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TRIAL CHAMBER I

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

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

Public Redacted Version

Prosecution's Reply to the « Conclusions finales de la Défense »

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INTRODUCTION

1. The Prosecution hereby replies to the “Conclusions finales de la Défense”.¹
2. At its essence, the Defence contests the sufficiency of the evidence to prove that (a) the Accused, with others within the UPC/FPLC, adopted a policy of enlisting, conscripting and using in hostilities children under the age of 15, as part of the common plan, (b) persons under the age of 15 were enlisted, conscripted and used by the UPC/FPLC, and (c) the Accused knowingly and intentionally contributed to the common plan. The Defence asserts instead that the Accused was just a political leader (para. 785) who tried to demobilise children; it claims there is no firm evidence of children under 15 in the military and that he had no knowledge of or involvement in their recruitment.
3. With respect to leadership and responsibility, the Defence appears to concede significant aspects of the case: (a) that the Accused - whose military call sign was “No. 1” - was *de jure* in control of the UPC/FPLC (para. 845); (b) that a key duty of any political or military leader is to constitute an armed force (para. 880); (c) despite its claim that the UPC/FLPC did not set out to recruit children, the known risk that recruitment drives would snare children under the age of 15 was in any event justified and accepted – because the obligation to constitute an army sufficient to meet the security threat was more pressing than his duty to observe the law against recruiting child soldiers, and in a conflict between the two duties the former took precedence (para. 880); and (d) when it suited his purpose the Accused issued untrue official documents as propaganda (para. 379), as the Prosecution argues was the case for the demobilisation documents.
4. The Defence wrongly dismisses the evidence that the Accused and co-perpetrators agreed to build an army to take over Bunia and to expand their territorial control throughout Ituri; that the plan involved the enlistment, conscription and use in hostilities of young persons, regardless of age; and

¹ ICC-01/04-01/06-2773-Conf.

that the Accused played a key part in adopting and implementing that common plan.

5. In fact, the evidence shows that Lubangas was *de jure* and *de facto* in charge of the UPC/FPLC, including having a decisive and active role in military matters. The Defence's suggestion that the military actions were separate somehow from the Accused's "political wing" is contradicted by its own admission that UPC/FPLC political goals were achieved through military actions (para. 379). The UPC/FPLC was a military force with political goals; its power was based in its military capacity to control the territory.
6. With respect to the policy and practice of recruiting children, trial witnesses and contemporaneous documents provide ample specific evidence of the age of children in the UPC/FPLC, of the policy of enlisting, conscripting, and using them, and of the Accused's awareness that children under the age of 15 were enlisted, conscripted and used in hostilities. The evidence shows that the Accused did not just accept the risk and the substantial likelihood of that outcome, he intended it.
7. As illustrative examples, the Chamber should consider a UPC/FPLC monthly report and the Accused's visit to a training camp. Contrary to the Defence's analysis (paras. 717-719), the 6 November 2002 UPC/FPLC monthly report confirms the existence of the policy to recruit children and the ways in which the policy was implemented, including that the UPC/FPLC coerced and pressured families to send their children. The demobilisation letters and decrees prove knowledge within the leadership of the presence of children, and their non-implementation confirms that they were shams.
8. The videotape of the Accused's visit to the Rwampara training camp on 12 February 2003 – shortly after issuing decrees to demobilise children – shows him, in military uniform, inspecting a formation of recruits that included children manifestly under the age of 15.² Moreover, his speech to them

² EVD-OTP-00570.

confirmed that he was in charge of the military and that he met with his senior commanders “every day”. Though the Defence (paras. 827-831) trivialises the Rwampara evidence, contending that this was his only visit and that giving a motivational talk to recruits is not an essential contribution, its argument misses the point. The visit and the motivational talk demonstrate the Accused’s knowledge, his deliberate contribution to the common plan, his role as supreme commander, and that his publicly touted efforts to demobilise, at the same time as he was visiting, reviewing, and encouraging the presence of child recruits, were complete shams.

