1) of the Rome Statute also requires that the attack against a civilian population be "widespread or systematic", in the sense of the attack being "*massive, frequent, carried out collectively with considerable seriousness*"[82] and "*directed against a multiplicity of victims*",[83] and affecting a significant[84] or a substantial number of persons/victims[85] or involving patterns of crimes, in the sense of "*non-accidental repetition of similar criminal conduct on a regular basis*".[86] The particular acts referred to in the definition are indicated as acts deliberately committed as part of such an attack.[87] An attack may be widespread without the need to have all its victims identified.[88] An attack is deemed "systematic" when it "*constitutes, or is part of, consistent with, or in furtherance of, a policy or concerted plan, or repeated practice over a period of time.*"[89]

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[82] See the Bemba Confirmation Decision, *supra* note 45, para. 83; the "Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", *supra* note 61, para. 95; and the "Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire'", *supra* note 52, para. 53. See also the Katanga Judgment, *supra* note 50, para. 1123.

[83] See the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, para. 396; the "Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", *supra* note 61, para. 95; and the "Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire'", *supra* note 52, para. 53.

[84] See the Proposal submitted by the United States, Comments received pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court: Report of the Secretary-General, Addendum, UN Doc. A/AC-244/1/ADD-2 (31 March 1995), pp. 12-13.

[85] See the Proposal submitted by Canada and Germany on Article 7, PCNI CCI1999/WGEC/DP.36 (23 November 1999).

[86] See the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, para. 397; the "Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", *supra* note 61, para. 96; and the "Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire'", *supra* note 52, para. 54. See also the Katanga Judgment, *supra* note 50, para. 1123.

[87] See the Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994), UN Doc. Supplement No. 10 (A/49/10), September 1994, p. 76, para. 14.

[88] See, for instance, the Bemba Confirmation Decision, *supra* note 45, para. 134.

[89] See the Proposal submitted by the United States of America, For Annex to Statute, Elements Related to Article on Crimes Against Humanity (2 April 1996).

46. The Common Legal Representative submits that in the present case the attacks directed against the non-Hema civilian population were both widespread and systematic. The broad geographical spread of the victimisation, the large number of victims affected by the attacks and the lengthy duration of the multiple commission of the acts against the civilian population confirm the wide and systematic scope of the attacks. Families and communities of all ages and gender suffered crimes in Mongbwalu, Sayo, Lipri, Bambu, Kobu, Kilo and surrounding villages.

47. In this regard, the Common Legal Representative contends that, contrary to the Defence's assertion,[90] the number of victims affected by the events within the charges is one of the most relevant factors to be taken into consideration for the purpose of determining under the *chapeau* of article 7(1) of the Rome Statute whether the attacks launched by the armed forces of the UPC/FPLC against the non-Hema civilian population were widespread and systematic.[91]

48. The Common Legal Representative submits that all the 980 victims who have been authorised to participate in the current proceedings suffered from the attacks carried out by the armed forces of the UPC/FPLC against the non-Hema civilian population. All of them were subject to persecution and were forced to flee their homes. 588 of the participating victims lost at least one and more often more of their family members. The properties of 748 victims were either pillaged or destroyed. 11 of the participating victims were either raped or subject to other gender crimes. 113 of the victims suffered from forcible transfer because they had to flee their houses and places of residence fearing the attacks.

49. The victims' account of events reveals that the crimes they suffered from were not spontaneous or isolated acts of violence, but were rather part of a planned,

[90] See the transcript of the confirmation of charges hearing session held on 14 February 2014, *supra* note 15, p. 3, line 20 to p. 4, line 3.
[91] See *supra* para. 45.

directed and organised attack against them, on the basis of their ethnicity.[92] The participating victims corroborate the evidence put forward by the Prosecution during the confirmation of charges hearing since they were attacked for the sole reason that they are non-Hemas. In all instances the victims know who their offenders were. The Defence presented no concrete, objective and serious evidence that would somehow explain the large-scale victimisation amongst the non-Hema civilian population who lived at the localities and during the period within the charges.

d. Attacks launched by the armed forces of the UPC/FPLC against the non-Hema civilian population were conducted pursuant to or in furtherance of organizational policy to commit such attacks

50. For the purpose of defining the "*policy*" requirement, the different Pre-Trial Chambers of the Court identified the following elements: a) it must be thoroughly organized and follow a regular pattern; b) it must be conducted in furtherance of a common policy involving public or private resources; c) it can be implemented either by groups who governs a specific territory or by an organization that has the capacity to commit a widespread or systematic attack directed against a civilian population; and d) it need not be explicitly defined or formalized.[93]

51. Chambers have also set the criteria to examine the terms *"State or organizational*" under article 7(2)(a) of the Rome Statute. In particular, as regards the term "*State*", the Chambers recognized that the policy does not need to have been conceived "*at the highest level of the State machinery*" for a "*State policy*" to commit attack.[94] With regard to the term "*organizational*", Chambers took the same approach

[92] See, *inter alia*, a/01211/13; a/01228/13; a/01236/13; a/01273/13; a/01284/13.

[93] See the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire", *supra* note 52, para. 43; and the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", *supra* note 61, paras. 84-86. See also the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, para. 396; and the Bemba Confirmation Decision, *supra* note 45, para. 81.

[94] See the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", *supra* note 61, para. 89; and the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire" *supra* note 52, para. 45.

interpreting the term in the sense that the determination of whether a group qualifies as an "o*rganization*" under the Rome Statute must be made on a case-by-case basis, and considering a number of factors, namely: (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a large group, which fulfils some or all of the abovementioned criteria.[95] In this regard, Pre-Trial Chamber II stressed that, while the above factors may assist the Chamber in its determination, "*they do not constitute a rigid legal definition, and do not need to be exhaustively fulfilled*".[96]

52. In addition, Chambers emphasized that the formal nature of a group and the level of its organization should not be the defining criterion, but rather that a distinction should be drawn on whether a group has the capacity to perform acts which infringe on basic human values. Furthermore, it has been recalled that had the drafters intended to exclude non-State actors from the term "*organization*", they would have not included said term in article 7(2)(a) of the Rome Statute.[97]

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[95] See the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya" *supra* note 61, paras. 90-93; the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire", *supra* note 52, para. 46; the Ruto *et al.* Confirmation Decision, *supra* note 61, para. 185 ; and the Muthaura *et al.* Confirmation Decision, *supra* note 71, para. 186.

[96] See the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", *supra* note 61, para. 93; and the Ruto *et al.* Confirmation Decision, *supra* note 61, para. 185.

[97] See the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya" *supra* note 61, paras. 90 and 92; the Ruto *et al.* Confirmation Decision, *supra* note 61, para. 184; and the Muthaura *et al.* Confirmation Decision, *supra* note 71, para. 112. See also in this sense ROBINSON (D.), *Essence of Crimes against Humanity Raised by Challenges at ICC*, in *European Journal of International Law*, 27 September 2011. According to the author: "*this interpretation is supported by the "ordinary meaning" of the term "organization", as it does not require us to import significant additional requirements into the plain meaning of the term. As long as an entity has sufficient institutional hallmarks to be called an "organization", then we have a collective dimension as opposed to individuals acting on their own. It is also supported by contextual interpretation, in that the*

53. Accordingly, Pre-Trial Chamber II determined that "*organizations not linked to a state may, for the purposes of the Statute, elaborate and carry out a policy to commit an attack against the civilian population*".[98]

54. In his Dissenting Opinion of 31 March 2010,[99] Judge Kaul read the juxtaposition of the notions "*State*" and "*organization*" under article 7(2)(a) of the Rome Statute as an indication that "*even though the constitutive elements of statehood need not be established those 'organizations' should partake of some characteristics of a State. Those characteristics eventually turn the private 'organization' into an entity which may act like a State or has quasi-State abilities*".[100] Judge Kaul has further identified some of those characteristics in the following elements: a) a collectively of persons; b) which was established and acts for a common purpose; c) over a prolonged period of time; d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; e) with the capacity to impose the policy on its members and to sanction them; and f) which has the capacity and means available to attack any civilian population on a large scale.[101]

55. In the *Katanga* case, Trial Chamber II stressed that

> "*une conception restrictive de l'organisation, qui exigerait qu'elle présente des caractéristiques quasi-étatiques, ne renforcerait pas l'objectif que poursuit le Statut, qui est la répression des crimes les plus graves2644. Une telle conception conduirait*

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structure of Article 7 features the disjunctive but high-threshold requirements of "widespread" or "systematic", coupled with the conjunctive but low-threshold requirements of "multiple" and "policy". To pack substantial additional content into the "policy" requirement would arguably undermine the schema of Article 7. The article is available at the following address: http://www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc/ .

