

1 International Criminal Court
2 Pre-Trial Chamber II - Courtroom 1
3 Situation: Democratic Republic of Congo
4 In the case of The Prosecutor v. Bosco Ntaganda - ICC-01/04-02/06
5 Presiding Judge Ekaterina Trendafilova, Judge Hans-Peter Kaul and Judge Cuno
6 Tarfusser
7 Confirmation of Charges Hearing
8 Thursday, 13 February 2014
9 (The hearing starts in open session at 9.30 a.m.)
10 THE COURT USHER: All rise.
11 The International Criminal Court is now in session.
12 PRESIDING JUDGE TRENDAFILOVA: Good morning to everyone. Please be
13 seated. We are now in session.
14 Court officer, would you please call the case.
15 THE COURT OFFICER: Thank you, Madam President. The situation in the
16 Democratic Republic of Congo, in the case of The Prosecutor against Bosco
17 Ntaganda, ICC-01/04-02/06. We are in open session.
18 PRESIDING JUDGE TRENDAFILOVA: Thank you very much. Again, I would
19 like to greet everyone.
20 Do we have some new faces on your team, Mr Desalliers?
21 MR DESALLIERS: (Interpretation) No, it's the same team, your Honour.
22 PRESIDING JUDGE TRENDAFILOVA: Thank you.
23 On the part of the Chamber, no. On the part of the Prosecutor I see a new face.
24 MS SAMSON: Yes, Madam President. The Prosecution is joined today by Ms
25 Kristy Sim, assistant trial lawyer.

1 PRESIDING JUDGE TRENDAFILOVA: Thank you very much. The legal
2 representatives, there is someone new.

3 MR SUPRUN: (Interpretation) Good morning, your Honour, Ms Karen, an intern,
4 had joined my team. She joined us yesterday.

5 PRESIDING JUDGE TRENDAFILOVA: We shall proceed. Mr Ntaganda, how do
6 you feel? You're fine? Thank you. You're also welcome to this hearing.
7 We shall proceed with -- before you start, Mr Desalliers, and proceed with your
8 presentation, I would now turn to Ms Samson whether they have an answer to the
9 question that was raised yesterday, that was posed to you by Judge Kaul and the
10 Defence as well joined.

11 MS SAMSON: Your Honour, there's no specific --

12 PRESIDING JUDGE TRENDAFILOVA: Sorry. Just I welcome also the
13 interpreters, the security officers, the stenographers and everyone. Excuse me, but I
14 just want you to proceed quite expeditiously. Sorry for interrupting you.

15 MS SAMSON: Not at all. Your Honour, the Prosecution reviewed its records and
16 as the Defence articulated yesterday, the source of the video does not provide a
17 precise date, and the video itself does not indicate a time stamp or any other way of
18 identifying the date on the face of the video. However, the timeframe that my
19 colleague Mr Desalliers mentioned yesterday seems to fit with the understanding of
20 the Prosecution in that the video was most likely filmed at some point after the
21 creation of -- the formal creation of the FPLC in September 2002 up until 2 December
22 2002 approximately.

23 Document EVD-PT-OTP-00938 is a UPC presidential decree signed by Thomas
24 Lubanga officially demoting Chef Kahwa and excluding him entirely from the
25 movement. So from at least from that day, Chef Kahwa is no longer among the

1 UPC/FPLC forces. So that, in our submission, would be the latest date by which
2 that video could have been filmed.

3 PRESIDING JUDGE TRENDAFILOVA: So thank you very much. At least this
4 document will guide us with regard to the final date up until when this video could
5 have been taken.

6 So is this a good reply to you, Mr Desalliers? Well, to the extent possible, of course.

7 MR DESALLIERS: (Interpretation) Yes, your Honour. In actual fact, that does
8 basically correspond to the hypothesis that I had advanced yesterday. And I think
9 we could indeed say that the video was filmed at some point between September
10 and December 2002. I think that would be a fair statement. So indeed I agree with
11 my learned friend.

12 PRESIDING JUDGE TRENDAFILOVA: Thank you very much.

13 Judge Kaul.

14 (Trial Chamber confers)

15 PRESIDING JUDGE TRENDAFILOVA: There is a proposal from the Bench
16 whether Mr Ntaganda could give some guidance, because he participated in these
17 events. But maybe during the break you can consult Mr Ntaganda so that we
18 proceed further on now and not lose precious time.

19 MR DESALLIERS: (No interpretation)

20 PRESIDING JUDGE TRENDAFILOVA: Thank you. The floor is already with you.
21 Please proceed, Mr Desalliers.

22 MR DESALLIERS: (Interpretation) Thank you, your Honour. No doubt you've
23 noticed that I've changed position here in the room. I'm somewhat to the left now.
24 Yesterday I was nearly at the very end of my presentation, and I'd now like to give
25 the floor to my colleague.

1 But just to conclude a few final remarks about the video that was shown yesterday, I
2 read out of the entire speech given by Mr Kahwa, Minister of Defence, the speech he
3 gave to the FPLC soldiers.

4 Now, this video shows, first of all, that the message was given in the presence of the
5 main commanders making up the general staff. You'll have noticed I'm sure at the
6 beginning that Mr Ntaganda was present. He saluted his superior officer,
7 Mr Kisémbó. Mr Kisémbó greeted and gave a salute to the minister of defence.
8 The minister of defence gave the speech on behalf of the president of the movement,
9 Mr Thomas Lubanga.

10 Now, this message is unmistakable. The FPLC received a clear message from the
11 highest possible level, not to attack the population or give them a hard time. They
12 were there to protect them, not to attack them. There can be no doubt that the
13 message that was given to the troops that we heard on the video was quite clear.
14 No, there was no ethnic aspects to the FPLC. The FPLC was there for all ethnic
15 groups and was there to protect everyone. The message could not be any clearer
16 regarding the way troops were supposed to behave towards the civilian population
17 and what the consequences would be if they did not behave properly.

18 Thus, your Honours, this video, the video showing this -- or rather, the passage that
19 I quoted of Mr Lubanga's speech and I would say the entire -- all the contemporary
20 documents from the UPC or the videos show members of the UPC/RP during the
21 period of charges, all this material taken together shows quite clearly that -- well,
22 there is no message in which the leaders express any hostile message whatsoever to
23 any ethnic group or to any part of the population. The documents show the same
24 thing.

25 The Prosecution have a great many documents from the UPC/RP, and none of these

1 documents contained any sort of message that could be interpreted as an attack or a
2 threat towards a particular ethnic group in the Ituri region.

3 All the evidence that we have adduced clearly show that this policy that the
4 Prosecution has described to you of -- they have tried to paint the UPC as being a
5 group of Hema people attacking non-Hema people in Ituri. This is
6 entirely -- this -- this is entirely without foundation.

7 I would like to come to my conclusion now. We have shown that the attacks
8 charged were not an attack on the civilian population. On the contrary, if you look
9 at the video footage of the events relating to the charges in the days following, try to
10 look at the footage in light of the horrible events that were described by the
11 Prosecution: massacres, looting, houses being torched, destroyed, towns razed to
12 the ground. Look at the footage and you will see that this position taken by the
13 Prosecution just does not hold -- just doesn't hold water.

14 There was no attack on civilian populations. There was no state policy to attack a
15 civilian population. The general prerequisites for crimes against humanity have not
16 been met, and that is why I said at the beginning of my presentation that it is not
17 even necessary to look at the specific conditions relating to each crime against
18 humanity because the prerequisites just are not there.

19 I would like to conclude with the issue of crimes against humanity. And I would
20 now give the floor to my colleague, Ms Buteau. She will be addressing the Court
21 regarding war crimes. Thank you.

22 PRESIDING JUDGE TRENDABILOVA: Thank you, Mr Desalliers.

23 You will proceed with the war crimes.

24 MS BUTEAU: Your Honour, Presiding Judge, I would like to continue the

25 Defence's presentation today by saying a few words about war crimes. First of all, I

1 must point out that there is no demonstration of the existence of an armed conflict
2 during the period defined by the Prosecutor; secondly, the general ambiguity about
3 the territorial and temporal scope of the charges of war crimes.

4 First of all, a few words about the existence of an armed conflict. In its DCC at
5 paragraphs 4 and 61, the Prosecution say that between 2 July 2002 and 31 December
6 2003 there was a non-international armed conflict involving the UPC in Ituri. They
7 present this as a proven fact, but this is just based on general statements, both in
8 terms of the temporal scope and the armed groups that allegedly took part.

9 However, the Prosecution cannot limit itself to presenting the existence of an armed
10 conflict and the organised character of the parties to the conflicts without
11 demonstrating their argument. None of the crimes as provided for in Article 8(2)
12 can be characterised.

13 On Monday when the Prosecution made its presentation, they based themselves
14 nearly solely upon indirect testimony, namely, reports from MONUC, from the UN
15 and various NGs -- NGOs, rather, to establish the existence of eight attacks that they
16 believe showed the existence of an armed conflict. Furthermore, regarding the first
17 attack, namely, the attack on Bunia in August 2002 alleged by the Prosecutor, during
18 the hearing the Prosecution mentioned a statement given by P-758, a woman who
19 claims that she had been a child soldier within the UPC. Yet if we look at her
20 statement closely, we see that this is not -- she is not talking about the August 2002
21 battle. She says that she fought the Lendu. Her statement is particularly confusing
22 on this -- on this point, and the attack described does not correspond to any known
23 fight.

24 The Prosecution's position regarding the existence of an armed conflict is
25 particularly weak. There are major shortcomings in the DCC. In the document the

1 Prosecution must allege all the material facts on which the charges are based.

2 Let us look at the in-depth analysis chart. We see that the Prosecution provides no
3 element to demonstrate the forces that later became the FPLC were an organised
4 armed group in the meaning of Article 8(2)(f) before early September 2002.

5 The Prosecution does not provide any direct evidence to confirm the existence of an
6 armed conflict during the period of time after June 2003. This date corresponds to
7 the arrival, and I speak specifically of 13 June 2003, the arrival of the interim
8 multinational force -- the name of that operation was Opération Artémis -- that was
9 deployed to re-establish peace in the region.

10 In written submissions and in submissions before the Court there is no elements
11 regarding about the other parties that allegedly took part, when they took part and
12 when they ended their activities. The Prosecution merely makes general mention of
13 the APC, the PUSIC, the FNI, the Lendu militia and the FRPI, saying that they were
14 organised armed groups that were in a position to conduct violent acts between 2003
15 and 2002.

16 These allegations are far too general and are not based on what actually happened.

17 For example, PUSIC and the FNI did not exist in the field before early 2003.

18 The Prosecution's position is clear regarding the level of organisation of the FPLC for
19 the period after their creation in September 2002. Their position is set out in
20 paragraph 7, but what about the time before then? The Prosecution remains silent.

21 The Defence would like to point out that unlike what the Prosecution hinted at
22 during Monday's presentations, Witness P-16 confirmed that the FPLC was
23 established after the APC was defeated in August 2002 in the battle against the
24 Ugandans. They were part of the APC soldiers at the time and were in Bunia.

25 The same thing holds true for the period after the arrival of the Artémis forces

1 in June 2003. No fighting is mentioned by the Prosecution in the DCC after the
2 fighting in Bunia, which was between 6 and 27 May 2003. In actual fact, the lack of
3 allegations in the DCC, the lack of evidence for the period after 27 May 2003
4 confirmed that there was not an armed conflict in Ituri after May 2003.

5 The Chamber shall see that the only thing in the in-depth analysis chart regarding
6 the UPC/RP specifically regarding the month of June and the other elements alleged
7 by the Prosecution after that date, the only mention made is of isolated incidents.

8 One cannot conclude that there was a non-international armed conflict.

9 The Prosecution itself confirmed that the conflict lessened in intensity in May 2003
10 with the arrival of the Artémis forces.

11 Monday the Prosecution mentioned two additional attacks. One attack on Lingabo
12 on 26 November 2003, another attack on Tchomia on 31 October 2003. These
13 attacks are not mentioned in the in-depth analysis chart regarding the contextual
14 elements relating to war crimes. I make reference to the IDAC chart, pages 384 to
15 396.

16 As for the alleged attack on Lingabo, the Defence did not find any reference to such
17 an attack in the DCC nor any reference in the IDAC chart.

18 As for alleged attack on Tchomia on 31 October 2003, the Defence asserts that the
19 evidence presented by the Prosecution once again are based only on indirect
20 evidence from a single source, PUSIC.

21 And finally, other evidence from the OTP shows that there were no attacks involving
22 the UPC as of May 2003. No such attacks were recorded by MONUC in their report
23 on events in Ituri between January 2002 and December 2003.

24 The demonstration by the Prosecution does not meet the necessary threshold. It
25 does not allow us to conclude that there are substantial grounds to believe that there

1 was an armed conflict and that the UPC armed forces were involved during the
2 entire period of charges, primarily during the period before September 2002 and
3 after May 2003.

4 Let us now move to the temporal and geographical scope of the charges and the
5 ambiguity thereof. The period set by the Prosecution was 2 July 2002 to 31
6 December 2003, even if the charges are restricted solely with the exception of crimes
7 relating to child soldiers to two main periods, 15 November to 15 December 2002,
8 the first period, and then 16 February and 3 March 2003.

9 This position taken by the Prosecution is clear-cut and set out in
10 paragraph -- paragraph 40 of the DCC.

11 Now, the first period of time relates to the Banyali-Kilo collectivity, 15 November to
12 15 December 2002. What does the Prosecution base themselves on to establish this
13 timeframe? The only dates and places mentioned in the DCC were between 21
14 November 2002 and 6 December 2002 in the villages of Pluto, Mongbwalu, Sayo,
15 Kilo and Nzebi. Why does the Prosecution allege that the attacks occurred between
16 15 November and 15 December if they do not have elements to cover the entire
17 timeframe?

18 Furthermore, regarding Nzebi, the Prosecution does not make specific reference to
19 that village in the DCC. They merely make passing reference to the village without
20 specifying the date or under what circumstances an attack occurred allegedly.

21 Let us now move to the second timeframe, the Walendu-Djatsi collectivity between
22 16 February and 3 March 2003.

23 Once again, the period of time is not properly set out according to the incidents
24 reported by the Prosecution in the DCC. Reference is made to attacks on the 18, 19,
25 22, 25 and 26 February 2003. There is no mention of attacks in March 2003. Thus,

1 the Chamber must restrict its analysis to the two actual periods of time in question,
2 namely, 21 November and 6 December 2002 and 18 to 26 February 2003.

3 As for crimes relating to child soldiers, I will return to this topic in a few moments.

4 Now, regarding the spacial or geographical scope of the charges, I would like to
5 draw the Chamber's attention to major confusion in paragraph 77 of the DCC and
6 subsequent paragraphs regarding attacks alleged by the Prosecution on the villages
7 within the collectivity of Walendu-Djatsi. The Prosecution specifically mentions
8 attacks on Kobu, Sangi, Bambu and Lipri.

9 Furthermore, the Prosecution allege in paragraph 77 of the DCC that there were
10 attacks on more than 40 villages. Which 40 villages are they talking about? The
11 Defence cannot answer that question. There is a footnote, but it has a list of 28
12 villages. So we have gone from 40 villages to 28.

13 At paragraph 78 the Prosecution then says more than 25 villages. The Defence
14 doesn't know what is going on here. Are we talking about 25 villages, 28 or 40?
15 Even if we were to restrict ourselves to the list of 28 villages in the footnote on page
16 11, the Defence wishes to the point out that the Prosecution has not alleged or
17 demonstrated that an attack truly occurred in each and every one of these villages.

