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TRIAL CHAMBER I

Before: Judge Adrian Fulford, President
Judge Elizabeth Odio Benito, Judge
Judge René Blattmann, Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF

THE PROSECUTOR

v. THOMAS LUBANGA DYILO

Public redacted version

Prosecution's Response to the Defence's « Requête de la Défense aux fins d'arrêt définitif des procédures »

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INTRODUCTION

Alleging abuse of process and Prosecutorial misconduct, the Defence seeks a permanent stay of the proceedings and the immediate release of the Accused. In the main it alleges that Prosecution witnesses lied at the behest of corrupt intermediaries who had “decisive” roles in the investigation, and that the Office of the Prosecutor (OTP) knew or had reason to know that its intermediaries were suspect. The Defence also accuses the Prosecution of deliberately withholding disclosure and otherwise acting in a biased manner in the case.

The critical facts, amply supported by the evidence, are that no intermediary had a decisive role in the investigation and the Prosecution did not have actual information or reason to suspect that any intermediary suborned perjury. There is conflicting evidence as to whether some witnesses, at the behest of the intermediaries or otherwise, lied at trial. The Prosecution rejects the substance of the Defence challenge. But ultimately, the claim that Prosecution witnesses lied is in fact no more than an allegation against their credibility. It is grounded entirely on contrary testimony by defence witnesses and arguments of inference and speculation. These, however, are matters that can and will be assessed at the end of trial, not now and certainly not in the form of an abuse application.

The Prosecution further refutes the allegation that it deliberately disclosed material late and knowingly presented erroneous evidence before the Chamber as a result of inadequate investigations. From the beginning, the Prosecution developed and implemented guidelines to identify information in its collection that was exculpatory or “Rule 77 material”. The guidelines

favoured disclosure, even where similar information had previously been provided to the defence. The Prosecution continually conducted electronic searches and reviewed the materials contained in its databases to identify and disclose relevant information to meet an expanding and at times unclear definition of 'relevance'. As a result the Prosecution disclosed over 100 statements of potentially exculpatory witnesses, approximately 1,000 items as potentially exculpatory, and over 3,000 items as "material to the preparation of the defence."

The Defence complaint is predicated on allegedly late disclosure of a handful of documents and an assumption that it shows a pattern of Prosecutorial misconduct. The Prosecution did not deliberately withhold those few documents identified by the Defence. In one case the delay was the consequence of a mistake in the registration, but the document when found was disclosed. Other items were internal work product; those too were disclosed. In any case, there was no pattern of abuse; to the contrary, the Prosecution policy demanded the proper disclosure of information. Nor does the Defence establish, from the allegedly late disclosures, that it was prejudiced, much less that it is impossible for it to receive a fair trial.

The Defence thus fails to meet its burden. To establish an abuse of process sufficient to require termination of the trial, the Accused must show that a fair trial is impossible. Here, the allegations of Prosecutorial misconduct are factually unsupported. In light of the above, the Prosecution asks the Chamber to dismiss the Defence Application in its entirety and order the continuation of the trial against the Accused.

STATEMENT OF FACTS

I. OVERVIEW OF THE INVESTIGATION

1. The OTP's investigation was opened on 23 June 2004 following the referral of the case from the Democratic Republic of the Congo (DRC). During the preliminary examination phase, the Prosecution set out to gather information on the range of criminal activities under the jurisdiction of the Court, without yet focusing on which aspects of the ongoing conflicts in different parts of the country merited the closest attention and which wrongdoers the closest investigation.¹
2. On the basis of such analysis in the course of 2004, the Prosecutor focused his investigation on the Ituri region² the places where the most serious crimes were allegedly committed during the period of concern.³
3. The OTP registered thousands of documents during the preliminary examination and the investigation. This included both potentially incriminating and potentially exculpatory material.⁴
4. DRC-OTP-WWWW-0582 (W-0582) described the difficult conditions in which the early steps of the investigation were conducted. Insecurity in Ituri was pervasive and of paramount concern, shaping the manner in which the investigation was undertaken. He said: "this isn't the case in most investigations before, but security in this case became our number one imperative; a categorical imperative. We couldn't work

¹ Rule68Deposition, 16/11/2010, p.17, line 9 to p.18, line 17.

² Rule68Deposition, 16/11/2010, p.19, lines 7-14.

³ Rule68Deposition, 16/11/2010, p.30, lines 6-12.

⁴ Rule68Deposition, 16/11/2010, p.32, lines 5-21, and p.33, lines 11-14.

without it, so it was above all other considerations whatever they were”.⁵

5. With no police force of its own, coupled with the harsh logistical conditions and security context in the region, the first investigations in the field proved to be “very difficult”.⁶ In 2004, when the Office decided to focus the investigation⁷ on the two groups that allegedly committed the most serious crimes in Ituri, the UPC and FNI-FRPI were still active and violent incidents regularly occurred.⁸ W-0582 recounted hearing the sound of gunfire from AK-47s every evening on his first mission to Bunia.⁹ Investigators travelled in or were escorted by MONUC military convoys,¹⁰ and from 2004 until the first half of 2006, travel in Ituri was mainly limited to the town of Bunia.¹¹ Within Bunia, movement was restricted to areas controlled by the United Nations peacekeeping forces, and movement by foot was restricted during certain hours.¹²
6. The absence of a functioning police force to maintain law and order in Bunia also enhanced the threat to security at the time.¹³ At the time, within the DRC, Ituri had been classified at the highest risk level by the United Nations,¹⁴ and MONUC soldiers were subject to attacks by

⁵ Rule68Deposition, 18/11/2010, p.33, lines 7-11.

⁶ Rule68Deposition, 16/11/2010, p.23, lines 2-3.

⁷ Rule68Deposition, 16/11/2010, p.21, lines 7-12.

⁸ EVD-OTP-00629, para. 19; Rule68Deposition, 16/11/2010, pp.35-36.

⁹ Rule68Deposition, 16/11/2010, p.34, lines 15-23.

¹⁰ T.334, p.12, lines 13-17.

¹¹ EVD-OTP-00629, para. 21.

¹² EVD-OTP-00629, para. 22.

¹³ Rule68Deposition, 16/11/2010, p.38, lines 17-20.

¹⁴ EVD-OTP-00629, para. 22.

militia groups.¹⁵ Thus, it was nearly impossible for investigators to travel to locations where crimes had been committed.¹⁶

7. Investigations were further constrained by ICC logistical difficulties in Ituri at the time.¹⁷ DRC-OTP-WWWW-0583 (W-0583) stated that the first ICC vehicles became available only in late 2005, and an ICC office was opened in Bunia only in 2006.¹⁸ To compound all of the above, W-0582 explained that those associated with the Court were not always welcome in Ituri: “groups could actually target a specific investigator, try to carry out surveillance about his movements, attack him or even abduct him.”¹⁹
8. The risk to potential witnesses associated with the investigation and trial against the Accused continued throughout the pre-trial and trial phases. The evidence shows that a climate of fear and intimidation reigned in Bunia, where those suspected of dealings with the ICC and the OTP were subjected to pressure from Hema loyalists and others close to the Accused.
9. Most of the former child soldiers and the witnesses were members of the Hema community and considered to be traitors by the community. Hema community elders, senior UPC members and others persons loyal to Thomas Lubanga mounted sustained pressure on several witnesses to lie, recant their prior statements or cease cooperation with the OTP entirely. They approached the witnesses and/or their relatives

¹⁵ Rule68Deposition, 16/11/2010, p.38, lines 7-16.

¹⁶ EVD-OTP-00629, para. 23.

¹⁷ EVD-OTP-00629, para. 19.

¹⁸ EVD-OTP-00629, para. 19.

¹⁹ Rule68Deposition, 16/11/2010, p.38, lines 21-25.

directly or during a series of community meetings convened for this purpose. W-0582 explained the impact that this climate of pressure and fear had on witnesses earmarked to testify against Thomas Lubanga: “we considered that the fears that they were addressing were really justified, but the real threats wasn’t really from an individual group, it was rather the fact of being identified in one’s community, in the village, in the family, as someone who was cooperating with the Court.”²⁰

10. Accounts of this relentless pressure and intimidation recur throughout the evidence of numerous witnesses. DRC-OTP-WWWW-0297 (W-0297) (a former child soldier) testified that “Cordo”, a relative of Lubanga, warned him and his family against testifying.²¹ Cordo also told him that he must deny having been a child soldier.²² He stated that Cordo issued similar warnings to [REDACTED] and [REDACTED],²³ and that they thereafter changed their testimony. DW-0004, who had been screened as a potential prosecution witness but declined to provide a statement, testified as a defence witness. He admitted that in meetings that he attended with elders of the community and his family he had been pressurised concerning his testimony.²⁴ He attended a meeting (before he provided a statement to the Defence)²⁵ at which a Defence resource person (Mbuna) and UPC officials were present;

²⁰ Rule68Deposition, 16/11/2010, p.47, lines 9-13, also p.47, lines 22-25.

²¹ T.285, p.12, lines 22-25: “Q. Did Cordo speak to your parents? A. Yes. Personally, he came on foot to the house, and sometimes he also would call my parents and me to go to his house and ask me to change my testimony and say that I had never been a child soldier.”

²² T.288, p.13, lines 9-16: “he said to me that if I were to come here, I should come and say that [...] I had never been a child soldier; I had never borne a weapon”. See also T.285, p.11, lines 10-14.

²³ T.285, p.15, lines 12-25 and p.16, lines 10-11.

²⁴ T.245, p.28, line 11 to p.30, line 11 and p.36, lines 6-12.

²⁵ T.245, p.39, lines 1-6.

there, the witness was made to apologise for collaborating with the ICC.²⁶ DW-0003 also testified that it was well-known within the Hema community in Bunia that certain persons had gone to Beni to “destroy” Thomas Lubanga.²⁷ He explained that he also came under immense pressure from the local Hema chiefs, the UPC and his own family to stop from collaborating with the ICC.²⁸ After he had apologised,²⁹ he was introduced to the UPC and the Defence resource person as a possible defence witness.³⁰ He said after testifying for Lubanga he no longer felt under pressure.³¹

11. Intermediary DRC-OTP-WWWW-0321 (W-0321) confirmed that members of the UPC started searching for him “on an active basis” when it became known that he was collaborating with the OTP.³² He described numerous incidents where UPC members³³ stopped him in the street and harassed him,³⁴ causing him to eventually [REDACTED].³⁵ W-0321 stated that the children who went with him to meet the OTP investigators were also threatened,³⁶ and he described how “high-ranking officials of the UPC” tried to obtain contact details of the children he had put in contact with the ICC from him in

²⁶ T.245, p.47, line 20 to p.48, line 8.

²⁷ T.240, p.14, lines 10-16.

²⁸ T.241, p.11, line 11 to p.12, line 11.

²⁹ T.240, p.15, lines 4-8.

³⁰ T.241, p.12, line 17 to p.15, line 8.

³¹ T.241, p.12, line 17 to p.15, line 8; T.241, p.17, lines 15-17: “when I leave this place, there will no longer be any pressure on me. I will continue working as a farmer, farm my land, and I will no longer be subject to pressure and I will feel at ease. I will have no worries.”

³² T.310, p.20, line 16 to p.21, line 9.

³³ T.310, p.26, lines 18-20, p.29, line 25 to p.30, line 3, and p.30, line 25 to p.31, line 10.

³⁴ T.310, p.21, line 23 to p.25, line 19.

³⁵ T.310, p.20, lines 17-18.

³⁶ T.310, p.33, line 17 to p.35, line 12.

exchange for money.³⁷ DRC-OTP-WWWW-0213 (W-0213) testified that one Chief declared that W-0321 should be killed.³⁸

12. Other witnesses such as DRC-OTP-WWWW-0038 (W-0038) and W-0213 testified about pressures exerted on them and their families because they were collaborating with the Court.³⁹ Even defence witnesses described the pressure on persons to alter their cooperation in the case against the Accused. DRC-D01-WWWW-0016 (DW-0016) testified that Mbuna and a former UPC member publicised the fact that he had been cooperating with the ICC.⁴⁰ Witnesses DRC-OTP-WWWW-0496 (W-0496) and DRC-OTP-WWWW-0497 (W-0497), parents of child soldier witnesses DRC-OTP-WWWW-0007 (W-0007) and DRC-OTP-WWWW-0008 (W-0008) ([REDACTED]), said that Defence resource persons and UPC/Hema members pressured them, [REDACTED], to contradict the testimony of prosecution witnesses W-0007 and W-0008⁴¹ by saying that they were not in the army.
13. Investigations were also complicated by the wariness of prospective witnesses. Many witnesses provided a full account only after repeated interviews.⁴² They were self-protective, fearful and slow to develop trust in the Court.⁴³ In particular, it was commonplace for witnesses to

³⁷ T.325, p.9, line 3 to p.12, line 15.

³⁸ T.133, p.48, line 1 to p.49, line 13.

³⁹ See T.133, p.48, line 1 to p.49, line 1 (W-0213) and T.336, p.75, line 24 to p.76, line 19 (W-0038).

⁴⁰ T.258, p.39, line 22 to p.40, line 11; see also p.41, line 18 to p.43, line 3.

⁴¹ The Chamber authorised the admission of the statements of W-0496 and W-0497; ICC-01/04-01/06-2473, Annexes 4A and 4B. See also ICC-01/04-01/06-2595, paras. 10 and 84(b).

⁴² (W-0007) T.150, p.11, lines 1-6; p.13, lines 9-12; (W-0008) T.137, p.73, lines 16-19; (W-0011) T.140, p.12, lines 18-20; p.13, lines 1-8; p.36, line 1.

⁴³ (W-0007) T.149, p.76, lines 2-11, 14, 22-25; T.149, p.92, lines 17-23; p.93, lines 6-7; p.94, lines 15-17; (W-0008) EVD-D01-00750, p.25, lines 799-800; p.26, lines 824-825; p.26, lines 845-847; p.30, lines 982-984.

withhold information that might lead to the identification of family members in order to protect them.⁴⁴

II. THE NEED FOR THE SERVICES OF INTERMEDIARIES IN COMPLEX INVESTIGATIONS

14. As previously submitted the OTP has no police force of its own and operated in hostile environments within the DRC.⁴⁵ The OTP thus relied on intermediaries to conduct activities related to its investigations in the field to improve the security for the witnesses and OTP staff. This approach is widely considered to be 'best practice' during investigations. Even in national jurisdictions where there are no significant security or access issues, law enforcement agencies commonly use intermediaries, informants and intelligence sources.⁴⁶
15. Witnesses W-0582 and W-0583 – the main investigators on the *Lubanga* case at the pertinent time⁴⁷ – each with a wealth of relevant experience in international and national jurisdictions,⁴⁸ explained that the use of intermediaries between 2005 and 2007 was necessary due to the prevailing insecurity in Ituri. W-0582 testified that “the priority of priorities was the security of our witnesses and investigators”.⁴⁹

⁴⁴ (W-0008) EVD-D01-00750, p.29, lines 959-960; lines 933-936; p.30, lines 975-976.

⁴⁵ See ICC-01/04-01/06-2310, paras. 12-14.

⁴⁶ See, for example, Martin Innes and James W.E. Sheptycki, *From Detection to Disruption: Intelligence and the Changing Logic of Police Crime Control in the United Kingdom*, 14 Int'l.Crim.Just.Rev.10 (2004). Prosecuting authorities (though not the OTP) may even recruit known criminals to assist in undercover operations.

⁴⁷ EVD-OTP-00629, para. 3 and Rule68Deposition, 16/11/2010, p.8, lines 19-21 and p.13, lines 5-7.

⁴⁸ EVD-OTP-00629, paras. 1-6 and Rule68Deposition, 16/11/2010, pp.3-6.

⁴⁹ Rule68Deposition, 16/11/2010, p.39, lines 18-21.

16. Witness W-0583 testified that the presence of armed militias in Ituri posed risks to potential witnesses, and was a factor that prompted the use of intermediaries to “locate and contact potential witnesses”.⁵⁰ Asked why the OTP decided to use intermediaries in the investigations, he explained: “we did not have access to the villages, we could not get out of Bunia to try to find people. So given that the individuals were not living in Bunia themselves, we had to find a way of contacting them. That was the main reason.”⁵¹
17. At no stage during the investigation were intermediaries involved in taking statements of potential witnesses, making decisions as to which witnesses to retain or withdraw or which lines of investigations/inquiry to pursue. Intermediaries provided crucial assistance to the conduct of the investigation but were excluded from the investigative decision-making process.⁵² Additionally, barring very few exceptions,⁵³ intermediaries were expressly excluded from interviews and screenings.⁵⁴ Intermediaries were also not privy to substantive information.⁵⁵
18. Witness W-0582’s evidence is unequivocal on this issue. Intermediaries served two main purposes: to identify and then contact potential witnesses, and to collect and provide security information regarding

⁵⁰ EVD-OTP-00629, paras. 27-28.

⁵¹ T.334, p.15, lines 4-8.

⁵² See W-0581’s evidence of the logistical nature of W-0321’s role in the investigation on former child soldiers; T.300, p.31, lines 16-23. See also T.300, p.37, line 11 to p.38, line 1.

⁵³ Rule68Deposition, 18/11/2010, p.31, line 20 to p.32, line 12, where W-0582 explains that W-0143 was present for translation purposes only.

⁵⁴ See evidence of W-0321 (T.308, p.80, lines 8-19) and W-0316 (T.328, p.40, line 24 to p.41, line 9). See also evidence of DW-0016 (T.258, p.12, lines 6-7) and W-0583 (T.334, p.30, lines 10-15).

⁵⁵ Rule68Deposition, 17/11/2010, p.15, lines 15-16.

the region and as it related to potential witnesses.⁵⁶ He emphasised that they had “nothing to do with the purely judicial aspect”.⁵⁷ Intermediaries “did not take part ... in these initial interviews” of the persons they identified as possible witnesses. “They arranged for the meeting, they arranged for the witnesses to come but they did not take part in the contact meetings.”⁵⁸ For example, OTP staff member DRC-OTP-WWWW-0581 (W-0581) instructed W-0321, in connection with an upcoming meeting with former child soldiers, that “[y]ou will bring the child to the vehicle, you will open up the door, the back -- the rear door of the vehicle and *the child will go into the vehicle and you will leave. Once I finish speaking with the child, I will call you* and I will tell you where you can take the following child and you will place that child in the vehicle”⁵⁹ (emphasis added). The investigators would only contact W-0321 again after their meeting had concluded: “at the end of an interview he would inform me. He would say, ‘We are through with the interview. Please wait for them in such-and-such a place where you would meet an agent who would give you a certain sum of money for them to take home.’ That is how I knew that they had completed their interview.”⁶⁰

19. Further, as to who would make the final decision on whether to interview an individual, W-0582 stated: “The person who took the decision was a representative of the Prosecutor, that is to say from the Prosecution division. On the basis of the screening, the decision was

⁵⁶ Rule68Deposition, 16/11/2010, pp.50-52.

⁵⁷ Rule68Deposition, 16/11/2010, p.52, line 13.

⁵⁸ Rule68Deposition, 16/11/2010, p.65, lines 2-4.

⁵⁹ T.308, p.72, lines 13-18.

⁶⁰ T.309, p.21, lines 15-20.

taken here as to whether to proceed with an interview or not. Particularly when it was an interview of a suspect, it was not up to the intermediary to take any decision at all.”⁶¹

III. INVESTIGATION AND DISCLOSURE OF INCULPATORY AND EXCULPATORY EVIDENCE

20. The OTP robustly pursued investigative steps in relation to exculpatory evidence. W-0582, a former investigating magistrate⁶² and the investigation team leader at the time,⁶³ stated that the Office at times focused more resources on investigating exculpatory evidence to ensure that the Defence would be able to fulfil its role at trial,⁶⁴ and provided an example of “the very principle of investigating incriminating and exculpatory evidence.”⁶⁵ Indeed, W-0582 made it clear that the “hierarchy and the Prosecution’s department”⁶⁶ *insisted* on several occasions on the identification of potentially exculpatory documents.

21. As regards the collection of documents, he expressed surprise at the “energy, the efforts made by people from the common law background to comply with the Rome Statute to present [...] all exculpatory information available”,⁶⁷ even alluding to the “paranoia”⁶⁸ of some people focusing on exculpatory information. According to its records,

⁶¹ Rule68Deposition, 17/11/2010, p.16, lines 16-20.

⁶² Rule68Deposition, 16/11/2010, p. 4, line 21 to p.5, line 3.

⁶³ Rule68Deposition, 16/11/2010, p.13, lines 5-7.

⁶⁴ Rule68Deposition, 18/11/2010, pp. 24-26.

⁶⁵ Rule68Deposition, 18/11/2010, p.22, lines 17-25.

⁶⁶ Rule68Deposition, 16/11/2010, p.32, lines 17-21.

⁶⁷ Rule68Deposition, 18/11/2010, p.25, lines 13-19.