[98] *Idem*.

[99] See the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", *supra* note 61, pp. 84 *et seq*.

[100] *Idem*, para. 51.

[101] Some scholars have upheld this interpretation. See in particular in this sense KRESS (C.), *On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision*, in *Leiden Journal of International Law*, 23 (2010), pp. 855–873, available at http://www.uni-koeln.de/jur-fak/kress/KeniaFinale.pdf ; see also SCHABAS (W. A.), *State Policy as an Element of International Crimes*, in *Journal of Criminal Law and Criminology*, Volume 98, Issue 3 Spring, article 6. Available at the following address: http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7299&context=jclc.

> *en effet à exclure toutes les entités qui auraient engagé une opération généralisée ou systématique impliquant la commission multiples d'actes relevant de l'article 7-1 du Statut en application ou dans la poursuite de leur politique, au seul prétexte qu'elles ne seraient pas suffisamment hiérarchisées pour être considérées, en théorie, comme étant aptes à conduire ou à faire appliquer une politique ayant pour but une telle attaque.* "[102]

56. The Common Legal Representative submits that notwithstanding the approach that will be adopted in the present case – *i.e.* a more stringent standard of a "*State-like*" organizations relied upon by Judge Kaul in his dissenting opinion or the more flexible "*capacity*" test for an organization adopted by the Majority of Pre-Trial Chamber II as well as by Trial Chamber II – the UPC/FPLC should nonetheless be deemed a hierarchical organization with the capability to commit a widespread and systematic attack against a civilian population within the meaning of article 7(2)(a) of the Rome Statute.

57. Indeed, the Common Legal Representative submits that the Prosecution presented during the confirmation of charges hearing sufficient and tangible evidence to demonstrate that (i) the UPC/FPLC was a collectivity of persons, organised in an established hierarchical way together with Thomas Lubanga Dyilo as the President, Floribert Kisembo as the Chief of Staff and the suspect as the Deputy Chief of Staff in charge of operations;[103] (ii) the UPC/FPLC was an organization with the capacity to impose a policy on its members and to sanction them;[104] (iii) the UPC/FPLC had communication ability and a solid supply of weapons and ammunition in order to carry out a widespread or systematic attack against a civilian population;[105] (iv) the UPC/FLPC was established and acted for a long period of time – *i.e.* from its creation on 15 September 2000 and throughout the 2003 – for a common purpose, which was to fully assume military and political control of Ituri, occupy the

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[102] See the Katanga Judgment, *supra* note 50, para. 1122.
[103] See the "Document containing the charges", No. ICC-01/04-02/06-203-AnxA, 10 January 2014, paras. 56 and 120.
[104] *Idem*, paras. 56 and 123.
[105] *Ibid.*, para. 125.

non-Hema dominated areas in Ituri and expel the non-Hema civilian population, particularly the Lendu, Ngiti and others non-originaires.[106]

58. In this regard, the victims' account of events reveals that the UPC/FPLC exercised control over part of the territory of a State - *i.e.* the region of Ituri – and had an explicit intention to attack the non-Hema civilian population living in that region. The victims' account further reveals that the attacks launched by the armed forces of the UPC/FPLC against the non-Hema civilian population were particularly violent, cruel and well-organised.

59. The Common Legal Representative concurs with the conclusions provided by the Prosecution in its presentation in relation to the regular pattern that the UPC/FPLC was following in implementing its policy of persecuting, pillaging and forcibly displacing the non-Hema civilian population and killing, raping and torturing those who stayed behind.[107]

60. Finally, concerning the knowledge of the attack by the perpetrator, the Common Legal Representative submits that the evidence adduced at the confirmation of charges hearing shows that the suspect was aware of sufficient objective circumstances to indicate the commission of multiple prohibited acts direct against a civilian population.[108] This requirement should be read in conjunction with article 30(1) of the Rome Statute and the international jurisprudence has provided some guidance on what such knowledge means.

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[106] See the "Prosecution submission of its presentation of evidence at the confirmation of charges hearing", No. ICC-01/04-02/06-258-AnxA8, 14 February 2014, pp. 4-6; 8-12.
[107] See the "Prosecution submission of its presentation of evidence at the confirmation of charges hearing", *supra* note 44 , pp. 32-37, paras. 67-75.
[108] See in this sense, the Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes, Proposal submitted by Canada and Germany on article 7, UN Doc. PCNICC/1999/WGEC/DP.36.

61. In particular, in the *Tadić* case, the ICTY Trial Chamber provided in its judgement the following analysis:

> "[…] *in addition to the intent to commit the underlying offence the perpetrator must know of the broader context in which his act occurs.*
> […]
> *Regarding the first aspect, the knowledge by the accused of the wider context in which his act occurs, the approach taken by the majority in* R. v. Finta *in Canada is instructive. In that case the majority decided that '[t]he mental element required to be proven to constitute a crime against humanity is that the accused was aware of or wilfully blind to facts or circumstances which would bring his or her acts within crimes against humanity. However, it would not be necessary to establish that the accused knew that his actions were inhumane.' While knowledge is thus required, it is examined on an objective level and factually can be implied from the circumstances. Several cases arising under German penal law following the Second World War are relevant in this regard. In a case decided by the* Spruchgericht at Stade, *Germany, the accused, who had been stationed near the concentration camp at Buchenwald, was assumed to have known that numerous persons were deprived of their liberty there on political grounds. In addition, it is not necessary that the perpetrator has knowledge of exactly what will happen to the victims and several German cases stressed the fact that denunciations, without more, constitute crimes against humanity. One case in particular is relevant. In that case two accused in 1944 informed the police that the director of the company for which they both worked had criticised Hitler. After the denouncement the director was arrested, temporarily released and then arrested again and brought to a concentration camp. Both of the accused were acquitted due to a lack of '*mens rea*' as they had not had either a concrete idea of the consequences of their action or an 'abominable attitude'. However, the* Obersten Gerichthofes *('OGH') remanded the case to the trial court, finding that a crime against humanity does not require either a concrete idea of the consequences or an "abominable attitude".*[109]

62. The Common Legal Representative submits that the evidence presented by the Prosecution during the confirmation of charges hearing indicates that the suspect had knowledge of the attacks launched by the armed forces of the UPC/FPLC again the non-Hema civilian population within the period of the charges.[110]

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[109] See ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgement (Trial Chamber), 7 May 1997, paras. 656-657.

[110] See the "Prosecution submission of its presentation of evidence at the confirmation of charges hearing", *supra* note 44, p. 30 -31. See also, "Prosecution submission of its presentation of evidence at the confirmation of charges hearing" No. ICC-01/04-02/06-258-AnxA8, 14 February 2014.

63. The Common Legal Representative endorses the developments of the Prosecution at the confirmation of the charges hearing on the constituent elements of the crimes and he will address below only the main legal issues related to said elements which particularly impact on the interests of victims.

4. Constituent elements of the crimes against humanity suffered from by the participating victims

64. The Common Legal Representative submits that the Prosecution presented during the confirmation of charges hearing sufficient and tangible evidence to demonstrate that there are sufficient grounds to believe that the suspect committed the crimes against humanity as charged.[111] In this regard, he observes that the Defence produced no evidence to challenge the Prosecution's evidence in relation to the constituent elements regarding said crimes.

a. Crime of murder under article 7(1)(a) of the Rome Statute

65. According to the constant jurisprudence of the Court, (i) for the act of murder under article 7(1)(a) of the Rome Statute to be committed the victim has to be dead and the death must result from the act of murder; (ii) the act itself may be committed by action or omission; (iii) the death of the victim can be inferred from factual circumstances; (iv) there is no need to find and/or identify the corpse; and (v) it is not necessary for the Prosecutor to demonstrate, for each individual killing, the identity of the victim and the direct perpetrator. Nor is it necessary that the precise number of victims be known.[112]

66. While observing that none of the participating victims stated to have suffered from the crime of attempted murder under article 7(1)(a) of the Rome Statute, the

[111] See the "Prosecution submission of its presentation of evidence at the confirmation of charges hearing", No. ICC-01/04-02/06-258-Conf-AnxA4 and No. ICC-01/04-02/06-258-Conf-AnxA5, 14 February 2014.
[112] See, for instance, the Bemba Confirmation Decision, *supra* note 45, paras. 132-133. See also the Katanga Judgment, *supra* note 50, paras. 767-769.