18 Furthermore, the Prosecution is duty bound to identify and give a specific location
19 for each one of these villages. Any ambiguity must lead to allegations being
20 withdrawn. For example, the Prosecution say that Buli with an "i" and Bule with an
21 "e" are the same village, but they are two different villages.

22 As for the lack of demonstration of the existence of crimes in these 28 villages or
23 perhaps 40 villages, I will give four examples that show the problem here, the
24 shortcoming.

25 If we look at the in-depth analysis chart from the Prosecution, we see the following:

1 For the crime of attacks on protected objects, with the exception of Bambu village, no
2 incident was alleged in the chart.

3 For the crime of sexual slavery as a war crime, a single mention of the village of Dala
4 out of -- correction, for the crimes of rape, of the 28 villages listed in the footnote,
5 only seven villages are mentioned in one -- under one of the headings of the chart.

6 And finally, when it comes to looting, only 12 villages are mentioned.

7 We wish to stress that for some of these villages and some of these crimes, there is
8 only indirect evidence from the Prosecution.

9 It is not the Defence's task to conduct such an exercise. The charges need to be
10 clearly set out in the DCC. In light of this considerable ambiguity, the Defence is
11 asking the Pre-Trial Chamber not to look at the charges relating to these 40 villages
12 but to restrict your analysis to the villages for which specific events have been
13 alleged in the DCC.

14 In any event, the Defence wishes to challenge the Prosecution's allegations regarding
15 attacks on all these 40 villages, and thus the Defence challenges the allegations
16 relating to the commission of a war crime in those villages. This point will be
17 fleshed out in our written submissions at a later juncture.

18 Let us now move to count 13. It is alleged that the suspect is guilty of forced
19 transfer of population under Article 8(2)(e)(viii) of the Statute.

20 There are two specific allegations from the OTP. And before I read them out, I
21 would like to highlight that the way that the Prosecution has described the events in
22 the DCC shows that this is not a crime under Article 8(2)(e)(viii). The Prosecution
23 asserts that in November two thousand and -- correction, in November and
24 December 2002 the attacks on the two towns forced the population to flee. In
25 February and March 2003 the attacks on the Walendu-Djatsi collectivity forced

1 civilians to flee, that an attack on the village of Petsy and other villages that were not
2 identified allegedly led to civilians fleeing and they took refuge in the surrounding
3 woods.

4 It clearly -- we can clearly see this is a movement of civilians. They had been alerted
5 that a military operation was on the horizon, and they spontaneously fled for the
6 alleged arrival of the FPLC soldiers so as to avoid fighting. But the Prosecution
7 does not allege at any time that the civilians were forced to move away because of a
8 specific order. There was no specific order or message or directive to that effect.

9 The fact that people moved is not sufficient. The Prosecutor has to show that there
10 was a specific order from Mr Ntaganda. And this order cannot induce the situation
11 as alleged by the Prosecutor.

12 The evidence presented by the Defence and even the evidence of the Prosecutor
13 demonstrates that the civilian population had fled Mongbwalu and Sayo well before
14 the arrival of the FPLC. The same applies to the alleged attacks against Pluto and
15 against the Walendu-Djatsi collectivity and Petsy.

16 The Prosecutor presents this charge in a single page, and there are 17 references to
17 the table and no specific element is presented on this case. And we realise that even
18 the limited cases of the three incidents, the Prosecutor is not able to clearly explain
19 their position.

20 Now I will deal with the crimes of enlistment of children of less than 15 years and
21 their use in the active participation of hostilities, and this relates to charges 14, 15
22 and 16.

23 The Prosecutor carried out ten years of intensive investigations on these charges, and
24 the investigations began in 2004 and continued throughout the trial of Mr Lubanga,
25 who is presented as a co-perpetrator of Mr Ntaganda. That is ten years of

1 investigation, a period during which the Prosecutor had the opportunity to
2 cross-check their evidence regarding Mr Lubanga. What is that evidence that the
3 Prosecutor has today after ten years of investigations and cross-checking? The
4 Defence will demonstrate that the Prosecutor is presenting to you incorrect evidence
5 and that they are fully aware of the limits of that evidence.

6 The presentation of the Prosecution evidence raises several factual and legal issues.

7 To begin with, we will talk about the scope of the charges relating to child soldiers
8 from the temporal and geographical scope as well as the generalised lack of

9 precision. Secondly, we will make -- give an overview of the applicable law. And
10 lastly, we will examine the direct evidence presented by the OTP.

11 The first part, the ambiguity of the charges and the territorial scope. The Prosecutor
12 states that the charges concern the period of 2 July 2002 and 31 December 2003 in the
13 Ituri territory, which is more than 65,000 square kilometres. The ambiguity of the
14 allegations of the Prosecution is clear. The DCC does not precise any location or the
15 date of enlistment of children of less than 15 years. The DCC does not give any
16 precise example of any children enlisted in the FPLC. A reading of the 160 pages of
17 the chart, that page does not give any assistance. The Defence therefore does not
18 have any precise information on the period of the charges.

19 How is it possible that after ten years of investigation the Prosecutor is still not able
20 to set out charges relating to child soldiers in a clear and precise manner in
21 accordance with the jurisprudence of the Court which makes the Prosecutor duty
22 bound to do so?

23 This total absence of demonstration in the opinion of the Defence is sufficient to
24 cause the withdrawal of the charges.

25 Regarding the applicable law to the crimes provided for in Article 8(2), the Defence

1 would like to present two principal points: The demonstration of the age of the
2 individuals and then the importance of the distinction between conscription and
3 enlistment, the notion of consent and the interpretation of the notion of active
4 participation in hostilities.

5 The demonstration of the age of the individuals must be founded on objective
6 elements. The elements of the crime relating to crimes provided for under Article
7 8(2)(vii) requires that in the -- the people -- in the case of individuals aged under 15
8 years, this demonstration has to be done in accordance with the jurisprudence of the
9 Court, which has established that to attain that threshold of substantial grounds, the
10 Prosecutor must provide concrete and tangible elements showing clear reasoning
11 supporting the specific allegations.

12 Being a constituent element of the crimes of enlistment and conscription of children
13 of less than 15 years and their use in active hostilities, the age of the individuals
14 enlisted by the FPLC has to be demonstrated in a concrete and tangible manner by
15 the OTP with objective and verifiable elements. Article 8(2)(vii) does not intend to
16 criminalise the fact of recruiting individuals that look like they are 15 years old but
17 children that actually are 15 years old unless the Defence submits, as we are going to
18 demonstrate, that no element presented by the Prosecutor provides evidence that
19 children less than 15 years old were included into the FPLC during the period of the
20 charges.

21 An estimation or general statements targeting young people, or kadogos, does not
22 prove that children of less than 15 years old were recruited by the FPLC.

23 Furthermore, one has to be very careful because the Prosecutor himself makes a
24 confusion and misrepresents the evidence.

25 I would like to draw the Court's attention to an example which illustrates the

1 misrepresentation by the Prosecutor of the evidence in the -- its charge -- in its chart.

2 That is page 523. The Prosecutor refers to a video in which Mr Lubanga addresses

3 the population. And this video is DRC-OTP-0102-0003, and it is transcript

4 EVD-PT-OTP-03814.

5 The Prosecutor states that in minute 21.01 seconds Mr Lubanga is supposed to have

6 declared that, and I will quote in English, "To the children who should not sleep but

7 work instead."

8 (Interpretation) The transcription in Swahili and the translation into French does not

9 mention the word "child" or "work". In reality, it is stated that Mr Lubanga says, "I

10 am asking all our young people not to go to sleep. Do not go to the sleep," and I'm

11 referring here to the French transcript DRC-OTP-0164-0913.

12 Furthermore, the Prosecutor presents certain incriminating evidence in its chart,

13 whereas it is in position of elements indicating that the presentation done is

14 incorrect. For example, the Prosecutor presents document ECD-PT-OTP-05245 and

15 document 05157 as incriminating evidence in its chart, pages 35, 104 and 577.

16 The first is a document prepared by P-46 which -- and that person compiles

17 interview notes with a young lady who claims to have been a child soldier in the

18 UPC. And the Prosecutor knows very well that this is Witness 5 of the Defence and

19 who appeared in the Lubanga case, and this witness stated clearly that they had

20 given testimony to benefit from the advantages of the demobilisation centre.

21 The second document is also a document prepared by P-46 following an interview

22 with a young boy in which it is stated that this child was never a child soldier in the

23 UPC. The Prosecutor presents these documents as evidence of the existence of

24 children of less than 15 years in the FPLC.

25 Lastly, amongst the video extracts presented by the witness in page -- on pages 484,

1 485 and 929 in its chart there is video number EVD-PT-OTP-02711, minute 01.49.02
2 and which shows, according to the Prosecutor, the image of an individual who looks
3 to be young and playing with an insect. The Prosecutor uses this element to show
4 that children of less than 15 years were present in the FPLC, and particularly as
5 Mr Lubanga's guards. And yet Mr Prosecutor knows that this individual testified
6 in the Lubanga case and stated that his name was Augustin Mbogo and that he was
7 aged 20 years at the time of those pictures.

8 Not only does the Prosecutor have all this information, but they never disclosed it to
9 the Defence in this case. The Prosecutor also alleged at least on two occasions that
10 towards the end of 2002, Bosco Ntaganda is supposed to have asked P-290 to train
11 four children of less than 15 years old in his residence in Bunia. The Prosecutor
12 states that this was military training. (Redacted)

13 (Redacted)

14 The Defence challenges the testimony of this witness and notes that they estimated
15 the age of the individuals by looking at their physical appearance, and they stated
16 that these trainees seemed to be less than 15 years old. Worse still, the Prosecutor,
17 on page 400 of its chart, indicates the reference relating to a document compiled by
18 P-46, including a statement of P-10 without indicating that they are referring to that
19 witness. That document shows that Witness P-10 made false statements to the
20 Court. What version does the Prosecutor want us to believe, that of P-10 or that of
21 P-46?

22 In any case, none of the elements presented by the Prosecutor to support their
23 charges reaches the threshold of precision necessary to support charges 14, 15 and
24 16. The elements presented to you by the Prosecutor are related to evidence that is
25 exclusively founded on redacted elements such as the reports of P-46 that the

1 Defence cannot cross-check. Evidence based on hearsay, that is testimony talking
2 about individuals that they themselves -- that -- individuals that came by themselves
3 to provide evidence and that this was not verified, neither by the Prosecutor or by
4 the NGOs.

5 The Prosecutor also presents evidence based on assessment of age from physical
6 features. Then the Prosecutor talks about evidence in which it asks the Chamber to
7 take a decision on the age of the individuals on the basis of video clips or
8 photographs.

9 Regarding that last point, the Defence would like to draw the attention of the
10 Chamber to the fact that the Prosecutor is presenting to you anonymous individuals
11 without demonstrating their real age. This practice imposes that there should be a
12 reversal of the onus of proof because it is up to the Defence to demonstrate the real
13 age of these individuals.

14 Secondly, it is difficult to assess the age of an individual based on their physical
15 appearance, particularly if they come from different ethnic groups and
16 socioeconomic environments. An expert witness confirms that the development of
17 an individual can vary greatly based on the ethnic group and feeding habits.

18 The Prosecutor showed you video clips from Rwampara as well as a photograph,
19 and the Prosecutor is asking you to assess the age of the individuals in these images,
20 so the Defence would like to submit that there is no probative value to this evidence.

21 Why is it that the Prosecutor is not looking for the individuals that they are
22 presenting to you? They prefer to present to you anonymous images out of context
23 and ask you to take your conclusions. So the onus of proof is reversed.

24 Lastly, the Defence will file written submissions containing observation regarding
25 the conclusions of the Prosecution on photographs and video clips.

1 Now, let us move on to the distinction between enlistment and conscription. On
2 point 14 of its charge -- of its chart the Prosecutor presents 116 pages of elements of
3 enlistment without any distinction, and they present these two crimes as different
4 charges. That is counts 14 and 15. And it looks to be essential for the Defence that
5 these two crimes should be evaluated differently by the Court.

6 The position of the Defence on this point is supported by the text of the Court which
7 indicates that there is a distinction, because they replaced the crime of recruitment
8 by the crimes of enlistment and conscriptions. There is also an essential element on
9 the voluntary nature of enlistment which distinguishes it from conscription. So
10 conscription cannot be established if there is no coercion.

11 So the Defence is requesting the Chamber to carry out a clear assessment of those
12 two charges in light of the elements of evidence provided by the Prosecutor.

13 Now, let us move on to the active participation in hostilities. In its DCC the
14 Prosecutor mentions this element in paragraph 98 where they claim that child
15 soldiers actively participated in hostilities in certain battles. In paragraph 99 the
16 Prosecutor adds that child soldiers were used as bodyguards by the leaders of the
17 UPC and FPLC.

18 During their oral submissions last Tuesday, the Prosecutor called on the Chamber to
19 have a broad interpretation of active participation. The Prosecutor is asking the
20 Chamber to include conduct such as spying, sabotage, the use of children at
21 checkpoints and as scouts to lure the enemy.

22 The Defence would like to point out that this position is expressed for the first time
23 by the Prosecutor during this hearing. The interpretation of the notion of
24 participation in hostilities suggested by the Prosecutor is abusively extensive and
25 violates rule -- the rule of Article 22(2).

1 The Defence submits that this notion is synonymous to direct participation, which
2 means committing acts of war, and this definition is drawn from the jurisprudence
3 of ICTR and is in conformity with the position of the ICRC. So the Defence requests
4 the Chamber to limit its interpretation to the elements pleaded by the Prosecutor in
5 the DCC.

6 Regarding the third part, the Prosecutor has not demonstrated that there are
7 substantive grounds to believe that children of less than 15 years were enlisted and
8 conscripted into the FPLC and that they participated in hostilities.

9 The Prosecutor presents a single example of an individual who was enlisted in the
10 FPLC as a child soldier, and this is Witness 758. The Prosecutor also presents
11 elements relating to P-10. The allegations of these two witnesses cannot constitute
12 serious evidence for the charges in counts 14, 15 and 16.

13 Regarding P-758, the Prosecutor refers to this witness 54 times in its chart.

14 The Defence notes that the statement of Witness 758 is widely redacted as well as the
15 statements of his father, mother and sister. All the information necessary for the
16 Defence to carry out investigation is redacted, including the identity of the witness,
17 the members of his family, his date and place of birth, his school profile and his
18 place of residence.

19 There is one thing that these redactions do not conceal. That is the important
20 contradictions and incoherences that exist between the various statements of the
21 witness as well as the statements of the members of the witnesses' families. These
22 contradictions are such that we can only arrive at a single conclusion today, that is
23 that Witness 758 was not a child soldier in the FPLC.

24 The Defence stresses that the information relating to the intermediary who presented
25 the witness is redacted. Nevertheless, the information available to the witness in

1 the statements of the witness and the members of the family indicate that this child
2 was taken care of by an NGO before meeting the Prosecutor.

3 Witness 758 is a woman presented as a former child soldier in the UPC. She claims
4 to have been forcibly enlisted by people in uniform of the UPC in July 2002 while
5 less than 15 years.