⁶⁸ Rule68Deposition, 18/11/2010, p.26, lines 6-9.

to date, the Prosecution has disclosed over 100 statements of potentially exculpatory witnesses, approximately 1,000 items as potentially exculpatory, and over 3,000 items as “material to the preparation of the defence.”⁶⁹

22. During the pre-trial phase, the Prosecution developed evidence review guidelines to govern the review and disclosure of the evidence collected in the DRC situation.⁷⁰ The review guidelines governed the determination of whether information collected was incriminatory, exculpatory or “Rule 77 material”. After material is identified, the Office not only makes a determination vis-à-vis relevance, but also on possible restrictions to disclosure (in particular those under Rules 81 and 82), and may need to consult internally, with other divisions of the Court (e.g. the Victims and Witnesses Unit (VWU) and Victims Participation and Reparations Section) and with third parties, including the information provider and relevant witnesses.⁷¹
23. As part of its approach to disclosure, the Prosecution:
 - (a) sought guidance from the Chamber where it had doubts as to the application of Article 67(2) and Rule 77;⁷²

⁶⁹ All disclosure statistics referred to in this response are calculated as at 10 December 2009, according to figures retrieved from the OTP’s evidence management database RingTail.

⁷⁰ The Office of the Prosecutor has developed internal guidelines on evidence review and disclosure which seek to encompass the principles of diligence, efficiency and transparency. These guidelines have been incorporated in the Prosecution’s Operational Manual, an internal working tool of the OTP which regulates, *inter alia*, the collection, review and disclosure of evidence. Further discussion on this, and other aspects of the Prosecution’s disclosure policy and practices, is contained in ICC-01/04-01/06-2625.

⁷¹ The Prosecution notes that – in order to assist the Defence, it applied highlights to documents containing five or more pages so as to identify information considered by the Prosecution as potentially exculpatory.

⁷² [REDACTED]

- (b) disclosed information even when it considered the information to be protected by Rule 81(1) or otherwise not relevant;⁷³
- (c) liberally assessed materials for potential exculpatory value and decided in favour of disclosure, even where the information had previously been disclosed, such as in the disclosure of hundreds of documents addressing the Ugandan occupation in Ituri; and
- (d) repeatedly conducted its electronic searches and reviewed the materials contained in its databases to identify and disclose relevant information in response to specific requests from the Defence⁷⁴ and court orders⁷⁵ but also following its own initiative to meet an expanding and at times unclear definition of ‘relevance’.⁷⁶

⁷³ See, for example, EVD-OTP-00641 (the internal memorandum containing an investigator’s opinion about the reliability of W-0031). The relevance and disclosability of the information in this document has been extensively addressed; see ICC-01/04-01/06-2625 and ICC-01/04-01/06-2656-Conf. See also EVD-D01-00393 and EVD-D01-00777 (emails to W-0582 and W-0583 containing logistical and practical information relating to their testimony, see T.334, p.84, line 19 to p.85, line 13) and EVD-D01-00578, a receipt re-disclosed with 81(1) redactions removed following a request from the Defence. The Prosecution has also agreed on a number of occasions to disclose materials to the Defence despite it being of the opinion that it is not being obliged to do so; see, for example, the email exchange ‘Demande de divulgation relative au témoin 627’ (last email sent from the Legal Officer of the Chamber to the Prosecution and Defence on 03/12/2010 at 15:41); attached for the Chamber’s convenience as Confidential Annex 3.

⁷⁴ See, for example, T.325, p.24, line 10 to p.25, line 10 (disclosure in respect of W-0031); T.316, p.7, line 12 to p.8, line 13 (disclosure in respect of W-0143); T.316, p.8, line 21 to p.9, line 5 (disclosure in respect of W-0316).

⁷⁵ Orders which, as the Prosecution submitted in filing ICC-01/04-01/06-2625, “have progressively identified and instructed disclosure of material and information, granting requests from the Accused for information that it deems relevant to its [...] abuse of process application”; para. 19. Disclosure orders have included material that did not previously appear to be disclosable – such as the identity of intermediaries: ICC-01/04-01/06-2434, para. 6 and Public Annex A; but also materials which the Defence has itself acknowledged is usually excluded from the prosecution’s disclosure obligations: ‘Requête de la Défense aux fins de divulgation de notes d’enquêteurs en lien avec les intermédiaires W-0031, W-0321, W-0316 et W-0143’, ICC-01/04-01/06-2503-Conf, para. 10.

It is noteworthy that the principles applied by the Prosecution in review and disclosure, including of internal work product, have been endorsed by this Chamber (ICC-01/04-01/06-2656-Conf, para. 17). See also T.325, p.17, line 19 to p.18, line 6. Additionally, in a number of instances where the Defence has specifically queried the non-disclosure or [REDACTED] disclosure of certain documents, after receiving and reviewing the documents in full, the Chamber has agreed with the Prosecution’s determination of relevance: see, for example, (i) the emails between the OTP and W-0582 and W-0583

IV. THE TRIAL PROCEEDINGS TO DATE

24. In its case-in-chief the Prosecution called 28 witnesses – 25 fact witnesses and three experts.⁷⁷ It also tendered over exhibits, including contemporaneous UPC/FPLC documents. The Prosecution's case – that the Accused is responsible for the war crimes of conscripting and enlisting children under the age of 15 into the UPC army and using them in hostilities – is based not only on illustrative examples of former UPC child soldiers, but also on a wealth of overview evidence from former UPC military and political insiders. Military insiders from the highest echelons of the UPC military hierarchy and political insiders testified that there were children under the age of 15 in the UPC.⁷⁸ Additionally, the Prosecution tendered contemporaneous video footage from the Rwampara military camp in February 2003 which depict children who appeared to be under the age of 15 in the UPC.⁷⁹
25. The Defence has split its case into two distinct stages, and completed only the first stage – its offer of proof as to its affirmative claim of abuse of process (the subject of the present litigation). To this end, the

referred to by the Defence in its request of 19/11/2010; T.336, p.3, line 15 to p.4, line 1 and ICC-01/04-01/06-2654-Conf-Exp; and (ii) EVD-OTP-00641 (the internal memorandum containing an investigator's opinion about the reliability of W-0031). Although the Chamber queried the lateness of the disclosure of this item, and whether there was a legitimate security concern for some discrete redactions, for the remainder of the (heavily [REDACTED]) document, the Chamber assured the Defence that it contained nothing 'that could conceivably assist the Defence in support either of the abuse of process argument or in relation to the trial more generally'; T.326, pp.4-6.

⁷⁶ See ICC-01/04-01/06-2625-Conf, paras.5-7 and 19.

⁷⁷ One background expert and two medical experts (who gave evidence on the age of the former child soldiers).

⁷⁸ See, for example, the evidence of W-0055 at T.174, p.40, lines 5-8, T.176, p.48, lines 23-24 and of W-0016 at T.189, p.16, lines 1-3; and the evidence of W-0041 at T.125, p.48, lines 15-17.

⁷⁹ EVD-OTP-00570.

Defence called 19 witnesses⁸⁰ – mostly family members or friends and acquaintances of witnesses called by the Prosecution – and tendered 815 exhibits.⁸¹ In response to the Defence abuse of process case, the Prosecution called seven witnesses⁸² and tendered over 100 exhibits.⁸³

SUBMISSIONS

26. Although there are other claims of prosecutorial misconduct, the bulk of the Application (paras. 27-199) alleges that Prosecution witnesses lied, and did so at the behest of corrupt intermediaries who had “decisive” roles in the investigation, and that the Prosecution knew or had reason to know that its intermediaries were suspect.
27. These are serious allegations. They are also baseless. The claim of perversion of justice and perjury committed by prosecution witnesses is in fact an allegation on the credibility of the Prosecution witnesses. It is grounded essentially on contrary testimony by defence witnesses and arguments of inference and supposition. The Defence’s claims that the OTP intermediaries with decisive roles in the investigation deliberately suborned perjury and that the Prosecution knew or had reason to know of their actions have even less factual support.
28. This line of defence ultimately is but a dressed-up version of the commonplace “oath against oath” trial situation. Every experienced judge, prosecutor, and defence counsel has participated in trials where

⁸⁰ In addition, W-0015, although a prosecution witness, was treated as hostile by the Prosecution and the Defence rely on his evidence to support the Application.

⁸¹ ‘D01’ exhibits tendered by the Defence since 27/01/2010 (as at 26/01/2011 according to eCourt).

⁸² Three OTP representatives W-0581, W-0582, W-0583; intermediaries W-0321 and W-0316; trial witness W-0038 (recalled) and W-0598. Another witness, withdrawn Prosecution witness W-0297, was also called by the Court during this stage at the request of the Defence.

⁸³ ‘OTP’ exhibits tendered by the Prosecution since 27/01/2010 (as at 26/01/2011 according to eCourt).

witnesses provide inconsistent evidence. Witnesses inevitably recall events differently due to either mistake or lapses of memory. Sometimes witnesses deliberately lie, out of coercion or fear of prosecution or promises of reward or bias or for no discernible reason. Inconsistent, or even contradictory, evidence at a trial is thus unremarkable. Indeed, it is in a trial in which all witnesses are strikingly consistent that their evidence is far more likely to be the product of coaching.⁸⁴

29. By characterising the credibility contest as an abuse of process, the Defence is trying to change the course of the trial to distract the Chamber from the issues of guilt or innocence. The Prosecution will show that the abuse of process claim is legally and factually unfounded. The correctness of the Defence's argument that the evidence cannot be relied on to establish guilt can, and should, be addressed at the end of the trial. Once the record is complete and the parties have made closing submissions, the Chamber will be able to assess the comparative credibility of witnesses and the reliability of each particular piece of evidence in view of the totality of the evidence presented. At that point the Chamber will determine the appropriate weight to be given to the competing evidence submitted by both

⁸⁴ For example, the manner in which DW-0003 and DW-0004 explained why they were changing their earlier version of events was similar; T.240, p.13, line 23 to p.14, line 2; T.242, p.16, lines 17-20; p.19 lines 11 to 15; T.245, p.12, lines 16-23; p.34, lines 5-21]. The identity of that evidence might be highly suggestive of coaching. T.285, p.34, lines 15-21; T.285, p.25, lines 6-13; EVD-OTP-00561 and EVD-OTP-00562, or that they collaborated to align their evidence on this matter.

⁸⁴ T.241, p.11, line 11 to p.12, line 2.

parties, and if it finds any evidence to be untrue or unreliable, to ignore that evidence in its judgement.⁸⁵

30. The Prosecution submits that the Application, based, in the main, on conflicting evidence and predicated upon assumptions of malfeasance that are not established as fact, should be rejected. In this case even more than most, there are completely understandable explanations for inconsistencies or disparities in the testimony. More importantly, there is not one single piece of evidence that shows (i) that any OTP intermediary had a decisive role in the investigation; (ii) that any intermediary with or without a decisive role deliberately suborned perjury; and (iii) that the OTP knew or had reason to know of possible subornation.

⁸⁵ As Trial Chamber II stated: “*Evidentiary weight* [...] is the relative importance that is attached to an item of evidence in deciding whether a certain issue has been proven or not. It depends on the intrinsic quality and characteristics of the item of evidence, but also on the amount and quality of other available evidence on the same issue. Thus, unlike probative value, *evidentiary weight is assessed at the end of a trial*, when the Chamber has heard all other evidence admitted in the case”: ICC-01/04-01/07-2635, para.13 (emphasis added). See also: “factors such as the personality of the witness, his demeanour in the courtroom, the manner in which he testified [...] or the consistency of his testimonies are all factors to be taken into consideration in the evaluation of the credibility of his testimony”: ICC-01/04-01/07-T-190-Red-ENG, p.5, lines 11-17. See, for example, *Prosecutor v. Niyitegeka*, ICTR-96-14-T, T. Ch., Judgement, 16 May 2003, paras. 39-42; *Prosecution v. Cerkez et al.*, IT-95-14/2-A, A.Ch., Judgement, 17 December 2004, para. 125; *Prosecution v. Mrksic*, IT-95-13/1-A, A.Ch., Judgement, 5 May 2009, para. 125; *Prosecutor v. Kupreskic et al.*, I IT-95-16-A, A.Ch., Judgement, 23 October 2001, para. 334; *Prosecutor v. Tadic*, Case No.: IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, 27 February 2001, para. 92; *Prosecution v. Mrksic*, IT-95-13/1-T, T.Ch., Judgement, 27 September 2007, in particular para. 16; *Prosecutor v. Boskoski*, IT-04-82-T, T.Ch., Judgement, 10 July 2008, paras. 9-19; *Prosecutor v. Kamuhanda*, ICTR-95-54A-T, Judgement, 22 January 2004, paras. 70-71; *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, T.Ch., Judgement, 1 December 2003, para. 683; *Prosecution v. Bizimungu et al*, ICTR-99-50-T, T.Ch., Decision on Jérôme-Clément Bicamumpaka’s Motion Seeking Permanent Stay of Proceedings, 27 February 2009, paras. 37-39.

I. THE APPLICATION FAILS TO ESTABLISH AN ABUSE OF PROCESS

A. BURDEN AND STANDARD OF PROOF

31. The Defence acknowledges (para. 19) that it bears the burden of proving that there was an abuse of process.
32. The Defence also urges that it need only prove its case on a balance of probabilities, which is the standard Trial Chamber III stated was appropriate for a challenge to admissibility.⁸⁶ The Prosecution submits that the Application does not meet that standard and, accordingly, should be denied. Nonetheless, it also preserves the position that the standard for claims such as this should not be the most minimal standard of proof available. This does not mean, of course, that the Defence is obligated to prove its defence beyond reasonable doubt. But courts and scholars recognise that despite the traditional common-law attachment to only two standards – balance of probabilities or proof beyond a reasonable doubt – there is an evolving acceptance of an intermediate standard based on the subject matter and importance of the issue: “clear and convincing evidence”.⁸⁷ The risk of error that a guilty person may be set free without regard to the weight of the evidence is more appropriately pegged at that intermediate standard. The “clear and convincing evidence” standard is justified by the importance of the issue; the fact that given the gravity of the charges and the near-complete status of the trial, a standard of more likely than

⁸⁶ Trial Chamber III rejected the Prosecution’s suggestion that a higher standard should apply; ICC-01/05-01/08-802, para. 203.

⁸⁷ See *Prosecutor v. Nikola Sainovic & Drogoljub Ojdanic*, IT-99-37-AR65, 30 October 2002, Decision on Provisional Release, Separate Opinion of Shahabuddeen, J., (disagreeing with the majority on the standard of review and urging an intermediate standard in evaluating an accused’s request for interim release) at paras. 31-39 and fns. 22-29 (citing cases).

not (i.e. 51-49 odds) would be insufficient to satisfy the international community that immediate termination is necessary; and that if the Application is denied the Defence can renew its complaints regarding the quality and sufficiency of the evidence at the end of the trial.

B. THE EXCEPTION NATURE OF A STAY OF PROCEEDINGS ON GROUNDS OF ABUSE OF PROCESS

33. For conduct to constitute abuse of process, it must meet a *very high threshold of gravity*.⁸⁸ As the Defence acknowledges (paras. 15-16), the exercise of that authority, however, is permitted only as a matter of “last resort”, when it is “repugnant to the rule of law to put the accused on trial” or if exceptional circumstances render a fair trial to be “irreparably impossible”.⁸⁹ The Appeals Chamber has found that, although the Statute does not expressly provide for such possibility, Chambers of the ICC nonetheless may stay proceedings for abuse of process.⁹⁰
34. A fair trial is impossible if “breaches of the fundamental rights of the suspect or the accused [...] make it impossible for him/her to make his/her defence within the framework of his rights”.⁹¹ The Chamber first has to consider other available procedural avenues or remedies that may address the violations of the rights of the accused and

⁸⁸ The Appeals Chamber in the *Lubanga* case, guided by relevant domestic jurisprudence, confirmed this high threshold: for illegal conduct to reach the sufficient standard for abuse of process it must be such as to make it “otiose, repugnant to the rule of law to put the accused on trial”: ICC-01/04-01/06-772 OA4, paras. 30-31. *Prosecutor v. Barayagwiza*, ICTR-97-19, A.Ch., Decision of 3 November 1999, para.74, see also *Prosecutor v. Nikolic*, IT-94-2-PT, T.Ch., Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para.114.

⁸⁹ ICC-01/04-01/06-2582 OA18, footnote 135.

⁹⁰ ICC-01/04-01/06-2582 OA18, para. 39.

⁹¹ ICC-01/04-01/06-772 OA4, para. 39.

guarantee a fair trial. Only in exceptional cases, and when no other remedies are appropriate, should a proceeding be stayed.⁹² “[A]n order staying proceedings on the ground of abuse of process [...] should never be made where there were other ways of achieving a fair hearing of the case, *still less where there was no evidence of prejudice to the defendant.*”⁹³

35. In some jurisdictions courts also weigh the alleged abuse against the gravity of the charges and the public interest in allowing the prosecution to proceed. Thus, there may be “cases [...] in which the seriousness of the crime is so great relative to the nature of the abuse of process that it would be a proper exercise of judicial discretion to permit a prosecution to proceed or to allow a conviction to stand

⁹² *DPP v. Hussain* (1994) 158 J.P.R. 602, and Choo, A. L.T., *Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited*, Criminal Law Review, Nov 1995, 864-874. “The normal course should be that any criminal charge should proceed to full trial”, A.Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings*, 2nd edition (2008, Oxford University Press), p.2 and authorities in fn.8. The ICTR Appeals Chamber in the *Akayesu* case stated that “an order staying proceedings on the ground of abuse of process [...] should never be made where there were other ways of achieving a fair hearing of the case”, see *Prosecutor v. Akayesu*, ICTR-96-4, Appeals Judgement, 1 June 2001, para.340. Thus it is not necessary if the factfinder can instead remedy the error by excluding or disregarding specific evidence: Attorney Generals Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney Generals Reference (No 2 of 2001) [2004] 2 A.C. 72, HL; see, for example, *R (Ebrahim) v Feltham Magistrates Court*; *Mouat v DPP* [2001] 2 Cr. App. R. 23; *DPP v Hussain* (1994) 158 JP 602. Courts should not use this measure to discipline the prosecution: In *R v Crown Court at Norwich ex parte Belsham* (1992) 94 Cr. App. R. 382, QBD, for instance, Watkins LJ said (at p.395): “It should also be borne in mind that a stay on the basis of an abuse of process must never be seen to be used simply as a form of disciplinary disapproval of the CPS. That it should be seen to be so is impermissible.”

⁹³ *Prosecutor v. Akayesu*, ICTR-96-4, A.Ch., Judgement, 1 June 2001, para. 340 citing *DPP v. Hussain*, The Times, 1 June 1994, cited in Archbold 2000, paras. 4-55 (emphasis added). Lord Woolf LCJ in the Court of Appeal hearing in Attorney Generals Reference (No 2 of 2001) further required that a stay result only if there is prejudice that “interferes with [the defendant’s] right to a fair trial in a way which cannot otherwise be remedied”, and “in the absence of prejudice of that sort, there is normally no justification for granting a stay.” A similar approach has been endorsed by the ICC Appeals Chamber in the most recent *Lubanga* judgement on abuse of process whereby it required that “fair trial [...] had become irreparably impossible” to halt the proceedings (ICC-01/04-01/06-2582 OA18, 8 October 2010, para. 61).

notwithstanding an abuse of process in relation to the defendant's presence within the jurisdiction."⁹⁴

36. It is against these standards and requirements that the abuse of process claim must be evaluated. In that regard, the Appeals Chamber recognises that a Chamber retains the abstract right to stay a trial for abuse of process,⁹⁵ but its decisions do not support the claim that a stay is required under the circumstances urged here. No other international tribunal has deemed a stay to be necessary in comparable circumstances,⁹⁶ nor does the Defence cite any national decision imposing or upholding a stay based on comparable allegations.
37. The Defence accusation of abuse of process is itself abusive of the parties', the participants', and the Court's time. The allegations are factually unsupported or exaggerated and, even if true, would be inadequate to demonstrate Prosecution misconduct or a level of irreparable harm sufficient to justify termination of the proceedings. Rather than demonstrating irreparable injury to the Accused's ability to receive a fair trial, this challenge follows a pattern of "a very substantial increase in the number of" abuse of process allegations as a defence. In one national jurisdiction a judge even concluded "[v]ery many of those applications are totally ill-founded and should never be

⁹⁴ See *R. v Nicholas Robert Neil Mullen* [1999] 2 Cr. App. R. 143. See also *Prosecutor v. Nikolic*, IT-94-2-AR73, A.Ch., Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, para. 30; *Prosecution v. Karadzic*, IT-95-5/18-AR73.4, Decision on Karadzic's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement, 12 October 2009, para. 46; *Prosecutor v. Delalic*, IT-96-21-A, Judgement, 20 February 2001, para. 618.

⁹⁵ ICC-01/04-01/06-772 OA4, paras.28, 37-39; ICC-01/04-01/06-2582 OA18, para. 39.