Common Legal Representative supports the Prosecution's assertion that the suspect should also bear criminal liability for the commission of said crime.[113]

b. Crimes of rape and other forms of sexual violence under article 7(1)(g) of the Rome Statute

67. The crime of rape is deemed committed where the coercive corporal invasion of a victim's body contemplated in article 7(1)(g) of the Rome Statute takes place by physical force or by taking advantage of a "*coercive environment*" inherent in certain situations, such as the presence of armed forces.[114] Rather, threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence.[115] In the *Katanga* case, Trial Chamber II developed more in detail the constituent elements of the crime of rape.[116]

68. By contrast, the crime against humanity of "other forms of sexual violence" envisaged in article 7(1)(g) of the Rome Statute has still not been examined in depth by the jurisprudence of the Court.[117] However, the Common Legal Representative submits that the sexual incidents different from rape discussed during the confirmation of charges hearing are forms of sexual violence, since they were unconsented acts of a sexual and very grave nature.

c. Crime of persecution under article 7(1)(h) of the Rome Statute

69. The commission of the crime of persecution under article 7(1)(h) of the Rome Statute requires the infliction of serious bodily or mental harm amounting to an "*intentional and severe deprivation of fundamental rights contrary to international law by*

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[113] See the "Prosecution submission of its presentation of evidence at the confirmation of charges hearing", No. ICC-01/04-02/06-258-Conf-AnxA4, 14 February 2014.
[114] See, for instance, the Bemba Confirmation Decision, *supra* note 45, para. 162.
[115] *Idem*.
[116] See the Katanga Judgment, *supra* note 50, paras. 963-968.
[117] See the Muthaura *et al.* Confirmation Decision, *supra* note 71, paras. 264-265; and the "Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo" (Pre-Trial Chamber III), No. ICC-02/11-01/11-9-Red, 30 November 2011, para. 59.

reason of the identity of the group or collectivity […] *committed against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3* [of Article 7 of the Rome Statute], *or other grounds that are universally recognized as impermissible under international law, in connection with any acts referred to in this paragraph or any crime within the jurisdiction of the Court*".[118]

70. The jurisprudence of the *ad hoc* tribunals provides more elements to define the crime of persecution, and in particular: (i) the *actus reus* of persecution consists in "[a]*n act or omission that discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law*";[119] (ii) "*although persecution often refers to a series of acts, a single act may be sufficient,*[120] *as long as this act or omission discriminates in fact and was carried out deliberately with the intention to discriminate on one of the listed grounds*";[121] (iii) "[t]*he acts or omissions that can amount to persecution include crimes enumerated in Article 5 or elsewhere in the Statute* [of the ICTY][122] *as well as intentional*[123] *acts and omissions which are not listed in the Statute*";[124]

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[118] See the Ruto *et al.* Confirmation Decision, *supra* note 61, para. 269; and the Muthaura *et al.* Confirmation Decision, *supra* note 71, para. 282. In this regard, according to C. BASSIOUNI, the crime of persecution is committed when the harm to the victim is committed *inter alia* "*because of the victim's beliefs, views, or membership in a given identifiable group (religious, social, ethnic, linguistic etc.).*" See BASSIOUNI (C.), *Crimes against Humanity in International Criminal Law*, Martinus Nijhoff Publishers: the Netherlands, 1992, p. 317.

[119] On the interpretation given by the Appeals Chamber on the requirement to "discriminate in fact", see ICTY, *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, 17 September 2003, para. 185 (the "*Krnojelac Appeal Judgment*"). See also ICTY, *The Prosecutor v. Vujadin Popovic, Ljuvisa Beara, Drago Nikolic, Ljubomir Borovcanin, Radivoje Miletic, Milan Gvero, Vinko Pandurevic*, Case No. IT-05-88-T, Trial Judgment, 10 June 2010, para. 964 (the "*Popovic Trial Judgment*").

[120] See ICTY, *The Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-A, Appeals Chamber, 29 July 2004, para. 135 (the "*Blaskic Appeal Judgment*") (quoting ICTY, *The Prosecutor v. Mitar Vasiljevic*, Case No. IT-98-32-A, Appeals Chamber, 25 February 2004, para. 113 (the "*Vasiljevic Appeal Judgment*")). See also ICTY, the *Popovic Trial Judgment, supra* note 119, para. 965.

[121] See ICTY, the *Vasiljevic Appeal Judgment*, *supra* note 120, para. 113; and the *Blaskic Appeal Judgment*, *supra* note 120, para. 135.

[122] See ICTY, the *Krnojelac Appeal Judgment*, *supra* note 119, para. 219; and the *Popovic Trial Judgment, supra* note 119, para. 966.

[123] See ICTY, *The Prosecutor v. Milomir Stakic*, Case No. IT-97-24-A, Appeal Judgment, 22 March 2006, para. 328 (the "*Stakic Appeal Judgment*"); and the *Popovic Trial Judgment, supra* note 119, para. 966.

[124] See ICTY, *The Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-A, Appeals Chamber, 3 April 2007, para. 296 (the "*Brdanin Appeal Judgment*"); *The Prosecutor v. Miroslav Kvocka, Mlado Radic, Zoran Zigic, Dragoljub Prcac*, Case No. IT-98-30/1-A, Appeals Chamber, 28 February 2005, para. 321 (the "*Kvocka et al. Appeal Judgment*"); the *Blaskic Appeal Judgment*, *supra* note 120, paras. 135 and 138; the *Krnojelac Appeal Judgment*, *supra* note 119, para. 199; and the *Popovic Trial Judgment, supra* note 119, para. 966.

(iv) it is required that the accused "*acted with the intent to harm a human being because he or she belongs to a particular community or group*[125] *defined by the perpetrator on a political, racial or religious basis*".[126] The discriminatory intent requirement amounts to a "*dolus specialis*";[127] and (v) the existence of a discriminatory policy is not a necessary requirement for proving persecution.[128]

d. Crime of deportation or forcible transfer of population under article 7(1)(d) of the Rome Statute

71. Pursuant to the jurisprudence of the Court, (i) the first element of the crime against humanity of deportation or forcible transfer of population under article 7(2)(d) of the Rome Statute requires that the perpetrator deported or forcibly transferred one or more persons by expulsion or other coercive acts; (ii) a literal interpretation of the wording used by the Elements of Crimes to define the *actus reus* leads to the conclusion that deportation or forcible transfer of population is an open-

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[125] See ICTY, the *Blaskic Appeal Judgment*, *supra* note 120, para. 165. The group can be defined based on positive or negative criteria. See also ICTY, the *Kvočka et al. Appeal Judgment*, *supra* note 124, paras. 347 and 366; the *Krnojelac Appeal Judgment*, *supra* note 119, para. 186; and the *Popovic Trial Judgment*, *supra* note 119, para. 968.