6 I would like at this point to distribute a chart which was compiled by the Defence
7 and which highlights the various contradictions between the various versions given
8 by the witness and the members of his family regarding enlistment. The chart is
9 confidential, but I believe that copies can be distributed to the parties and
10 participants.

11 PRESIDING JUDGE TRENDABILOVA: It's not going to be shown on the screen
12 but just in paper?

13 MS BUTEAU: (Interpretation) We have copies for everyone.

14 PRESIDING JUDGE TRENDABILOVA: And thank you very much. This has to be
15 filed in the record of the case.

16 MS BUTEAU: (Interpretation) As you can see, it is a table summarising the
17 various statements from the witnesses and the members of their families. The
18 Defence felt that this is the easiest way of presenting the statement of this witness in
19 public session.

20 So when you look at the table, you can see that there are various and serious
21 contradictions between the various statements that make the versions irreconcilable,
22 and these include the fact that P-758 and members of his family present five different
23 versions of his enlistment and three different dates.

24 P-758 provided two different versions about his age at the time of his alleged
25 abduction, and in one of these versions she was more than 15 years old. P-758 and

1 the members of his family present at least three versions different and incompatible
2 versions of the circumstances of his flight from the FPLC.

3 The mother and sister of P-758 contradict each other also regarding the manner in
4 which the mother learnt about the enlisted -- enlistment of her daughter.

5 The Prosecutor himself also points out to Witness P-806 that the version of his
6 enlistment is different by the -- to the version given by his sister.

7 In our written submissions we will include all the contradictions between the
8 versions of these witnesses and the members of their families.

9 Secondly, the Defence would like to point out that they were informed belatedly by
10 the Prosecutor, that is about ten days ago, that Witness P-758 gave a statement to an
11 NGO. And this is in annex 25.2 of the second request for an arrest warrant.

12 The Defence was not in a position to annex this statement to the statement of P-758
13 because a different pseudonym was used. This statement was compiled in a
14 document produced by an NGO in -- for the purpose of adding charges against
15 Mr Lubanga. An analysis of this statement confirms the position of the Defence,
16 that is, the witness was never enlisted in the FPLC.

17 For example, in his statement P-758 claims that she was 15 years old at the time of
18 the events, and this is not something that is innocent. She alleges that Mr Lubanga
19 came to the camp after their training, he made a speech and then brought meat. Yet
20 in her statement to the OTP in 2013, while she was aware that this statement was
21 being taken for the Ntaganda case, she stated something else, that is, she never saw
22 Mr Lubanga and that it was Mr Ntaganda who came and made a speech at the camp
23 and brought meat.

24 P-758 is the only witness presented by the Prosecutor as an example of a child
25 soldier alleged to have been enrolled or enlisted by the FPLC while under 15 years

1 old. In light of the elements provided to you, the Defence submits that this
2 testimony cannot be retained by the Chamber.

3 Let us now move to Witness P-10. The Prosecution's position on this witness is
4 particularly inconsistent. This witness gave testimony before Pre-Trial Chamber I
5 in the Lubanga case. During that case she was depicted as a child under the age of
6 15. But I think the conclusions of Pre-Trial Chamber I in Lubanga count here,
7 because the Prosecution indicated that they relied on this witness not as a child
8 soldier but rather for testimony regarding the events that she experienced. And the
9 Prosecution refers to this person as a young recruit. So the prosecution themselves
10 don't seem to be very convinced about this person's actual age.

11 Reference is made to a wound that P-10 suffered allegedly during combat. The
12 testimony regarding this wound, a photograph of the wound, some X-rays of her
13 wrist and jaw, and then finally an expert report relating to the X-rays and the age.
14 Why was that information provided on the charts? It must have been to give the
15 Chamber to believe that the witness was under 15, and yet the Prosecution know
16 that the expert report regarding the age of this person was not probative. It shows
17 that she had finished her growth at the time of the X-ray and that the only possible
18 conclusion was that the person was 19 years of age or more when the X-ray was
19 taken in 2007.

20 So this position, this untenable position taken by the OTP shows that the Prosecution
21 is desperate. They are clutching at straws. They do not have the necessary
22 evidence to support their accusations. Why is it that they are taking this position
23 when the documentary proof and the testimony show without a shadow of a doubt
24 that P-10 lied about her age, that she was over 15 when she enlisted in the FPLC?
25 For example, Witness P-10 has given at least six different dates of birth.

1 At this juncture, your Honour, would it be possible for us to go into private session
2 for about five minutes?

3 PRESIDING JUDGE TRENDABILOVA: Of course. Court officer, please make the
4 arrangements.

5 (Private session at 10.32 a.m.)

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13 Page 24 redacted – Private session

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- 24 (Open session at 10.41 a.m.)
- 25 THE COURT OFFICER: We are in open session, Madam President.

1 PRESIDING JUDGE TRENDAFILOVA: Please proceed, Ms Buteau.

2 MS BUTEAU: (Interpretation) Thank you. To conclude on this particular point,
3 the Defence requests that the Chamber dismiss all statements from Witnesses P-758
4 and P-10, which the Prosecution has used to make conclusions on all kinds of
5 matters ranging from the alleged responsibility of Mr Ntaganda to various elements
6 of crimes excluding this testimony, including the only case presented officially by
7 the Prosecution as a former child soldier will lead to the five charges relating to child
8 soldiers being dismissed.

9 There is no specific reliable example of an FPLC member under the age of 15 during
10 the time of the charges, and thus all the charges relating to child soldiers must be
11 dismissed by your Chamber.

12 I would now like to move to the second part of my presentation. This relates to the
13 crimes of rape and sexual slavery of child soldiers under 15. These are counts 6 and
14 9.

15 The Defence is of the opinion that the Prosecution has not demonstrated the
16 existence of individuals under 15 within the ranks of the FPLC during the time of the
17 charges for a number of reasons that we shall now set out. This conclusion must
18 lead to these charges being dismissed, namely, the charges of rape and sexual
19 enslavement of children -- child soldiers under 15, counts 6 and 9.

20 All the same, if the Chamber were to look closely at the charged crimes, counts 6 and
21 9, the Defence would like to present two submissions. The first is based on the
22 principle of legality, the second on international law relating to armed conflict and
23 international humanitarian law.

24 First of all, the principle of legality codified in Article 22 of the Statute sets out that
25 criminal law shall not be applied in extensive manner, for example, to the

1 disadvantage of a suspect or accused. This is a principle of criminal law and is one
2 of the fundamental values of a society based on the rule of law. The principle is
3 recognised in many international and regional instruments. Furthermore, it has
4 been confirmed by this Court's jurisdiction.

5 The way in which the Prosecution has introduced these crimes in the DCC
6 demonstrates that, first of all, they are trying to expand the application of Article
7 8(2)(e)(vi) to situations that are analogous, arguing an extensive interpretation of
8 Article 4 of Additional Protocol II to the Geneva Conventions adopted 8 June 1977,
9 yet this provision of the protocol does not allow for such an interpretation.

10 The protection under Article 4 applies only if a child soldier is captured by the
11 opposing party. It sets out that the opposing party must allow the child to be
12 reunified with his family and that the child is entitled to schooling. Article 4(3) in
13 no way can be used to interpret Article 8 to expand the scope thereof to victims who
14 might be part of the same group as the perpetrator of the crime.

15 Secondly, the Defence asserts that the crimes committed by members of armed
16 forces on members of the same armed force do not come within the jurisdiction of
17 international humanitarian law nor within international criminal law. Customary
18 international law applying to all armed conflicts, be it international or
19 non-international, is made up of several principles that are intended to protect
20 civilians and making a clear distinction between civilians and combatants. Such
21 law also sets out rules relating to the ways in which war is waged.

22 International humanitarian law is not intended to protect combatants from crimes
23 committed by combatants within the same group. Such crimes come under
24 national law and human rights law. Thus, the charges found in counts 6 and 9
25 cannot be confirmed in accordance with the principle of legality.

1 I would now like to turn to the issue of rape as a war crime. The Prosecution asserts
2 that Witnesses P-22, P-18, P-19 and P-113 were raped by FPLC soldiers. That is
3 their allegation. First of all, the Defence wishes to remind the Chamber that
4 Witness P-22 has passed away, and the Defence did file an application to exclude
5 that person's testimony. That filing was made last week.

6 Furthermore, Witnesses P-18, 19 and 113 are anonymous witnesses. The Defence do
7 not know who they are. Thus, we were not in a position to make enquiries to
8 investigate the veracity of their allegations.

9 If their statements are to be considered by the Chamber, they must be corroborated
10 by one or several other items of evidence, yet the Prosecution has not provided any
11 additional evidence to corroborate their specific accounts. This is particularly
12 important in this particular case because you see, Witnesses 18 and 19 both gave
13 contradictory statements in 2005 and 2013, because they did not say that they had
14 been raped in their initial statements.

15 Witness P-113 gave at least three statements to the Prosecution. In the first
16 statement the witness said clearly, and I quote in French, "There were many Hema
17 militiamen, but no one tried to assault us physically or abuse us sexually."

18 In a statement given in June 2013, the witness confirmed her statement in 2005
19 except one detail related to her son. However, in another statement, this time from
20 October 2013, the witness recants and says that she had been raped several times.

21 This really casts doubt on the credibility of the statements given by these three
22 witnesses, P-18, P-19 and P-113.

23 The Defence argues that these contradictions are such that further investigations
24 must be conducted in relation to these witnesses. In any event, the Defence wishes
25 to argue that since there has been no corroboration of these statements made by

1 these witnesses, the Chamber cannot take consideration thereof.

2 We will flesh out these arguments in our written submissions that we'll be filing
3 later, but we do wish to raise a point regarding Witness 17. The Prosecution based
4 themselves on this person's testimony.

5 P-17 claims that he was a soldier within the FPLC at the time of the charges. The
6 witness said that he never saw any cases of sexual abuse committed by UPC soldiers,
7 but if one reads P-17's statements, one sees that the OTP investigator continued
8 questioning the person and -- in a very leading manner and truly insisted, thus
9 pushing P-17 after 12 questions to changing his statements. And then the person
10 said that there had been rapes by the FPLC in Mongbwalu and Sayo, and this change
11 led the investigator to say, and I quote, "Are you sure about that? Because we've
12 really pressured you and now -- yes, and we continued the questions. We don't
13 want you to give an answer just to end this particular topic. Do you understand?"
14 The same technique was used with witness -- with another witness, even though the
15 investigator was quite leading, saying there had been a crime, leading the witness to
16 changing the testimony. And it would appear that the Prosecution did not meet the
17 Prosecution -- their duties, and this really casts doubt on the person's credibility.

18 Now let us move to the war crime of an attack on protected objects. This is
19 provided for in Article 8(2)(e)(iv).

20 As for all other crimes of war, it is necessary for the Prosecution to demonstrate the
21 elements provided for under elements of crimes, namely, that the perpetrator
22 launched an attack, and a specific objective of the attack -- or target, rather, was one
23 or several buildings, churches or other places of worship, schools, hospitals, places
24 where ill people were being cared for, et cetera.

25 The Prosecution must demonstrate that there was a specific intent to attack those

1 buildings, which rules out any incidental destruction of such buildings during an
2 attack on military objectives.

3 If one reads the DCC carefully, one sees that the Prosecution stated that the charge of
4 an attack on -- of protected objects was based on events described in paragraphs 69,
5 71, 72, 78 and 81. In actual fact, the only attack on a protected object that is
6 mentioned in those paragraphs is restricted to an attack on a hospital in Bambu
7 without any further details provided. During oral submissions the Prosecution
8 gave a number of vague and very general examples of attacks on churches, schools
9 and hospitals, but there was no specific attacks -- there was no specific reference
10 made to attacks in the meaning of Article 8(2)(e)(iv).

11 The Prosecution mentioned an incident in which a man was allegedly taken from a
12 hosp -- correction, a church in Sayo and executed in front of Mr Ntaganda. Now, if
13 this even were to be established, this would not be a deliberate attack on a building
14 as set out in Article 8(2)(e)(iv). The same holds true for other incidents alleged by
15 the Prosecution during yesterday morning's hearings.

16 The Prosecution has not met the requisite burden of proof when they
17 prosecute -- when they allege without any reference or any details that there was an
18 attack on Walendu-Djatsi. I quote, "The forces of Bosco Ntaganda attacked and
19 looted the hospital in Bambu which was the largest one of the region." The UN
20 researcher, P-46, went there after the fact and stated, and I quote, "Everything was
21 destroyed systematically, including the beds. Nothing was working anymore. The
22 UPC also looted the hospitals, the religious buildings, the churches, schools in the
23 surrounding villages," end of quote.

24 The Defence thinks that such a statement is not specific enough to allow the suspect
25 to defend himself against the charges that stand against him. Regarding the

1 hospital in Bambu, the only two elements found in the in-depth analysis charge are
2 the statement of P-46, who says that he saw the hospital after it was destroyed and
3 the report that this same person drafted after this mission to the field.

4 The Defence would argue that these two items of evidence that come from the same
5 force namely -- source, namely, P-46, well, they do not corroborate one another.

6 And, furthermore, the witness was not a direct witness of the attack and cannot
7 confirm who was responsible for the attack, nor can he confirm that the hospital was
8 specifically targeted with a specific intention of destroying it.

9 So the charge cannot be confirmed, because there is no evidence to allow one to can
10 conclude on the basis of Article 61(7) that the FPLC committed acts of destruction of
11 protected objects with the specific intent to attack such objects.

12 I would now like to move to another topic. Perhaps this might be the right time to
13 take our break, or would you rather I continue? I have about another five minutes.

14 PRESIDING JUDGE TRENDAFILOVA: I look at the interpreters. Could we take,
15 in addition to the two minutes left, three more? Thank you so much.

16 Please proceed, Ms Buteau.

17 MS BUTEAU: (Interpretation) Thank you.

18 I would now like to turn to the crime of looting as a war crime. This is provided for
19 in Article 8(2)(e)(v) of the Statute. Now, in this particular case the Prosecution has
20 an obligation to demonstrate the elements contained in the elements of crimes, more
21 specifically, that the perpetrator took the property in question, that the perpetrator
22 intended to take the items or goods away from the owner and take ownership
23 thereof for private or personal reasons, and that this appropriation of property was
24 done without the owner giving his consent.

25 The Defence wishes to draw the Chamber's attention to two points of law: First of

1 all, I think it's important to specify that Preliminary Chambers have confirmed that it
2 is necessary to demonstrate that the looted goods were actually the possessions of
3 the enemy as is the case for the crime of destruction of the enemy's goods. Even
4 though this was not specified in the elements of crime, it is necessary to demonstrate
5 this relationship between the perpetrators of the crime and the people who were the
6 victims of looting,

7 Be it the individual victims of looting, being supporters or holding allegiance to the
8 armed groups against which the FPLC was allegedly fighting.

9 Secondly, it is essential for the Prosecution to describe the goods or items to
10 determine whether they were indeed taken without the consent of the legitimate
11 owner thereof in the meaning of Article 8(2)(e)(v).

12 The evidence provided by the Prosecution refers to certain actions or a culture of
13 systematic looting during UPC military operations without necessarily making the
14 link to the attacks mentioned in the DCC.

15 There is vague mention made of an expression in Swahili, "kupiga na kuchaji,"
16 which was repeated several times during the Prosecution's submissions with a view
17 to demonstrating acts of looting.