⁹⁶ To the contrary, see *Prosecution v. Bizimungu*, ICTR-99-50-T, T.Ch., Decision on Jérôme-Clément Bicamumpaka's Motion Seeking Permanent Stay of Proceedings, 27 February 2009, paras.37-39; *Prosecutor v. Seselj*, IT-03-67-PT, T.Ch., Order Regarding Seselj's Motion for Contempt Proceedings, 15 May 2007.

made. This is one such matter. [...] The sooner counsel realise that the taking of bad points of this kind does nothing in any way to assist the process of criminal justice the better.”⁹⁷

II. INTERMEDIARIES ACTING ON BEHALF OF THE PROSECUTION DID NOT HAVE DECISIVE ROLES IN THE INVESTIGATION NOR INDUCE WITNESSES TO LIE OR FABRICATE EVIDENCE, AND THE PROSECUTION DID NOT KNOW OR HAVE REASON TO KNOW OF ANY ALLEGEDLY IRREGULAR ACTIONS BY THEM

38. An assessment of the evidence shows that none of the intermediaries played anything other than support roles in the investigation. DRC-OTP-WWWW-0316 (W-0316), W-0321, DRC-OTP-WWWW-0143 (W-0143) and DRC-OTP-WWWW-0031 (W-0031) assisted the investigation but they did not determine its scope or parameters nor did they conduct investigations or engage in investigative functions or perform analyses. An assessment of the evidence also shows that none of them suborned perjury or deliberately contributed to the introduction of corrupt and false evidence at trial. It follows therefore that the OTP could not have had knowledge of any such subornation.
39. Finally, the OTP had no reason to suspect that its intermediaries were suborning perjury or procuring false evidence for the trial. The OTP had no information that could suggest that intermediaries induced witnesses to lie or fabricate evidence. Even if one were to accept the Defence assessment of the evidence of wrongdoing, the evidence it cites in order to demonstrate the Prosecution’s knowledge of this does not amount to an abuse of process.

⁹⁷ *R. v. Bradish*, [2004] EWCA Crim 1340 (2004) 148 S.J.L.B. 474 Official Transcript [2004], at 2004 WL 960915 (Judgement, Lord Justice Kay).

40. It is impossible in the pages allotted to respond to each alleged inconsistency cited by the Defence in the Application. However, the Prosecution will address the most important direct allegations against intermediaries W-0316, W-0321, W-0143 and witness W-0031.

A. INTERMEDIARY W-0316

41. Intermediary W-0316 acted as an intermediary in connection with two trial witnesses,⁹⁸ though one witness (DRC-OTP-WWWW-0015 (W-0015)) recanted his earlier statements and was treated as hostile by the Prosecution. The Defence assertion is that W-0316 supplanted the role and function of the investigators of the OTP in the conduct of the investigation, procured false evidence for trial, and that the OTP knew that he was unreliable and untrustworthy.
42. First, the assertion (para. 30) that W-0316 had a “decisive” role is incorrect. For example, W-0583 testified that W-0316 was used to “localise militia members, in particular UPC members”.⁹⁹ W-0316 was able to access specific areas and villages and locate mass graves, but he did so pursuant to direction and information from the OTP¹⁰⁰ and not of his own volition. W-0583 stated that W-0316’s primary role was to provide security information and details related to “militia-men”.¹⁰¹
43. Indeed, the evidence the Defence cites does not support its position that W-0316 played an instrumental role. For instance, the Defence refers to exhibits EVD-D01-00411, EVD-D01-00355, EVD-D01-00356,

⁹⁸ W-0015 and W-0038.

⁹⁹ T.334, p.57, lines 21-23.

¹⁰⁰ T.334, p.18, lines 4-23. See also evidence of W-0316 at T.327, p.33, lines 1-4.

¹⁰¹ EVD-OTP-00629, para. 33.

EVD-D01-00308, EVD-D01-00364 and EVD-D01-00365 as a basis for the claim that W-0316 performed “analyses, identified, contacted and located witnesses”.¹⁰² On the contrary, the exhibits demonstrate that W-0316 performed tasks of a logistical nature, arranging for witness travel and accommodation. EVD-D01-00364 for example is a receipt that W-0316 submitted to the Office for reimbursement of travel expenses incurred in order to assist witnesses in security matters.¹⁰³ The Defence also asserts that W-0316 “obtained identification” by referring to exhibits EVD-D01-00682 and EVD-D01-00382. These exhibits demonstrate that W-0316 assisted the Office in obtaining travel documents (passport and laissez-passer) so that witnesses could travel, clearly a support function and hardly an analysis or instrumental contribution to the direction of the case.

44. W-0316 also introduced and identified individuals to the OTP whom the OTP had not known of beforehand, which W-0582 testified was part of W-0316’s work.¹⁰⁴ From this, the Defence summarily assumes (para. 31) that W-0316 was “necessarily informed of the objectives of the investigation” and that he had access to confidential information. There is no evidence to support that conclusion and indeed the evidence refutes it: for example, W-0038, one of the persons introduced by W-0316, testified unequivocally that he was instructed at the outset by the OTP investigator not to discuss his interview with W-0316.¹⁰⁵ W-

¹⁰² No evidence is referred to as a basis for the assertion that W-0316 was ‘performing analyses’.

¹⁰³ T.331, p.58, lines 13-22.

¹⁰⁴ Rule68Deposition, 17/11/2010, p.63, lines 8-12. See also p.62, lines 16-23, where W-0582 intimates that the main function of W-0316 was to assist with identifying and locating witnesses already known to the OTP.

¹⁰⁵ T.336, p.59, line 13 to p.60, line 6.

0583, the investigator who primarily dealt with W-0316,¹⁰⁶ testified that W-0316 was “never present” during interviews with potential witnesses.¹⁰⁷

45. Nor is there evidence sufficient to establish, even on the balance of probabilities, that false evidence was offered at trial at his instigation, much less that the Prosecution knew or should have known that he was corrupting the case.
46. The Defence assertions that W-0316 induced witnesses to lie about material facts is based on evidence primarily from DW-0016 and W-0015, who are themselves self-confessed liars. Their evidence is suspect and contradicted by W-0316, whose testimony is corroborated by W-0038, W-0583 and W-0582. Under oath, and in stark terms, he refuted the direct allegations made against him by DW-0016 and W-0015.

Reliability of W-0316's evidence regarding the allegations of evidence falsification

47. The Defence (footnote. 55) makes much of the fact that in an October 2009 interview W-0316 denied knowing DW-0016 and W-0015, whereas in his testimony in November 2010 he admitted that he knew those persons. This, the Defence suggests, is proof that the witness is not credible. W-0316 explained that during the October 2009 interview he was not given a photograph of DW-0016 and thus could not affirm with certainty whether he knew him. After reading DW-0016's evidence, which clearly identified DW-0016, W-0316 had more

¹⁰⁶ T.334, p.19, lines 1-6.

¹⁰⁷ EVD-OTP-00629, para. 39 and T.334, p.30, lines 14-15.

information about him and was able to recall and identify him.¹⁰⁸ Prior to his testimony on 8 November 2010, W-0316 was interviewed by the Prosecution.¹⁰⁹ Before this interview he was able to review in detail the allegations DW-0016 and W-0015 made during their testimony.¹¹⁰ Since DW-0016 and W-0015 only testified in March 2010, W-0316 had been unaware of their specific allegations when he was interviewed in October 2009.¹¹¹ In his November 2010 interview, and in Court, W-0316 explained why he denied knowing DW-0016 or W-0015 during the October 2009 interview.¹¹²

48. The Defence's assessment of W-0316's evidence also ignores the witness's direct responses to the allegations against him. W-0316 calmly refuted the allegations made against him by DW-0016 and expressed "shock"¹¹³ at DW-0016's "many lies and false accusations".¹¹⁴ He denied that there was ever a plan for DW-0016 to lie because W-0316 needed someone to say something about Thomas Lubanga.¹¹⁵ Finally, he denied that he deliberately identified witnesses for financial

¹⁰⁸ T.328, p.30, line 15 to p.31, line 2.

¹⁰⁹ See T.328, p.25, line 24 to p.26, line 1.

¹¹⁰ T.328, p.26, lines 4-6 and T.330, p. 14, lines 6-7.

¹¹¹ T.333, p.27, lines 12-21.

¹¹² T.328, p.30, line 15 to p.31, line 2: the witness essentially explained that during the October 2009 interview he was unable to see a photograph of DW-0016 and thus could not affirm with certainty whether he knew him. Furthermore, W-0316 explains that DW-0016's evidence clearly identified DW-0016 and after reading it, W-0316 was able to identify him, hence the apparent change in his evidence; T.329, pp.17-19.

¹¹³ T.328, p.26, line 13.

¹¹⁴ T.328, p.26, lines 13-14. He continued, saying that he was "shocked at this false accusation which has been cobbled together to cast aspersions on my character, and I repeat that this allegation, in my humble opinion, does not emanate from [REDACTED] [W-0015] or from [REDACTED] [W-0016]"; T.330, p.14, lines 9-11.

¹¹⁵ T.328, p.33, line 25.

gain or that he asked anyone to fabricate testimony before the Court or fabricate a story for the Prosecution.¹¹⁶

49. The Defence also ignores that W-0316's evidence is corroborated by W-0583, the investigator who primarily dealt with W-0316.¹¹⁷ When asked if he ever suspected W-0316 of preparing witnesses to lie, he said that "he had no information that led him to believe [...] that he would undertake such things".¹¹⁸ While W-0583 testified that he did not "fully trust him",¹¹⁹ this lack of complete trust did not concern falsification of witness testimony.¹²⁰

50. Similarly, W-0582 stated that he had no knowledge while he worked for the OTP of any intermediary asking a witness to lie.¹²¹

DW-0016's allegations against W-0316

51. It is important to remind the Chamber that the Prosecution did not offer the evidence of DW-0016 at trial. His allegations are not designed to show that his testimony against the accused was unreliable, since he did not provide testimony. Instead, he is offered to support the claim that two other witnesses introduced to the OTP by the intermediary (one of whom also did not inculcate the accused at trial) were prepared to give false evidence.

¹¹⁶ T.333, p.27, line 22 to p. 28, line 5.

¹¹⁷ EVD-OTP-00629, para. 30, and T.334, p.19, lines 2-6.

¹¹⁸ T.334, p.29, lines 22-25. See also T.334, p.30, lines 1-3.

¹¹⁹ EVD-OTP-00629, para. 37.

¹²⁰ T.334, p.29, lines 17-25.

¹²¹ "[N]o, I've never heard anyone speak about anything in that sense and, if you're referring to [W-0316] or [W-0143], [W-0154] or to all the intermediaries that I knew, the quality of their work was linked to the fact that they behaved certainly [...] in a sufficiently correct way for the information we could obtain via them was valid"; Rule68Deposition, 17/11/2010, p.17, line 22 to p. 18, line 2.

52. Additionally, these allegations are yet another example of “oath against oath”. As noted previously, the testimony concerned events that occurred many years ago, from 2005; inconsistencies or failures of memory, particularly about less significant details, are entirely to be expected.¹²² On the major points, however, this is at best a credibility contest between witnesses, where the circumstances and other corroboration must be taken into account. By those tests, the allegations do not establish that W-0316 solicited DW-0016 to provide false incriminating evidence against the accused.
53. DW-0016 insisted that while he was in Kampala for the interview with the OTP in September 2005, he was not personally handed money in order to purchase [REDACTED] products (the cover story for his presence in Kampala),¹²³ but rather, that the money was given to W-0316;¹²⁴ this presumably is key to establishing the intermediary’s corruption. In cross-examination, however, DW-0016 was shown a video in which he received more than \$200 in cash from W-0583.¹²⁵
54. DW-0016 testified that after being coached by W-0316, he lied to investigators during the five day interview.¹²⁶ W-0316 denied this. The Prosecution submits that under the circumstances here, DW-0016’s version is wholly improbable. The interview lasted approximately 40 hours, eight hours a day,¹²⁷ and produced approximately 1,000 pages of

¹²² For example, the inconsistency in the evidence of W-0583 and W-0316 as to how the OTP first met DW-0016, or between W-0316’s testimony about his knowledge of threats to DW-0016 and his contact with him after the Kampala interview and the OTP’s internal records.

¹²³ T.257, pp. 38-39.

¹²⁴ T.257, p.20, lines 15-18 and T.258, p.22, lines 3-15.

¹²⁵ See EVD-OTP-00532; T.258, p.29, lines 1-7.

¹²⁶ T.258, p.10, lines 7-11.

¹²⁷ T.258, p.10, lines 19-23.

transcripts.¹²⁸ W-0316 was not present during any of the interview.¹²⁹ With no advance notice of the questions or the topics that were to be asked,¹³⁰ DW-0016 answered questions spontaneously¹³¹ and with specific and accurate details.¹³² It is inconceivable that DW-0016's answers during the interview were false and could have been pre-planned with, say, W-0316.¹³³ This becomes all the more unlikely when one considers that DW-0016's corroborative evidence that he was coached consists of a notebook containing what he said were notes that W-0316 wrote to assist him to lie in the interview; one need only compare the detailed questions and answers during the 40 hours of interview with these "notes"¹³⁴ – which are no more than 10 words, jotted down on four pieces of paper – to realise that the handful of words in the notebook could not have helped him to lie at length and in detail in his 1,000 page statement.

55. DW-0016's testimony that he and W-0316 planned his lies over several months is also questionable. He testified that he met with W-0316 in March or April 2005¹³⁵ when W-0316 introduced himself as working with the ICC and needing someone to tell lies about Thomas Lubanga.

¹²⁸ See EVD-OTP-00533 through to EVD-OTP-00552.

¹²⁹ T.256, p.28, lines 17-19.

¹³⁰ T.258, p.11, lines 2-9.

¹³¹ T.258, p.11, lines 2-18.

¹³² For example, on specific names of commanders and modes of punishment applied at the Mandro camp (soldiers being tied to a tree and shot); T.258, p.16-17.

¹³³ This is especially so given W-0583 testified that he did not discuss the details of the interview with W-0316; see T.335, p.75, lines 1-6. This evidence is corroborated by W-0316 at T.328, p.41, lines 6-25.

¹³⁴ EVD-D01-00387 to EVD-D01-00390. See also evidence of W-0583 at T.335, p.74, lines 6-14, where he says that the notes were not detailed and that he saw nothing wrong in DW-0016 consulting the notes.

¹³⁵ T.256, p.9, lines 14-15.

They then planned the lies.¹³⁶ In cross-examination DW-0016 changed this account, saying that W-0316 never told him that he was working with the ICC¹³⁷ and that at that first meeting with investigators¹³⁸ he did not know he was meeting officials of the ICC. In short, the Chamber is asked to accept that W-0316 prepped DW-0016 to provide false testimony and that DW-0016 agreed, but that when a meeting was arranged and the moment had come for the plan to be put into place, he did not realise he was meeting with an ICC investigator.¹³⁹

56. The Defence also cites a number of answers in DW-0016's 2005 interview that it claims proves that he lied in that interview. It claims, for example, that DW-0016's inability to say what the 'UPC' acronym stood for shows that he was not in the UPC and was coached. But in the relevant exchange, DW-0016 appeared to interpret the question to be seeking the purpose, goal and ideals of the UPC; accordingly, his answer ("a party which is looking for peace in Congo")¹⁴⁰ was a fitting response, not proof of ignorance. Similarly, his inability to name his brigade commander does not confirm that he was prepped to lie, since a few pages later he provided the names of chiefs in his section,¹⁴¹ names incidentally that were not among the 10 words of alleged coaching notes. The Defence is additionally incorrect in arguing that ranks other than "commander" did not exist in the FPLC during 2002 to 2003, and therefore that DW-0016's statement regarding other ranks

¹³⁶ T.256, p.11, lines 6-13.

¹³⁷ T.258, p.2, line 14 to p.3, line 1.

¹³⁸ T.258, p.2, lines 6-13.

¹³⁹ This evidence is also contradicted by the evidence of W-0583, who states that he identified himself as an OTP investigator with the ICC; T. 334, p.32, lines 20-22.

¹⁴⁰ EVD-OTP-00535, p.1407, lines 50-57.

¹⁴¹ EVD-OTP-00545, at pages 1796-1798.

was false. For instance, EVD-OTP-00454, tendered through DRC-OTP-WWWW-0055 (W-0055),¹⁴² details the numerous UPC/FPLC hierarchical positions of command that existed at the relevant time.¹⁴³ Though the Defence claims that W-0055 corroborates the absence of ranks, in fact W-0055 clarified that there were no ranks within the *recruits* of the UPC.¹⁴⁴ A review of the UPC log book shows ranks and positions within the FPLC did exist at the relevant time.¹⁴⁵

57. In addition to claiming that DW-0016 lied at the intermediary's behest during the five day interview, the Defence alleges (para. 41) that W-0316 induced DW-0016 to fabricate a threat so that he could receive protective measure such as relocation. This too is unfounded and inaccurate. In fact, no mention of relocation or protection is contained in the excerpt cited by the Defence (footnote 39).¹⁴⁶ A review of the evidence cited by the Defence¹⁴⁷ reveals that the issue of threats and relocation was raised by DW-0016, after he had been visited by individuals enquiring about his interview with the OTP. He then began to worry about the risk.¹⁴⁸ In fact, DW-0016 treats the threat as genuine and not fabricated. There is no evidence that this incident was made up

¹⁴² The Accused's Chief of Intelligence (G2 main staff); T.174, p.49, lines 10-17.

¹⁴³ T.175, p.37.

¹⁴⁴ T.176, p.42, lines 1-4.

¹⁴⁵ EVD-OTP-00409.

¹⁴⁶ It is true that (at T.258, p.42, line 14 to p. 43, line 2) DW-0016 testified that W-0316 asked him to call a number he had been given if he was threatened and that for protection reasons they might move DW-0016, but this evidence was after DW-0016 said he received threats because of his meetings with the ICC; the topic was thus broached by DW-0016, not by W-0316. It is noted that DW-0016 said he was threatened because he had lied to the ICC (T.258, p.46, lines 15-23) – a point the Prosecution disputes.

¹⁴⁷ T.257, p.27, line 9 to p.28, line 10.

¹⁴⁸ DW-0016 clearly states that upon returning home to Bunia he was told of certain persons visiting his house accusing him of lying about Thomas Lubanga. DW-0016 then said he went to W-0316's house and expressed that he was "at risk because of these problems"; T.257, p.27, line 20.

by W-0316. It is more likely to have actually occurred; moreover, the post-interview threats and visit would be a key reason why DW-0016 would recant, claim that he lied, and attribute his initial story to W-0316.¹⁴⁹

58. It is against this backdrop that DW-0016's accusation that a threat letter directed at him was forged by W-0316, in his presence (para. 42), need be assessed. Though DW-0016 stated that the letter was written by W-0316,¹⁵⁰ W-0316 did not recognise the handwriting, the paper, or the letter itself¹⁵¹ and was adamant that he did not write it at his house.¹⁵² DW-0016's additional evidence, that the letter bore W-0316's fingerprint, is difficult to believe since W-0316 was intelligent, professional,¹⁵³ had experience in [REDACTED], and worked with the [REDACTED].¹⁵⁴ Surely he would know not to leave his fingerprint on a document that he would not want to be traced back to him. Indeed, W-0316 insisted that the document be sent for forensic analysis.¹⁵⁵

¹⁴⁹ DW-0016 testified that [REDACTED] came to his house and told people he had lied (T.258, p.42, lines 3-6). DW-0016 added that he argued and fought (T.258, p.47, lines 14-15) with friends who were UPC soldiers (T.258, p.47, line 17) who asked if he had testified about Thomas Lubanga (T.258, p.46, lines 16-20). DW-0016 further testified that at one point a merchant came to his house enquiring about his discussions with the ICC, which made him afraid (T.258, pp.46-47).

¹⁵⁰ T.257, p.28, lines 5-8.

¹⁵¹ T.329, p.13, lines 14-18, reference to EVD-D01-00120.

¹⁵² T.328, p.26, line 12 to p.27, line 24; T.329, p.14, lines 7-16: W-0316 said there was no guava tree and no lawn at his house, contrary to the DW-0016's evidence at T.257, p.30, lines 10-11.

¹⁵³ See evidence of W-0583 regarding W-0316 at T.334, p.40, lines 1-5.

¹⁵⁴ EVD-OTP-00597.

¹⁵⁵ T.328, p.27, lines 8-12. In this regard, the Defence alleges (para. 42) that the Prosecution has not tendered the original of the threat letter. As submitted to the Court, the Prosecution is unable to locate the original but is continuing to expend all efforts to do so. This does not demonstrate an intention not to tender the document; on the contrary, the Prosecution is ready to do so once and if it can locate the original initially received by DW-0016, if indeed it was ever in the Prosecution's possession.