9. Finally, the Prosecution makes two additional observations. First, the Defence brief is replete with numerous assertions and denials that lack citations to evidence establishing their factual basis.³ Assertions by counsel are not evidence; factual statements not supported by evidence should be disregarded. Secondly, in assessing the evidence, the Defence focuses on pieces in isolation, ignoring the totality of the evidence. The fact finder, however, finds facts and evaluates credibility of witnesses based on all of the relevant evidence admitted at trial.⁴ When the evidence at this trial is reviewed in its totality, the inescapable conclusion must be that the Accused is guilty beyond reasonable doubt.

³ See e.g. the statements set out in #2773, paras. 466, 598, 610 and 792.

⁴ Along the same line, see Pre-Trial Chamber II in the Bemba confirmation decision; ICC-01/05-01-08-424, at para. 58 and fn. 77. See also ICTY and ICTR: *Prosecutor v. Kupreškić et al.*, IT-95-16-A, “Appeal Judgement”, (“*Kupreškić Appeal Judgement*”), App. Ch., 23 October 2001, para. 334; *Prosecutor v. Rutaganda*, ICTR-96-3-A, “Judgement”, (“*Rutaganda Appeal Judgement*”) Appeals Chamber, 26 May 2003, para. 207; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, “Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker”, (“*Sesay Ruling to Exclude Evidence*”) Trial Chamber, 23 May 2005, para. 4; *Fofana Appeal Decision on Bail*, paras 22-24.

SUBMISSIONS

CRIMINAL RESPONSIBILITY OF THE ACCUSED

I. THE COMMON PLAN

10. The Pre-Trial Chamber held that the common plan needs to include an element of criminality, although the plan need not be specifically directed at the commission of a crime.⁵ The Prosecution's theory aligns with these principles.⁶ The plan to build an army included the enlistment, conscription and use to participate actively in hostilities of children under the age of 15.
11. The Prosecution disagrees with the Defence complaint (para. 801)⁷ that the evidence of events before September 2002 – i.e, events relating to the period when the common plan was devised – is irrelevant or falls outside of the Chamber's jurisdiction.
12. In the face of undisputed evidence, the Defence argues that the Accused was not acting in concert with the co-perpetrators before September 2002. The Prosecution points out the following flaws in the Defence's analysis.
13. The Defence claims that the meeting in Kasese, Uganda in May-June 2002 was of a "purely political nature" (para. 785). But this distinction is not based on the evidence. Bosco Ntaganda and Kisémbó Bamehuka, two senior military commanders, were part of the Accused's delegation.⁸ Their presence confirms that the UPC/FPLC was a military force with political goals.
14. W-0041 confirmed that the group that took control of Bunia in August 2002 was composed of the guards of the Accused⁹ and that Richard Lonema was

⁵ "Decision on the confirmation of charges", ICC-01/04-01/06-796-Conf-tEN, para. 344.

⁶ "Prosecution's Closing Brief", ICC-01/04-01/06-2748, paras. 3, 11, 63, 75.

⁷ For ease of reference, the Prosecution cites throughout its Reply in this manner to relevant portions of the "Conclusions finales de la Défense".

⁸ T.125, p.2, line 16 to p.4, line 15, p.27, lines 3-9; T.126, p.3, line 22 to p.5, line 10. The Defence did not challenge that Bosco was in the Accused's guard.

⁹ T.125, p.13, line 23 to p.14, line 2. DW-0019 confirmed that Kisémbó and Bosco took part in this battle: T.340, p.46, line 20 to p.47, line 3

the Accused's representative in Bunia¹⁰: explaining his evidence that the Accused must have appointed Lonema, W-0041 said "if you have to act for someone, then it is that person who is going to appoint you to act on his behalf".¹¹ To challenge W-0041's testimony,¹² the Defence merely asserts (para. 374) that he is 'wrong'.¹³