18 The nature of the stolen goods is an essential information for the Defence given the
19 exception provided for in the elements of the crime, referring especially to the
20 military necessity of these goods. The Prosecution, therefore, has the obligation to
21 demonstrate the projected use of these goods by the perpetrators. So the Defence
22 submits that the grabbing of goods as war loot, such as weapons, ammunition,
23 vehicles, and so on for military purposes as well as communication equipment
24 would be relevant.

25 Witness P-16 refers to this type of goods which was allegedly seized by the FPLC.

1 You have you also have to set aside the appropriation of food or cattle if that was not
2 necessary under the circumstances of necessity.

3 Regarding the analysis of the elements of evidence presented by the Prosecution in
4 point 12 of its analytical table, the Defence would like to point out that the
5 Prosecutor refers to several facts that cannot be considered as pillaging within the
6 meaning of Article 8(2), especially the evidence mentioned by the Prosecution
7 relating to the destruction of property.

8 Lastly, the evidence presented indicated that the pillaging in Mongbwalu was done
9 by the APC and the Lendu combatants before the arrival of the UPC. After the
10 break, my colleague Maître Valdivia will deal with the issue of the liability of
11 Mr Ntaganda. But before that the Defence would like to submit once again that the
12 lack of evidence and the ambiguity of the allegations are such that the Defence can
13 only apply to the Chamber not to confirm the charges brought against Mr Ntaganda.
14 Thank you.

15 PRESIDING JUDGE TRENDAFILOVA: We shall take the break and we shall
16 resume at 11.35.

17 THE COURT USHER: All rise.

18 (Recess taken at 11.02 a.m.)

19 (Upon resuming in open session at 11.36 a.m.)

20 THE COURT USHER: All rise.

21 PRESIDING JUDGE TRENDAFILOVA: Please be seated. We are in session now.

22 Mr Desalliers, it's again your team, so the floor is again over to you.

23 MR DESALLIERS: (Interpretation) Thank you, Madam President. Before giving
24 the floor to my colleague, Maître Valdivia, I would like to answer a question put to
25 us by the Chamber this morning regarding the date of the video in Mandro relating

1 to Mr Kahwa's speech. During the break we cross-checked with our client, and we
2 believe that we can give you a precise answer to that question.

3 So the position of the Defence is that that video was made during the days following
4 the military operations at Mongbwalu, and the troops appearing on that video are
5 indeed the troops that were sent to Mongbwalu.

6 PRESIDING JUDGE TRENDAFILOVA: Thank you very much for this further
7 information, Mr Desalliers. So now who is the member of your team?
8 Would you state your name, madam?

9 MS VALDIVIA: I am Maître Andrea Valdivia.

10 PRESIDING JUDGE TRENDAFILOVA: Due to some filings and decisions to be
11 taken with regard to you joining the team of Mr Desalliers. It was in the beginning
12 of the case. So, Ms Valdivia, please proceed.

13 MS VALDIVIA: (Interpretation) Madam President, your Honours, my
14 presentation will deal with the modes of liability, and it will comprise three parts.
15 The first part will be the failure of the Prosecutor to take a clear position regarding
16 her criminal prosecution. The second part will deal with the incompatibility
17 between the various modes of liability, and I will conclude with the common
18 elements relating to several modes of responsibility. That is the plan and the mens
19 rea of Mr Ntaganda.

20 To begin with, the Defence is particularly concerned by the failure of the Prosecutor
21 to take a clear position when in pages 35 and 49 of the DCC and during their oral
22 submissions they present almost all the modes of liability in the Rome Statute.
23 The Prosecutor has responsibility for her case, and as provided for in Article 61(5) of
24 the Rome Statute, the Prosecutor shall support each charge with sufficient evidence.
25 And the Defence submits that a charge within the meaning of this article is made up

1 of the material elements of the crime and its objective and subjective elements of the
2 mode of liability. So under this article it is incumbent on the Prosecutor to clearly
3 present her case including the mode of liability for each alleged charge.

4 In effect, jurisprudence from the international criminal tribunals, which we will
5 quote confirms that the charge is made up of alleged crimes and mode of liability.

6 And yet after reading the DCC, it is clear that the Prosecutor is incapable of
7 identifying the appropriate mode of liability and to present a consistent case. The
8 Defence submits that the Prosecutor's thesis regarding the contribution of Mr
9 Ntaganda is incomprehensible and inconsistent and assures that the Prosecutor did
10 not choose any position.

11 The Prosecutor cannot maintain for the same facts that Mr Ntaganda's contribution
12 was crucial and essential and at the same time in the alternative was carried out in
13 any other manner. The Prosecutor attributes to the suspects what crime and what
14 liability? The Prosecutor has the duty to be clearer.

15 Pursuant to Article 61(3)(a) of the Rome Statute which states that the Prosecutor shall
16 inform the person within a reasonable time before the hearing of the charges on
17 which he intends to rely to bring the person to trial, this fundamental law targets the
18 position of the contents of the charges as well as the mode of liability, which for the
19 time being includes all the modes, practically all the modes of liability, that is Article
20 25(3)(a) and Article 28, without mentioning that Article 25(3) deals with three
21 different modes of liability.

22 The Defence submits that neither the DCC nor the IDAC document disclosed to the
23 Defence is informative about the liability alleged by the Prosecutor. We will
24 comment in our written submissions regarding our observations on the Prosecutor's
25 position. The Prosecutor tried to justify the absence of a clear position by the

1 existence of Regulation 55 of the Regulations of the Court. This approach is
2 unacceptable. That approach is defective in two aspects. The first one is that the
3 Prosecutor is trying to take ownership of a prerogative which is that of the Chamber,
4 that of the Trial Chamber, and, secondly, Regulation 55 can only be applied in
5 exceptional cases and in accordance with a precise procedure. It cannot be used to
6 justify the absence of a clear position of the Prosecutor regarding the charges against
7 a suspect.

8 The Prosecutor claims that they adopted a broad-based approach in order to avoid
9 uncertainties. In reality, uncertainty is created by the Prosecutor from the very
10 beginning of the proceedings.

11 The Defence submits that it is by identifying the appropriate mode of liability from
12 the very beginning that the Prosecutor can contribute to the efficiency and
13 expeditiousness of the proceedings. This manner of proceeding cannot be an
14 acceptable practise before the International Criminal Court, because it deprives Mr
15 Ntaganda of his rights to be informed within a reasonable time before the hearing of
16 the charges against him, because presenting all the modes of liability is equivalent to
17 not informing the suspect at all.

18 Now let us move on to the second part of my presentation, which is the
19 incompatibility of the various modes of liability alleged by the Prosecutor.

20 Let us begin with the incompatibility between Article 25(3)(a) of the statute and
21 Article 25(3)(d), that is incompatibility related to contribution. It is clear from the
22 mode of liability set out in Article 25(3)(d) of the statute in our case that it cannot be
23 pleaded as in the alternative. In fact, for the same alleged facts, the Prosecutor
24 should be in a position to take a clear position and to state whether Mr Ntaganda
25 contributed in an essential manner or in any other manner.

1 Furthermore, in the decision confirming the charges in the Kenyatta, et al, case
2 referring to Article 25(3)(d), your Honourable Chamber specified that liability may
3 not be considered for the same alleged facts, except if the contribution to the crime
4 was carried out in a manner other than those set out in Article 25(3)(a) to (c).
5 The judgment in the Lubanga case as well as the decision in the arrest warrant in
6 Mbarushimana case confirms this approach. It follows that the two modes of
7 liability, that is, 25(3)(a) and 25(3)(d), cannot be used in an alternative manner for the
8 same facts considering that the type of contribution is simply not the same.
9 Now let us move in to the alternative mode of liability, that is regarding attempts
10 provided for in Article 25(3)(f) of the Rome Statute. As interpreted by
11 jurisprudence, only the people who attempt to commit a crime, that is in opposition
12 to those that participate in a crime, can be held responsible in application of this
13 provision. This mode of liability can only be taken in -- can only raise the liability of
14 a direct perpetrator of a crime and not the commission of a crime through the acts of
15 another person.
16 During the hearing, the Prosecutor attached to Article 25(3)(f) two attempts of
17 murders preceded by rapes. The victims do not identify Mr Ntaganda as the rapist
18 or as the person who tried to kill them. The direct perpetrator, to use the term
19 employed by the Prosecutor during the hearing, is not Mr Ntaganda. Because of
20 that, the mode of liability within the meaning of Article 25(3)(f) must be rejected or
21 dismissed.
22 Now, let us move on to the last part of my presentation. I'm going to present a few
23 common or, rather, objective and subjective elements that are common to the various
24 modes of liability, namely, the common plan and the mens rea of Mr Ntaganda. Let
25 us begin with the common plan.

1 In order for the criminal responsibility of an individual to be engaged owing to his
2 participation in a common plan, the Prosecutor must as they admit themselves
3 demonstrate that the common plan includes at the very least an element of
4 criminality. The Prosecutor alleged that Mr Ntaganda contributed to a plan aimed
5 at assuming military and political control and occupying the Ituri regions dominated
6 by the non-Hemas and drive out the non-Hema civilian population, particularly the
7 Lendu, the Ngiti, and the non-originaires.

8 The establishment of an armed group as such cannot be considered as a criminal act.

9 The criminal aspect of the common plan proposed by the Prosecutor relies on the
10 claim that the UPC/RP and the FPLC had as their objective to steal the Hema, the
11 non-Hema lands and to expel them.

12 But as my learned colleague Mr Desalliers explained in detail, this claim is totally
13 unfounded. It was demonstrated that the UPC/RP and the FPLC were not, contrary
14 to what the Prosecutor has suggested, a group of Hemas. And from the Prosecution
15 evidence it is clear that not only did the UPC/RP not have as objective to attack their
16 non-Hema inhabitants of Ituri, but they had as objective to protect the entire
17 population and all ethnic groups. That was the reason for the creation of that
18 movement.

19 The objective was not to attack the civilian population, but to put an end to the
20 abuses perpetrated against the members of that population. That was the real
21 common plan in this case. And it is these ideals that Mr Ntaganda subscribed to.

22 We therefore submit that the evidence in the case is totally unfounded with regard to
23 the allegations of the OTP relating to the existence of a common plan including an
24 element of criminality.

25 Let us now move on to the last part, that is, the subjective elements provided for

1 under Article 30. Pursuant to Article 30, no one can be criminally liable unless the
2 material element of the crime is committed with intent and knowledge.

3 According to paragraph 2 of that same article, the Prosecutor must prove that the
4 suspect had either the intention to adopt criminal conduct, or in the case of indirect
5 perpetration, that at the very least he was aware that in the normal course of events
6 the perpetration of the crimes was virtually certain and even almost inevitable
7 consequence.

8 In the present case and as pleaded by the Prosecutor, it is necessary for the
9 Prosecutor to present substantive grounds to believe that Mr Ntaganda had the
10 intention of contributing to the creation and implementation of the common plan;
11 and that he was aware that in the normal course of events the inevitable, practically
12 inevitable consequence would be the implementation of the common plan; and that
13 according to the Prosecutor, there was a *modus operandi* relating to the commission
14 of the crimes listed in the 18 counts in the DCC.

15 Jurisprudence states that the text of Article 30 of the statute does not encompass
16 *dolus eventualis*, recklessness, or any lower form of responsibility. In addition, this
17 article may not be interpreted in a broad manner.

18 Now, based on this principle, how does the Prosecutor demonstrate the intention of
19 Mr Ntaganda? Let us consider for one moment the Prosecutor's allegations in the
20 DCC. To begin with, in an attempt to prove the *mens rea* of Mr Ntaganda, the
21 Prosecutor alleges facts that are supposed to have taken place before and after the
22 two main alleged events, that is, the attacks in Mongbwalu and the attacks in
23 Walendu-Djatsi.

24 The Prosecutor also mentions events before and after the period of the charges.

25 And yet we submit that the intention must be proven on each occasion and for each

1 alleged crime.

2 The mens rea cannot be applicable based on the fact that crimes were committed
3 during prior events.

4 The Prosecutor is wrong in claiming in paragraph 139 of the document containing
5 the charges that the mens rea within the meaning of Article 30 can be applicable
6 equally to the conduct adopted in the past.

7 The Chamber calls -- or, rather, the Defence calls on the Chamber to adopt its
8 conclusion not only relating to the prior events, but also relating to the events
9 pleaded by the Prosecutor in paragraph 140 of its DCC. These events are not part of
10 the charges and cannot be considered as proven.

11 As has been mentioned under Article 30, the Prosecutor must demonstrate that the
12 crimes perpetrated following the conception of the plan should be perpetrated
13 intentionally, that is by Mr Ntaganda, or must be a consequence of the normal
14 course of events.

15 Mr Ntaganda never had any intention of committing any one of the crimes alleged
16 when the FPLC was carrying out military operations whose objectives were always
17 to drive out the APC and the Lendu combatants. The proof linked to the two main
18 alleged incidents demonstrate that the purpose of those military operations was to
19 put an end to the abuses perpetrated by the APC and the Lendu combatants who
20 were attacking the population.

21 The video from Mongbwalu presented by my colleague, Maître Desalliers, is very
22 clear about this point. The mens rea of Mr Ntaganda as a result cannot be invoked
23 based on the Prosecutor's evidence.

24 Secondly, the evidence presented by the Defence shows that Mr Ntaganda and his
25 hierarchical superiors have always strongly opposed the commission of crimes

1 against civilians both in their speeches and in the instructions given to the armed
2 forces. Such instructions given by Mr Kahwa in presence of Mr Ntaganda leave no
3 doubt to the fact that the UPC/RP and the FPLC did not tolerate the commission of
4 crimes against the civilian population.

5 Where it concerns the crimes of enlistment, conscription, and the use of children
6 under the age of 15 in the FPLC, the Defence refers you to the presentation of Maître
7 Buteau and will develop these points in greater detail within the framework of its
8 written observations.

9 Furthermore, have we not seen in the video of Mongbwalu that Mr Ntaganda said
10 that the only intention that he had was to protect the inhabitants and their property.

11 And Mr Ntaganda even warned the woman in the market to tell him if anybody
12 wanted to harm her. The Prosecutor cannot state that these rapes, murders,
13 pillages, displacement of civilians would happen within the normal course of events.

14 Your Honour, your Honours, I have finished my presentation. And with your
15 permission, I would now like to hand the floor over to my colleague, Maître
16 Desalliers. Thank you very much.

17 PRESIDING JUDGE TRENDABILOVA: Thank you, Ms Valdivia, for being concise
18 and to the point.

19 Now Mr Desalliers takes over, as I understand?

20 MR DESALLIERS: (Interpretation) Thank you very much, your Honour. Just a
21 few observations that I'd like to make in order to finish with the presentation of the
22 Defence team. Now, these observations concern the concerns of the Defence with
23 regards to certain subjects which we would like to raise orally here in order to give
24 you a general idea and about which we shall or we intend to develop further in our
25 written submissions at a later point.

1 Now, three points which we would like to raise, three points for the Chamber: The
2 first point concerns the nature of the evidence presented by the Office of the
3 Prosecutor to you. We have listened attentively to the presentation of the Office of
4 the Prosecutor over the last days, and we have been able to look at the IDAC table
5 which was communicated to us, and we note how striking it is to see that or how the
6 Prosecutor is basing itself to a massive extent on evidence which is obtained, not
7 from the results of its investigations, but which come from third-party sources,
8 NGOs, United Nations, and even press articles.