59. Finally, it is telling that in spite of numerous opportunities to do so (in Kampala and Bunia in 2005¹⁵⁶ and in Kinshasa in 2007¹⁵⁷) and despite making telephone calls to the OTP regarding alleged protection concerns,¹⁵⁸ DW-0016 only admitted to lying during the Kampala interview when he met with the Defence.¹⁵⁹
60. In sum, the allegation that in 2005 DW-0016 gave a wholly false 1,000 page statement to investigators about the Accused and the UPC, crafted by W-0316, and thereafter continued to provide false information to the OTP at W-0316's urging, is uncorroborated, conflicts with other evidence, and as a matter of common sense is implausible. It cannot support a conclusion that the OTP set out to suborn perjury at trial.

W-0015

61. W-0015 gave three statements to the OTP,¹⁶⁰ all of which were referred to in some form or another during his testimony. The first two predated his initial testimony in June 2009. Then, when called as a Prosecution witness, he alleged at the start of his testimony that W-0316 coached him to falsely implicate the accused.¹⁶¹ Accordingly, like the evidence of DW-0016, his testimony is not part of the Prosecution's case against the accused.

¹⁵⁶ T.258, p.10, lines 7-11.

¹⁵⁷ T.258, p.50, line 23 to p.51, line 6.

¹⁵⁸ T.258, pp.41, line 18 to p.43, line 2.

¹⁵⁹ T.258, p.50, lines 3-8.

¹⁶⁰ EVD-OTP-00319, EVD-OTP-00320 and EVD-OTP-00553.

¹⁶¹ W-0015 was subsequently declared hostile to the Prosecution: see ICC-01/04-01/06-2201.

62. Again, inconsistencies or failures of recollection must be expected, particularly regarding events that occurred years before and that may have been of little importance at the time. For example, regarding how the OTP first met W-0015 (para. 61), when asked if he *participated or assisted* in the meeting between W-0015 and the OTP in Kampala 2005, W-0316 said “I don’t recall. I don’t think so, I don’t recall.”¹⁶² W-0316 also explained that in October 2009 he did not confirm that he knew W-0015 during the October 2009 interview because the photograph shown to him was “fuzzy”.¹⁶³ On the key issues, however, the “oath against oath” contest between W-0015 and W-0316 (who denied the allegations and emphasised that W-0015 *was* in the UPC,¹⁶⁴ a point the Defence ignores), does not establish that W-0316 induced false evidence against the accused, much less that he did so with the knowledge of the Prosecution.
63. At the outset, it is noteworthy that the Defence recites a series of allegations (para. 56) W-0015 made against W-0316.¹⁶⁵ The Defence did not ask W-0316 and give him the chance to comment on most of them; as to those, the Defence should not now rely on this evidence to support the inferences being drawn.¹⁶⁶

¹⁶² T.332, p.49, line 20. This is not an outright denial as the Defence suggests. Additionally, in re-examination, W-0316 clarified that he might have met W-0015 in Kampala, though he was clear that he did not *organise* the meeting -which is different than *assisting or participating*: T.333, p.26.

¹⁶³ T.329, p.17, line 11 to p.19, line 19.

¹⁶⁴ T.330, p.14, lines 9-11 and T.329, p.20, lines 7-8.

¹⁶⁵ For instance, that W-0015 was threatened by W-0316, and that W-0015 was told by W-0316 to say that he was visually impaired and could not read.

¹⁶⁶ T.337, p.47, line 19 to p.48, line 5. The Prosecution had intended to provide W-0316 with an opportunity to comment on these allegations in the course of its examination in chief but did not do so due to time constraints and the Chamber’s guidance; T.329, p.24 to p. 25, line 16. The Prosecution notes in particular the Chamber’s comments at T.329, p.25, lines 5-8 as regards the Defence questioning. The Prosecution submits that this also applies to the third point in paragraph 58 of the

64. On the comparative credibility issues, there are substantial reasons to suspect the truthfulness of W-0015. For example, the lateness of his recantation: as with DW-0016, W-0015 admitted under oath he had never told the OTP this new story (i.e. that he had given inaccurate statements to the OTP and had been coached to do so by W-0316), despite having had endless opportunities to do so.¹⁶⁷ W-0015 also obfuscated when asked to provide evidence on identity (he refused, for example, to provide a photograph to Prosecution investigators so that it could be shown to his grandparents).¹⁶⁸ Further and significantly, the close [REDACTED] relationship between W-0015's [REDACTED] and [REDACTED], and pressure from his family, provide a motive for this new account four years after his first interview with the Prosecution.¹⁶⁹ He also said that he was threatened by four men, including a UPC soldier called '[REDACTED]', an incident he communicated to the Prosecution at the time.¹⁷⁰ Notably, during his evidence, W-0015 confirmed that some of the information related to his involvement with the UPC was indeed true.¹⁷¹
65. Further, the chimerical character of his allegations concerning the existence of a "well-established, well-rooted network" of persons effectively working in unison to "recruit people who were not involved

Application (involving W-0316 accompanying W-0015 to MONUC). This was not put to W-0316 in questioning and accordingly ought to be treated with caution.

¹⁶⁷ T.264, p.49, line 13 to p.51, line 24.

¹⁶⁸ T.264, p.52, line 13 to p.54, line 22.

¹⁶⁹ T.264, p.54, line 23 to p.57, line 13. In this regard, W-0015 testified that he came under pressure from his own family – [REDACTED] – because of the "gravity of the situation"; T.264, p.57, lines 6-13 (though, to be sure, he said they pressured him because, allegedly, he was lying about being in the army).

¹⁷⁰ T.264, p.34, line 23 to p.35, line 9.

¹⁷¹ T.264, pp. 16-18, 20.

in the conflict”,¹⁷² undermine his reliability. Not only could W-0015 not substantiate his allegation that such a network existed,¹⁷³ he also implausibly suggested that “UPC ministers” might have been part of it.¹⁷⁴

66. In addition, W-0583, an experienced investigator, explained that he was “very surprised” by W-0015’s allegations regarding his identity and not being in the UPC, because: (i) when he interviewed W-0015 he was impressed with the detail¹⁷⁵ that W-0015 provided, from which he determined that W-0015 was credible; and (ii) W-0015’s identity ([REDACTED]) was corroborated by another militia leader whom W-0583 eventually contacted.¹⁷⁶ W-0583 pointed out that the interview occurred over several days; it is “difficult to imagine that you can learn a story and memorise it and repeat in the same way over several days”.¹⁷⁷ Further, the intermediary was not present during W-0015’s interview.¹⁷⁸

67. Finally, the Defence argues (para. 57) that portions of the two pre-June 2009 statements of W-0015 were “artificial and mendacious”. Leaving aside the fact that W-0583 provided reasonable explanations for some of the questions being raised,¹⁷⁹ the Defence is impermissibly using the statements for the truth of their contents, contrary to the Chamber’s

¹⁷² T.265, p.14, line 21 to p.17, line 2.

¹⁷³ T.265, p.17, lines 17-18: “I am not in a position to give you the details; I have no idea; I am not in a position to give you the exact number of NGOs”. See also lines 4-8.

¹⁷⁴ T.265, p.16, line 24.

¹⁷⁵ See for instance T.264, pp.16-17, 20.

¹⁷⁶ T.334, p.37, lines 7-20, and p.38, lines 11-13.

¹⁷⁷ T.334, p.39, lines 8-13.

¹⁷⁸ T.264, p.25, lines 5-16.

¹⁷⁹ T.336, p.14, lines 2-9 in relation to the allegation that W-0015 was unable to provide details on the structure of the UPC.

guidance.¹⁸⁰ Again, W-0015 testified in Court under oath. The Defence could and should have elicited the evidence from W-0015 while he was on the stand, but did not.¹⁸¹ As the Chamber explained, the failure to do so weakens substantially the claim that W-0015 deliberately lied, much less that he was coached to do so.

68. Finally, the fact that the investigator had strong reason to believe the witness's evidence during the protracted interviews, that he corroborated portions of that evidence, and that the intermediary was not present during the interview and there were no indicia of coaching, demonstrates that even if W-0316 had prepped false evidence, the OTP did not know or have reason to know of it.

W-0038

69. W-0316 also introduced W-0038 to the OTP. W-0038 steadfastly rejected any allegation that he lied or that W-0316 induced him to lie. He reiterated that all the information he provided in court and during the interviews was true, accurate and unembellished.¹⁸² He made it

¹⁸⁰ The Chamber made clear that the statements were not to be used to prove the truth of their contents. See T.264, p.60, lines 15-22: "we would need to exercise the same care that we've indicated in relation to other statements in a broadly similar situation, that we would only be looking at them for the appropriate purposes, and namely, I would have thought, with this witness for, as it were, the coherence and the evolution of his account, *rather than necessarily the truth or otherwise of the facts which are asserted within the statement*" (emphasis added). To be sure, the Defence seeks to use them not to prove truth, but to prove falsity, but that is a distinction without a difference, since the Chamber intended that the statements are not to be used as substantive evidence of any sort.

¹⁸¹ In this regard, the Chamber's directed: "if during the course of submissions to come, robust suggestions are to be made, either to the detriment of 316 or to the detriment of this witness, which, in fairness, should have been put to this witness, *you have a duty to do so whilst he is before the court*, and that if you have failed to do so, the fact that the witness has not had an opportunity of dealing with the robust suggestion will play a part in our consideration of whether or not the point that you are seeking to make is a good one." T.337, p.47, line 19 to p.48, line 1 (emphasis added).

¹⁸² T.336, p.78, lines 13-17. See also T.336, p.79, lines 22-24 (in relation to the September 2009 statement): "I only talked about what I had done and what I knew about. I did not add anything or hold anything back. And I answered the questions that were put to me. I just knew things that I knew about".

clear that at no time did he discuss the substance of his interviews with W-0316.¹⁸³ He made no allegations of wrongdoing by W-0316.¹⁸⁴

70. The Defence theory that, because W-0038 declined to accuse W-0316 of wrongdoing, he has no bearing on the evidence of W-0015 and DW-0016, is curious. W-0038 was re-called specifically to respond to allegations that the intermediary procured false evidence. His testimony is highly relevant to that point.
71. At the same time, and despite W-0038's own evidence and the failure of the Defence to put these specific allegations to the witness himself,¹⁸⁵ the Defence also proffers a wildly speculative theory (paras. 66 to 68) that W-0316 *could have* persuaded him to lie. The theory is based on an inference drawn from unrelated and unremarkable facts: W-0038 prepared notes; he and W-0316 met on several occasions; and W-0316 asked him verification questions regarding his role in the army and his knowledge of high commanders of the UPC¹⁸⁶ before the witness was screened and interviewed. There is nothing in these facts to support the ultimate inference. In line with the Chamber's admonition that accusations should be put to witnesses (not raised in an after-the-fact ambush), the Prosecution notes that the Defence chose not to ask W-0316 if he persuaded W-0038 to lie: its failure disentitles it to make that inferential argument now.

¹⁸³ See T.336, p.53, line 18 to p.54, line 9; T.336, p.56, line 25 to p.57, line 4; T.336, p.72, line 24 to p.73, line 6 and T.336, p.74, lines 2-21.

¹⁸⁴ T.337, p.48, line 18 to p.50, line 22.

¹⁸⁵ T.337, pp.26-29: for example, the Defence did not put to W-0038 the assertion that W-0316 had a role in preparing the notes that the witness used during the interview.

¹⁸⁶ T.336, p.45, line 23 to p.46, line 6.

The evidence does not demonstrate subornation by 316 or that the OTP knew.

72. As detailed above, the evidence does not reveal subornation or corruption of evidence at trial by W-0316. It follows therefore that the OTP could not have had knowledge of any such subornation.
73. Even if the allegations of subornation were *prima facie* accepted, the Defence has identified no evidence showing that the OTP *knew* W-0316 asked witnesses to lie and/or fabricate evidence. The evidence it points to includes two investigator's notes from January and February 2006 related to an incident regarding three potential FNI child soldiers.¹⁸⁷ Contrary to what the Defence argues, these notes do not reveal that W-0316 lied. There was merely an uncertain assessment regarding W-0316's actions in connection with an alleged breach of security, not substantive evidence, and was qualified by the following: "according to [REDACTED] *impression* of the situation, [REDACTED] was coached to relate this story" (emphasis added).¹⁸⁸ The "impression" was the opinion of another intermediary (W-0143), not the OTP, and is not a definitive conclusion. In his testimony W-0582 explained that the incident occurred in large part because investigators other than W-0583 had tasked and been in contact with W-0316.¹⁸⁹ Critically, he also said: "When you have information sources or sources in which you trust and with whom you've been working, you can't suddenly, on the basis

¹⁸⁷ EVD-D01-00383 and EVD-D01-00384.

¹⁸⁸ EVD-D01-00384, page 1, para. 6.

¹⁸⁹ Rule68Deposition, 17/11/2010, pp. 70-71. W-0582 testified that the full picture had not been obtained; they "didn't have an accurate idea of what happened"; and "it was decided that only [W-0583] should manage [W-0316], and only the other female investigators should manage [W-0143], and the error of having mixed everybody up was not going to be repeated. So this was what was decided, without saying if one of the two had lied"; Rule68Deposition, 17/11/2010, p.71, lines 20-23.

of one incident, withdraw their support- go without their support”.¹⁹⁰ Nothing in these reports gave the OTP reason to know, or even suspect, that W-0316 induced witnesses to lie.

74. Concerning the evidence of DRC-OTP-WWWW-0028 (W-0028) from the *Katanga & Ngudjolo* case – an allegation first made on 20-25 October 2010 about an intermediary who introduced no witnesses in *this* case – the Prosecution repeats the submissions made in ICC-01/04-01/06-2670-Conf. This evidence is inadmissible, irrelevant, and ought not to be considered.
75. Similarly, two emails from May 2006, on which W-0583 gave evidence, do not show that the OTP *knew* that W-0316 induced witnesses to lie. Far from it. In respect of EVD-D01-00391, W-0583 explained that “justification of payments” referred to the OTP’s need to determine how to reimburse W-0316 since he was no longer on contract.¹⁹¹ He also explained the sentence in the email referring to the information being “bizarre” and needing to be “cross-checked”: it did not “mean the information was bad or not. It just means they needed to be cross-checked”.¹⁹²
76. None of the other documents the Defence refers (para. 73) to support the allegation that the OTP knew that W-0316 induced witnesses to lie and/or fabricate evidence against the Accused. Firstly, these principally deal with matters occurring in 2008, when W-0316 was no longer employed by the OTP and long after his involvement with witnesses

¹⁹⁰ Rule68Deposition, 17/11/2010, p.71, line 23 to p. 72, line 1. See also p.73, lines 8-17 for further explanation from W-0582.

¹⁹¹ T.335, p.10, lines 1-14.

¹⁹² T.335, p.10, lines 15-20.

had ceased. Secondly, the documents reveal questions concerning W-0316's personal circumstances, specifically financial and security related matters that cannot be reasonably argued as providing a basis for suspecting that he may have previously colluded with witnesses to procure false evidence. There is nothing unusual in the fact that information related to his security threats could not be verified, hence he was not referred to the VWU. Scores of witnesses are not referred to the VWU for various reasons, but this does not mean that their evidence is presumptively unreliable.

77. The Prosecution also rejects the Defence's argument that it failed in its duty to inform the Chamber of its concerns about W-0316. To be clear, the Prosecution did not have reason to believe that witnesses introduced by W-0316 had been induced to lie. After W-0015 made the allegations in court, the Prosecution disclosed whatever material it possessed suggesting knowledge of improper behaviour by W-0316. Finally, in ensuring that W-0316 testified, the Prosecution clearly did what it could to assist the Chamber in determining the truth on this issue.

78. W-0316's employment with the [REDACTED] and direct contact with the DRC government is no indicia that he was likely to cause serious prejudice to the integrity of the process.¹⁹³ The Defence has not furnished or referred to any evidence that supports this inference.

Contrary to the Defence allegation (para.71), W-0582 testified that he

¹⁹³ On the contrary, W-0582 testified that he didn't think it possible that W-0316 would have been able to do so (Rule68Deposition, 17/11/2010, p.67, lines 14-20). W-0583 referred to W-0316's association with the [REDACTED] as advantageous, in that W-0316 was familiar with [REDACTED] (EVD-OTP-00629 and T.334, p.18, lines 1-3). Importantly, W-0316 was not associated with any of the armed groups involved in the region under investigation at the time (EVD-OTP-00629, para. 31).

believed there was no compromise of the Court's mandate on account of W-0316's work for the [REDACTED].¹⁹⁴

79. And finally, as set out above, W-0015 and DW-0016 were interviewed at length, outside the intermediary's presence, by an experienced investigator who verified their detailed information where he could, assessed their credibility, and had no reason to disbelieve or doubt their statements. In sum, the OTP had no cause to suspect, let alone know, that W-0316 had induced witnesses to lie.

B. INTERMEDIARY W-0321

80. In 2004, W-0321 began to work full-time in the Ituri region with an NGO that worked with children, including to demobilise child soldiers.¹⁹⁵ Starting in 2007, he assisted the OTP as an intermediary with witnesses DRC-OTP-WWWW-0517 (W-0157), W-0213, DRC-OTP-WWWW-0294 (W-0294), W-0297, and DRC-OTP-WWWW-0298 (W-0298). Like the other intermediaries, W-0321 did not supplant the role and function of the investigators of the OTP and was not used to conduct investigations. W-0321 himself testified as to his very restricted role vis-à-vis witnesses and potential witnesses.¹⁹⁶
81. Indeed, the tasks the Defence ascribed to W-0321 (para. 76) – locating witnesses, providing travel expenses or mobile phones to witnesses or potential witnesses, receiving specific instructions from OTP investigators, relaying information from witnesses back to the OTP and setting up meetings between OTP investigators and witnesses or

¹⁹⁴ Rule68Deposition, 17/11/2010, p.66, line 5.

¹⁹⁵ T.308, p.9, line 20 and T.310, p.75, lines 21-25.

¹⁹⁶ T.308, p.47, lines 15-18. See also T.308, p.48, line 25 to p.49, line 3.

potential witnesses – are precisely the support tasks that intermediaries were called upon to perform.

82. Testifying about his initial contact with the OTP, W-0321 confirmed that the OTP contacted him regarding W-0157 because he knew W-0157's address and could assist in transmitting travel expenses to W-0157 and his mother.¹⁹⁷ But the investigator did not tell W-0321 what she intended to speak about with W-0157 and his mother.¹⁹⁸
83. W-0321 also explained the limited instructions that W-0581 gave him when he was asked to facilitate a meeting with several children in November 2007.¹⁹⁹ OTP investigators thus ensured that intermediaries were not privy to discussions between investigators and witnesses. In response to questions from the Defence, W-0321 reiterated: "They did not give me any information and I did not ask them any questions about that. [...] When you work with children, the ethics state that you can never ask the children questions about the substance of the discussions that they have had. I could never have done that."²⁰⁰
84. There is also no evidentiary support for the allegation (para. 81) that W-0321 encouraged the Prosecution witnesses he introduced to lie about being child soldiers in the UPC. Apart from DW-0004, the children themselves do not say that, though W-0297 and W-0298 made allegations that they subsequently recanted.

¹⁹⁷ T.308, p.47, lines 5-9.

¹⁹⁸ W-0321 said, "she did not tell me what the purpose of their discussions were"; T.308, p.47, lines 17-18. See also T.308, p.48, line 25 to p.49, line 3: "Q. Did [investigator] ... explain to you what you had to tell [REDACTED] and his mother about their travel to [REDACTED]? A. No, she told me nothing about that".

¹⁹⁹ T.308, p.72, lines 13-18 and T.309, p.21, lines 15-20. See also W-0581 on this at T.300, p.27, line 23 to p.28, line 20.

²⁰⁰ T.320, p.42, lines 10-14.

85. Finally, there is no support for the Defence supposition that the OTP knew or should have known that W-0321 corrupted evidence.

Alleged acts of subornation on the part of W-0321 and evidenced by witnesses W-0297, W-0298, DW-0003 and DW-0004.

W-0297

86. W-0297 explained at length his abduction by the UPC, the camps where he received military training and his involvement generally with the UPC.²⁰¹ Notably, he testified in detail about a particular incident at the UPC camp in Mandro when he killed a [REDACTED] soldier named '[REDACTED]' and [REDACTED] and then sent to Barriere;²⁰² the Defence does not challenge the witness' account in this regard.
87. To suggest that W-0321 induced W-0297 to fabricate his evidence, the Defence relies heavily on a statement that W-0297 provided to the Defence in December 2009. The Defence notes that there are major inconsistencies between that statement and his subsequent testimony before the Chamber. However, there are also significant and critical consistencies – in the Defence interview and at trial he insisted that he had been recruited in and served as a child soldier with the UPC.²⁰³ These facts are, indeed, the heart of the allegation against the Accused.

²⁰¹ T.285, pp.44-50, T.286, p.4, lines 21-24 and T.286, p.14, lines 1-2.

²⁰² T.286, p.15, line 3 to p.16, line 6.