15. The Defence also claims (paras. 378-379) that W-0041 confirmed that the 11 August 2002 declaration "was intended to gain political capital from events to which they had not contributed", but the references provided do not establish this point. The Defence's attempt to characterise as propaganda, and therefore untrue, the 11 August 2002 declaration¹⁴ is untenable when assessing the documents alongside the ample witness testimony about *the UPC* takeover of Bunia in August 2002.¹⁵ The Accused himself admitted in an interview as well as in official letters that "on the 9th of August 2002, *we actually chased the RCD/ML out of Ituri and we occupied the whole of Ituri*".¹⁶
16. Additionally, taking political advantage of a military occupation as alleged by the Defence (para. 379), confirms that UPC/FPLC political goals were achieved through military actions.
17. Lastly, the Defence tries improperly to tender new evidence regarding a photograph of the Accused with his co-perpetrators (para. 792). Though witnesses could not confirm when the photo was taken,¹⁷ the Defence concession that it dates to July 2000 accords with the Prosecution's theory that the Accused and these very militiamen worked together since 2000.

¹⁰ T.125, p.24, line 12 to p.25, line 8.

¹¹ T.125, p.25, lines 3-18.

¹² T.125, p.24, line 6 to p.25, line 18.

¹³ W-0043 also confirmed that Mr. Lonema was the coordinator: T.153, p.75, line 4 to p.76, line 18. During its questioning, the Defence did not challenge the witness's evidence on this point.

¹⁴ See in contrast T.125, p.13, lines 8-19.

¹⁵ T.153, p.75, line 4 to p.76, line 18; T.199, p.19, lines 12-17; T.203, p.2, lines 11-16; T.179, p.60, line 15 to p.61, line 12, p.76, lines 11-17; T.181, p.32, line 24 to p.33, line 23; T.184, p.56, line 6 to p.58, line 2; EVD-OTP-00403, p.0106

¹⁶ EVD-OTP-00584; T.130, p.45, lines 21-24 (emphasis added).

¹⁷ Witnesses could not confirm the date or circumstances in which the photograph was taken: T.343, p.15, line 4 to p.16, line 9, p.21, line 12 to p.22, line 1.

II. THE ACCUSED'S ESSENTIAL CONTRIBUTION

18. The Accused made an essential contribution to the common plan to take over Ituri using military means, including the use of children under 15, through his control over the FPLC and the directions he gave to recruit and use children under 15. The Defence agrees (paras. 561, 806, 811, 845, 862) that the Accused was *de jure* in control, but that he lacked *de facto* control. To the contrary, the evidence also overwhelmingly established his *de facto* control over the FPLC, its Chief of Staff, and other main staff officers. His substantive control means that the activities of the UPC/FPLC as regards the recruitment and use of children under 15 are attributable to the Accused.¹⁸ Without the Accused's contribution as head of the UPC/FPLC and architect of its policies, the implementation of the common plan using criminal means – the recruitment and use of child soldiers – would have been frustrated.
19. In addition to contesting the Accused's *de facto* control, the Defence argues (para. 820) alternatively that effective control over the perpetrators of the crimes is not sufficient, that the evidence must prove the personal and deliberate contribution. This stance is erroneous and contrary to ICC jurisprudence.¹⁹ It is sufficient in this case that the Accused was in control over the FPLC and had an instrumental role in the functioning of the military to demonstrate his essential contribution to the implementation of the common plan. Without this contribution, the implementation of the common plan, and the recruitment and use of child soldiers, would have been frustrated.
20. The Defence's position that the Accused only had *de jure* control is contrary to wealth of witness and documentary evidence. The UPC and FPLC were one and the same organisation and the Accused was its leader. His *military* call sign was "No. 1",²⁰ and he had a close superior-subordinate relationship with

¹⁸ See #2748, Section 9.

¹⁹ See #796-Conf-tEN, paras. 347, 373-383.

²⁰ #2748, para. 244, citing W-0055.

his two main FPLC senior commanders, co-perpetrators Kisembo²¹ and Bosco. Kisembo, the Chief of Staff, reported to the Accused as legal and factual head of the army.