9 We understand that in criminal proceedings such evidence can be useful for a
10 contextual basis, but as you've been able to see with regards to the presentation of
11 the Office of the Prosecutor, the references to investigators of the United Nations,
12 investigation or rapporteurs from NGOs to Witness 46, 56, 315, 317, and even to
13 press articles, they were not raised just in order to give you a context or to give you
14 an idea of the context of the situation in Ituri, but indeed to demonstrate the
15 commission of crimes.

16 And I would refer you in this regard to the observations of the Pre-Trial Chamber in
17 the Gbagbo case where it was indicated that such evidence could not be presented as
18 a result of a complete investigation, a correct investigation carried out by the Office
19 of the Prosecutor in accordance with Article 54(a) of 1(a) of the statute.

20 Even if NGO reports and press articles can usefully show the historical background
21 to a conflict, they do not normally constitute a valid substitute for the necessary
22 evidence in order to confirm the charges in accordance with the proper regulations
23 governing the administration of justice. And I've taken this quote from the decision
24 in the Gbagbo case.

25 Furthermore, we would also like to raise this concern that we have given the number

1 of evidentiary items the Prosecutor bases itself, not only to present contextual
2 elements, but to try and bring evidence with regards to the commission of crimes
3 and for which he asked or she asked for confirmation.

4 Now, the second point that we wish to bring to the attention of the Chamber and
5 which does cause significant concerns to the Defence concerns the risk of third
6 parties interfering in the investigations of the Office of the Prosecutor. And we
7 have filed evidence in this regard, a statement of witness D-18-001 and, firstly,
8 mentioning that the Office of the Prosecutor communicated to the Defence a table
9 which indicated the links between the different witnesses and certain intermediaries,
10 and we have submitted this table as evidence for the Defence. Now, this table
11 makes it possible for us to see in particular that three witnesses, namely, 5, 20, and
12 38, P-38, upon which the Prosecutor bases a considerable amount of its evidence of
13 its allegations, this witness is alleged to have been presented to the Office of the
14 Prosecutor by an intermediary identified as P-316.

15 Now, according to the statement of the witness, D-18-1, this intermediary was guilty
16 of fraudulent practises. In fact, the Witness 18 indicated to us that this intermediary
17 had presented to the Office of the Prosecutor over 2000 -- during 2005, had been
18 presented to them in 2005, and this intermediary 316 had incited the Witness 1 of the
19 Defence to make false statements to the Office of the Prosecutor, and he stated the
20 following:

21 "P-16 incited me to make false statements to the investigators with the aim of
22 providing false testimony before the International Criminal Court. Other persons
23 other than myself have been incited to make false statements to the Office of the
24 Prosecutor by P-316. This latter person did not act alone, because he acted within a
25 network of persons who were working in Bunia, Kampala, and Kinshasa in drawing

1 up false testimony," end of quote.

2 Though the witness adds in his statement that this network included people who
3 were working in MONUC or in local NGOs, and the witness continued in his
4 statement indicating that this intermediary, 316, who was working for the
5 intelligence services in the Congo, specifically asked him to introduce himself as the
6 former bodyguard of Bosco Ntaganda and to pretend that he had participated in
7 military operations by the UPC in Mongbwalu, Kilo, Kobu, and Lipri and to say to
8 the investigators that Mr Ntaganda had carried out the Mongbwalu operation.

9 However, this Witness D-1, who was called to testify in the Lubanga case, stated that
10 he had never participated as a soldier in the FPLC, never was a soldier in the FPLC.

11 And we met this witness in January 2014, and this witness indicated to us that
12 following the statement that he provided in the Lubanga case, 2009, 2010, following
13 that, he was never contacted by the Office of the Prosecutor thereafter.

14 We submit that this situation is highly concerning, because it does call into question
15 or at least raises major question marks with regards to the validity of other witnesses
16 said to have been presented by this intermediary, 316, and who today are presented
17 by the Prosecution as witnesses with a view to confirming the charges against Mr
18 Ntaganda.

19 So we will develop this issue of intermediaries in our written submissions, but I
20 would also like to raise a concern with which the Defence has with regards to
21 information communicated by the Office of the Prosecutor on the subject of two
22 witness, two of these witnesses, P-55 and P-12. We have received a note, an
23 investigator's note, which referred to discussions that were held between the Office
24 of the Prosecutor and the VWU and which provided extremely concerning
25 information with regards to these two witnesses. And in order to avoid any

1 difficulties that there might be, I will present some of the information, but I believe
2 we have to go into a closed session in order not to identify the witnesses -- well,
3 private session I mean by this, your Honour.

4 PRESIDING JUDGE TRENDABILOVA: Court officer, please do the arrangements
5 for private session.

6 (Private session at 12.13 p.m.)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

26

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Open session at 12.16 p.m.)

9 THE COURT OFFICER: We are in open session, Madam President.

10 PRESIDING JUDGE TRENDABILOVA: Thank you.

11 Proceed, Mr Desalliers.

12 MR DESALLIERS: (Interpretation) The third concern that we would like to raise

13 and bring to the attention of the Chamber relates to the methods used by the

14 investigators of the Office of the Prosecutor within the framework of their

15 questioning of the witnesses during their investigations, during their interviews.

16 The question was already addressed by my colleague, Caroline Buteau, when she

17 mentioned the means of questioning of P-17 and P-38, which were equivalent, if we

18 take into account these interviews, they were equivalent to a form of pressure put on

19 the witness or in particular a way of making the witness understand what the

20 objectives were, what the expectations were of the Office of the Prosecutor.

21 I won't come back to the points that were already mentioned by my colleague, but

22 just to say that P-17, P-38, P-55, and P-28 -- P-290 and 768 were questioned by the

23 Office of the Prosecutor as suspects under Article 55(2). And these meetings with

24 the witnesses are highly revealing, because, unlike a statement which is just signed

25 by the witness, these types of interviews that were carried out between the

1 investigators, they were often completely recorded in their entirety, so you can see
2 exactly what type of methods of questioning the Office of the Prosecutor used.

3 Now, my colleague raised some of them, some of them which are concerning, and I
4 would add that, to us, it seems difficult within the framework of mutual
5 investigations, exonerating and incriminating investigations to submit as the Office
6 of the Prosecutor has during these interviews a complete list of previous statements
7 to the witness.

8 And you can see in particular when you read the interviews of Witness P-17, for
9 example, the witness is literally read pages, complete pages of statement, often
10 putting together different sources. They're put together, two, three, four pages of
11 them to then say to the witness, "Well, this, this is what you've said." And then they
12 can say, "This is exactly what is of interest to us, and let's continue with the interview
13 on this basis."

14 And we submit that this is not the way of checking or verifying the truth or the
15 authenticity of the statement of the witness. The investigators must be far more
16 neutral, and they must be far more open. But this way of proceeding is a way of
17 telling the witness, "Look, this is what is of interest to us." And this way of
18 proceeding for incriminating evidence is really in contrast with the way in which
19 investigators carry out their investigating looking for exonerating evidence, because
20 the obligation is indeed the same, the obligation to investigate for exonerating and
21 incriminating evidence.

22 But we wish nevertheless to raise or mention the way in which the investigators
23 have carried out with the exonerating interviews, which contrast with the way in
24 which they are ready to push a witness in order to reveal incriminating evidence.

25 And this is an example which comes from the testimony of Witness P-17. During

1 the meeting with this witness, the 2 June 2013, 2 June 2013, the witness was met two
2 times, once in June, one block in June, once in July. The June block finished in the
3 following way. And here I quote the question that is put by the investigators, "Is
4 there something exonerating with regards to Bosco Ntaganda which we might have
5 forgotten or which we haven't addressed sufficiently, anything that you think, yes,
6 this is important for the investigators to know. They must know this in order to
7 have a complete and just image."

8 So the witness cannot answer this question, because how can the Witness P-17 know
9 what is exonerating for Bosco Ntaganda? It is up to the investigators to actively
10 seek such evidence. And they can't just leave it up to the witness to determine
11 themselves if evidence can be exonerating for a suspect or an accused.

12 So obviously here I'm only addressing, I'm only giving an overview of the concerns
13 which we shall address in further detail later, but we do wish to address the main
14 aspects of them within the framework of this hearing.

15 Your Honour, that completes the presentations of the Defence, and subject to final
16 observations that we might make at the very end, those are our observations.

17 PRESIDING JUDGE TRENDABILOVA: Thank you very much, Mr Desalliers. It is
18 my hope that you are going to provide your presentation in writing to us and to the
19 Prosecutor the way you have prepared it and as it was presented during the hearing.
20 You would like to make a point to this?

21 MR DESALLIERS: (Interpretation) Yes, your Honour. I just wanted to state
22 exactly the way in which the Defence intends to proceed as our presentations are
23 not, our notes aren't necessarily -- they don't necessarily correspond exactly with
24 what was said during the hearing. What we would propose to the Chamber to do
25 would be to take each transcript from the hearing where the Defence took the floor,

1 we're going to copy it into a document, a separate document, and then we will be
2 able to insert all the references, all the relevant references, and we'll be able to
3 communicate that document to the Chamber or the parties such that it be integrated
4 into the case file of the court.

5 PRESIDING JUDGE TRENDAFILOVA: Well, actually, this could be done by
6 anyone who will follow the transcript. So this is something that could be acceptable
7 to us, that you just take the relevant parts of your presentation, and you put them in
8 one file so that we and the Prosecutor could receive this in order to save some time
9 in going through the transcripts and making this summarised version of your
10 presentation.

11 Now, we have 35 minutes more. The Prosecutor according to the decision on the
12 schedule should have been ready to start with its closing statements. Are you ready
13 to proceed, Ms Samson?

14 MS SAMSON: Indeed, your Honour. I'm in your hands. If the Chamber would
15 prefer that I proceed now, I'm prepared to do so. If you would like to hear one
16 comprehensive closing from the Prosecution after lunch, I'm prepared to do that as
17 well. It's entirely as you please.

18 PRESIDING JUDGE TRENDAFILOVA: Let me consult my colleagues.

19 (Trial Chamber confers)

20 PRESIDING JUDGE TRENDAFILOVA: Ms Samson, the Defence, the legal
21 representatives, the view of the full Chamber is that a comprehensive closing
22 statement would be much more useful for the Chamber and also for everyone who
23 participates in this hearing.

24 So we shall take the break now and we shall commence at 2 o'clock. So you will
25 have one-hour-and-a-half to summarise, to think about what you are going to say.

1 And how much time do you think it will take?

2 MS SAMSON: I believe, your Honour, that it will take just over one hour.

3 PRESIDING JUDGE TRENDABILOVA: Yes. So if it is one hour -- we have the
4 legal representatives, are you ready, yes, to proceed? And tomorrow we shall
5 proceed with the Defence as of 9.30. Well, but without putting any pressure, if the
6 Prosecutor's office, the legal representative would need some minutes more, of
7 course, we would like to give all the opportunities to the parties to make the best
8 contribution to this case.

9 So I thank very much the Defence team that was in charge mainly of today's hearing,
10 the Prosecutor's team, the legal representatives, the interpreters, the stenographers,
11 the court reporters, the security officers, and the court officer as well. And we shall
12 meet at 2 o'clock. Thank you.

13 THE COURT USHER: All rise.

14 (Recess taken at 12.27 p.m.)

15 (Upon resuming in open session at 1.59 p.m.)

16 THE COURT USHER: All rise.

17 PRESIDING JUDGE TRENDABILOVA: Please be seated. We are now in the last
18 session of today's hearing, and we shall proceed with the closing statement of the
19 Prosecutor.

20 Please, Ms Samson.

21 MS SAMSON: Thank you.

22 PRESIDING JUDGE TRENDABILOVA: Now it's your time.

23 MS SAMSON: Thank you. Madam President, your Honours, the evidence
24 presented at this confirmation hearing establishes substantial grounds to believe that
25 Bosco Ntaganda is criminally responsible for the crimes as charged in the document

1 containing the charges.

2 During the course of its presentations, the Prosecution has analysed how the
3 evidence proves the different elements of the crimes and of the modes of liability. It
4 has presented direct evidence of these crimes, the context in which they were
5 committed, and Bosco Ntaganda's individual criminal responsibility for them.

6 The Prosecution relies upon the evidence of: 18 crime base witnesses who are direct
7 eyewitness and victims of these crimes; eight UPC military insiders, including one
8 child soldier; two UPC political insiders; six independent, neutral observers of these
9 crimes, three of whom were permanently based in Ituri at the relevant time and the
10 three others conducted missions to Ituri for periods of time to investigate and assess
11 the events in Ituri; we also rely upon four witnesses who were living in Ituri at the
12 relevant time and who were in frequent contact with UPC/FPLC leaders. We rely
13 on videos depicting the events and contemporaneous UPC/FPLC documents.

14 The Defence would have your Honours believe that all of these witnesses in their
15 various roles and from their different vantage points got it wrong, that those who
16 directly participated in these assaults, those who were direct victims of them and
17 those who observed the assaults got it wrong. That somehow these witnesses are
18 mistaken that UPC forces committed the crimes against them and their neighbours.

19 The evidence of the ten insider witnesses alone should be sufficient to satisfy your
20 Honours that there are at least substantial grounds to believe that the UPC/FPLC
21 forces committed horrendous crimes against the non-Hema civilian population of
22 Ituri and that Bosco Ntaganda bears responsibility for them.

23 These high, mid and low-level insiders provide detailed descriptions of the UPC's
24 structure, the planning and execution of military assaults, the intentional targeting of
25 civilians, the crimes committed by the troops, the lack of punishment for these

1 crimes, and critically Bosco Ntaganda's central role within the organisation and in
2 the establishment and pursuit of its policies.

3 Bosco Ntaganda claims that he and his co-perpetrators could not have
4 planned -- could not have had a plan to occupy Ituri and expel the non-Hema
5 civilian populations and take over their territory. He says that the UPC was a
6 movement working only to establish peace in the region. They embraced all ethnic
7 groups in Ituri equally and they sought to protect them from harm.

8 Madam President, your Honours, this could not be further from the truth. Let me
9 recall the words of military insider P-768 who gave evidence about Bosco
10 Ntaganda's real intentions which he said he heard directly from Bosco Ntaganda
11 himself on multiple occasions. And I quote, "He was raising awareness amongst
12 the militaries and in particular young Hema civilians that he was arming. He
13 would tell them the Lendu were our enemies and that we needed to exterminate
14 them, to make them disappear and chase them away from these territories that we
15 were occupying."

16 This is exactly the common plan as articulated by the Prosecution. It is exactly the
17 policy and plan that Bosco Ntaganda agreed upon and implemented. It is what he
18 ordered, committed, induced and intended. At the very least, he knew it would
19 result in the ordinary course of events.

20 The public remarks of UPC military leaders does not undermine the critical evidence
21 of their very own troops as presented meticulously by the Prosecution. Insider
22 upon insider confirms that the UPC was targeting civilians. This practice and
23 policy was very different from its public discourse. At the same time as they spoke
24 of establishing peace, the UPC leaders were building an army, securing weapons
25 and ammunition, waging assaults on various villages throughout Ituri and planning,

1 ordering, inducing and tolerating the commission of crimes.