[126] See ICTY, *The Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-A, Appeals Chamber, 17 December 2004, para. 101 (the "*Kordić Appeal Judgment*"); the *Blaskic Appeal Judgment*, *supra* note 120, para. 131; the *Vasiljević Appeal Judgment*, *supra* note 120, para. 113; the *Krnojelac Appeal Judgment*, *supra* note 119, para. 185; *The Prosecutor v. Milomir Stakic*, Case No. IT-97-24-T, Trial Chamber II, 31 July 2003, para. 738 (the "*Stakic Trial Judgment*"); the *Stakić Appeal Judgment*, *supra* note 123, para. 327 (referring to the *Kordić Appeal Judgment*, *supra*, para. 101; the *Vasiljević Appeal Judgment*, *supra* note 120, para. 113; the *Krnojelac Appeal Judgment*, *supra* note 119, para. 185); *The Prosecutor v. Vidoje Blagojevic and Dragan Jokic, Blagojevic*, Case No. IT-02-60-T, Trial Judgment, 17 January 2005, para. 583 (the "*Blagojević Trial Judgment*"); *The Prosecutor v. Mladen Naletilic, aka "TUTA" and Vinko Martinovic, aka "ŠTELA"*, Case No. IT-98-34-T, Trial Chamber, 31 March 2003, para. 636 (the "*Natelilic Trial Judgment*"); and the *Popovic Trial Judgment, supra* note 119, para. 964, 967. Although Article 5(h) reads "*persecutions on political, racial and religious grounds*" the three listed grounds are alternatives and the establishment of one of the grounds is sufficient basis for a finding of persecution. See also the *Blaškić Appeal Judgment*, *supra* note 120, paras. 131 and 135 (quoting the *Vasiljević Appeal Judgment*, *supra* note 120, para. 113).
See also ICTR, *The Prosecutor v. Nahimana et al.*, Judgment, Case No. ICTR-99-52-A, 28 November 2007, (the "*Nahimana et al. Appeal Judgment*"), para. 985.

[127] See the *Stakic Trial Judgment*, *supra* note 126, para. 737.

[128] See ICTY, the *Blagojević Trial Judgment*, *supra* note 126, para. 582; *The Prosecutor v. Radoslav Brñanin*, Case No. IT-99-36-T, Trial Judgment, 1st September 2004, para. 996 (the "*Brñanin Trial Judgment*"); the *Stakić Trial Judgment*, *supra* note 126, para. 739; *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, 15 March 2002, Trial Chamber II, para. 435 (the "*Krnojelac Trial Judgment*") (citing *The Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic, also known as "Vlado"*, Case No. IT-95-16-T, Trial Chamber, 14 January 2000, para. 625); and the *Popovic Trial Judgment*, *supra* note 119, para. 967.

conduct crime; (iii) in other words, the perpetrator may commit several different conducts which can amount to expulsion or other coercive acts, so as to force the victim to leave the area where he or she is lawfully present, as required by article 7(2)(d) of the Rome Statute and the Elements of Crimes; (iv) in order to establish that the crime of deportation or forcible transfer of population is consummated, the Prosecutor has to prove that one or more acts that the perpetrator has performed produced the effect to deport or forcibly transfer the victim.[129]

72. The jurisprudence of *ad hoc* tribunals provides more elements to define the crime of deportation or forcible transfer of population.

73. In particular, the displacement must be "*forced, carried out by expulsion or other forms of coercion such that the displacement is involuntary in nature, and the relevant persons had no genuine choice in their displacement.*"[130] It is the absence of genuine choice that makes the displacement unlawful.[131] Consent, or a request, to be displaced must be determined to be real in the sense that it is given voluntarily, and is the result of an individual's free will, assessed in the light of surrounding circumstances.[132] The

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[129] See the Ruto *et al.* Confirmation Decision, *supra* note 61, paras. 244-245.

[130] See ICTY, the *Stakic Appeal Judgment*, *supra* note 123, para. 279; the *Krnojelac Appeal Judgment*, *supra* note 119, para. 233; *The Prosecutor v. Dordevic,* Case No. IT-05-87/1-T, Trial Judgment, 23 February 2011, para. 1605 (the "*Dordevic Trial Judgment*"). Although the Appeals Chamber referred to the crime of deportation, the Trial Chamber notes that the forced character of the displacement is a requirement also for the crime of forcible transfer. See e.g., *The Prosecutor v. Momcilo Krajisnik*, Case No. IT-00-39-T, Trial Judgment, 27 September 2006, para. 724; and the *Popovic Trial Judgment*, *supra* note 119, para. 896.

[131] See ICTY, the *Stakic Appeal Judgment*, *supra* note 123, para. 279; the *Krnojelac Appeal Judgment*, *supra* note 119, paras. 229 and 233; and the *Dordevic Trial Judgment*, *supra* note 130, para. 1605; the *Popovic Trial Judgment*, *supra* note 119, para. 896.

[132] See ICTY, the *Stakic Appeal Judgment*, *supra* note 123, para. 279. See also ICTY, the *Krnojelac Appeal Judgment*, *supra* note 119, para. 229, in which the Appeals Chamber noted that it is "*impossible to infer genuine choice from the fact that consent was expressed, given that the circumstances may deprive the consent of any value*", and, "*when analysing the evidence concerning these general expressions of consent, it is necessary to put it into context and to take into account the situation and atmosphere that prevailed in the KP Dom, the illegal detention, the threats, the use of force and other forms of coercion, the fear of violence and the detainees' vulnerability.*" See also ICTY, *The Prosecutor v. Milan Martic*, Case No. IT-95-11-T, Trial Judgment, 12 June 2007, para. 108; the *Blagojevic Trial Judgment*, *supra* note 126, para. 596; the *Brñanin Trial Judgment*, *supra* note 128, para. 543; the *Dordevic Trial Judgment*, *supra* note 130, para. 1605; the *Popovic Trial Judgment*, *supra* note 119, para. 896; and *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23-T& IT-96-23/1-T, Trial Chamber, 22 February 2001 (the "*Kunarac Trial Judgment")*, para. 460, cited with approval in ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac*

determination as to whether a transferred person had a genuine choice is one to be made within the context of the particular case being considered.[133] The forceful character of the displacement is determined not only by physical force, but also by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, or by taking advantage of a coercive environment.[134] Specifically, "[t]*he population movement occurred by force since the population was coerced to move by threats, physical violence, or by orders which they felt would lead to serious danger if disobeyed*"[135]. Furthermore, if civilians are put before the choice of either fleeing or taking up arms to defend themselves, this is not a 'genuine' choice, and therefore it should be considered forcible transfer.[136]

74. Regarding the "lawful presence" element, "*the words "lawfully present" should be given their common meaning and should not be equated to the legal concept of lawful residence. The clear intention of the prohibition against forcible transfer and deportation is to prevent civilians from being uprooted from their homes and to guard against the wholesale destruction of communities.*"[137] The immigration status of residency is irrelevant. What

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and Zoran Vukovic, Case No. IT-96-23& IT-96-23/1-A, Appeals Chamber, 12 June 2002 (the "*Kunarac Appeal Judgment")*, paras 127-128 (in the context of rape).

[133] See e.g., ICTY, the *Stakić Appeal Judgment*, *supra* note 123, para. 282 and the *Popovic Trial Judgment*, *supra* note 119, para. 898.

[134] See ICTY, *The Prosecutor v. Momcilo Krajisnik*, Case No. IT-00-39-A, Appeals Chamber, 17 March 2009, para. 319; the *Krnojelac Appeal Judgment*, *supra* note 119, paras. 229 and 233; the *Kunarac Appeal Judgment*, *supra* note 132, para. 129 (in the context of rape); the *Stakic Appeal Judgment*, *supra* note 123, para. 281. In particular, in the *Stakic Trial Judgment*, the Trial Chamber concluded that "*the atmosphere in the municipality of Prijedor during the time relevant to the Indictment was of such a coercive nature that the persons leaving the municipality cannot be considered as having voluntarily decided to give up their homes*" (see the *Stakic Trial Judgment*, *supra* note 126, para. 707). In the *Milutinovic Trial Judgment*, the Trial Chamber stated that "*Trial and Appeals Chambers have inferred a lack of genuine choice from threatening and intimidating acts that were calculated to deprive the civilian population of exercising its free will, such as the shelling of civilian objects, the burning of civilian property, and the commission of or threat to commit other crimes calculated to terrify the population and make them flee the area with no hope of return*" (see *The Prosecutor v. Milan Milutinovic, Nikola Šainovic, Dragoljub Ojdanic, Nebojsa Pavkovic, Vladimir Lazarevic, Sreten Lukic*, Case No. IT-05-87-T, Trial Judgment, 26 February 2009, para. 165). See also ICTY, the *Dordevic Trial Judgment*, *supra* note 130, para. 1605; the *Popovic Trial Judgment*, *supra* note 119, para. 896; and the *Krnojelac Trial Judgment*, *supra* note 128, para. 475, citing ICTY, *The Prosecutor v. Krstic*, Case No. IT-98-33-T, Trial Chamber, 02 August 2001 (the "*Krstic Trial Judgment")*, para. 529.