²⁰³ See W-0297's evidence on the circumstances of his first enrolment (EVD-D01-00148 at-0080, lines 253-279; and T.285, p.44, lines 2-24; p.50, lines 10-13), and on serving in the UPC (EVD-D01-00150, at page 0063, lines 372-377; see also EVD-D01-00149, at page 0504, lines 63-66), under Bosco's command (EVD-D01-00149, at pages 0507-0508; and T.290, p.32, lines 12-12).

88. Beyond the witness's *consistent* insistence that he was a child soldier, W-0297 also explained the apparent inconsistencies between his statement to the Defence and his in-court testimony, or other alleged misstatements by the witness. The Defence identifies the inconsistencies but is wholly silent on the explanations.

- The account of his abduction into the UPC: he testified that he was forcibly abducted, consistent with earlier statements to the OTP, but in his statement to the Defence he said he was asked – but specifically not by W-0321²⁰⁴ – to embellish that account. He testified that his story of forcible abduction was true, and he told the Defence the contrary out of concern for his safety.²⁰⁵
- Whether W-0321 told the children that they would be rewarded financially if they testified against the accused: in the Defence interview W-0297 stated that, but in court he explained that he suggested that he acted out of financial gain because any other reason would be offensive to persons loyal to the accused.²⁰⁶
- Inconsistencies between his account of his schooling and school records produced by the Defence: W-0297 repeatedly disputed the accuracy of the records,²⁰⁷ and DRC-D01-WWWW-0029

²⁰⁴ T.288, p.24, lines 14-20: “On that day, I was afraid, and that is why I said [W-0321] had asked me to come and tell the Judges that I had been forcibly enlisted into the army. However, [W-0321], *to tell the truth, did not say that.*” Emphasis added.

²⁰⁵ T.288, p.24, lines 18-20 and p.29, lines 1-10 and 17-23.

²⁰⁶ T-288, p. 25 line 17 to p. 26 line 24; T-289, p. 4 line 6 to p. 6 line 14; T-288, p. 27 lines 5-25.

²⁰⁷ See T.289, p.16, line 21 to p.17, line 21. See also p.23, line 24 to p.25, line 7, p.27, line 17 to p.28, line 13 and p.29, line 16 to p.30, line 7.

(DW-0029) stated that the records relating to W-0297 and his brother contained massive errors.²⁰⁸

- Alleged false information regarding whether his mother was deceased: in a complicated explanation, W-0297 fully explained the discrepancies.²⁰⁹

W-0298

89. Contrary to the Defence assertion (para. 102), W-0298 was *not* introduced to the OTP by W-0321 but by Legal Representative Luc Walley. ²¹⁰
90. W-0321 did not encourage or induce W-0298 to lie about his abduction and involvement in the UPC. First, W-0298's father (DRC-OTP-WWWW-0299 (W-0299)) confirmed that his son also served in the UPC.²¹¹ Even DRC-D01-WWWW-0015 (DW-0015) ([REDACTED]), confirmed that W-0298 fled from school in the company of a number of

²⁰⁸ See for instance DW-0029's admission that, in relation to W-0297, the failure of the school record to contain salient information such as a date, or the year of birth is "a really major error", "a serious mistake" and "a serious error": T.296, p.24, lines 10-25.

²⁰⁹ T.285, p.7, line 24 to p.8, line 5. Indeed, DW-0003 confirms that this is in fact his mother's name, and that she does live in [REDACTED] further attesting, in the Prosecution's submission, to the credibility of W-0297 and his testimony before the Chamber: T.239, p.13, lines 10-15. There is also a reference in the record to a screening note prepared by W-0581 that states that the witness' mother was deceased. In fact the screening note referred to is not as inconsistent as the Defence suggests. For instance, it shows that the witness *does* provide the name - [REDACTED], where the witness and his family actually resided before the war broke out, as well as where she was killed. The witness also clarified when questioned by Defence counsel (see T.290, p.17, line 12 to p.18, line 3) that his biological mother was in fact named [REDACTED], and is deceased. He explained that [REDACTED] is his father's second wife and his [REDACTED] whom he also calls mother.

²¹⁰ Chart on 'Known contacts between intermediaries and witnesses', DRC-D01-0003-5847* at 5873. The Defence has sought admission of this document (ICC-01/04-01/06-2644-Conf-Anx6), a request the Prosecution opposed. Whether or not the document is ultimately admitted into evidence, the Prosecution submits that the Defence has mischaracterised the introduction despite being in possession of the correct information.

²¹¹ T.117, p.7, line 24 to p. 8, line 13; p.36, lines 3-11 and p.37, lines 15-17; T.119, p.8, line 17 to p.9, line 19.

other boys, went to [REDACTED], and turned up about a week later in a very unkempt state, armed with a weapon.²¹² She also confirmed that she knew that he had gone off to join the UPC; she doubted only that he could possibly function effectively as a soldier owing to his tender age.²¹³ With that corroboration, it is submitted that W-0298's ample detail about his abduction and involvement in the UPC is truthful.²¹⁴

91. Although W-0298 initially appeared to backtrack, once special measures had been put in place²¹⁵ and he resumed his testimony he explained why he initially gave a different account of his involvement in the UPC – that, earlier, he had been angry and could not testify; he never suggested that his testimony was untruthful.²¹⁶
92. These are the critical points. The so-called “massive contradictions” cited by the Defence (para. 118) between the evidence of W-0298 and that of W-0299 are not unusual, and in any event do not impute wrongdoing to W-0321. [REDACTED].²¹⁷
93. Finally, any inconsistency relating to W-0298's date of birth appears to have been resolved by the x-rays that were taken on 11 January 2008, and which confirm that as of that date, W-0298's age was between 15½

²¹² T.279, p.6, line 19 to p.7, line 15.

²¹³ T.279, p.19, line 8 to page 20, line 17.

²¹⁴ T.123, pp.4-22.

²¹⁵ The special measures to ensure that the witness felt comfortable testifying in court included having the curtain extended between himself and the Accused; T.123, p.3, lines 12-15.

²¹⁶ T.123, p.30, lines 24-25.

²¹⁷ T.122, p.16, line 12 to p.17, line 24.

and 16 years old.²¹⁸ In any event, this evidence too has no bearing on whether W-0321 induced W-0298 to lie about being in the UPC.

DW-0003 and DW-0004

94. The claim of subornation comes from the testimony of DW-0004 (possibly a child soldier) and, DW-0003 ([REDACTED]). The accounts of DW-0003 and DW-0004 which the Defence relies upon to justify its allegations against W-0321, are tenuous and unreliable. This is especially so when evaluated against the testimonies of other witnesses, some of whom the Defence carefully omit from their assessment.
95. DW-0004 may or may not be a former child soldier in the UPC; he denies it, but others identified him as a former soldier.²¹⁹ His insistence that all child soldiers in the UPC joined of their own volition²²⁰ (which incidentally is also a crime under the Statute) is inconsistent with the evidence of witnesses such as W-0157²²¹ and W-0297,²²² and other evidence that has unfolded in the course of the trial.²²³ His eagerness to absolve Mr Lubanga from participating in this forced recruitment renders his motives all the more questionable.

²¹⁸ EVD-OTP-00443.

²¹⁹ [REDACTED] testified that he met him in the training camp in Mandro: [REDACTED], p.16, line 12 to p.17, line 9. See also W-0321's evidence at T.323, p. 10, line 11 to p.11, line 11.

²²⁰ T.243, p.23, lines 5-25.

²²¹ T.185, p.68, lines 14-25 and p.70, lines 3-6.

²²² T.285, p.46, lines 7-12.

²²³ See for instance, W-0046: T.37, p.45, lines 1-14 and p.46, lines 10-21; W-0010: T.144, p.14, line 20 to p.15, line 24; W-0008: T.135, p.7, line 21 to p.8, line 1 and p.8, lines 15-22; W-0213: T.132, p.9, lines 18-19; W-0298 : T.123, p.19, lines 5-19; W-0299: T.117, p.7, line 20 to p.8, line 2; W-0038: T.113, p.39, line 11 to p.40, line 1; W-0046: T.37, p.45, lines 1-14 and p.46, lines 10-21.

96. There are also inconsistencies regarding the evidence when he met W-0321. But whenever the meeting occurred, DW-0004 confirmed that W-0321 was only interested in children who had genuinely served as child soldiers in the UPC.²²⁴
97. DW-0004 was identified as a former child soldier and potential witness. He testified, however, that he never served in the UPC but was told to fabricate this account by W-0321. However, [REDACTED] testified that DW-0004 *did* perform several weeks of military service with the UPC,²²⁵ and that he ([REDACTED]) saw DW-0004 undergoing military training at the camp in Mandro.²²⁶ [REDACTED] described DW-0004's military service, even providing the name of DW-0004's training commander.²²⁷
98. DW-0003 is a self-confessed liar.²²⁸ According to him, he would lie for the money: "[w]hen someone mentions a large amount of money, and that's going to change your life, are you going to refuse? Because for that amount of money you could sell your mother or father to live happily".²²⁹ And he maintained his so-called false account during

²²⁴ In response to questions from the Defence about their initial meeting, DW-0004 testified: "He called me and I walked towards him and he *asked me the question as to whom amongst us had been a child soldier*. I refused and I asked him to address the question to the other children who were in our company. He called another person and that other person also refused"; T.242, p.6, lines 10-14 (emphasis added). See, however T.245, p.5, lines 17-18 where the witness reiterates this account under cross-examination, but states that he did answer the question in the negative: "He asked me and then he said, "Please, come here." "*Were you a child soldier?*", he asked me, and I said, "*No, I was never a child soldier*" (emphasis added).

²²⁵ [REDACTED], p.16, lines 9-18. See also [REDACTED], p.17, lines 6-9.

²²⁶ [REDACTED], p.16, lines 14-18.

²²⁷ [REDACTED], p.17, lines 8-9.

²²⁸ T.240, p.27, lines 1-6.

²²⁹ T.240, p.26, lines 7-10.

repeated meetings with the OTP investigators,²³⁰ notwithstanding the opportunities to come clean. Notably, DW-0003's account contradicts the testimony of DW-0004.²³¹

99. DW-0003 testified that DW-0004 and [REDACTED] were not in the UPC. He also accompanied [REDACTED] in November 2007 to Beni to meet with OTP investigators.²³² According to him, W-0321 told him to pretend he was [REDACTED] father, in order to give permission for the interview and other steps – a point refuted and explained by W-0321.²³³ He also alleges that W-0321 told the children – but outside his presence – to lie about their abduction and their service as child soldiers, and that [REDACTED] should lie about his mother's death.²³⁴ Also these allegations were repeatedly contested by W-0321.²³⁵
100. In fact, DW-0003 was presented as [REDACTED] guardian, and there was never any intention to deliberately pass him off as [REDACTED] father, as the Defence suggests. There was no reason to. Thus, on 18

²³⁰ T.239, p.34, lines 15-18 (November 2007); p.44, lines 2-9 (March 2008); p.46, lines 1-4 (May 2008).

²³¹ For example, DW-0003 and DW-0004 also contradicted each other regarding (i) the number and names of children who were screened; (DW-0003; T.239, p.32, lines 13-21), (DW-0004; T.242, p.7, lines 16-20); (ii) DW-0003 said none of the children screened were child soldiers (T.239, p.48, lines 1-5), DW-0004 said that at least one of the screened children was a child soldier ('[REDACTED]'; T.242, p.9, lines 5-9); (iii) DW-0003 says that W-0321 instructed/coached them to lie about DW-0004's threat by the UPC in February 2008 (T.240, p.46, lines 9-23) whereas DW-0004 says that he and [REDACTED] made up the UPC threat to him (T.245, p.40, lines 6-21 and p.42, line 13 to p.43, line 2).

²³² T.239, p.31, lines 22-25. DW-0003 clarified that [REDACTED], together with DW-0004, had first met W-0321 at a demobilisation centre for former child soldiers in around 2005 – see T.239, p.22, line 23 to p.23, lines 1-2: "[W-0321] arrived in our area about five years ago. He came to recruit children. [...] He came to recruit children in our region. He took children from the streets and at the junction." DW-0003's evidence contradicts the testimony given by DW-0004 (viz. that he met W-0321 for the first time at a [REDACTED] in 2008 – see T.242, p.5, line 23 to p.6, line 9).

²³³ T.309, p.11, line 17 to p. 12, line 8, T.310, p.11, line 23 to p.12, line 3. [REDACTED].

²³⁴ T.239, p.31, lines 17-20 and p.34, lines 5-12; T.240, p.7, line 17 to p.8, line 2.

²³⁵ In general terms: T.308, p.51, lines 6-21; p.80, lines 11-19; p.82, line 24 to p.84, line 25; T.309, p.10, lines 23-24; p.18, line 8 to p.19, line 19; p.29, line 21 to p.30, line 3; T.310, p.10, lines 10-16; p.12, lines 4-11. On the allegedly deceased parents: T.308, p.82, lines 2-9.

January 2008, DW-0003 signed an affidavit in his own name (Joseph Maki), providing his consent for [REDACTED] to be x-rayed,²³⁶ which confirms that it was never intended that DW-0003 would be passed off as [REDACTED] father.²³⁷ On 29 May 2008, DW-0003 signed another document prepared by the OTP (this time signing his name as [REDACTED]) in which he clearly described [REDACTED] as his “[REDACTED]”²³⁸ - further demonstrating that the OTP investigators were absolutely transparent as regards the relationship between DW-0003 and [REDACTED].

101. Further, the claim that W-0321 told DW-0003 and DW-0004 to lie to the OTP (upon their return from the interview with the investigators in Beni) that they had been questioned by the UPC also does not stand up to scrutiny. The accounts of both W-0321 and W-0581 on this event²³⁹ contradict that of DW-0003.
102. Finally, the detail that [REDACTED] provided in the course of his testimony (referred above, para. 86), demonstrates that he *was* in fact a child soldier with the UPC,²⁴⁰ and refutes the Defence suggestion (para. 93) that W-0321 asked DW-0003 and [REDACTED] to fabricate this account.
103. Moreover, the evidence in fact suggests that DW-0003 and DW-0004 were pressured to lie by Cordo and others loyal to the Accused.²⁴¹

²³⁶ The affidavit was prepared by the OTP.

²³⁷ EVD-D01-00107.

²³⁸ EVD-OTP-00526. See also T.241, p.6, line 17 to p.7, line 7.

²³⁹ T.310, p.33, line 20 to p.36, line 24; T.301, p.38, line 23 to p.43, line 20.

²⁴⁰ See, for example, [REDACTED], p.44, lines 21-24; p.46, line 7 to p.50, line 18.

²⁴¹ See para.10.

[REDACTED] testified that DW-0003, DW-0004 and himself had all been instructed by a relative of Mr Lubanga named “Cordo” to deny that the children had ever been child soldiers.²⁴² He also testified that he feared that he would be killed if he did not comply.²⁴³ [REDACTED] knew that Cordo issued similar warnings to DW-0003 and DW-0004 because he met them both in [REDACTED] after they had testified and they confirmed to him that they had complied with Cordo’s order.²⁴⁴

104. DW-0003 also corroborated that pressure was mounted on him and DW-0004 as regards their testimony before the ICC.²⁴⁵ Although he did not mention “Cordo”, he confirmed that he was asked to attend meetings with local chiefs, including Chief Ndasi, Chief Nembe and Chief Kamuhanda,²⁴⁶ the former mayor, and “authorities of the UPC”.²⁴⁷ With the exception of Cordo, these were the same parties mentioned by [REDACTED] as present in meetings he attended.

²⁴² [REDACTED], p.11, lines 3-14: “he said to me that if I were to come here, I had to say that I had never been a soldier, and in that way Mr Thomas Lubanga would be freed. [...] He came to see me and he was alone. He said to me that if I were to come here, I had to tell the Judges that I had never been a soldier.”

²⁴³ [REDACTED], p.20, lines 21-24.: “I was very much afraid of Cordo. [...] I was also afraid of the neighbourhood chiefs. I was afraid of what they could tell the young people in the neighbourhoods because these young persons could kill me.”

²⁴⁴ [REDACTED], p.30, lines 8-14: “I saw [REDACTED] upon his arrival in [REDACTED]. Now, with regard to [REDACTED], I saw him once he had returned from [REDACTED]. We were all together in [REDACTED]. [REDACTED] and Mr Cordo had sent them here in order to say that I had not been a child soldier and that Mr Thomas had never recruited child soldiers.” [REDACTED] even produced photographs (EVD-OTP-00561 and EVD-OTP-00562) that he had taken with [REDACTED] in [REDACTED], corroborating that this meeting did take place, contrary to [REDACTED] testimony that he did not meet [REDACTED] in [REDACTED]; [REDACTED], p.19, lines 6-7.

²⁴⁵ T.241, p.11, line 11 to p.12, line 2.

²⁴⁶ T.241, p.12, lines 21-22. W-0297 appears to describe [REDACTED] when he speaks of the threats by Cordo, as [REDACTED] local chiefs appear to be in attendance. See T.285, p.19, lines 17-24: “Q. Was there anybody else with Mr Cordo who called the meeting or who spoke to the villagers during the meeting? A. Yes. [...] Chief Maté was also there, as well as *Chief Comwanda (phon)*. *Chief Nyambee* was also in attendance. These were the heads of the various neighbourhoods” (emphasis added).

²⁴⁷ T.241, p.12, line 12 to p.15, line 19.

W-0213

105. Consideration must be given to the fact that W-0213 testified for three days under oath during which time he provided detailed evidence on his participation in the UPC. Not once did the Defence directly suggest that he had never been in the UPC or that he was lying.
106. The Defence alleges (para. 129) that inconsistencies between the evidence of W-0213 and other available evidence demonstrates that W-0213's account is false. In this regard, the Defence points to the fact that the witness stated that he was born in [REDACTED] 1991, while his mother provided a different date of birth.²⁴⁸ However the witness stood by this account under cross-examination and provided a plausible explanation: "As my birth certificate was burnt, and so people came and asked her questions, and she gave the answer that – that occurred to her".²⁴⁹

W-0294

107. The Defence also refers to the testimony of W-0294 to demonstrate that W-0321 encouraged witnesses to lie about their identity. Yet again, none of the inconsistencies cited demonstrate that W-0321 manipulated the witness. It is worth noting that even the Defence does not tie these alleged inconsistencies with W-0321.
108. To substantiate its allegations, the Defence relies mainly on the account of [REDACTED], who said that W-0294 was not in the UPC. In fact, he was not around at the relevant time to know if W-0294 was in the UPC.

²⁴⁸ In this regard, the Prosecution repeats the submissions set out ICC-01/04-01/06-2670-Conf.

²⁴⁹ T.133, p.16, line 21 to p.17, line 19.

Apart from [REDACTED] unreliability – as shown by his refusal to answer questions on cross-examination²⁵⁰ – there is a conflict between him and DRC-OTP-WWWW-0293 (W-0293) ([REDACTED])²⁵¹ who, in the course of her testimony, confirmed her son *was* a soldier.²⁵²

Disparity between names of children contained on the list provided to W-0321 and those that he ultimately presented to the OTP does not support the allegation of subornation

109. The Defence emphasises (paras. 107, 273) that W-0321 provided children to the OTP whose names were not on a list of children originally requested by the OTP. In the Defence's submission, the differences between these lists exposes W-0321's insincerity. The Prosecution disagrees.
110. The Prosecution concedes that there were differences in the list of names W-0321 provided to W-0581 and the original list he received; the list was first given to W-0031, and he passed it to W-0321.²⁵³ Both W-0581 and W-0321²⁵⁴ explained that some of the children on the first list were not immediately available, so W-0321 substituted other children

²⁵⁰ [REDACTED], p.40, lines 14-16 and p.43, lines 6-7; [REDACTED], p.8, line 24 to p.9, line 5 and p.16, line 16 to p.18, line 1.

²⁵¹ [REDACTED] alleged for example that W-0294 fled to Uganda with his mother and brothers; T.251, p.25, lines 8-15. However, W-0293 testified that she only fled to Uganda with three of her sons, and that W-0294 was not one of them; T.153, p.38, line 18. [REDACTED] showed reluctance in answering questions in respect of Thomas Lubanga: [REDACTED] (he did not recognise him on the picture EVD-OTP-00530), [REDACTED], p.42, lines 12-23, and p.43, line 7. See also [REDACTED], p.10, lines 13-15; [REDACTED], pp.7-8; p.14, line 13 to p.15, line 9; and p.17 line 3 to p.18, line 3.

²⁵² T.153, p.48, line 16 to p.49, line 3 and p.51, line 18 to p.52, line 1. W-0293 confirmed W-0294's account; T.153, p.47, line 19 to p.49, line 3.

²⁵³ T.308, p.53, lines 16-21; and T.321, p.18, lines 7-17.