2 Indeed Witness P-768, to whom I alluded moments ago, heard from Bosco Ntaganda
3 at different times during the assault on Mongbwalu and surrounding areas that they
4 should exterminate the Lendu and chase them away from the territories they were
5 occupying. Yet this very same witness is one of three witnesses upon whom the
6 Defence relies to argue that the real aim of the Mongbwalu assault was to target
7 enemy military forces and not to target the Lendu or other non-Hema civilians.
8 The other two military insiders that they rely upon, Witnesses P-38 and P-55, also
9 describe how civilians were deliberately targeted by the UPC during the Mongbwalu
10 assaults. And these three insiders are not the only witnesses to confirm that the
11 non-Hema civilians, in particular the Lendu, were deliberately targeted, including
12 during this Mongbwalu assault.

13 All of the victims, military and political insiders and independent observers such as
14 the two UN witnesses, P-46 and P-317, and international NGO researcher P-315,
15 provide evidence of the UPC's intentional targeting of non-Hema civilians,
16 especially of the Lendu in these assaults, including on the Banyali-Kilo and the
17 Walendu-Djatsi collectivities.

18 Your Honours, as you ask yourself, was an attack directed against the non-Hema
19 civilians by the UPC forces, including at Mongbwalu, the Prosecution would recall
20 that underlying this contextual element of crimes against humanity is the absolute
21 prohibition of targeting civilians in customary international law.

22 Does it mean that just because the UPC has any military or even personal motive for
23 attacking a location at the same time that they deliberately target civilians, such as
24 taking over a place to occupy it, to oust their enemy, APC or Lendu forces, or even to
25 access gold mines for personal benefit, that you must conclude that there is no crime

1 against humanity?

2 In our submission, Madam President, your Honours, the answer is no. The

3 Prosecution has three arguments on this point, two legal and one factual.

4 First the legal argument that whenever there is intentional targeting of civilians, the

5 fact that there might be any other motive for an assault, military or otherwise, does

6 not change the fact that the targeting was intentional and constitutes an attack

7 against civilians.

8 The Appeals Chamber of the ICTY in Prosecutor versus Tadic held that the Trial

9 Chamber erred in law when it concluded that for crimes against humanity an act

10 cannot be taken for purely personal reasons.

11 The Appeals Chamber stressed, and I quote, "Motive is generally irrelevant in

12 criminal law." To illustrate their point, the ICTY Appeals Chamber referred to the

13 Prosecution's example of the crime of theft. Allow me to quote again: "For

14 example, it doesn't matter whether or not an accused steals money in order to buy

15 Christmas presents for his poor children or to support a heroin habit. All we're

16 concerned about is that he stole and he intended to steal."

17 The ICTY Appeals Chamber also held in Prosecutor versus Blaskic that the Trial

18 Chamber was wrong to conclude that there would be no attack directed against the

19 civilian population in the context of crimes against humanity if there was any

20 military necessity. The ICTY Appeals Chamber emphasised, and I quote, the "...

21 absolute prohibition on targeting on civilians."

22 Similarly, the Appeals Chamber in the Special Court for Sierra Leone in the

23 Prosecutor versus Fofana and Kondewa held in that case that the Trial Chamber

24 was, and I quote again, "... manifestly incorrect to conclude that widespread or

25 systematic attacks against a civilian population cannot be characterised as crimes

1 against humanity simply because the ultimate objective of the fighting force was
2 legitimate and/or aimed at responding to aggressors. The rules of international
3 humanitarian law apply equally to both sides of the conflict, irrespective of who is
4 the aggressor, and the absolute prohibition under international, customary and
5 conventional law on targeting civilians precludes military necessity or any other
6 purpose as a justification."

7 The fact that there can be a military motive alongside the deliberate targeting of
8 civilians has also been recognised by the Pre-Trial Chamber I of this International
9 Criminal Court in the case of the Prosecutor versus Katanga and Ngudjolo. When
10 confirming charges of both crimes against humanity and war crimes, Pre-Trial
11 Chamber I held, and I quote, "Although there was a UPC military camp in the centre
12 of Bogoro village and UPC soldiers were based at this camp, the attack was not only
13 directed against the military target but also against the predominantly Hema civilian
14 population of the village."

15 Secondly, the argument that there is a requirement to establish that civilians were
16 the primary object of the attack does not mean that they must be the exclusive object
17 of the attack.

18 This factor of civilians being the primary object of the attack is viewed by some as
19 only being a potential factor but not a legal requirement as such to be fulfilled.

20 In any event, as the Appeals Chamber in Fofana emphasised, and I quote, "What
21 must be primary is the civilian population as a target and not the purpose or the
22 objective of the attack."

23 The Appeals Chamber in Fofana found that the Trial Chamber had misdirected itself
24 in law when the Trial Chamber concluded that "The evidence adduced does not
25 prove beyond reasonable doubt that the civilian population was the primary object

1 of the attack. By contrast, there is evidence that these attacks were directed against
2 the rebels or juntas that controlled towns, villages and communities throughout
3 Sierra Leone."

4 In particular, the Appeals Chamber found that the Trial Chamber had "...
5 misdirected itself by confusing the target of the attack with the purpose of the attack.
6 When the target of an attack is the civilian population, the purpose of that attack is
7 immaterial."

8 Thirdly, I would like to raise a factual argument on this point. The non-Hema
9 civilians were a primary object of the attack. They were not mere incidental victims.
10 The Defence first relies upon the evidence of the three UPC military insiders, P-768,
11 P-38 and P-17, to argue that civilians were not targeted at Mongbwalu or
12 Walendu-Djatsi as the aim was instead to target the APC and Lendu forces. Indeed
13 there was a military motive of the attack, and it was to oust the RCD and Lendu
14 militia from Mongbwalu. However, alongside that motive of ousting the enemy
15 armed group was the criminal aim to oust civilians equally viewed as the enemy by
16 crimes used as tools of warfare, including rape, murder, forcible displacement,
17 pillaging, property destruction and persecution.

18 This is supported by the consistent accounts of the victims, military and political
19 insiders and observers in Ituri, including UN, NGO staff and journalists.

20 By way of example, I refer to the evidence of P-768, P-38 and P-17 relied upon by the
21 Defence to argue it was the APC/Lendu militia and not Lendu civilians who were
22 the target of the attack.

23 The Prosecution recalls that all three state that for the Mongbwalu assault Bosco
24 Ntaganda gave instructions to target and kill civilians and that he targeted and
25 killed civilians himself.

1 P-768 described how Bosco Ntaganda would often tell his troops, especially young
2 Hema, that the Lendu were the enemy, needed to be exterminated, to be made to
3 disappear and chased away from the territories the UPC were occupying. P-768
4 describes how before the Mongbwalu assault, Bosco Ntaganda ordered the troops to
5 arrest everyone from the Lendu tribes, even to eliminate them.

6 P-38 confirmed that it was a tribal war and all Lendu were the enemy, including
7 civilians.

8 Similarly for the Walendu-Djatsi operation, P-38 confirms that they treated
9 everybody as a target, including civilians. After the attack, they were also required
10 to search for Lendu, describing how they used knives to kill the civilians, in
11 particular, female civilians.

12 P-17 and P-38 describe orders before the Walendu-Djatsi operation to clean out the
13 villages, comb through them, flatten them and kill everyone they would find,
14 including civilians. All the other insiders were consistent in confirming the
15 non-Hema civilians, especially Lendu, were targeted, including Witnesses P-10 and
16 P-758, who received the instructions from Ntaganda, in the case of Witness P-10, to
17 kill Lendu civilians.

18 Witness P-55 said that once the UPC controlled an area, if any Lendu returned, they
19 would be killed. Witness P-16 confirms that three-quarters of villages that the UPC
20 attacked were Lendu or Ngiti villages. Victims including P-22, P-18, P-19 and P-113
21 gave consistent accounts of how because they were Lendu they were attacked. P-19
22 and P-113 were told that the Lendu were not humans.

23 The Defence relies upon certain video footage, including as taken by the local Radio
24 Candip journalist, to allege that there was no such organisational policy to attack the
25 non-Hema civilian population, in particular to suggest that the UPC/FPLC and its

1 leaders, Thomas Lubanga, Floribert Kisembo, Chef Yves Kahwa, sought to ensure
2 their troops did not attack Lendu civilians.

3 These statements do not reflect the reality, either in terms of actual instructions being
4 given to the forces, as evidenced by insider and victim witnesses present in the
5 assaults on the non-Hema civilians, nor the reality of the policy adopted by the
6 co-perpetrators or the reality of what was happening on the ground.

7 These public video transmissions in which statements were made regarding UPC
8 civilians amount to UPC propaganda for political purposes, including for the foreign
9 powers present in Ituri at the time. For instance, the video of Mongbwalu in which
10 Floribert Kisembo and other UPC leaders, including Bosco Ntaganda, are seen
11 interviewed by a Radio Candip journalist.

12 First, Radio Candip has been described by witnesses as being used by the UPC as a
13 propaganda tool and under UPC control at the relevant time. Second, it is clear that
14 Floribert Kisembo is not speaking to Lendu civilians in the video.

15 P -- Witness P-16 explains, and I quote, "Floribert Kisembo showed his attitude
16 against the Lendu many times because he only attacked Lendu villages. The Hema
17 profited in creating the FPLC to make war against the Lendu." Witness P-16 is a
18 military insider.

19 And what is the reality regarding Chef Kahwa? He was prosecuted by a Congolese
20 military tribunal for crimes against humanity and war crimes for his role in leading
21 troops in the attack on Zumbe, and the crimes include murder and attacks on
22 protected civilian objects.

23 What was the reality regarding Thomas Lubanga? Witness P-16 describes how he
24 also viewed the Lendu as the enemy.

25 And what was the reality regarding the UPC/FPLC and its ethnic composition?

1 Witnesses including UPC political insiders P-41, P-5 and PUSIC political insider P-12
2 and military insiders including P-16 confirm that the UPC/FPLC was in reality a
3 predominantly Hema organisation and that the Hema had the power.

4 The introduction of other ethnicities was again UPC propaganda. Those of other
5 ethnicities include a token Lendu and Ngiti member of the UPC joining in fear.

6 PUSIC political insider P-12 states that the UPC was an exclusively Hema movement
7 and that it had always been known as such. He said the UPC's suggestion that it
8 was a movement created by the will of the people of Ituri was, and I quote, "un vaste
9 mensonge".

10 P-12 cites the example of one non-Hema appointed national secretary of the UPC.
11 This individual, Denis Akobi, referred to by the Defence, told him that he became
12 national secretary of the UPC because he did not have a choice. He wanted to live
13 in Bunia and had to join the movement to avoid being killed.

14 Witness P-41, a non-Hema political person within the UPC, describes how
15 non-Hema in the movement were not involved in the decision-making within the
16 UPC and that non-Hema were merely appointed. He says in French, and I quote,
17 (Interpretation) "... to give a good image of the movement."

18 (Speaks English) Military insider P-16 also describes how he did not exercise real
19 powers of his position within the UPC/FPLC because he was not a Hema.

20 I will turn now, your Honours, to briefly address some of the Defence arguments.

21 First, the Defence asserts that the evidence does not establish that there were child
22 soldiers under the age of 15 in the ranks the UPC. This assertion is completely
23 contradicted by the sheer wealth of credible evidence positively of the enlistment,
24 conscription and use of children under the age of 15 to participate actively in
25 hostilities. This evidence, your Honour, comes from ten military and political

1 insiders, as well as from numerous other witnesses and contemporaneous videos
2 and documents.

3 The Defence asserts that the Prosecution is essentially required to prove the dates of
4 birth of witnesses using objective elements, that the eyewitness accounts of
5 numerous individuals who worked with, used themselves, demobilised or saw
6 frequently at the UPC headquarters cannot be relied upon because they are merely
7 subjective and unreliable.

8 The Prosecution notes the findings of Trial Chamber I in the Lubanga trial judgment
9 that, and I quote, "It is feasible for non-expert witnesses to differentiate between a
10 child who is undoubtedly less than 15 years old and a child who is undoubtedly
11 over 15."

12 The Defence relies on the trial testimony in the Lubanga proceedings of Witnesses
13 D-37 and D-11.

14 D-37 stated that he was part of a Hema self-defence force in Mandro which was
15 organised to defend the Hema community under the leadership of Chef Kahwa and
16 Bosco Ntaganda. The witness recalls having joined the group in June 2002 and that
17 it later became part of the FPLC after the takeover of Bunia in 2002.

18 The witness asserts that while there were children under the age of 18 in the UPC,
19 there were absolutely none under the age of 15. And certainly he says there were
20 none in the escort of Bosco Ntaganda.

21 This evidence is implausible and contradicted by a volume of credible evidence of
22 the recruitment, enlistment and use of children both in Bosco Ntaganda's bodyguard
23 and throughout the UPC forces.

24 Defence Witness 11 testified that he did not see any child soldiers in the UPC. If
25 there were any he said, and I quote, "... perhaps they were in the interior." He

1 explained that possibly there were children under the age of 15 within the umbrella
2 of the UPC and the interior but not in Bunia. These children he said might have
3 sought food or protection, and although on occasion they were asked to carry out
4 minor tasks such as transporting military equipment, they did not receive military
5 training.

6 Witness D-11 testified that he did not know whether the -- whether children under
7 the age of 15 were used in battle or were at the Rwampara military training camp.
8 He was unaware of procedures to verify the age of recruits.

9 Notably, Trial Chamber I concluded in relation to this witness, and I quote, "The
10 Chamber has taken into account the close professional relationship between this
11 witness and the accused, and it has weighed his evidence in light of the other
12 persuasive material that indicates there were children below 15 years of age in the
13 FPLC. The Chamber considers that this witness was frequently evasive in his
14 testimony which the Chamber has approached with considerable caution. In the
15 result, the Chamber has only relied on his account when supported by other credible
16 evidence."

17 I will now turn, your Honours, to address the Defence argument that the rape and
18 sexual slavery of child soldiers does not constitute a war crime.

19 The Prosecution submits that both treaty and customary law recognise that children
20 are particularly vulnerable during armed conflict and they were afforded strong
21 legal protections as a result. Child soldiers continue to enjoy these protections even
22 if they were directly participating in hostilities and regardless of whether the
23 perpetrator of crimes against them is a member of the same armed group.

24 During non-international armed conflict, children, including child soldiers, have
25 strong protections under international humanitarian law. They are protected first

1 and foremost by fundamental guarantees of humane treatment under Article 4 of the
2 Additional Protocol II and customary law as they are persons affected by the armed
3 conflict. These include an absolute prohibition against sexual violence.

4 On top of the fundamental guarantees applicable to all, children have a second
5 additional layer of protections because they are particularly vulnerable. These
6 protections include the prohibition against the recruitment and use of child soldiers,
7 recognised indeed as a separate crime under the Statute, as well as other rules
8 relating to the health and well-being of children affected by armed conflict.

9 The Prosecution submits that in combination, the high levels of protection provided
10 for children under treaty and customary law substantiate the proposition that
11 children continue to enjoy these legal protections even when they are child soldiers.

12 The Prosecution recognises that many child soldiers have active combat roles, and as
13 a result they directly participate in hostilities. Any such participation has an (sic)
14 impact on both the general protections that children enjoy as those affected by the
15 conflict and the special protections they have because of their vulnerability as
16 children.

17 For such time as anyone, including child soldiers, directly participates in hostilities
18 they can be lawfully targeted and killed by the opposing forces which are entitled to
19 engage in legal military force against the enemy forces without a legal obligation to
20 distinguish between the children and adults participating.

21 However, the Prosecution submits that there is a fundamental difference between
22 losing protection from being targeted by opposing forces during the conduct of
23 hostilities and losing protections for treatment of those same children by members of
24 the forces into which they have been conscripted or enlisted.