[135] See ECCC, *The Prosecutor v. Nuon, Ieng, Khieu, Ieng T.*, Case File No.: 002/19-09-2007-ECCC-OCIJ, 15 September 2010, para. 1450.

[136] See ICTY, the *Popović Trial Judgment*, *supra* note 119, paras. 920 and 928-930.

[137] *Idem*, para. 900.

is important is that "*the protection is provided to those who have, for whatever reason, come to "live" in the community—whether long term or temporarily*" and that "*the requirement for lawful presence is intended to exclude only those situations where the individuals are occupying houses or premises unlawfully or illegally and not to impose a requirement for "residency" to be demonstrated as a legal standard.*"[138] Moreover, said specific element intends to protect also "*internally displaced persons who have established temporary homes after being uprooted from their original community.*"[139]

75. Regarding other elements in relation to the crime of deportation or forcible transfer of population, (i) the accused does not need to intend the displacement of the individuals on a permanent basis;[140] and (ii) the transfer of even one person from a territory can be sufficient to result in deportation or forcible transfer.[141]

e. Relationship between the crime of deportation and forcible transfer, and the crime of persecution

76. In the *Ruto et al.* case, Pre-Trial Chamber II stated that "*the acts of forced displacement also constitute acts of persecution as they were directed against a particular group for reason of their perceived political affiliation.*"[142]

77. The Common Legal Representative submits in this regard that the question of whether a given act, such as forcible transfer or deportation, results in persecution is answered not with reference to its apparent cruelty, but with reference to the discrimination with which the act is undertaken.[143] It follows that deportation and

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[138] *Ibid*., para. 900.
[139] *Ibid*.
[140] See ICTY, the *Stakić Appeal Judgment*, *supra* note 123, paras. 278, 306, 307 and 317; the *Brnanin Appeal Judgment*, supra note 124, para. 206; and the *Popovic Trial Judgment, supra* note 119, para. 905. See also ICTY, the *Krnojelac Trial Judgment*, *supra* note 128, para. 474; and *The Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, Trial Chamber, 3 March 2000 (the "*Blaskic Trial Judgment"),* para. 234.
[141] See the Elements of Crimes, article 7(1)(d): 1. "*The perpetrator deported or forcibly transferred, without grounds permitted under international law,* one or more persons *to another State or location, by expulsion or other coercive acts.*"
[142] See the Ruto *et al.* Confirmation Decision, *supra* note 61, p. 101.
[143] See POCAR (F.), *Persecution as a Crime under International Criminal Law*, in *Journal of National Security Law and Policy* (2008), p. 355, 360. See also ACQUAVIVA (G.), *Forced Displacement and International*

forcible transfer may be proven to amount to persecution if, in addition to the contextual elements of crimes against humanity, they were carried out on discriminatory grounds.

78. In particular, the ICTY Trial Chamber stated that "*when the Prosecution charges the accused with the persecution crime, that crime can be committed through various underlying acts and in many occasions some of these underlying acts have also been charged as separate crimes (murder, forcible transfer and deportation). In those cases, the Prosecution must prove the specific elements of the crimes separately but it is, however, still required to determine whether they meet the requisite criteria for the crime of persecution.*" [144] In addition, the ICTY Appeals Chamber concluded that "*displacements within a state or across a national border, for reasons not permitted under international law, are crimes punishable under customary international law, and these acts, if committed with the requisite discriminatory intent, constitute the crime of persecution.*"[145]

5. Constituent elements of the war crimes suffered from by the participating victims

79. The Common Legal Representative submits that the Prosecution presented during the confirmation of charges hearing sufficient and tangible evidence to demonstrate that there are sufficient grounds to believe that the suspect committed the war crime of pillaging as charged.[146] In this regard, he observes that the Defence produced no evidence to challenge the Prosecution's evidence in relation to the constituent elements regarding said crime.

Crimes, Legal and Protection Policy Research Series, Division of International Protection, United Nations High Commissioner for Refugees (UNHCR), Switzerland, 2011, p. 14.

[144] See ICTY, the *Popovic Trial Judgment*, *supra* note 119, para. 970

[145] See ICTY, the *Krnojelac Appeals Judgment*, *supra* note 119, para. 222.

[146] See the "Prosecution submission of its presentation of evidence at the confirmation of charges hearing", No. ICC-01/04-02/06-258-AnxA6, 14 February 2014.

a. Crime of pillaging under article 8(2)(a)(v) of the Rome Statute

80. According to the constant jurisprudence of the Court, (i) pillaging a town or place pursuant to article 8(2)(e)(v) of the Rome Statute entails a somewhat large-scale appropriation of all types of property, such as public or private, movable or immovable property, which goes beyond mere sporadic acts of violation of property rights; (ii) the Elements of Crimes do not require the property to be of a certain monetary value; and therefore (iii) a determination on the seriousness of the violation is made by a Chamber in light of the particular circumstances of the case.[147] In the *Katanga* case, Trial Chamber II emphasised that "*il y a violation grave, par exemple, si les actes de pillages ont eu d'importantes conséquences pour les victimes, même si ces conséquences ne sont pas de la même gravité pour toutes les victimes, ou encore si un grand nombre de personnes se sont vues privées de leurs biens.*"[148]

81. The jurisprudence of the *ad hoc* tribunals provides more elements to define the crime of pillaging, and in particular (i) the concept of pillage in the traditional sense implies an element of violence;[149] (ii) acts of pillaging must be serious because only serious violations of international law fall under the jurisdiction of the international tribunal;[150] (iii) it neither requires the appropriation to be extensive or to involve a large economic value;[151] (iv) there is no difference between public or private property in cases of pillaging;[152] (v) pillaging is not restricted to acts of appropriation committed by individual soldiers for their private gain, rather it includes both such individual acts and large-scale seizures of property within the framework of

[147] See, for instance, the Bemba Confirmation Decision, *supra* note 45, para. 317.
[148] See the Katanga Judgment, *supra* note 50, para. 909.
[149] See ICTY, *The Prosecutor v. Zejnil Delalic et al*, Judgment, Case No. IT-96-21-T, 16 November 1998, para. 591.
[150] See ICTY, *The Prosecutor v. Dario Kordic and Mario Cerkez*, Judgment, Case No. IT-95-14/2-A, 26 February 2001, para. 80.
[151] See ICTY, the *Natelilic Trial Judgment, supra* note 126, para. 612.
[152] *Idem*, para. 79.

systematic economic exploitations;[153] and (vi) "*pillage*" is prohibited whether organised or resulting from "*isolated acts of indiscipline.*"[154]

82. In conclusion, the Common Legal Representative submits that all the victims admitted to participate in the present proceedings suffered harm of the nature described in these submissions They were all civilians when they were cruelly attacked by the armed forces of the UPC/FPLC – men, women, the elderly, children, the handicapped – and this solely on the basis of their ethnicity with no pity and no distinction with regard to sex or age. The vast majority of the victims lost as a result of said attacks one or more of their family members. Some lost their whole family. The victims' loved ones who included a large number of women and children were killed by bullets, by arrows, by bladed weapons, by machetes, by lances or nail-studded sticks. Most of them were mutilated. Some were decapitated and their head was borne as a trophy through the region. The bodies of the victims were buried in common graves. Others were burned. Many women and young girls were raped and turned into sexual slaves. The property of the vast majority of the victims were pillaged and burnt systematically. All victims were persecuted. Those who survived had to leave their homes, had to flee and take refuge far away from their homes for many years because of the fear of being attacked.

83. The evidence presented by the Prosecution during the confirmation of charges hearing regarding the acts committed by the armed forces of the UPC/FPLC against the non-Hema civilian population within the charges is therefore corroborated by the victims' account. Accordingly, the Common Legal Representative submits that all the allegations contained in the document containing the charges must be cumulatively confirmed.