²⁵⁴ T.301, p.3, line 21 to p.4, line 17 (W-0581) and T.321, p.24, line 23 to p.26, line 24 (W-0321).

that met the OTP's criteria.²⁵⁵ Initially the arrangement was for W-0031 to put the OTP in touch with former child soldiers he had worked with. Given that W-0031 had already left Bunia due to security concerns, W-0321, as someone with whom W-0031 had worked, began to assist in this capacity.

111. Therefore, it is immaterial that W-0321 provided the OTP with children who had not been requested beforehand.²⁵⁶ Ultimately, only the OTP decided if the children met the requisite criteria and the interview process, if any, that later ensued was also *for the OTP alone*.

The Prosecution had no reason to suspect that W-0321 acted improperly.

112. The Defence also suggests (para. 139) that because W-0321 also worked as an intermediary for the NGO [REDACTED], which arranged for representation and participation of victims in these proceedings, his role as intermediary was compromised. As made plain earlier, the OTP regularly and necessarily uses intermediaries who are in touch with potential victims/witnesses. These persons are often linked to NGOs on the ground.²⁵⁷ The fact that the intermediaries may have also had contact with witnesses to assist them in participating as victims before the Court is not unusual. Such organisations are usually the only way for these victim/witnesses to access the Court's victims' participation scheme. There is no evidence that W-0321 benefited financially or was

²⁵⁵ See EVD-D01-00317: "before meeting them would you mind checking with [REDACTED] about **their** age and **profiles** (what militia they belonged to?). If they were in 2002 older than 15 and/or did not belong (sic) to UPC, **please do not meet them.**"

²⁵⁶ W-0581 confirmed that when he noticed that some of the children were not those that had been originally requested, he made enquiries with the head office and was informed that he should screen the children provided they still met the OTP's criteria: T.301, p.3, line 21 to p.4, line 17 and p.55, lines 1-7; and EVD-D01-00317.

²⁵⁷ Rule68Deposition, 16/11/2010, p.48, line 8 to p.49, line 2 and p.50, lines 6-19.

expected to benefit from bringing potential victim applicants to [REDACTED] who were also OTP witnesses. Nor does the Defence suggest that W-0321 was entitled to collect benefits that would accrue to such victims, as it argues regarding W-0143. Further, the Defence did not put any such allegation to W-0321 when he testified so as to give him an opportunity to deal with it. Accordingly the allegations (paras. 139 to 142) are baseless and should be disregarded.

113. As regards the OTP's knowledge of acts of subornation on the part of W-0321, the evidence does not reveal any such conduct by him. It follows therefore that the Prosecution could not have had knowledge of such subornation. Even if the allegations of subornation were *prima facie* accepted, the Defence has identified no evidence showing that the OTP knew that W-0321 asked witnesses to lie and/or fabricate evidence. In particular, the new names on W-0321's list, see paragraphs 109-111, in no way suggested that W-0321 had committed fraudulent acts.
114. The Prosecution also rejects the assertions made in paragraph 147. The Prosecution's enquiries had already revealed that W-0321 worked for reputable organisations and had acquired much experience from working with former child soldiers. Therefore there was no reason for the Prosecution to suspect him of inducing witnesses to lie. Furthermore, as detailed above, W-0321 was not involved in making the decision whether to retain a potential witness and he was not present during the screenings or interviews.

C. INTERMEDIARY W-0143

115. There is no evidence in this case that W-0143 induced witnesses to lie or fabricated evidence. W-0143 introduced five trial witnesses to the OTP, namely W-0007, W-0008, DRC-OTP-WWWW-0010 (W-0010), DRC-OTP-WWWW-0011 (W-0011) and W-0031,²⁵⁸ and was in contact with intermediaries W-0031, DRC-OTP-WWWW-0145 (W-0145), W-0316 and W-0321, amongst others.²⁵⁹
116. As noted previously, intermediaries did not determine the objectives or know the details of the investigation. Nonetheless, the Defence asserts (para. 153) that W-0143 was informed of the investigation objectives and that, according to W-0582, the investigation objectives were drawn up on the basis of information provided by W-0143 (and inferentially, it must be assumed, that W-0143 joined in the setting of objectives). However this allegation – key in the Defence’s argument – is not substantiated by the references it cites ²⁶⁰ nor by the evidence. To the contrary, W-0582 stressed that the intermediaries were not “aware of our investigations and the content of our investigations”²⁶¹ and that “no intermediary could participate in the decision-making process

²⁵⁸ It is unclear why the Defence refers to entry 134 in footnote 312; entry 134 deals with intermediary W-0321, not W-0143.

²⁵⁹ Footnote 315 refers to the testimony of W-0321 during which he explains that he (W-0321) knows W-0143 and W-0031. No mention is made of W-0145 and W-0316. The contact between W-0143 and W-0316 was limited to one instance during which W-0143 provided money to W-0316; Chart on ‘Known contacts between intermediaries and witnesses’, DRC-D01-0003-5847* at 5862, entry 72, last line (the Defence has sought admission of this chart. The Prosecution opposed this. The Chamber is yet to rule on the request).

²⁶⁰ In the reference cited (footnote 323), the Defence asks W-0582 what criteria W-0143 used to identify and select children to introduce them to the Office. W-0582 responds that it was not up to W-0143 to say the criteria regarding who was a good witness or not, but that it was up to the Office. W-0582 goes on repeating that the Defence shouldn’t invert the system of functioning and that it was above all the investigators who knew exactly what they wanted. He concludes that “it wasn’t up to [W-0143] to determine anything from that point of view”: Rule68Deposition, 17/11/2010, p.23, lines 6-19.

²⁶¹ Rule68Deposition, 16/11/2010, p.50, lines 20-21.

with investigators, which I repeat once again was the full responsibility of the prosecutions division of the OTP.”²⁶²

117. At most, the Defence sets out reasons – mainly alleged inconsistencies within the testimonies of certain witnesses²⁶³ – from which to conclude that the witnesses lied and that therefore W-0143 must have suborned perjury. None of these arguments proves manipulation of witnesses by W-0143, and in fact the Defence largely does not even mention any involvement of W-0143.²⁶⁴

118. In addition, some of these inconsistencies are misrepresented and/or can be explained.²⁶⁵ By way of example:

- footnote 339: the fact that W-0007 stated in his 2005 statement that he went to Fataki to provide re-enforcement and that he testified that he went there after the defeat in Bunia (in March 2002²⁶⁶) is not inconsistent. The Accused himself stated in an interview that after their defeat in March 2002, many UPC

²⁶² Rule68Deposition, 17/11/2010, p.17, lines 4-6.

²⁶³ The Defence also lists one inconsistency (paras. 173-174) in relation to W-0006 and W-0009's voting cards. W-0006 and W-0009 were withdrawn from the Prosecutions trial witnesses list. Therefore, no abuse can be attributed to the Prosecution. Moreover, it is known that the children provided false information to obtain election cards for different purposes, including their own safety and security (See ICC-01/04-01/06-2501, paras. 16-21 and ICC-01/04-01/06-2666, para. 5. See also T.151 p.24, lines 3-8.).

²⁶⁴ The exception concerns the birth certificates of W-0007, W-0008, W-0010 and W-0011.

²⁶⁵ Moreover, a variety of elements, including possible trauma and cultural differences need to be taken into account when evaluating their testimonies. The trauma expert explained that trauma may influence the memory of individuals and influence the structure of their testimony: T.166, p.50, line 9 to page 58, line 25. The name expert testified on the different uses and habits in relation to names and dates: T.223, p.57, lines 2-14; p.67, line 8; p.69, line 23; p.70, lines 10-12; p.71.

²⁶⁶ T.150, p.10, lines 11-13.

soldiers fled amongst others to Fataki, where they fought against Ugandans and Lendus.²⁶⁷

- footnote 351: W-0008 explained that he did not mention all battles, including the one at Iga Barrière in his 2005 interview because there was a lot to say, and because of time constraints he was unable to say everything.²⁶⁸ W-0008 did mention this battle during his 2008 re-interview.²⁶⁹
- footnote 389: W-0010 never said that she was taken by soldiers at a slaughterhouse (which would have been removed from [REDACTED]), but rather that she passed by the slaughterhouse after being captured at [REDACTED].²⁷⁰
- footnote 406: the fact that W-0011's birth certificate does not contain the names [REDACTED] is irrelevant: it contains his official name as "[REDACTED]", which is also the name on his demobilisation certificate, his school enrolment, and his victim application.²⁷¹ W-0011 explained that "[REDACTED]" is also his name but he does not use it,²⁷² and his sister added "[REDACTED]" (the name of his grand-father) when completing his demobilisation certificate for him.²⁷³

²⁶⁷ Video DRC-OTP-1001-0008 (MFI-P-00039) and corresponding transcript: DRC-OTP-0172-0381, lines 507-523; EVD-OTP-00003 at 0439.

²⁶⁸ T.137, p.73, lines 16-19.

²⁶⁹ T.137, p.74, lines 11-18.

²⁷⁰ T.144, p.15, lines 2-8.

²⁷¹ EVD-D01-00059; EVD-D01-00211 (p.21/27); EVD-D01-00211 (p.5/27); T.139, p.50, line 24 to p.51, line 1. This is also in line with the explanations given by the name expert: T.223, p.57, lines 2-14; p.67, line 8; p.69, line 23; p.70, lines 10-12; p.71.

²⁷² T.138, p.52, line 10; T.139, p.50, lines 20-23; p.48, lines 22-24.

²⁷³ T.139, p.49, lines 16-19.

- footnote 470: W-0157 explained that he had just completed his sixth year and just started his first year in secondary school.²⁷⁴

119. These minor inconsistencies do not alter the fact that these witnesses all gave detailed accounts of their participation as child soldiers in the UPC. Notwithstanding that these events occurred six to seven years ago, they were able to respond to detailed questions about their recruitment, military training, and deployment in the UPC. Their accounts were corroborated by other witnesses, including their parents, political and military insiders, humanitarian aid workers, UN representatives, and also by documentary and video evidence.
120. The only involvement attributed to W-0143 is his assistance in obtaining the birth certificates. These were issued after the Office interviewed the witnesses concerned. With one exception, they either corroborate the dates of birth provided by witnesses during their interviews or provide a date that makes them older.²⁷⁵ Had W-0143 intended to falsely present the witnesses as child soldiers (with falsified birth certificates to this effect), he would have made them

²⁷⁴ T.187, p.30, lines 7-8 and 25.

²⁷⁵ The statement of W-0007 (EVD-D01-00219) indicates [REDACTED]/1991 whereas his birth certificate (EVD-OTP-00085) indicates [REDACTED] 1990 as his date of birth. The statement of W-0008 (EVD-D01-00205) and his birth certificate (EVD-D01-00055) indicate [REDACTED]/1991 as his date of birth. The statement of W-0010 (EVD-D01-00217) indicates [REDACTED] 1989 whereas her birth certificate (EVD-OTP-00079) indicates [REDACTED]/1988 as her date of birth. Only in respect of W-0011 does the birth certificate indicate a date of birth that is (a few months) earlier: his statement (EVD-D01-00210) indicates [REDACTED]/1992 whereas his birth certificate (EVD-D01-00059) indicates [REDACTED]/1992 as his date of birth. Witnesses W-0006 and W-0009 are not trial witnesses and therefore their documents are not admitted into evidence. However, the argument also applies in respect of them: the statement of W-0006 (DRC-OTP-0132-0079) and her birth certificate (DRC-OTP-0132-0010) both indicate [REDACTED]/1989 as her date of birth. The statement of W-0009 (DRC-OTP-0126-0154) indicates [REDACTED]/1989 whereas her birth certificate (DRC-OTP-0132-0011) indicates [REDACTED]/1988 as her date of birth.

appear to be younger, not older. If anything, these documents prove the contrary of what the Defence suggests.²⁷⁶

121. Even if the allegations of subornation were *prima facie* accepted, the Defence has identified no evidence showing that the OTP *knew* that W-0143 asked witnesses to lie and/or fabricate evidence. In spite of this, the Defence maintains (paras. 175-183) that the OTP had sufficient information to suspect W-0143 because (i) W-0143 acted on behalf of the victims, and (ii) the Prosecution had information that raised doubts about his impartiality and reliability. The Prosecution rejects both these arguments.
122. The Defence argues (paras. 177-178) that – because W-0143 acted on behalf of certain victims – this “suggests that he considers himself as being entitled to collect, on behalf of the victim, any benefits due to the victim from his or created a “clear risk of bias and should necessarily impel the Office to eschew his services and exercise the utmost caution towards the evidence gathered by him”. This argument has no merit.
123. First, there is no evidence that W-0143 benefited financially or expected to benefit from assisting individuals to participate in the proceedings. Reparations are not necessarily granted *to individuals*,²⁷⁷ and in any case would not be granted to someone assisting the victims. Even if W-0143 was entitled to collect reparations on behalf of victims, he would be under a duty to pass on these benefits to the victims. There would be

²⁷⁶ At the time these certificates were issued, a simple statement sufficed to obtain the card (T.47, p.68, lines 11-17; T.223, p.54, lines 17-24).

²⁷⁷ Article 75(2) of the Statute: the Chamber may order to make reparations through the Trust Fund.

no benefit to him. The Prosecution therefore fails to see how his acting on their behalf could have created a “clear risk of bias”.

124. Second, the individuals concerned submitted their applications to participate as victims only *after* they had provided witness statements to the OTP.²⁷⁸ Therefore, even on the Defence’s account, no benefit accrued to W-0143 for acting on their behalf. Their participation as victims (and any reparations they may receive as a result) is clearly not dependent on their appearing as prosecution witnesses. In fact, the large majority of the participating victims are not prosecution witnesses.
125. Unless the Defence is suggesting that every person or organisation who assists victims necessarily commits acts of subornation, its argument that the Prosecution would have had sufficient information to suspect W-0143 of acts of subornation and manipulation of evidence because he acted on behalf of the victims is without merit.
126. Moreover, the Defence argues that the Prosecution possessed information that raised doubts about the impartiality and reliability of W-0143. First, the Defence refers (para. 179) to his financial requests.²⁷⁹ However it fails to establish that these requests detrimentally affected or otherwise influenced the quality of W-0143’s work or raised impartiality or reliability issues. The record cited shows nothing but requests for moderate compensation (\$3USD per hour),²⁸⁰ complaints

²⁷⁸ The witnesses’ first statements were taken between July and December 2005. The victim applications were signed in May 2006.

²⁷⁹ One of the documents referred to by the Defence (DRC-OTP-0233-0168*) has not been admitted into evidence.

²⁸⁰ EVD-D01-01013 and EVD-D01-01015.

about delays in reimbursements, and a small number of accounting irregularities over the course of three years. It does not impute any suspicions about W-0143's reliability or credibility as regards the work that he did for the OTP.

127. Secondly, the Defence cites (para. 180) an internal report dated 23 February 2006. The report, and the assessment made therein, is internal work drafted by two junior investigators.²⁸¹ W-0582 addressed the comments related to W-0143 made in this report during his testimony. He explained that an investigation was carried out within the OTP and that it was concluded that W-0143 remained a credible and reliable intermediary. The investigation certainly did not reveal any acts of subornation by W-0143.²⁸² The Prosecution notes the Defence used the same incident (reported in a different document)²⁸³ to 'substantiate' its contention that W-0316 was unreliable (on the basis that in that document it is indicated that W-0143's impression was that W-0316 coached a witness regarding a security threat).²⁸⁴ This argument necessarily implies that the Defence considers W-0143 to be reliable, and yet here it argues the contrary.

²⁸¹ EVD-OTP-00641, page 1.

²⁸² Rule68Deposition, 17/11/10, p.2, line 3 to p.9, line 20 and p.72, line 20 to p.75, line 11 (particularly p.75 lines 3-10); Rule68Deposition, 18/11/10, p.10, lines 3-6 and p.11 lines 2-3.

²⁸³ EVD-D01-00384.

²⁸⁴ See paragraph 73 above.

128. Thirdly, the Defence refers (para. 181) to documents provided by W-0143, the authenticity of which is allegedly “highly dubious”, to demonstrate that the OTP had information that raised doubts about his impartiality and reliability. These are:

- *DRC-OTP-WWWW-0279 (W-0279)’s birth certificate*: the Defence alleges that it was prepared on the basis of information given by W-0143. This is not correct: in the report it is indicated that the date of birth on the certificate was provided by the investigator based on information taken from W-0279’s own statement.²⁸⁵ W-0143 conveyed, but was not the source of, the information.
- *DW-0004’s student card*: the Defence alleges it was prepared by W-0143.²⁸⁶ Again, this is not correct: DW-0004 does not say that W-0143 obtained the card;²⁸⁷ the card was issued in September 2008, one month after the OTP ceased providing assistance to DW-0004²⁸⁸; the receipt cited by the Defence in support of its allegation is dated February 2008, some seven months before the card was issued in September 2008 and refers to W-0297 not DW-0004. This card was

²⁸⁵ DRC-OTP-0233-0406 at 0424, entry 119 states: “[REDACTED] [an OTP investigator] calls [REDACTED] [W-0143] and tasks him to verify the existence of the birth certificate of W-0297, at the municipality of [REDACTED]. [REDACTED] gives [REDACTED] the name of the witness ([W-0279]), whom he knows, as well as his alleged date of birth, since this should facilitate the search in the archives ([REDACTED] 1991: information found on the witness’ statement)” (emphasis added). The Defence has sought admission of DRC-OTP-0233-0406*, the Prosecution opposed this, and the Chamber is yet to make a decision.

²⁸⁶ The documents cited in footnote 429 of the Application are DW-0004’s student card (EVD-D01-00294) and a receipt of W-0143 (EVD-D01-00336). In footnote 317 of the Application, the Defence also indicate that W-0143 provided DW-0004’s student card. However, the reference cited (T.302, p.55, lines 10 et seq.) is unrelated to this issue.

²⁸⁷ T.245, p.59, lines 2-6: “Q. Could you tell us who prepared this student card? A. The student card? The person who took care of that, I think it was [REDACTED]. However, the gentleman who prepared the card, I don’t know his name. They took passport photos. They took passport photos, and before leaving [REDACTED] they brought us cards, me and [REDACTED]. But I forgot that card in [REDACTED]”.

²⁸⁸ T.303, p.2, line 25 to p.3, line 9 and p.3, line 21 to p.4, line 25.

disclosed by the Defence to the Prosecution in June 2010, when W-0143 was being relocated and his cooperation with the OTP had stopped. This alone shows it could not have alerted the OTP in 2008 of any irregularity upon which the OTP should have acted.

- The birth certificates of W-0007, W-0008, W-0010 and W-0011: the Prosecution refers to its submissions on this issue made above in paragraph 120.
- The Defence also mentions that the birth certificates provide different birth dates than those indicated on the election cards. This is because that the witnesses requested the election cards for a different purpose, including their own safety and security.²⁸⁹ Moreover, the OTP was unaware of the existence of these election cards until June 2010. By that fact alone, they could not constitute the basis for any 'abuse' on the part of the OTP.
- In addition, the Defence states that some information on the birth certificates is missing. Court expert Kambayi Bwatshia and DW-0029 both testified to the unreliability of administrative records in the region. The expert explained that administrative deficiencies occurred in regions affected by war, such as Ituri,²⁹⁰ and DW-0029 acknowledged that, even prior to the war, in the case of schools for example, proper organisation could be hindered and accuracy of records could be compromised depending on which individuals

²⁸⁹ See ICC-01/04-01/06-2501, paras. 16-21 and ICC-01/04-01/06-2666, para. 5. See also T.151 p.24, lines 3-8.

²⁹⁰ T.223, p.57, lines 2-14.

did the work.²⁹¹ There is nothing to indicate that W-0143 is responsible for the missing details and in this context, they would not have raised suspicions as to his reliability or credibility.

129. Finally, the Defence refers (paras. 182-183) to the negotiations between W-0143 and the VWU in the summer of 2010. The Prosecution was not privy to these conversations which took place after his cooperation with the OTP had stopped and thus those facts alone could not constitute the basis for any 'abuse' on the part of the OTP. The same arguments apply as those in respect of his financial gains. Lucrative side-activities do not affect the credibility of an individual, who – as mentioned by W-0582 – spent much of his time volunteering for [REDACTED] and for the OTP.²⁹²

130. In conclusion, none of these documents should have raised serious doubts about the impartiality and reliability of W-0143. In addition, none of them show that the OTP had sufficient information to suspect W-0143 of acts of subornation and manipulation.

D. W-0031

131. The Defence's arguments in respect of W-0031 are more far-reaching. There is no evidence that witness W-0031 induced witnesses to lie or fabricate evidence. In fact, the Defence did not suggest this to him when he testified. The Defence alleges (paras. 185-188) that (i) W-0031 played a central role as an intermediary over a long period of time; (ii) the witnesses with whom he has had dealings have all given

²⁹¹ T.296, p.9, lines 4-17.

²⁹² Rule68Deposition, 18/11/2010, p.9, line 17 to p.10, line 14.

manifestly untruthful statements; and (iii) the Prosecutor possessed information that raised serious doubts about the reliability of W-0031. The Defence does not demonstrate how such allegations form part of the underlying contention that the Prosecution thereby abused the process.