25 Whilst child soldiers may forfeit protection from attack by directly participating in

1 hostilities, this does not impact on their other legal protections. This includes their
2 protection against being subjected to sexual violence, a position supported by
3 customary practice.

4 Further, the Prosecution accepts that international humanitarian law is generally
5 structured around regulating the conduct between parties to an armed conflict
6 rather than regulating the conduct of members of one party to an armed conflict
7 towards each other.

8 However, the prohibition on the recruitment of child soldiers places the legal
9 obligation on the commanders of the armed groups not to expose children to the
10 risks of participation in the armed conflict by conscripting, enlisting or using
11 children in their forces.

12 This is an exception to the traditional position because it regulates the party of a
13 conduct to -- the party -- pardon me, it regulates the conduct of a party to a conflict
14 in relation to its own members, and the exception is made in order to provide
15 explicit protections for children as a vulnerable group.

16 Therefore, the fact that the conduct occurred within the party to an armed conflict
17 does not present a barrier to the recognition of child soldiers as victims of rape and
18 sexual slavery.

19 Your Honours, I will now turn to address the challenge of the Defence on the
20 credibility of certain Prosecution witnesses.

21 The Defence makes a vague and unsubstantiated argument that the evidence of
22 certain Prosecution witnesses and perhaps the entirety of the Prosecution evidence,
23 it is unclear, is called into doubt because of intermediaries. The Defence makes
24 specific reference to Witnesses P-38, P-5 and P-20 who had initial contact with the
25 Office of the Prosecutor through intermediary P-316.

1 It is unclear if the Defence is asking the Chamber to completely disregard the
2 accounts of these witnesses or if the Defence asserts that these witnesses were, at
3 least in the case of P-38 and P-5, not really the political and military insiders they say
4 they were.

5 The Defence fails to mention that Witness P-38, who testified in the Lubanga
6 proceedings, was examined and cross-examined at length about whether P-316 or
7 anyone else influenced his account. Trial Chamber I fully canvassed the credibility
8 of P-38 and determined that he gave, and I quote, "a wholly credible account" and
9 that "Notwithstanding his connection with P-316, the Chamber has concluded he
10 was a reliable witness whose evidence is truthful and accurate." We submit, your
11 Honours, that the Defence arguments in relation to P-38 have no factual foundation.
12 As for Witness P-5, a UPC political insider, there are numerous contemporaneous
13 UPC documents attesting to his position and role within the UPC. The Prosecution
14 additionally, during the course of the Lubanga proceedings, asked Witnesses P-20
15 and P-5, who did not themselves testify during the proceedings, whether or not they
16 had been influenced to lie by 316. They denied ever having been influenced in any
17 way in their accounts given to the Prosecution.

18 While the transcripts of these OTP interviews with P-5 and P-20 were disclosed
19 under the provisions of Rule 77 in this case and not as incriminating evidence, it is
20 incumbent upon the Prosecution to bring this issue to the attention of the Chamber.
21 The Prosecution also notes in relation to Defence Witness D18-0001 that in his recent
22 Defence statement he states that intermediary P-316 influenced other persons to
23 make false statements to the Office of the Prosecutor.

24 It is noteworthy that in his under-oath testimony in the Lubanga proceedings, this
25 very same witness confirmed that he did not, in fact, know whether any other

1 persons had been influenced to lie.

2 And I quote from the examination of this witness in Court:

3 Question: "You did not know that anybody else had lied to the OTP; isn't that
4 right?"

5 Answer: "Yes, indeed, I said that in 2009."

6 A little bit further in his examination:

7 "You said, and I quote" -- question: "You said and I quote: 'I am not aware of any
8 other persons whom the intermediary recruited for the same purpose of providing
9 information to the OTP. The intermediary did not give me any details about
10 whether he contacted any other people who might become witnesses, or to testify. I
11 am the only person I know who had contact with the intermediary in these
12 circumstances.' That's what you told the investigator in June of last year; isn't that
13 right?"

14 Answer: "That is correct."

15 Your Honour, I will move now to a discussion of Witness P-10. As for Witness
16 P-10, Trial Chamber I noted that the Defence in that case did not dispute that P-10
17 was a soldier in the FPLC and found that the video material and P-10's comments on
18 it "remain essentially unaffected" by its criticisms in relation to her age.

19 The Defence's attacks today on Prosecution Witness P-10's credibility evolve around
20 the difficulty to determine her age.

21 In various identification documents and accounts that she and other witnesses have
22 provided, the date of birth of witness P-10 is inconsistent. This led Trial Chamber I
23 in the Lubanga judgment to decide that it could not conclude beyond reasonable
24 doubt that Witness P-10 was under 15 when she was a UPC soldier.

25 However, this matter is irrelevant to the case at hand because the Prosecution has

1 made its position clear in documents filed in the record that it is not relying on
2 Witness P-10 as a child soldier, but Witness P-10's evidence as a military insider and
3 as someone closely connected to Bosco Ntaganda remains highly relevant to this
4 case.

5 The Defence request to ignore the totality of her evidence should be rejected.

6 The Defence complains furthermore of redactions to the identity of four witnesses:

7 Witnesses P-758, P-13, P-18 and P-19. However, Article 68(1) and Rule 81(4)
8 explicitly permit the redaction of the identity of witnesses for reasons of security at
9 the confirmation hearing stage. This is appropriate at the pre-trial stage where, if
10 charges are confirmed, the parties can explore fully issues of witness credibility at
11 trial.

12 As stated by Madam President on the very first day of this hearing, this hearing is
13 neither a trial nor a mini trial. It is a filter to distinguish cases that should go to trial
14 from those that should not.

15 With Witness 758 and other witnesses, the Defence is inviting the Chamber to
16 embark upon precisely the sort of in-depth scrutiny of the credibility and reliability
17 of individual pieces of the Prosecution's evidence that is neither anticipated nor, it is
18 submitted, possible at the present proceeding.

19 Such an assessment can only be made after the credibility, reliability and consistency
20 of the evidence has been fully explored through questioning, cross-examination of
21 the witnesses and review of relevant documentary evidence.

22 The presentation of witness evidence by way of written statements at the pre-trial
23 stage is considered the norm, given the nature and purpose of the hearing.

24 The Prosecution submits that the Chamber's assessment at this stage of the
25 proceeding should be limited to assessing, firstly, whether the evidence presented is

1 relevant and admissible and whether it is, in fact, able to sustain the charges.

2 The evidence upon which the Defence is relying does not undermine the

3 Prosecution's evidence. At its highest, the evidence demonstrates that there are

4 contested issues of fact which must be resolved by an in-depth examination of the

5 evidence only possible at trial.

6 Chambers of this Court have held that the evidence is to be viewed globally and not

7 in isolation in order to piece together an overall picture of events and liability.

8 To conclude, Madam President, your Honours, the Prosecution's evidence

9 establishes substantial grounds to believe that Bosco Ntaganda and the UPC

10 conducted a widespread or systematic attack against the non-Hema civilian

11 population pursuant to an organisational policy; that the UPC/FPLC was a

12 structured organisation with a capacity to carry out violence; that an armed conflict

13 not of an international character existed between or about 2 July 2002 and 1

14 December 2003; that during the assaults on Banyali-Kilo and Walendu-Djatsi

15 collectivities in November, December 2002 and February, March 2003 Bosco

16 Ntaganda and the UPC committed the crimes of murder and attempted murder,

17 forcible displacement, attack against a civilian population, rape, sexual slavery,

18 persecution, destruction of property and destruction of protected objects; that Bosco

19 Ntaganda and the UPC enlisted and conscripted children under the age of 15 and

20 used them to participant actively in hostilities; that the UPC troops raped and

21 sexually enslaved child soldiers; that Bosco Ntaganda personally committed crimes;

22 that Bosco Ntaganda planned attacks, secured weapons, delivered ammunition

23 before and during attacks, deployed troops, commanded assaults, participated

24 directly in those assaults, issued orders, insisted on respect for hierarchy, created

25 sectors, promoted staff, had the power to discipline his troops, recruited for the

1 army, trained the recruits, kept a watchful eye on the day-to-day activities of his
2 forces; that he was the key commander in charge of operations and organisation; that
3 Bosco Ntaganda bears individual criminal responsibility for the crimes charged
4 which he committed, ordered, induced and/or attempted pursuant to Article 25(3)(a)
5 as a direct perpetrator, a direct or indirect co-perpetrator, Articles 25(3)(b) and
6 25(3)(f) or to which he contributed pursuant to Article 25(3)(d) or as a military
7 commander pursuant to Article 28(a); that he and his co-perpetrators contributed
8 towards a common plan and that he used UPC forces and supporting Hema civilians
9 at his disposal to contribute to such crimes; that he intended or was aware that
10 implementing the common plan would in the ordinary course of events result in the
11 commission of the crimes charged; or that he acted with a group with a common
12 purpose to commit crimes to which he contributed either with the aim of furthering
13 the criminal activity or in the knowledge of the group's intent to commit the crimes;
14 that he had effective command and control over the UPC troops; and that he failed
15 to take all reasonable and necessary measures to prevent, repress or punish the
16 perpetrators of the crimes.

17 Madam President, your Honours, the Prosecution requests that the charges against
18 Bosco Ntaganda be confirmed and that he be committed for trial. I thank you.

19 PRESIDING JUDGE TRENDABILOVA: Thank you, Ms Samson. I thank the team
20 of the Prosecutor for the concise and to the point closing statements.

21 Now it's the turn of the legal representative. Will you start yourself, Mr Suprun,
22 and then followed by Ms Pellet?

23 MR SUPRUN: (Interpretation) Yes, your Honour.

24 PRESIDING JUDGE TRENDABILOVA: The floor is over to you.

25 MR SUPRUN: (Interpretation) Your Honour, your Honours, first of all I would

1 like to make a correction to a figure to which I referred during my opening remarks,
2 and in particular the number of victims of attacks authorised to participate in this
3 case. In fact, the number of victims of attacks admitted to participate in this case
4 and which I represent is 980, and not 1,080 as indicated during my opening remarks.
5 Your Honour, your Honours, with regard to the evidence that has been presented by
6 the Office of the Prosecutor during this confirmation hearing, the victims that I
7 represent are of the view that there is sufficient evidence to establish substantial
8 grounds to believe that Mr Bosco Ntaganda committed each of the crimes which he
9 is accused of.

10 Indeed, the Office of the Prosecutor produced before the Chamber the evidence both
11 in documentary and visual form as well as numerous statements which, taking into
12 account their precise and detailed nature, could not give rise to any doubt with
13 regards to their truthfulness, credibility, nor their probative value. On the other
14 hand, the Defence has produced no real objective or serious objective proof in
15 support of its reasoning.

16 I'm not within the framework of my statement going to go into all the different
17 aspects raised by the -- raised during the confirmation hearing, and I shall therefore
18 limit myself to some of them. I shall further develop those aspects within the
19 framework of my final written submissions.

20 Your Honour, your Honours, because the Defence seems to deny the inter-ethnic
21 nature of the conflict which struck Ituri during the period of the charges, I firstly
22 refer and I reiterate entirely my opening statement during which I presented to the
23 Chamber the views of the victims concerning the origin and context of the conflict.
24 Furthermore, the inter-ethnic nature of the conflict in Ituri is universally recognised
25 and in particular by numerous reports established both by the United Nations and

1 the different NGOs working in human rights. And it is corroborated by numerous
2 witness accounts, including those presented by the Office of the Prosecutor during
3 this confirmation hearing.

4 The inter-ethnic nature of the conflict which took place in Ituri during the period of
5 the charges and more specifically the inter-ethnic nature of the conflict between the
6 Hema and the Lendu was furthermore recognised by Trial Chamber I in its
7 judgment of 14 March 2012 issued in the case the Prosecutor against Thomas
8 Lubanga Dyilo, and in particular paragraphs 67 and -- paragraphs from 67 to 91
9 thereof.

10 The Trial Chamber 1 based itself in this regard on numerous evidentiary items, while
11 this ruling is subject to an appeal which is still pending, no party, including the
12 Defence, has specifically contested the conclusions of the Trial Chamber I regarding
13 the inter-ethnic nature of the conflict in Ituri.

14 The Defence furthermore aims to show that the objective of the armed groups of the
15 UPC/FPLC was not to attack the civilian population, but to fight against Lendu
16 combatants and the APC armed forces.

17 In this regard I would like to draw the attention of the Chamber to the fact that none
18 of the victims of attacks authorised to participate in this case and who I represent
19 were at the time of their victimisation either a combatant or a member of an armed
20 group of any kind, but they were all among the civilian population.

21 If, as the Defence claims, the civilian population was not targeted by the armed
22 groups UPC/FPLC, why was a military campaign carried out by the groups? Why
23 did it make so many victims among the civilian population while each of the victims
24 specifically mentioned in their application forms for participation that it was indeed
25 troops or militia from the UPC/FPLC, particularly the suspect, who were the

1 perpetrators of crimes committed against them? In what way and in what context
2 were the crimes therefore committed? By accident perhaps, or by an unhappy
3 crossing of circumstances?

4 If there were killings among the civilian population, if they could have been
5 committed unexpectedly following fighting between armed groups, there are other
6 crimes committed against victims and attributed to the suspect, such as pillaging,
7 persecution or acts of sexual violence, these crimes certainly cannot be committed by
8 accident or unexpectedly but only with premeditation.

9 The Defence has produced no evidence to counter the numerous witness accounts
10 cited by the Office of the Prosecutor during this confirmation hearing in support of
11 the premeditated nature of all the acts committed by the UPC/FPLC troops against
12 the civilian population, including by the suspect himself and which are attributed to
13 the suspect.

14 The witness statements are corroborated through the accounts of events which
15 affected the victims authorised to participate in this case. The Defence seems to
16 quite simply ignore such testimony without trying to contest it or to produce
17 evidence in support of its reasoning. This would therefore seem to be pure
18 speculation.

19 The reason for the light-weightedness with which the Defence has presented its case
20 concerning crimes against humanity appears to be evident. It is because the
21 Defence does not have any real objective or serious evidence to be able to counter the
22 evidence presented to the Chamber that it was the civilian population living in the
23 localities of Mongbwalu, Sayo, Lipri, Bambu, Kobu, Kilo who were specifically
24 targeted by the campaign carried out by the armed groups, the UPC and the FPLC.

25 The Defence bases itself principally on a video, but the said video is not able to

1 challenge in any way the truthfulness, credibility, or probative value of the evidence
2 presented by the Office of the Prosecutor. For example, the video excerpt shown by
3 the Defence where the troops, the UPC/FPLC troops allegedly were very received by
4 the civilian population in Mongbwalu, does not show whether these troops were
5 really very well received by all of the population or rather just by one part thereof, a
6 part of the population who as it would seem supported the UPC/FPLC and which
7 remained in Mongbwalu after the other group constituted of non-Hema had either
8 been exterminated or driven out of town by those troops.

9 In this regard I would like to draw the attention of the Chamber to the fact that
10 among the victims authorised to participate in the case, 124 victims lived with their
11 family in Mongbwalu at the time of the attack against the civilian population by
12 armed groups, the UPC and the FPLC. They were all driven out of the town.

13 Sixty-one victims lost one or more of their family members, four victims were also
14 subject to acts of sexual violence, and 110 victims also suffered pillaging.