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[153] See ICTY, *The Prosecutor v. Zejnil Delalic et al*, *supra* note 149, para. 590; *The Prosecutor v. Dario Kordic and Mario Cerkez*, *supra* note 150, paras. 49 and 352; *The Prosecutor v. Tihomir Blaskic*, Judgment, Case No. IT-95-14-T, 3 March 2000, para. 184; and the *Natelilic Trial Judgment, supra* note 126, para. 612.

[154] See SANDOZ (Y.), SWINARSKI (C.) & ZIMMERMAN (B.)(eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Martinus Nijhoff Publishers, (1987), para. 4542, p. 1376.

6. Modes of individual criminal liability as charged

84. The notion of "commission" as set forth in article 25(3)(a) of the Rome Statute refers to forms of participation which result in criminal liability as principal,[155] this notion corresponding to "perpetration" or "co-perpetration".[156] Paragraphs (b), (c) and (d) of article 25(3) of the Rome Statute refer to forms of secondary criminal liability as accessory.[157] Finally, article 28 of the Rome Statute refers to the criminal liability of military commanders and other superiors, which is subsidiary to that provided for in article 25(3) of the Rome Statute.[158]

85. The concept of "co-perpetration" under article 25(3)(a) of the Rome Statute was first developed by Pre-Trial Chamber I in the *Lubanga* case. In particular, the Chamber based its reasoning on the concept of "control over the crime" for the purpose of distinguishing between principals and accessories and developed the definition of both the objective and subjective elements of co-perpetration based on joint control over the crime.[159] In the *Katanga and Ngudjolo Chui* case, Pre-Trial Chamber I applied the above mentioned concept of control over the crime and further developed the notion of a principal's control over the organisation.[160] In the *Bemba* case, Pre-Trial Chamber II applied the jurisprudence established in the

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[155] See the Lubanga Confirmation Decision, *supra* note 45, para. 320. See also the "Decision concerning Pre-Trial Chamber Ps Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo" (Pre-Trial Chamber I), No. ICC-01/04-01/06-8-Corr, 24 February 2006, para. 78.

[156] In this sense, see CRYER (R.), FRIMAN (H.), ROBISON (D.) and WILMSHURST (E.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2007, p. 302.

[157] See the Lubanga Confirmation Decision, *supra* note 45, para. 320. See also "Decision concerning Pre-Trial Chamber Ps Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo", *supra* note 155, para. 78; and the "Decision on the Prosecution Application under Article 58(7) of the Statute" (Pre-Trial Chamber I), No. ICC-02/05-01/07-1-Corr, 27 April 2007, para. 77, footnote 101.

[158] See the Bemba Confirmation Decision, *supra* note 46, paras. 342 and 402. See also TRIFFTERER (O.), *Causality, a Separate of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?*, in *Leiden Journal of International Law*, vol. 15, 2002, p. 186.

[159] See the Lubanga Confirmation Decision, *supra* note 45, paras. 322 and 326-367.

[160] See the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, paras. 488-539.

Lubanga and the *Katanga and Ngudjolo Chui* cases.[161] In both Kenyan cases, Pre-Trial Chamber II relied on its previous jurisprudence in the *Bemba* case.[162]

86. In particular, in the *Katanga and Ngudjolo Chui* case, as well as in the Kenyan cases, Pre-Trial Chambers I and II acknowledged that the objective element of the co-perpetration under article 25(3)(a) of the Rome Statute requires that the "*execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect.*"[163]

87. The concept of "*essential contribution*" by each co-perpetrator resulting in the realisation of the objective elements of the crime has been applied widely in all cases: the *Abu Garda* case,[164] the *Al Bashir* case,[165] the *Banda and Jerbo* case,[166] the *Mbarushimana* case[167], the *Gaddafi and Al-Senussi* case,[168] the *Gbagbo* case,[169] the *Hussein* case[170] and the *Bosco Ntaganda* case.[171]

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[161] See the Bemba Confirmation Decision, *supra* note 46, paras. 346-371.
[162] See the Ruto *et al.* Confirmation Decision, *supra* note 61, para. 292; and the Muthaura *et al.* Confirmation Decision, *supra* note 71, para. 297.
[163] See the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, paras. 515, 516 and 518. See also the Ruto *et al.* Confirmation Decision, *supra* note 61, para. 292; and the Muthaura *et al.* Confirmation Decision, *supra* note 71, para. 297.
[164] See the "Decision on the Confirmation of Charges" (Pre-Trial Chamber I), No. ICC-02/05-02/09-243-Red, 8 February 2010, paras. 152, 154, 160 and 161 (the "Abu Garda Confirmation Decision").
[165] See the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", *supra* note 45, paras. 210-213; and the "Second Decision on the Prosecution's Application for a Warrant of Arrest" (Pre-Trial Chamber I), No. ICC-02/05-01/09-94, 12 July 2010.
[166] See the "Corrigendum of the 'Decision on the Confirmation of Charges'" (Pre-Trial Chamber I), No. ICC-02/05-03/09-121-Corr-Red, 7 March 2011, paras. 126-129, 136, 150-153 and 160 (the "Banda and Jerbo Confirmation Decision").
[167] See the "Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana" (Pre-Trial Chamber I), No. ICC-01/04-01/10-1, 28 September 2010, paras. 31-35; and the Mbarushimana Confirmation Decision, *supra* note 45, paras. 271 and 279.
[168] See the "Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Alsenussi'" (Pre-Trial Chamber I), No. ICC-01/11-01/11-1, 27 June 2011, paras. 68-69.
[169] See the "Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo" (Pre-Trial Chamber III), No. ICC-02/11-01/11-9-Red, 30 November 2011, paras. 73-77.
[170] See the "Public redacted version of *'Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein'*" (Pre-Trial Chamber III), No. ICC-02/05-01/12-1-Red, 1st March 2012, para. 39.

88. In the *Lubanga* case, the Majority of Trial Chamber I upheld the jurisprudence of Pre-Trial Chambers I and II with regard to the interpretation of "co-perpetration" under article 25(3)(a) of the Rome Statute.[172]

89. The Common Legal Representative notes that different Chambers of the Court have consistently found that a suspect may be responsible as a "*co-perpetrator*" pursuant to article 25(3)(a) of the Rome Statute where (i) the suspect got into an agreement or common plan with other person(s) (the other co-perpetrator(s)),[173] (ii) the suspect and the other co-perpetrators made a coordinated essential contribution resulting in the objective elements of a crime,[174] (iii) the suspect and the other co-perpetrators carried out the subjective elements of the crimes charged,[175] (iv) the suspect and the other co-perpetrators were mutually aware and mutually accepted that implementing their common plan would result in the realisation of the objective elements of the crimes,[176] and (v) the suspect was aware of the factual circumstances enabling him or her to control the crimes jointly with the other co-perpetrator(s).[177]

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[171] See the "Decision on the Prosecutor's Application under Article 58" (Pre-Trial Chamber II), No. ICC-01/04-02/06-36-Red, 13 July 2012, paras. 67, 69 and 71.
[172] See the Lubanga Judgement, *supra* note 47, paras. 989-1006.
[173] See the Lubanga Confirmation Decision, *supra* note 45, paras. 343-345; the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, paras. 522-523; the Bemba Confirmation Decision, *supra* note 46, para. 350; the Abu Garda Confirmation Decision, *supra* note 164, para. 160; the Banda and Jerbo Confirmation Decision, *supra* note 166, 7 March 2011, para. 129; and the Lubanga Judgement, *supra* note 47, paras. 1006 and 1018(i).
[174] See the Lubanga Confirmation Decision, *supra* note 45, paras. 346-348; the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, paras. 524-525; the Bemba Confirmation Decision, *supra* note 46, para. 350; the Abu Garda Confirmation Decision, *supra* note 164, para. 160; the Banda and Jerbo Confirmation Decision, *supra* note 166, para. 136; and the Lubanga Judgement, *supra* note 47, paras. 1006 and 1018(ii).
[175] See the Lubanga Confirmation Decision, *supra* note 45, para. 349; the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, para. 527; the Bemba Confirmation Decision, *supra* note 46, para. 351; the Abu Garda Confirmation Decision, *supra* note 164, para. 161; the Banda and Jerbo Confirmation Decision, *supra* note 166, para. 151; and the Lubanga Judgement, *supra* note 47, paras. 1012 and 1018(iii).
[176] See the Lubanga Confirmation Decision, *supra* note 45, paras. 361-364; the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, para. 533; the Bemba Confirmation Decision, *supra* note 46, paras. 351 and 370; the Abu Garda Confirmation Decision, *supra* note 164, para. 161; the Banda and Jerbo Confirmation Decision, *supra* note 166, para. 150; and the Lubanga Judgement, *supra* note 47, para. 1012.
[177] See the Lubanga Confirmation Decision, *supra* note 45, paras. 366-367; the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, para. 538; the Bemba Confirmation Decision, *supra* note 46,