132. The Defence assertion (paras. 184-199) that W-0031 played a decisive role in the investigations is unsupported. Indeed, it is based solely on the fact W-0031 received \$23,000 from the OTP and allowances over a prolonged period of time: hence, it claims (para. 188) that “it is clear from these observations that W-0031 has played a central role as intermediary over a long period of time”. The Defence misrepresents the evidence: with one exception (a payment made for W-0031 to travel to his own interview location)²⁹³, all of the allowances or payments cited by the Defence were made in 2007 or later, after W-0031 left Ituri.²⁹⁴ They were not for services as an intermediary, but rather to support him while he was in the OTP’s protection program, prior to his referral to the International Criminal Court Protection Program (ICCPP).²⁹⁵ The fact that an intermediary was reimbursed for specific costs incurred does not establish his decisive role in the investigation, much less impute any suspicions about the intermediary’s reliability or credibility.

²⁹³ A plane ticket paid in [REDACTED] 2005 (EVD-D01-00576) to travel to Kinshasa where his interview took place.

²⁹⁴ W-0031 left Bunia and Ituri in December 2006 :T-202, p.23, lines 13-16; p.32, lines 13-16; p.63, lines 15-18 From that moment he would not have been able to act as an intermediary.

²⁹⁵ The OTP sent his referral to VWU on 20/02/2007. The referral was rejected and therefore the Office continued providing him with an allowance that covered his meals, accommodation, medical expenses and transportation costs (for relocation and meetings with the OTP).

133. The Defence states (paras. 189-195) that the witnesses who W-0031 “dealt with” have all given manifestly untruthful statements. The witnesses concerned are the same as those that the Defence mentions in respect of intermediaries W-0321 and W-0143, namely W-0007, W-0008, W-0011, W-0157, W-0293, W-0294, W-0298, and W-0299. Contrary to what the Defence insinuates, W-0031 only acted as an intermediary (for a very limited time) in respect of W-0157.²⁹⁶ In addition, nowhere does the Defence link W-0031 with any of these allegedly untruthful statements.
134. The Defence limits itself (paras. 191-194) to detailing the allegedly inconsistent evidence of one child, W-0157, but does not allege that W-0031 did anything other than present this witness (para. 195) to the OTP. The Prosecution disagrees with the summary claim that this “strongly” corroborates the Defence’s argument that W-0031 encouraged many potential witnesses to give false testimony.
135. Lastly, although the Defence fails to attribute any role of W-0031 in respect of the witnesses he “dealt with”, it gives two reasons why the OTP should have suspended its collaboration with him. One, the Defence refers to a report dated 23 February 2006, which was drafted by two junior investigators.²⁹⁷ As already explained, after this report was drafted, the OTP conducted an assessment of W-0031’s credibility

²⁹⁶ DRC-D01-0003-5847*, entry 23 (at 5853, 5854 and 5855). Although some of the other witnesses knew W-0031 because of his work and [REDACTED], he only acted as intermediary for W-0157. DRC-D01-0003-5847* has not been admitted into evidence.

²⁹⁷ EVD-OTP-00641.

which was concluded positively.²⁹⁸ As a result, W-0031 was called as a trial witness.

136. Two, the Defence cites (para. 197) the testimony of W-0582, who stated that he did not trust W-0031, who was insistent on playing a decisive role in the investigations. The Defence omits to mention that W-0582 had very limited contact with W-0031, and indeed, was not even certain that he ever met him.²⁹⁹ Moreover, he clarified that his mistrust, based on a personal impression about W-0031,³⁰⁰ reflected the fact that he found W-0031 to be pretentious, and that he “pretended that he could solve everything”.³⁰¹ Finally, although W-0582 indicated that W-0031 attempted to convey his importance to the OTP,³⁰² the OTP did not give W-0031 any decisive role.³⁰³

III. THE PROSECUTION DID NOT PRESENT FALSE EVIDENCE KNOWINGLY OR BECAUSE IT FAILED TO CONDUCT A PROPER INVESTIGATION

137. The Defence (paras. 229-262) also contends that the Prosecutor did not conduct the necessary investigations to ascertain the reliability of the evidence it introduced, and that (para. 22) this ‘blatant negligence in the performance of its investigative duties’ constitutes a ‘serious and irremediable prejudice to the norms of a fair trial’. The Prosecution refutes this.

²⁹⁸ T.326, p.3, line 3 to p.4, line 5; p.6, line 12 to p.7, line 12; and p.9, lines 3-11. These findings were detailed in an *ex parte* report emailed by the Prosecution to the Chamber on 09/11/2010 at 15:59, also referred to in decision ICC-01/04-01/06-2656, para. 5.

²⁹⁹ See Rule68Deposition, 18/11/2010, p.10, line 17 where he indicates it is “probable” that they met.

³⁰⁰ Rule68Deposition, 18/11/2010, p.11, line 2: “it was just an impression”.

³⁰¹ Rule68Deposition, 18/11/2010, p.10, line 25 to p.11, line 1.

³⁰² Rule68Deposition, 18/11/2010, p.11, line 25 to p.12, line 4.

³⁰³ W-0031 only acted as an intermediary in respect of one trial witness (W-0157), and two other individuals (W-0110 and W-0169); DRC-D01-0003-5847*, entry 23 (at pages 5853, 5854 and 5855).

A. THE THOROUGHNESS OF THE PROSECUTION'S INVESTIGATION

138. The OTP conducted its investigation thoroughly and in accordance with its obligations under Article 54(1)(a) and (b). It strenuously rejects the Defence allegations that it did not meet its obligations with regard to its investigation in this case.
139. Under the Statute, it is for the OTP to determine which methods of investigation are appropriate in a particular case. The methods of investigation undertaken in this case necessarily considered the realities of the security situation on the ground in Ituri and the DRC generally, and, importantly, the need to protect the security and wellbeing of potential witnesses and victims. However, these realities did not impact upon the OTP's obligation to fully investigate both incriminating and exonerating evidence – as W-0582 stated in his testimony – and to ensure that any evidence it sought to present was capable of belief and reliable.

B. METHODS OF VERIFYING WITNESS INFORMATION

140. The Defence asserts (para. 238) that the Prosecution failed to sufficiently verify its evidence because it did not follow the methods advocated and preferred by the Defence. The standard set out in the Statute with respect to the “appropriate measures to ensure [an] effective investigation”³⁰⁴ falls squarely within the Prosecution's discretion. Hence, the appropriateness will differ from case to case;³⁰⁵

³⁰⁴ Article 54(1)(b).

³⁰⁵ Appropriate measures may include the delegation of tasks: see Section 3.4 of the UK CPIA Code of Practice: http://www.xact.org.uk/information/downloads/CPIA_Disclosure_code_of_practice.pdf. See also T.336, pp.12-15.

with its knowledge and experience in the field, the OTP is in the best position to decide which measures will best advance the goals of the investigation in the particular circumstances of a case.³⁰⁶ In this instance, the evidence of W-0582 and W-0583 demonstrates that appropriate steps were taken to ensure the reliability of evidence, while at the same time taking into account the realities of the security situation in the region and the need to ensure the safety of witnesses and the confidentiality of the investigation.

141. As indicated above, both W-0582 and W-0583 testified that the security situation restricting investigators' movements and the need to avoid unnecessary risks to witnesses affected how the investigations were conducted.
142. For instance, the Defence alleges that the Prosecution erred by failing to verify witness information with the parents and family members of witnesses. The OTP screened many alleged child soldiers and had no reason to question the identity and *bona fides* of the former child soldiers that it presented as witnesses. They provided a very detailed account of their experiences in the UPC army consistent with the Prosecution information. There is in any event no specific obligation on the OTP to adopt one particular method – checking with the witnesses' families – to verify the accounts provided by each of its witnesses. Requiring that a prosecuting authority must check with witnesses family members, notwithstanding the grave security and privacy concerns, would impose an impractical and dangerous standard.

³⁰⁶ Bergsmo M., and Kruger P., in 'Commentary on the Rome Statute of the International Criminal Court', ed. Triffterer O., (C.H.Beck, Hart, Nomos, 2nd Ed. 2008), [12], p.1080.

143. Accordingly, W-0582 amply explained that the policy of the OTP was to eschew routine contact with the families of witnesses, so as to not put the safety of witnesses at risk.³⁰⁷ He elaborated that the policy was in place because of concern that family members of witnesses could notify militia leaders of a witness' testimony against them. The majority were members of the Hema community. The OTP could not put a witness' safety at risk – such would be clearly dangerous both to the child and the investigation, since if the witness' cooperation became known, steps could be taken against him or her that would render the witness unavailable to provide evidence.³⁰⁸
144. However, and as noted by the Defence, the OTP managed to interview some family members, such as the parents of W-0298,³⁰⁹ W-0294,³¹⁰ and W-0157. As noted above, W-0298's father (W-0299) confirmed under oath that his child *had* been in the UPC during the indictment period,³¹¹ and W-0294's mother (W-0293) gave evidence about the age of W-0294 and confirmed that he *was* a former child soldier.³¹² The parents of W-0007 and W-0008 (W-0496 and W-0497) also confirmed that their children *were* in the UPC.³¹³ The OTP did not contact the wife of W-

³⁰⁷ Rule68Deposition, 18/11/2010, p.32, line 13 to p.33, line 7.

³⁰⁸ Rule68Deposition, 18/11/2010, p.32, line 13 to p.33, line 7.

³⁰⁹ W-0299, who testified.

³¹⁰ W-0293, who testified.

³¹¹ T.117, p.7, line 24 to p.8, line 13.

³¹² T.153, p.47, line 19 to p.49, line 3.

³¹³ (W-0496) EVD-D01-00732 to EVD-D01-00749, see particularly EVD-D01-00734, pages 0108-0110, EVD-D01-00735, page 0138, lines 611-622; and (W-0497) EVD-D01-00729 to EVD-D01-00731, see particularly EVD-D01-00730 at page 0170, lines 409-427.

0015 because, as W-0583 explained, W-0015 had firmly stated that he did not want his wife to know about his contact with the OTP.³¹⁴

145. The Defence also claims that the Prosecution should have checked with the *chefs de collectivité* as a means of verification. But, as stated by W-0582, the *chefs de collectivité* had close ties to the militia under investigation; consequently it would have posed a risk to mention the cooperation of child soldiers to these individuals.³¹⁵ The Defence also alleges (paras. 240-242) that the OTP should have contacted the Independent Electoral Commission (IEC) to verify age and identity, but W-0583 stated that the OTP was not allowed access to the IEC database, and W-0582 testified that the database would not have been useful as it contained the ages of adults but not those of children.³¹⁶ Moreover, the records of many institutions at that time were likely incomplete and/or inaccurate, particularly because of the conflict.³¹⁷ Furthermore, these arguments establish only that the OTP did not follow particular avenues of verification that it considered unsafe, but not that it failed to investigate through other reliable methods. In fact, as W-0582 testified, the OTP undertook to verify the ages of child witnesses by, *inter alia*, obtaining civil documents, and subjecting the witnesses to medical examinations.³¹⁸

³¹⁴ T.336, p.11, line 20 to p.12, line 1.

³¹⁵ Rule68Deposition, 18/11/2010, p.18, line 19 to p.19, line 7.

³¹⁶ Rule68Deposition, 18/11/2010, p.21, lines 15-19 (W-0583); T.336, p.11, lines 8-10 (W-0583).

³¹⁷ See para. 128 above.

³¹⁸ See Rule68Deposition, 18/11/2010, p.15, lines 6-16 and p.16, lines 19-24. In this regard, the Prosecution notes that a review of the evidence of DW-0029 reveals that many of the records of the schools the defence tendered were compiled in an irregular fashion. See in particular, T.296, p.11, lines 6-17, p.12, line 3 to p.13, line 13, and pp.22-24.

146. In respect of age determination, the Defence allegation (para. 237) that the Prosecution “deliberately eschewed the obvious investigative measures” is without merit. The OTP obtained x-rays of the teeth and wrists of its former child soldiers, which were analysed by experts, whom it called as prosecution witnesses.³¹⁹ The OTP thus pursued the most objective method to determine age – obtaining and presenting scientific data.³²⁰
147. As a further example of the complications and need to resort to creative means to verify information, some witnesses were protected, so the investigators could not directly provide their names to persons to verify their stories.³²¹ The OTP on occasion was unable to travel to the witness’s home region to meet with persons to seek confirmation of the witness’s statement – a situation that applied with respect to W-0015.³²² Where this was the case, the OTP used alternate methods, like interviewing individuals who belonged to the military or political organisations with which witnesses had been involved. Interviewees were asked to name members of particular military units, thereby providing a means to confirm witnesses’ accounts of their participation in a particular group, without jeopardising their security.³²³
148. The fact that because intermediaries were asked to obtain birth certificates for certain witnesses, does not mean that investigators “did

³¹⁹ W-0358 and W-0359.

³²⁰ EVD-OTP-00426, EVD-OTP-00427, EVD-OTP-00428, EVD-OTP-00429, EVD-OTP-00430, EVD-OTP-00431, EVD-OTP-00432, EVD-OTP-00433, EVD-OTP-00435, EVD-OTP-00444, EVD-OTP-00449, EVD-OTP-00443, EVD-OTP-00450.

³²¹ See, for example, T.336, p.15, lines 4-7.

³²² T.336, p.15, lines 1-4.

³²³ T.336, p.13, lines 10-14 and p.15, lines 7-11.

not verify any information themselves”. Nor does obtaining birth certificates for certain witnesses, and accepting a ‘State diploma’ from W-0015 – irrespective of whether those documents were authentic – prove that the OTP “chose merely to rely on documents which lacked any guarantee of authenticity”.³²⁴

149. Finally, the Defence points (para. 237) to alleged problems in the evidence of DRC-OTP-WWWW-0089 (W-0089) and DRC-OTP-WWWW-0555 (W-0555)³²⁵ to illustrate the Prosecution’s purported failure to conduct a proper investigation. The Prosecution again reiterates that the existence of inconsistent or contradictory evidence does not establish that the original evidence is untrue, much less that the Prosecution demonstrably failed in its duty to verify its evidence.
150. Contrary to the Defence assertion (para. 254), the evidence of W-0089’s family and from the schools he claims to have attended does *not* reveal W-0089’s testimony to be untrue. [REDACTED], DRC-D01-WWWW-0009 (DW-0009), testified that W-0089 was not in the UPC, but he did admit that W-0089 left home in 2001 and that he did not know what [REDACTED] was up to after that.³²⁶ Thus his evidence is not based on

³²⁴ W-0015 is certainly not in any position to reliably comment on whether or not the OTP investigators were ‘satisfied’ with the ‘State diploma’ he presented: Application, para. 246.

³²⁵ For W-0555, the Defence relies on his witness statement, DRC-OTP-0228-0023*, and a school record, DRC-D01-0003-5548* (admission sought in ICC-01/04-01/06-2660-Conf). The Prosecution opposed the request for admission. If the Chamber decides to not admit these documents, the Prosecution submits that paragraphs 256-258 should be struck from the Application and disregarded by the Chamber. If the Chamber decides to the admit them, the Prosecution submits that the school record, DRC-D01-0003-5548*, should be afforded less weight in light of the fact that no witness has been called to authenticate it, as was the case with the other records admitted into evidence.

³²⁶ DW-0009 says that [REDACTED], and that after this, W-0089 left the household (T.270, p.35, lines 8-11, T.270, p.33, lines 13-16). He was also unable to say when W-0089 left the house (T.270, p.33, lines 17-18) or even why W-0089 left because at the time he (DW-0009) “was engaged in [his] farm work” (T.270, p.33, lines 18-19). DW-0009 also said “When we heard that [REDACTED] had moved away from home [REDACTED]” (T.270, p.34, lines 9-10, emphasis added). Furthermore, the Prosecution notes that the Defence did not put to W-0089 that he was never in the UPC, and submits

his personal knowledge, since W-0089 testified he joined the UPC in 2002, after he left [REDACTED].³²⁷ Moreover, W-0089's evidence on his name, date and place of birth – which the Defence claims is contradicted by [REDACTED] – was confirmed by the very sort of evidence the Defence urges should have been relied on to verify information, i.e. his electoral card and the printout thereof from the IEC database.³²⁸

151. DRC-D01-WWWW-0023 (DW-0023)'s testimony cited by the Defence is largely refuted by W-0089 in a post-testimony interview that the Prosecution conducted with him regarding documents disclosed by the Defence prior to the appearance of DW-0023.³²⁹ The evidence of DW-0009 and DW-0023 contradict each other on several points.³³⁰ Further, that W-0089 admitted during his testimony that he lied about his age to [REDACTED] (para. 255) is immaterial, as it does not relate in any way

therefore that this suggestion should be given little weight (see, for example, the Chamber's comments at T.337, p.47, line 19 to p.48, line 1).

³²⁷ T.195, p.10, lines 4-13. It is therefore plausible that W-0089 was in the army but that DW-0009 was not aware of it.

³²⁸ The copy of W-0089's electoral card (EVD-OTP-00555) and the IEC printout (EVD-OTP-00640) both confirm the personal details given by W-0089 in court: see particularly T.195, p.5, lines 12-25. In the Prosecution's submission it is odd that on the one hand the Defence is contesting W-0089's evidence on his identity – confirmed by the IEC database printout – while on the other hand it appears to vouch for the reliability of such records by arguing that the Prosecution should have verified the identity and civil status of the witnesses it called with institutions such as the IEC; Application, paras. 240-241.

³²⁹ EVD-D01-00985, EVD-D01-00986 and EVD-D01-00987: W-0089 acknowledged having applied to an NGO for a different project and later having [REDACTED] for another project. Neither project came to fruition. W-0089 disputed that the signatures on the application form were his and confirmed that he was a member of an armed group, namely the UPC. The Defence sought the admission of the transcripts of this interview and the Chamber granted this request; ICC-01/04-01/06-2664-Conf.

³³⁰ DW-0023 says that in 2000/2001, [REDACTED] fled to Kasenyi and then to Bunia because of the first war in Bogoro (T.266, p.38, 18-25). DW-0009 does not mention Kasenyi. DW-0023 also says that "[REDACTED] in 2002/2003" (T.266, p.38, lines 2-10) and W-0089 "disappeared" between 2006 and 2007 (T.266, p.39, lines 1-5). DW-0009 says W-0089 left home in 2001 (see footnote 326). DW-0023 says that W-0089 went to primary school in [REDACTED] and did secondary school in [REDACTED] (T.266, p.36, line 14 to p.38, line 1). DW-0009 says W-0089 went to primary school in [REDACTED] (T.270, p.29, lines 20-22) and does not mention any other schools.

to the argument that the Prosecution failed to conduct adequate investigations.

152. The Defence argues (para. 256) that W-0555's statement sets out a chronology of uninterrupted studies from 2001-2002 to 2004-2005, which renders unbelievable that he could have been in an armed group from February or March 2002 to June or July 2003.³³¹ W-0555 stated that he continued to attend school *even while in the army*,³³² and it is obvious from the statement – that during 2002-2003 schools functioned with interruptions and irregularly³³³ – that his studies, although consecutive, were interrupted.
153. W-0555 did not testify. Accordingly, the alleged inconsistencies cited by the Defence could not be addressed by him.
154. The Defence cites a "Palmares"³³⁴ – a school record – to prove that W-0555 was not in an armed group in Bunia in 2002-2003. This document, that has not been authenticated, lists a '[REDACTED]' under the heading "N.B. Will pass the second session in September".³³⁵ If anything, the document seems to indicate that he did *not* attend the school during that year. Finally, the Defence makes unfounded accusations (para. 258) about the OTP investigations (or alleged lack

³³¹ It is not clear what the Defence means by 'normal schooling'. Also, the Defence inaccurately states (footnote 566) "that he commenced his 5th year of secondary school in 2004". In fact, W-0555 commenced his 5th year of secondary school in 2003. See DRC-OTP-0228-0023*, para. 8: "En début 2004, pendant ma cinquième année". This means that he would have started 5th year in 2003.

³³² DRC-OTP-0228-0023*, paras. 20, 21, 29 and 30.

³³³ DRC-OTP-0228-0023*, paras. 8, 29. This is confirmed by DW-0025; see T.259, p.17, lines 12-17.

³³⁴ DRC-D01-0003-5548*, a 2002-2003 school record for [REDACTED].

³³⁵ DRC-D01-0003-5548*, see bottom of page 3.

thereof), in respect of W-0555. The Prosecution rejects all these Defence conclusions which are based on supposition.

IV. THE PROSECUTION DID NOT FAIL TO MAKE TIMELY AND SUFFICIENT DISCLOSURE TO THE DEFENCE AND WAS NOT BIASED

155. The Defence also accuses (paras. 263-285) the Prosecution of deliberately delayed disclosure and incessant public displays of bias. Regarding disclosure, the claim (para. 23) is also that the Prosecution ‘deliberately concealed information’ – which, if true, would be grave. To substantiate this, the Defence proffers a handful of materials that – in the Defence’s view – were disclosed unjustifiably late.³³⁶ As regards bias, the Defence cites an interview given by Ms Le Fraper du Hellen and a book written by Mr Courtemanche.