15 The Defence has also not produced any serious evidence to counter the evidence
16 presented of the Office of the Prosecutor with regards to the widespread and
17 systematic nature of the attacks carried out by the UPC/FPLC against the civilian
18 population.

19 While the Office of the Prosecutor has presented numerous witness accounts in this
20 regard, corroborated by statements of all of the victims authorised to participate in
21 this case and contained in their application forms as well as in numerous reports
22 established both by the United Nations and by other different NGOs in this regard, I
23 would like to draw the attention of the Chamber to the fact that 980 victims of
24 attacks against the civilian population authorised to participate in this case lived in
25 different localities of Ituri in particular Mongbwalu, Sayo, Lipri, Bambu, Kobu and

1 Kilo. 964 of these victims were driven out of the localities where they were living.
2 650 victims lost their lives during the attacks or their family members died. Ten
3 victims were subjected to sexual violence. 792 victims lost their possessions owing
4 to looting.

5 All the victims have clearly indicated that it was the UPC/FPLC soldiers, including
6 the suspect himself, who were responsible for the crimes committed against them.

7 And what shall we make of these facts and these victims' statements? Is the
8 evidence not convincing enough, your Honours? Does it not corroborate the
9 widespread and systematic nature of the attacks by the UPC/FPLC against the
10 civilian population?

11 In light of the evidence adduced by the OTP, the Defence repeatedly makes reference
12 to this same evidence, this same video without presenting any other evidence. This
13 just is not serious.

14 The Defence seems to be contradicting itself in actual fact. In particular, the
15 Defence mentions one particular individual who appears on the video who says that
16 the factory does not belong to the Lendus, but it should belong to the entire people,
17 all Congolese people. They conclude that the objective of the UPC/FPLC was to
18 protect the interests of the entire population.

19 However, the leaders of the UPC/FPLC did not see the Lendu people as belonging to
20 the people of the Congo or being part of the general population of the region and
21 that the objective of the UPC/FPLC was, according to the Defence, was to bring
22 peace to the region but only by driving out the Lendus. That was the only way that
23 they thought peace could be re-established.

24 To support that particular line of argument, namely, that the UPC/FPLC did not
25 intend to drive out the Lendus, the Defence bases itself only on statements that were

1 heard on a video produced by UPC/FPLC leaders themselves. The Defence has not
2 provided any further evidence. But these statements, rather pathetic and reeking of
3 demagoguery, cannot be given any particular probative value. They do not show in
4 any way the true intent of the UPC/FPLC leaders.

5 In actual fact, the victims are quite sure that these statements were nothing more
6 than a masquerade, something cobbled together by the UPC/FPLC leaders. The
7 statements were merely intended for journalists. These statements were produced
8 by people who could pass for co-perpetrators of the crimes for which the suspect is
9 charged today.

10 Finally, the truthfulness and the credibility of these statements are without any
11 foundation in light of the events that really happened in Ituri. The reality has been
12 corroborated by the evidence adduced by the OTP and by the statements of all the
13 victims who have been allowed to take part in this case.

14 In this regard I would like to draw the Chamber's attention to the fact that out of the
15 980 victims of the attacks against the civilian population, 742 were Lendu people.

16 Only 12 of these people were Hemas.

17 Is this not convincing proof, your Honours? Does this not corroborate the evidence
18 adduced by the Office of the Prosecutor that the attacks led by the UPC/FPLC
19 targeted the Lendu in particular and, furthermore, the non-Hema population?

20 Your Honours, in light of the evidence that has been adduced during this
21 confirmation of charges hearing, the victims call upon the Court to confirm the
22 charges against Mr Bosco Ntaganda, each and every one of the charges, and to refer
23 the suspect to the Trial Chamber for trial on the basis of the confirmed charges. I
24 thank you.

25 PRESIDING JUDGE TRENDAFILOVA: Thank you very much, Mr Suprun.

1 Now it's the turn of Ms Pellet.

2 MS PELLET: (Interpretation) Thank you, your Honour. Your Honours, first of
3 all, I would like to begin by echoing one particular observation made by Mr
4 Desalliers just before he began his substantive remarks Wednesday late in the
5 morning. He said it, and I quote, "The observations that we will be making during
6 the hearing cannot be exhaustive, of course, particularly because it is so difficult to
7 find the evidence on which the Prosecution is basing its case."

8 Now, since the same approach was taken to the evidence on which the Defence
9 bases its case, and since this evidence was not disclosed to the legal representatives
10 of victims, and since in any event the legal representatives of victims have had access
11 only to public records on the case file, our position is hardly any better, hardly more
12 favourable.

13 This being said, your Honours, if we could recall that we have been authorised to
14 submit final written submissions after the end of the hearings, I will make a few
15 remarks.

16 I am representing former child soldiers, and thus I will restrict myself to certain
17 issues that bear directly upon their personal interests and upon counts 9, 14, 15 and
18 16.

19 First of all, your Honours, if I could hark back to the remarks made by Maître Buteau
20 this morning, casting doubt upon the Prosecution and saying that the DCC does not
21 specify any place, any date of enrolment or conscription of children under 15 years
22 of age. She added that the DCC is not specific. It does not give any specific
23 example of children who allegedly were enrolled in the FPLC.

24 Your Honours, it might be sufficient to remind the Defence that in light of
25 Regulation 89 of the regulations of evidence and procedure, no less than 140

1 participation forms were disclosed, forms from former child soldiers who were
2 enrolled, conscripted, who took an active part in hostilities, some of who were raped
3 and maintained in sexual slavery.

4 It is unacceptable to claim that these victims do not exist here in this courtroom.

5 This is just not acceptable. Your Honours, I will not repeat my opening remarks.

6 However, the Defence's arguments relating to the difference between enlistment and

7 conscription lead me to reiterate one fact. The 140 victims that I represent who are,

8 I dare say, representative of the army of children amongst the ranks of UPC/FPLC

9 could not have joined this militia voluntarily. Once again, your Honours, I

10 reiterate, these children were between seven-and-a-half years of age and 15 years of

11 age.

12 The Defence alleges that the age of the children must be based on objective and

13 verifiable items of information. I will set out a more detailed reply in my filings,

14 but if I could just remind the Chamber that these children are from the Ituri region.

15 And I would point out that the civil registry in that part of the world are not as

16 reliable as the civil registry in Quebec City or Montreal. And some of my clients do

17 not even know their exact day of birth. For these reasons the Defence would have

18 us believe that these people just don't exist. This just won't do. The victims

19 deserve more.

20 During the presentation of their evidence relating to counts 7 and 8, the Prosecution,

21 more specifically Ms Rabanit, established that the duration of time during which the

22 young girls were held as sex slaves could not be a requisite criteria for the element of

23 the crime in question.

24 We believe that this conclusion applies mutatis mutandis to the sexual slavery of

25 female recruits within the UPC/FPLC. Ms Rabanit based herself on evidence from

1 the Prosecution explaining that the sexual slavery of these civilians ranged in time
2 from one to three days. She made reference to statements from Witnesses P-18,
3 P-19, P-22 and P-113.

4 Your Honours, victim a/01308/13 was raped by Bosco Ntaganda and other
5 UPC/FPLC commanders throughout the entire duration of her service within the
6 militia, namely, from August 2002 to mid-2003 during nearly one full year of time.
7 Victims a/00741/13, a/00743/13 and a/00747/13 told us that the rapes only stopped
8 when they were actually sent out to fight on the battlefield.

9 Your Honours, regarding the count of rape and sexual slavery of female recruits of
10 the UPC/FPLC, I wish to expand upon a number of arguments, and I will further
11 expand upon them in my final written submissions.

12 First of all, Ms Buteau's arguments this morning leave me puzzled. A war crime
13 cannot be constituted unless it has to do with civilians? Under no case could it be
14 constituted when it came to child soldiers within the ranks of the UPC/FPLC?

15 Thus, very young girls, forcibly enlisted, forced to join a militia, trained to fight,
16 subjected to inhumane and degrading treatment, repeatedly raped, they are not
17 covered by the protection that is set out in the Rome Statute, because, first of all,
18 these were not children captured by the enemy; and, secondly, this would have been
19 a crime committed by a member of an armed force on members of the same armed
20 force? And this would only come under martial law or common human rights law
21 according to Ms Buteau.

22 If we take that argument to its logical end, as I said in my opening remarks, your
23 Honours, if we consider the repeated, the systematic sexual violence perpetrated
24 among -- upon young girls within the UPC, so this would be an army without a
25 commander, an army deprived of its chief of staff, an army without most of its

1 soldiers.

2 Now, if we could now turn to the age of the young girls who form the -- for which
3 charges of rape and sexual slavery were made.

4 I would like to point out this: Other than the fact that the Prosecution themselves
5 referred to recruits in general and that the recruits aged under 15 in particular, the
6 elements of the crime of sexual slavery provided for in Article 8(2)(e)(vii) make no
7 reference to a particular age limit. Thus, all recruits, no matter what their age may
8 have been who were victims of rape and sexual slavery, are covered by these
9 provisions.

10 Finally, a few words about the domestic tasks that these girl child soldiers had to
11 carry out. These tasks also show that the crime of sexual slavery occurred. In
12 actual fact, in the decision relating to the confirmation of charges in Katanga and
13 Ngudjolo, Pre-Trial Chamber I ruled, and I quote, "The concept of sexual slavery
14 also covers situations in which women and young girls are forced to marry or when
15 they are used as servants or forced to carry out other tasks that ultimately end or
16 lead to forced sexual activity, including the rape -- the rapes that they are subjected
17 to by the people who are keeping them captive."

18 Your Honours, concerning the active participation in hostilities of children under 15
19 years of age, I would like to return to this point in further detail in my final written
20 submissions. However, in light of the arguments advanced by Ms Buteau this
21 morning, I would like to submit the following to you for your consideration.

22 Now, if the specific scope of the crime was to have children participate actively in
23 hostilities, if this is not clear in the legal texts of the Court, I believe we should note
24 that within the ruling pursuant to Article 74 of the Statute, in the Lubanga case, the
25 Trial Chamber based its assessment of the crime provided for under Article

1 8(2)(e)(vii) on several factors without excluding a particular category of facts.

2 It was indispensable for Pre-Trial Chamber I in light of the need to take into account
3 all the forms of participation including the fact, and I quote "that quite a variety of
4 children were taking part actively in hostilities. Some were on the front lines,
5 others performed all kinds of roles, support roles to assist the combatants." The
6 Chamber added, and I quote, "In order to decide whether an indirect role should be
7 considered as being active participation in hostilities, it is crucial to determine
8 whether the support provided by the child to the combatants exposed that child to
9 true danger, thus making that child a potential target."

10 By applying that particular criterion, the Pre-Trial Chamber took into account not
11 only their participation in fighting, in particular in Kobu, Songolo, and Mongbwalu,
12 but also the fact that the children who were deployed as soldiers or they were used
13 as military guards. By the same token, the concept of having children participate
14 activity in hostilities was expanded to cover the use of children under 15 years of age
15 as bodyguards or children serving within the Presidential Guard or using children
16 as escort soldiers, soldiers escorting military leaders.

17 The Chamber specified that active participation or hostilities should also be taken or
18 expanded and taken to mean including the transportation of looted goods or
19 ammunition for battles.

20 Regarding the use of children for household tasks, the Chamber ruled that the roles
21 that were given to these girl soldiers were to help the military leaders, for example,
22 doing cooking and doing other usual tasks carried out by girls and women. The
23 Chamber added, however, that these tasks cannot be deemed to be active
24 participation in hostilities in the meaning of Article 8(2)(e)(vii). However, domestic
25 tasks can be deemed to be a form of active participation in hostilities when they are

1 carried out in addition to other tasks carried out as UPC/FPLC soldiers, such as
2 taking part in fighting or taking part in patrols or serving as a bodyguard.

3 Your Honours, since the Defence themselves made reference to documents in the
4 possession of the prosecution that were not actually adduced in this case, it seems to
5 me that the Defence conveniently forgot that Witness OTP 10 explained her
6 difficulties, why it was difficult for her to know exactly what her birth date was. In
7 a written statement that was entered into evidence in the Lubanga case, the witness
8 in question explained the circumstances in which her voter card was issued. And
9 the Defence made reference to that case this morning.

10 Your Honours, what the victims have experienced, I speak of the 140 victims I
11 represent, their experiences corroborate the evidence adduced by the Prosecution
12 regarding the enlistment, conscription, active participation in hostilities of children
13 under 15 years of age as well as the rape and sexual enslavement of female recruits in
14 the UPC/FPLC. These crimes have had an impact on the victims in the long term
15 and on a day-to-day basis. Some of them are suffering from injuries and illness as a
16 result of the inhumane treatment that they were subjected to when they were child
17 soldiers. All the victims that I represent today have suffered psychological harm.
18 To conclude, your Honours, I wish to state that the Prosecution has shown that there
19 is sufficient evidence to establish the existence of substantial grounds to believe that
20 the suspect committed the crimes which he has been charged with and has reached
21 the threshold necessary at this particular stage of the proceedings in accordance with
22 Article 61(5) of the Rome Statute.

23 All these facts have been demonstrated by the Prosecution with sufficient elements
24 at the confirmation of charges stage, and thus the Pre-Trial Chamber is in a position
25 to rule that the charges that stand against Bosco Ntaganda, in particular the charges

1 of enlistment, conscription, and using children to take part actively in hostilities
2 under the age of 15 in addition to the charges of rape and sexual slavery, must be
3 confirmed and must -- and thus Mr Bosco Ntaganda must be sent for trial.
4 Even though the harm that the victims have suffered and even though the harm that
5 they still -- and the suffering they still endure have not been truly dealt with during
6 this hearing, I do hope that this -- that their voice has been heard. I thank you, your
7 Honours.

8 PRESIDING JUDGE TRENDABILOVA: Thank you very much, Ms Pellet.

9 We come to the end of our session today. On behalf of my colleagues, I would like
10 to thank the Office of the Prosecutor, the Defence team of Mr Ntaganda, the legal
11 representatives of the 1,020 victims that have been granted the status of victims'
12 participants to the case. My thankfulness goes to the interpreters. Really very
13 much grateful to you. Also to the court recorders, to the stenographers, to the
14 security officers, to the court officer, also not to forget our legal support staff.
15 And we shall resume tomorrow at 9.30 with the closing statements of the Defence.

16 MS SAMSON: Excuse me, sorry.

17 PRESIDING JUDGE TRENDABILOVA: Sorry? Oh, yes, I'm sorry. We shall be in
18 Courtroom 2 because tomorrow the case against Mr Ruto and Mr Sang has to take
19 place here because there is a lot of -- a lot of participants in this case.

20 MS SAMSON: Excuse me.

21 PRESIDING JUDGE TRENDABILOVA: Oh, I'm sorry. I didn't see you, Ms
22 Samson.

23 MS SAMSON: Not at all. I have a very brief submission. I wanted to correct for
24 the transcript. When the corrected version will be prepared later this evening, in
25 page 79, line 12 of the real-time transcript, it should say "has no impact" rather than

- 1 "has an impact." Thank you.
- 2 PRESIDING JUDGE TRENDAFILOVA: Well, thank you. I hope that this is
- 3 immediately reflected.
- 4 Yes, thank you very much. Again, have a good evening. See you tomorrow at 9.30
- 5 in Courtroom 2.
- 6 THE COURT USHER: All rise.
- 7 (The hearing ends in open session at 3.31 p.m.)