90. Different Chambers of the Court have also been consistent in finding that a "*co-perpetrator*" who did not physically commit the crimes but who had the crimes committed through another person may be responsible as an "*indirect co-perpetrator*" where (i) instead of being aware of his or her direct joint control over the crimes, the suspect was aware of the factual circumstances enabling him or her to exercise, jointly with another, control over the commission of the crime through another person(s),[178] and *in addition* to the first four circumstances identified in the previous paragraph,[179] (ii) the suspect had control over an organisation,[180] (iii) the organisation under the suspect's control was an organised and hierarchical apparatus of power,[181] and (iv) the execution of the crimes was secured by an almost automatic compliance with the suspect's orders.[182]

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paras. 351 and 371; the Abu Garda Confirmation Decision, *supra* note 164, para. 161; the Banda and Jerbo Confirmation Decision, *supra* note 166, para. 160.

[178] See the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, para. 538; the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", *supra* note 45, para. 223, with Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para. 104; the "Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI'" (Pre-Trial Chamber I), No. ICC-01/11-12, 27 June 2011, para. 69; the Ruto *et al.* Confirmation Decision, *supra* note 61, para. 292; and the the Muthaura *et al.* Confirmation Decision, *supra* note 71, para. 297.

[179] See the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, paras. 522, 525, 527 and 534; the "Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI'", *supra* note 178, para. 69; the Ruto *et al.* Confirmation Decision, *supra* note 61, para. 292; and the Muthaura *et al.* Confirmation Decision, *supra* note 71, para. 297.

[180] See the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, para. 500; the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", *supra* note 45, para. 223; the Abu Garda Confirmation Decision, *supra* note 164, para. 246; the "Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI'", *supra* note 178, para. 69; the Ruto *et al.* Confirmation Decision, *supra* note 61, para. 292; and the Muthaura *et al.* Confirmation Decision, *supra* note 71, para. 297.

[181] See the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, paras. 511-514; the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", *supra* note 45, para. 223; the Abu Garda Confirmation Decision, *supra* note 164, para. 246; the "Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI'", *supra* note 178, para. 69; the Ruto *et al.* Confirmation Decision, *supra* note 61, para. 292; and the Muthaura *et al.* Confirmation Decision, *supra* note 71, para. 297.

[182] See the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, paras. 515-518; the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", *supra* note 45, para. 223; the Abu Garda Confirmation Decision, *supra* note 164, para. 246; the "Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI'", *supra* note 178, para. 69; the Ruto *et*

91. The Common Legal Representative submits that the forms of criminal responsibility set forth in paragraphs (b), (c) and (d) of article 25(3) and in article 28 of the Rome Statute are subsidiary to those established in article 25(3)(a).[183] Hence, although they may all be applicable for the purpose of determining the mode of the individual criminal liability for the commission by the armed forces of the UPC/FPLC of the crimes with respect to the participating victims, they can only be considered if the Chamber decides that the suspect cannot be considered as the principal to the crime imputed to him either individually or as co-perpetrator.[184]

92. However, the Common Legal Representative submits that the evidence presented by the Prosecution during the confirmation of charges hearing clearly demonstrate, in light of the principles of the constant jurisprudence of the Court as referred to in *supra*, that in the present case the suspect shall bear the form of individual criminal liability as set forth in article 25(3)(a) of the Rome Statute as the principal to the crimes committed by the armed forces of the UPC/FPLC.

93. Moreover, the liability of the suspect as the principal within the meaning of article 25(3)(a) of the Rome Statute is corroborated by numerous evidence presented at trial in the *Lubanga* case and admitted by Trial Chamber I.[185] In particular, Trial Chamber I established that the suspect (i) was a Commander within the UPC/FPLC; [186] (ii) was later appointed as Chief of Administration within the UPC/FPLC;[187] (iii) was one of the leaders of the UPC/FPLC;[188] (iv) was one of the

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al. Confirmation Decision, *supra* note 61, para. 292; and Muthaura *et al.* Confirmation Decision, *supra* note 71, para. 297.

[183] See *supra* para. 84.

[184] See, for instance, the "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga", *supra* note 45, para. 60; the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, para. 467; and the Bemba Confirmation Decision, *supra* note 46, paras. 342 and 402.

[185] See the Lubanga Judgment, *supra* note 47.

[186] *Idem*, paras. 725, 841, 1051, 1079, 1082 and 1099.

[187] *Ibid*., para. 725.

[188] *Ibid*., paras. 911, 1040, 1042, 1043, 1071, 1074, 1080, 1081, 1111, 1116, 1131, 1134, 1135, 1159, 1178, 1210, 1211, 1277 and 1354.

founders of the UPC/FPLC;[189] (v) carried out military activities within the UPC/FPLC together with Thomas Lubanga, Floribert Kisembo and Chief Kahwa;[190] (vi) planned military operations within the UPC/FPLC;[191] (vii) dealt with military issues within the UPC/FPLC;[192] (viii) had duties as regards appointments and other staffing matters within the UPC/FPLC;[193] and (ix) was Deputy Chief of Staff with responsibility for military operations within the UPC/FPLC.[194]

94. Although the appeal of the judgment of 14 March 2012 is still pending, Trial Chamber I's findings regarding the suspect's role within the UPC/FPLC was not subject of the Defence's appeal[195] and, consequently, are of relevance for the proceedings in the present case.

95. In the event that the Chamber finds that the evidence submitted during the confirmation of charges hearing is not sufficient to establish substantial grounds to believe that Mr Bosco Ntaganda shall bear the mode of individual criminal liability under article 25(3)(a) of the Rome Statute as principal to the crimes committed by the armed forces of the UPC/FPLC, the Common Legal Representative submits that the evidence as adduced by the Prosecution suffices to conclude at this stage of the proceedings that the suspect shall bear any and each of the forms of individual criminal responsibility set forth in paragraphs (b), (c) and (d) of article 25(3) and in any case – given his role within the armed forces of the UPC/FPLC – the one set forth in article 28 of the Rome Statute.

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[189] *Ibid*., para. 1027
[190] *Ibid*., para. 1045, 1112, 1128, 1131, 1218, 1219, 1267, 1270, 1271, 1352, 1353
[191] *Ibid*., para. 1151.
[192] *Ibid*., para. 1159.
[193] *Ibid*., para. 1162.
[194] *Ibid*., paras. 1172, 1173, 1180, 1200, 1208, 1214 and 1242.
[195] See the "Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre du « Jugement rendu en application de l'Article 74 du Statut » rendu le 14 mars 2012", *supra* note 49.

7. Evidentiary threshold required for the confirmation of charges

96. The Pre-Trial Chambers of the Court have consistently understood the evidentiary threshold established in article 61(7) of the Rome Statute as requiring the Prosecution to merely offer "*concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations*".[196]

97. The evidentiary threshold for the confirmation of the charges is admittedly higher than the one required for the issuance of a warrant of arrest or a summons to appear in order to protect the suspect against wrongful prosecution and ensure judicial economy.[197] Nonetheless, the Common Legal Representative submits that the threshold for the confirmation of the charges cannot and should not be as high as the one applicable at trial.