A. THE CLAIMS OF DELIBERATELY DELAYED DISCLOSURE

156. The allegation that the Prosecution deliberately failed to disclose relevant material in a timely manner is unfounded. The Prosecution hired 15 legal assistants to assist the trial team in the review and disclosure process to ensure that it was conducted in a proper and timely manner. The fact that some documents were disclosed weeks, months and, in some cases, years after their collection show the Prosecution’s dedication to the fairness in re-reviewing documents that were initially not regarded as relevant or material and only became so

³³⁶ Without identifying all purportedly late disclosures, the Defence provides “examples” that it states are part of a larger pattern of ‘constant’ ‘unjustifiably delayed disclosures’; it claims (footnote 579) that the volume of supposedly late disclosures since February 2010 are such that it cannot prepare a full list. The Defence cannot make the argument that there is constant and pervasive non-disclosure by relying on only ‘illustrative examples’, the Prosecution cannot address examples that are not cited; and the Chamber cannot reach a decision based on unarticulated complaints.

later,³³⁷ or they were either subject of legitimate exercise of the Prosecution's litigation rights,³³⁸ or required determination by the Chamber on whether or not they should be disclosed.³³⁹

157. The Prosecution also readily concedes, as it has done previously,³⁴⁰ that items may well fall through the cracks and that its searches and review processes are fallible.³⁴¹ This was the case for the interview notes of [REDACTED].³⁴² That there have been inadvertent omissions and delays in the course of disclosing more than 5,000 items over nearly five years is unsurprising. But the Prosecution's continuing searches and disclosure of materials and its forthright acknowledgment of its mistakes demonstrate its diligence and commitment to comply with its disclosure obligations, not an intent to withhold exculpatory or material evidence.
158. The Prosecution responds to the specific examples of deliberately delayed disclosure alleged by the Defence in the Application as follows:

³³⁷ For this, the Prosecution reiterates the submissions advanced in ICC-01/04-01/06-2625-Conf, in particular para. 19.

³³⁸ In this regard the tables based on information extracted from the 'situation contacts management system' is an obvious example. These were ultimately determined to be disclosable by the Chamber in its decision ICC-01/04-01/06-2585.

³³⁹ See footnotes 72 and 75 above. The example of the tables based on information extracted from the 'situation contacts management system' is also relevant here.

³⁴⁰ T.329, p.9, lines 7-19.

³⁴¹ As the Chamber acknowledged, "[h]uman error will always be with us"; T.329, p.9, line 20.

³⁴² See paragraphs 171-172.

Deliberate delays in disclosing evidence material to the preparation of the defence

159. The Prosecution responded to the complaint about late disclosures (para. 269) on 15 March 2010.³⁴³ Its explanations in that response demonstrate that the delays were understandable, and in any case no prejudice resulted.

Deliberate delays in disclosing evidence affecting the credibility of prosecution witnesses

Witness W-0157

160. School records concerning W-0157 were collected on 4 November 2009 and disclosed on 8 March 2010 (para. 271). The chain of custody metadata – which the Defence received at the time of disclosure – makes it clear that the four-month delay was primarily due to the originals being transferred to France for forensic examination.³⁴⁴ It is incorrect to say that it was a deliberate refusal on the part of the OTP to disclose relevant evidence that caused this delay.

Witness W-0581

161. The Defence cites (paras. 272-273) the allegedly late disclosure of the list of individuals to be screened in November 2007, which was sent by W-0321 to W-0581. As regards this document, the Prosecution relies on

³⁴³ See email and attachment sent from the Prosecution to Legal Officer of the Chamber, Monday 15/3/2010, 19:17. These are attached hereto for the Chamber's convenience as Confidential Annex 4.

³⁴⁴ The eCourt chain of custody metadata for EVD-D01-00169 reveals that the records were received at ICC headquarters on 13/11/2009, and were transferred to the Technical and Scientific Police in France for forensic examination. They were received back by the OTP on 16/02/2010 and disclosed on 08/03/2010.

the submissions set out in the ‘Prosecution’s Response to the “Cinquième requête de la Défense aux fins de dépôt de documents” of 15 December 2010’³⁴⁵ and maintains that it does not demonstrate any intention of the Prosecution to violate its obligation to disclose relevant materials to the Defence. As advanced therein, the Prosecution did not disclose a document that was responsive to the Defence’s request.³⁴⁶ Crucially, the Accused *suffered no prejudice* since the Chamber granted the Defence’s request to recall W-0581 and it was able to fully examine him on all aspects of the mission to screen potential child soldiers.

Deliberate delays in disclosing evidence that would impeach the honesty of intermediaries

Intermediary W-0316

162. As to the criticisms regarding disclosure related to W-0316 (paras. 274-276), the Prosecution diligently and in good faith conducted, and then repeated, electronic searches and reviews of materials contained in its databases to identify relevant information. As demonstrated below, the OTP has never deliberately delayed the disclosure of this information to the Defence, including and in particular in respect of W-0316.
163. After W-0015 was re-interviewed in June 2009, the Defence requested, and the Prosecution disclosed, copies of receipts and other expense documents related to the witness. The Chamber also ordered the re-

³⁴⁵ ICC-01/04-01/06-2670-Conf, specifically paras. 11-14.

³⁴⁶ As explained in the response, no written instructions were sent to W-0031 or W-0321 and no written list of names was sent to W-0321.

disclosure of statements or interview records relevant to W-0316, with redactions to his name lifted.³⁴⁷

164. On 2 July 2009, the Defence expanded its request to encompass copies of receipts and other expense documents for all trial witnesses. The Prosecution agreed and of its own volition additionally disclosed materials relevant to intermediary W-0316. By December 2009, the Prosecution had disclosed almost 1,000 receipts and expense documents related to trial witnesses and intermediary W-0316.³⁴⁸
165. In September 2009 the Prosecution interviewed trial witness W-0038, who had been introduced by W-0316, and in October 2009 interviewed W-0316 himself, in its investigation of the allegations made by W-0015.³⁴⁹ To prepare for the interview of W-0316, it retrieved information from internal databases and disclosed it to the Defence in December 2009.³⁵⁰
166. In May and June 2010, following the Chamber's 12 May 2010 'Decision on Intermediaries',³⁵¹ the Prosecution conducted fresh searches across its evidence database and extracted information from the 'situation contacts management system', and disclosed this to the Defence in June and July 2010.

³⁴⁷ T.196, p.70, line 19 to p.71, line 8. Disclosure was effected on 26 June 2009.

³⁴⁸ According to figures obtained from the OTP's evidence management database, RingTail, for disclosures up to 31/12/2009.

³⁴⁹ The Defence was present at W-0038's interview, and the transcripts of W-0316's interview were finalised and disclosed to the Defence in November 2009 (as shown in the eCourt metadata for example EVD-D01-00372, EVD-D01-00377 and EVD-D01-00360).

³⁵⁰ Including, for example, an internal memorandum dated 08/09/2007 (DRC-OTP-0219-0067). For the Chamber's convenience, this is attached as Confidential Annex 5.

³⁵¹ ICC-01/04-01/06-2434-Conf-Exp.

167. In October 2010, the Prosecution conducted further extensive searches following the ‘Decision on the defence request for disclosure of screening notes’³⁵² and the Chamber’s declaration that “[a]ny information in the possession of the prosecution that relates to the knowledge of the prosecution about, or its actions or involvement with, intermediary 143, 316 or 321 in the context of any alleged irregular behaviour is disclosable”.³⁵³ These searches encompassed the OTP’s databases for the management of internal work product; within those databases, relevant materials were identified and reviewed for possible disclosure.³⁵⁴ The results were disclosed in October and November 2010.

168. Following W-0316’s testimony, the Prosecution met with the witness at the “thank you” meeting. During the meeting, W-0316 requested financial assistance. The Prosecution promptly told the Defence.³⁵⁵

169. The specific disclosure details for the documents in Annex II of the Application are set out in the table attached as Confidential Annex 1.

Intermediary W-0031

170. In respect of the information related to W-0031 (paras. 277-278),³⁵⁶ the Prosecution relies on the submissions set out in the ‘Prosecution’s

³⁵² ICC-01/04-01/06-2585-Conf.

³⁵³ ICC-01/04-01/06-2585-Conf, para. 19.

³⁵⁴ As the result of searches across its internal databases, more than 1,000 documents were identified, cross-checked against materials registered in the evidence database and reviewed for disclosure purposes.

³⁵⁵ For the Chamber’s convenience, this note, which was emailed to the attention of the Chamber by the Defence on 01/12/2010 at 12:43. See also information related to the “thank you” meeting for W-0297 disclosed to the Defence. These are both attached as Confidential Annex 6.

³⁵⁶ EVD-OTP-00641.

Submissions on Disclosure pursuant to Chamber's I Order of 5 November 2010'.³⁵⁷ This particular document – an internal memorandum – was retrieved during searches conducted in late October 2010 across internal databases in respect of W-0143 following the decision on screening notes, ICC-01/04-01/06-2585, and disclosed on 1 November 2010.

Deliberate delays in the disclosure of patently exculpatory evidence

171. The Defence states (paras. 279-280) that the interview notes of [REDACTED] from September 2006³⁵⁸ were not disclosed until October 2010 and that '[n]o explanation was given as to the reasons why this [...] was not disclosed until more than four years after it was taken'. This was an inadvertent omission due to an internal mistake; when the investigator returned from mission the notes were inadvertently not registered in the evidence management system in accordance with the established practice of the Office (although the document was saved in the OTP's internal information management system). The notes thus were not in the evidence database, to be retrieved in the Prosecution's routine keyword searches. They were found during the expanded searches across internal databases conducted in October 2010 following the decision on screening notes, ICC-01/04-01/06-2585. They were then disclosed without delay.³⁵⁹

³⁵⁷ ICC-01/04-01/06-2625-Conf.

³⁵⁸ EVD-D01-00773.

³⁵⁹ The eCourt chain of custody metadata confirms registration on 14/10/2010 and disclosure a week later.

172. Moreover, the fact that the Prosecution disclosed similar information³⁶⁰ shows that this was not part of a deliberate policy on the part of the Prosecution to withhold ‘patently exculpatory evidence’.
173. Significantly, the Defence has pointed to no evidence to support its contention that delays in disclosure were part of a deliberate policy of the Prosecution to withhold material from the Defence.³⁶¹ The contention is effectively based on one document,³⁶² which the Defence characterises with exaggeration as “patently exculpatory”, and ignores the raft of disclosures that the Prosecution *has* disclosed. The Prosecution submits that it cannot reasonably be imputed from the examples the Defence cites, that the OTP has been anything less than conscientious and diligent in discharging its disclosure obligations.
174. Importantly, the Defence also fails to prove prejudice stemming from the alleged lack of disclosure. It complains (para. 281) in the abstract that as a result of the Prosecution’s alleged failures it has been deprived of the possibility of conducting further investigations and questioning witnesses. However, the Defence fails to specify which material the Prosecution failed to disclose on time and the line of

³⁶⁰ For example, information provided by former trial witness DRC-OTP-WWWW-0026.

³⁶¹ The Court in *R (Ebrahim) v Feltham Magistrates Court; Mouat v DPP [2001] 2 Cr. App. R. 23*, stated that a stay of proceedings would only be granted in response to the defendant’s claim that he had been deprived of a piece of evidence if the defendant demonstrated that a fair trial was not possible on a balance of probabilities; or that there had been bad faith or other serious fault on the part of the prosecution: Attorney General’s Reference (No.1 of 1990), Re [1992] Q.B. 630 applied at para. 23.

³⁶² The sole example advanced for the claim (para. 265) that ‘[t]he Office of the Prosecutor is thereby giving itself the right to deprive the Defence of the possibility of considering certain exculpatory evidence’ is an opinion expressed by an investigator regarding the reliability of W-0031. The relevance and disclosability of this information has been extensively addressed; see ICC-01/04-01/06-2625-Red, and ICC-01/04-01/06-2656-Conf. The Prosecution submits that even in the event that the Chamber accepted that this document had been deliberately withheld, it is one isolated instance and should not be taken as indicative of a general practice of withholding information.

inquiry it has been deprived of pursuing or the witnesses it was unable to question further.³⁶³

B. IN RESPONSE TO THE CLAIM OF FAILING TO REPORT THAT CERTAIN WITNESS EVIDENCE WAS UNTRUTHFUL OR INACCURATE

175. The Prosecution agrees that it would be obligated to inform the Defence and the Chamber if it knew that it had tendered false evidence (paras. 282-283).³⁶⁴ However, it disputes the Defence submission (paras. 282-285) that it knowingly presented false evidence and failed to inform the Court of this. Had the Prosecution had any doubt on the reliability of its evidence it would have discarded it from its list of evidence; if already offered, it would have informed the Defence and the Chamber. For example, upon discovering that witnesses W-0007 and W-0008 were brothers, rather than the cousins they had claimed to

³⁶³ In response to a previous complaint of late disclosure (the same included in paragraph 269 of the Application), the Chamber made it clear that the Defence must specify the prejudice is suffered because of not receiving documents earlier, and required the Defence to provide 'a schedule setting out the documents that [the Defence] say have been served inexcusably late with a short comment column on the right-hand side summarising what [the Defence] say is the prejudice that the Defence has experienced as a result of late service'; T.254, p.20, lines 3-9, 20-25. The ICTY Appeals and Trial Chambers also entertained Defence submissions with respect to alleged instances of the Prosecution's lack of disclosure of exculpatory material if a prejudice for the Defence has been demonstrated as a result of such failure and no other remedy is available: *Prosecutor v Krstic*, Appeals Judgement, IT-98-33-A, 19 April 2004, paras. 153, 165, 171, 187, 192, 199. See also *Karemera et al.*, Decision on Joseph Nzirodera's Motion to Exclude the Testimony of Witness Gay, ICTR-98-44-T, 16 July 2007, para. 5. Moreover, in most instances the materials *were in fact received by the Defence before relevant witnesses appeared*: the school records related to W-0157 (EVD-D01-00169, obtained after that witness had testified) were disclosed on 9 March 2010, i.e. well before the appearance of defence witness DW-0029 in May 2010. The Defence chose not to ask the witness any questions thereupon: T.293, p.56, lines 1-12. W-0581 was specifically recalled in order for the Defence to address the issues arising from these lists with him: T.310, p.69, line 18 to p.70, line 2. All but one item of the W-0316 documents in Annex II of the Application were disclosed and in the possession of the Defence prior to W-0316's appearance in Court. The only document disclosed after W-0316's testimony (EVD-D01-00391) was however disclosed prior to the conclusion of the testimony of W-0583 who was in the best position to comment on it, since the document (EVD-D01-00391) is an email from him to his superior containing opinions about expenses incurred and information provided by W-0316.

³⁶⁴ The Prosecution does not dispute that it has a clear obligation to inform the Court and the Defence where it knows that a prosecution witness has lied: see, for example, Articles 24(3) and 25(1) of the Code of Professional Conduct.

be during in-court testimony, the Prosecution informed the Court³⁶⁵ and disclosed the post-testimony transcripts to the Defence.³⁶⁶

176. The Prosecution disagrees that W-0316 is a false or manifestly untruthful witness. As set out above, inconsistencies within and amongst the testimony of witnesses and in documentary and other evidence are inevitable. However, inconsistent or inaccurate statements cannot, on their own, constitute false testimony.³⁶⁷ There may be any number of reasons why contradictions exist within a witness' evidence or between a given witness' testimony and other evidence.³⁶⁸

177. It also disagrees that it was under any obligation to inform the Defence or Chamber of its decision to withdraw W-0157 in the *Katanga & Ngudjolo* case, or that this decision is illustrative of an awareness of any falseness in his evidence.³⁶⁹

³⁶⁵ T.247, p.35, lines 5-7.

³⁶⁶ Transcripts W-0007: EVD-D01-00752 (DRC-OTP-0222-0607), EVD-D01-00753 (DRC-OTP-0222-0631), EVD-D01-00754 (DRC-OTP-0222-0655) disclosed on 04/02/2010. Transcripts W-0008: EVD-D01-00750 (DRC-OTP-0222-0371), EVD-D01-00751 (DRC-OTP-0222-0411) disclosed on 11/02/2010.

³⁶⁷ *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, ICTR Trial Judgement, Chamber I, 27 January 2000, paras. 98-99.

³⁶⁸ In this regard, domestic courts have placed special attention on the prosecution's knowledge of the critical facts when addressing situations of false evidence adduced at trial. The US Supreme Court noted that due process could never be satisfied "through the pretence of a trial which in truth is but used as a means of depriving a defendant of liberty through a *deliberate deception* of court and jury by the presentation of testimony *known to be perjured*"; Henning, P., *Prosecutorial Misconduct and Constitutional Remedies*, 77 Wash. U. L.Q. 713 (1999), p.755-756 citing *Mooney v. Holohan* 294 U.S. 103, 112 (1935) (emphasis added). Likewise, in *Napue v. Illinois* (360 U.S. 264 (1959)) also the US Supreme Court emphasised that the prosecution knew about the perjury committed by a witness, and reversed the conviction.

³⁶⁹ As regards W-0316, the Prosecution does not know that the answers he gave were untruthful. There may be plausible and reasonable explanations for him not recalling that he introduced witnesses to the OTP and for thinking that W-0183 was killed. In respect of W-0157, the Prosecution repeats the submissions in ICC-01/04-01/06-2393.

C. THE PROSECUTION DID NOT BREACH ITS OBLIGATIONS OF FAIRNESS
AND IMPARTIALITY

178. The Defence claims (paras. 287-297) that an interview given by Ms Le Fraper du Hellen, formerly the Head of the Jurisdiction, Complementarity and Cooperation Division of the OTP, and the book 'Le monde, le lézard et moi' written by Gil Courtemanche (over whom the Prosecution has no control or authority), formerly a short-term consultant on contract with the OTP, demonstrate an incessant public display of bias in respect of the accused which is incompatible with the Prosecutor's functions.
179. At the outset, the Defence is trying to re-open a matter already decided by this Chamber.³⁷⁰ The Defence's claim (para. 297) that the interview, and the publication of a fictional book, constitute or contribute to an abuse warranting the termination of these proceedings is a waste of this Court's time and attention.

V. **PARTICIPATING VICTIMS DID NOT COLLUDE TO PROVIDE FALSE
TESTIMONY, AND IN ANY EVENT THE PROSECUTION PLAYED NO PART IN
THE PRESENTATION OF EVIDENCE BY THE VICTIMS**

180. The Defence states that Victims a/0225/06 and a/0229/06, at Victim a/0270/07's instigation, presented themselves under false identities and that they made false statements before the Chamber. The Defence substantiates these allegations by citing to several defence witnesses and documents produced by the Defence (paras. 200-228).

³⁷⁰ ICC-01/04-01/06-2433.

181. The victims concerned requested to testify in the proceedings on 2 April 2009.³⁷¹ The Prosecution asked the Chamber to dismiss the request or seek clarifications regarding the intended interventions.³⁷² After the Chamber ordered the victims to provide clarifications,³⁷³ the Prosecution again opposed the request, and urged that the victims' views and concerns and/or evidence of harm they suffered could be presented at the sentencing or reparations phases.³⁷⁴
182. The Prosecution had no contact with the victims concerned and was under no obligation to verify or investigate the accuracy of the summaries that it received in advance of their testimonies. Neither the victims' appearance nor their alleged unreliability can be attributed to the Prosecution. Even if they did collude, the Prosecution fails to see how this could amount to prosecutorial abuse of process. Nor is the alleged collusion sufficiently significant for the Chamber to conclude that the Accused cannot possibly receive a fair trial.

CONCLUSION

183. In light of the foregoing, the Prosecution submits that the Accused has failed to discharge his burden. There is no evidence (i) that any OTP intermediary had a decisive role in the investigation; (ii) that any intermediary with or without a decisive role deliberately suborned perjury; and (iii) that the OTP knew or had reason to know of possible subornation. The credibility of the witnesses should be decided at the

³⁷¹ ICC-01/04-01/06-1812-Conf, p.4.

³⁷² ICC-01/04-01/06-1824-Conf, para. 10.

³⁷³ T.171, p.37, line 4 to p.38, line 2.

³⁷⁴ ICC-01/04-01/06-1895-Conf, paras. 14-15.

end of the trial. Nor is there any other evidence of Prosecutorial misconduct. Accordingly the Application should be rejected.

REQUEST FOR ORAL HEARING

184. The Prosecution acknowledges that the Chamber does not generally schedule in-court argument on submissions. This submission, however, requests an analysis of a multitude of facts and is potentially case-dispositive. Given the importance of the matter, an oral hearing would be appropriate in this case.



Luis Moreno-Ocampo
Prosecutor

Dated this 31st day of January 2011

At The Hague, The Netherlands