98. In this regard, Pre-Trial Chamber III stated that "[t]*he nature of these evidentiary thresholds depends on the different stages of the proceedings and is also consistent with the foreseeable impact of the relevant decisions on the fundamental human rights of the person charged*".[198] Consistent with this approach, Pre-Trial Camber I has determined that "[t]*he evidentiary threshold to be met for the purposes of the confirmation hearing cannot exceed the standard of 'substantial grounds to believe', as provided for in article 61(7) of the Statute*",[199] and that "*at no point should Pre-Trial Chambers exceed their mandate by entering into a premature in-depth analysis of the guilt of the suspect. The Chamber, therefore, shall not evaluate whether the evidence is sufficient to sustain a future conviction.*

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[196] See the Lubanga Confirmation Decision, *supra* note 45, para. 39; the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, para. 65; the Bemba Confirmation Decision, *supra* note 46, para. 29; the Abu Garda Confirmation Decision, *supra* note 164, para. 37; the Banda and Jerbo Confirmation Decision, *supra* note 166, para. 30; the Mbarushimana Confirmation Decision, *supra* note 45, para. 40; the Ruto *et al.* Confirmation Decision, *supra* note 61, para. 40; and the Muthaura *et al.* Confirmation Decision, *supra* note 71, para. 52.

[197] See the Lubanga Confirmation Decision, *supra* note 45, para. 37; the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, para. 63; the Bemba Confirmation Decision, *supra* note 46, para. 28; the Banda and Jerbo Confirmation Decision, *supra* note 166, para. 31; the Mbarushimana Confirmation Decision, *supra* note 45, para. 41; the Ruto *et al.* Confirmation Decision, *supra* note 61, para. 40; and the Muthaura *et al.* Confirmation Decision, *supra* note 71, para. 52.

[198] See the Bemba Confirmation Decision, *supra* note 46, para. 27.

[199] See the Katanga and Ngudjolo Confirmation Decision, *supra* note 46, para. 62.

Such a high standard is not compatible with the standard under article 61(7) of the Statute."[200]

99. The Common Legal Representative notes that the Appeals Chamber has confirmed the existence of different and progressively higher evidentiary thresholds applicable at successive stages of the proceedings, by clarifying that "*the evidentiary threshold of 'reasonable grounds to believe' for the issuance of a warrant of arrest must be distinguished from the threshold required for the confirmation of charges ('substantial grounds to believe', article 61 (7) of the Statute) and the threshold for a conviction ('beyond reasonable doubt', article 66 (3) of the Statute). It is evident from the wording of the provisions that the standards of 'substantial grounds to believe' and 'beyond reasonable doubt' are higher standards of proof than 'reasonable grounds to believe'.* […] *Certainty as to the commission of the crime is required only at the trial stage of the proceedings (see article 66(3) of the Statute), when the Prosecutor has had a chance to submit more evidence*".[201]

100. In light of the jurisprudence of the Court quoted above, the Common Legal Representative submits that the Defence's assertions that the Prosecution has failed to meet the required evidentiary threshold ought to be dismissed. At the present stage of the proceedings, the Chamber is not meant to determine the suspect's criminal liability or lack thereof. Instead, at this stage the Chamber is meant to assess, like in many national jurisdictions,[202] whether sufficient evidence has been presented by the Prosecution to commit the suspect for trial. During the trial proceedings, all relevant evidence will be introduced and thoroughly considered, and the principle of *in dubio pro reo* will be fully applicable.

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[200] See the Abu Garda Confirmation Decision, *supra* note 164, para. 40.

[201] See the "Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'" (Appeals Chamber), No. ICC-02/05-01/09-73, 3 February 2010, paras. 30-31. See also the Bemba Confirmation Decision, *supra* note 46, para. 27; the Ruto *et al.* Confirmation Decision, *supra* note 61, para. 40; and the Muthaura *et al.* Confirmation Decision, *supra* note 71, para. 52.

[202] See, for instance, the German Code of Criminal Procedure (*Strafprozeßordnung*), 1st February 1877, ss. 201 and 203; the Russian Criminal Procedure Code (*Ugolovno-protsessual'nyi kodeks Rossiiskoi Federatsii*), 18 December 2001, arts. 228 and 236; the Magistrates' Courts Act 1980 (c. 43), 1st August 1980, ss. 4 and 6; and the US Federal Rules of Criminal Procedure, 21 March 1946, rule 5.1.

101. In conclusion, considering the evidence presented by the Prosecution and the corroboration thereof by the accounts of the participating victims, the Common Legal Representative submits that there is sufficient evidence to establish substantial grounds to believe that Mr Bosco Ntaganda committed the crimes alleged against him, reaching the standard of proof required by article 61(5) of the Rome Statute.

102. In contrast, the Defence has produced no evidence to counter the numerous evidence presented by the Prosecution that it was the non-Hema civilian population living at the localities of Mongbwalu, Sayo, Lipri, Bambu, Kobu, Kilo and surrounding villages who were specifically targeted by the campaign carried out by the armed forces of the UPC/FPLC. The evidence presented by the Prosecution is corroborated by the accounts of events provided by the participating victims in their applications for participation. The Defence seems to simply ignore the victims' statements without trying to challenge them or to produce evidence in support of its reasoning.

103. The only evidence presented by the Defence during the confirmation of charges hearing is a video excerpt. However, said video is not able to somehow challenge the truthfulness, credibility, or probative value of the evidence presented by the Prosecution. Indeed, the video excerpt played by the Defence showing individuals saying that the UPC/FPLC troops were "very warmly welcomed" by the civilian population in Mongbwalu,[203] does not show whether those troops were actually "very warmly welcomed" by the entirety of the population or rather only by a small part thereof, a part of the population who would had supported the UPC/FPLC and who remained in Mongbwalu after the other group constituted of non-Hemas had either been exterminated or driven out of town by those troops. In any case, this excerpt does not suffice alone to rebut the amount of reliable evidence presented by the Prosecution on the widespread and systematic attack.

[203] See the transcript of the confirmation of charges hearing session held on 12 February 2014, *supra* note 60, p. 69, lines 11-12.

104. In this regard, the Common Legal Representative submits that amongst the victims authorised to participate in the present case, 124 victims lived with their family in Mongbwalu at the time of the attack against the civilian population by the armed forces of the UPC/FPLC. They were all driven out of the town. 61 victims lost one or more of their family members, 4 victims were also subject to acts of sexual violence, and 110 victims also suffered from pillaging.

105. Moreover, while relying on the video in question, the Defence seems contradicting itself. Indeed, the Defence mentions Floribert Kisembo – one of the UPC/FPLC's leaders – appearing on the video who says that the factory does not belong to the Lendus, but it should belong to the entire population, all the Congolese people.[204] The Defence concludes in this regard that the objective of the UPC/FPLC was to protect the interests of the entire population.[205] However, Floribert Kisembo's statements can only be understood in the sense that the leaders of the UPC/FPLC simply did not envisage the Lendus being integral part of either the Congolese people or the civilian population of the region. Indeed, should the UPC/FPLC had an objective, as the Defence asserts, to bring peace to the region, the only way envisaged in that regard by the leaders of the UPC/FPLC was to establish peace by driving out the Lendus.

106. To support its line of reasoning that the UPC/FPLC did not intend to drive out the Lendus from the region but aimed to bring peace, the Defence relied on statements that were heard on a video produced by the UPC/FPLC leaders themselves.[206] The Defence has not provided any further evidence. However, those statements, rather pathetic and reeking of demagoguery, cannot be given any particular probative value insofar it is legitimate to argue that those statements seem to be nothing more than a pure masquerade, something cobbled together by the UPC/FPLC leaders. Those statements were clearly aimed at hiding the real intents of

[204] *Idem*, p. 65, lines 8-13.
[205] *Ibid*., p. 67, lines 11-15.
[206] *Ibid*., p. 69, lines 21-23.

the UPC/FPLC with regard to the civilian population of Ituri and instead at promoting the opposite ideas in order to form a positive picture of the UPC/FPLC as a peace-maker for the region. In addition, those statements were produced by other leaders of the UPC/FPLC – people who should definitely share the whole responsibility for the commission by the armed forces of the UPC/FPLC of the crimes with respect to the non-Hema civilian population and for which the suspect is currently charged. Finally, the truthfulness and the credibility of those statements is rebutted in full by the course of events actually happened in Ituri, the reality of which is corroborated by the evidence adduced by the Prosecution and supported by the account of the victims admitted to participate in the present case.

FOR THE FOREGOING REASONS

The Common Legal Representative respectfully requests the Pre-Trial Chamber to confirm all the charges against Mr Bosco Ntaganda and commit him for trial.

Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 7th day of March 2014
At The Hague, The Netherlands