21. In addition to his power over appointments within the military, the Accused – aka “No. 1” – had authority over the military’s activities. W-0055 testified that “all reports had to be submitted to him”;²² “on many occasion [Kisembo] handed reports to President Lubanga”;²³ it was a normal practice for the General Chief of Staff to “make the proposal, [REDACTED] to the hierarchy.”²⁴ According to W-0041, military meetings would usually be chaired by the President himself.²⁵
22. Entries in the UPC logbook also clearly confirm that the Accused was in control: e.g., entry DRC.00017.198, middle entry, a message from the G2 to No. 1.²⁶ Even W-0017, whom the Defence asserts (paras. 431-439) proved that the Accused was not in charge, testified seeing the Accused in the company of commanders including a brigade commander, Salumu, and a company commander.²⁷ W-0017 even joked with one of Salumu’s bodyguards about obtaining money for the military from the Accused.²⁸ W-0017’s evidence also demonstrates that even on the ground, the Accused was perceived as the Supreme Commander, the only one above the Chief of Staff.²⁹ W-0017 reported that Kisembo’s bodyguards talked about his frequent contacts with the

²¹ As regards the Defence’s submissions on EVD-D01-01092 and the defection of Kisembo, it is underscored that this document is signed in December 2003, outside the time period of the charges. Having said that, it does not demonstrate that Kisembo had autonomy during the period of the charges because it refers to a situation that existed in December 2003 only.

²² #2748, para. 284; T.189, p.64, lines 3-5.

²³ T.175, p.22, lines 19-20.

²⁴ T.189, p.62, lines 11-13.

²⁵ T.126, p.67, lines 3-24.

²⁶ #2748, para. 246.

²⁷ #2748, paras. 245, 254 and 263; T.158, p.13, line 17 to p.14, line 17, p.16, lines 6-19, p.43, lines 4-13, p.44, lines 11-15.

²⁸ T.158, p.16, line 22 to p.17, line 1.

²⁹ #2748, para. 251; T.154, p.24, lines 14-19.

Accused,³⁰ and recalled that Kisembo would often refer to his meetings with the President.³¹

23. With respect to the Accused's particular role in the planning of military operations, the Defence errs when it argues (para. 486) that the Accused only intervened to authorise logistics and finance. The first error is to confuse the strategic role of a top commander and the operational commanders. Additionally, the evidence shows that the Accused was involved in operational details. W-0055 described, for example, how the military operation to [REDACTED], during the [REDACTED], was planned at the Accused's residence,³² requiring the inescapable inference that he was integrally involved in the development and organisation of the military plan.
24. Similarly, the Defence misstates the evidence (para. 486) when alleging that W-0055 said he never saw the Accused meeting with the general staff. On the contrary, W-0055 confirmed that the Accused met with the Chief of Staff, Bosco, [REDACTED] (main staff officers) and Rafiki,³³ but not with the commanders from the field, such as Aru, Mahagi and Tchomia.³⁴ At no point did he mention "general staff" - commanders from the field are not general staff commanders.
25. Furthermore, W-0055's evidence that the Accused would call meetings with [REDACTED] regarding the UPDF and when there was fighting,³⁵ cements the notion of the Accused being in *de facto* control and fully responsible for the FPLC.
26. Another example offered by the Defence (para. 491) concerning the Accused's responsibility over the children within Jerome Kakwavu's troops from August

³⁰ T.158, p.28, lines 7-11, p.34, line 22 to p.35, line 6, p.41, lines 20-25, p.43, lines 2-3 ("A. I can't remember how long it took, but sometimes it could take up to an hour, because we spent a while there"). See also #2748, para. 259.

³¹ T.158, p.43, line 17 to p.44, line 10.

³² T.175, p.11, lines 5-11.

³³ T.175, p.41, lines 12-20.

³⁴ T.175, p.41, lines 8-11.

³⁵ T.175, p.41, lines 21-23. See also #2748, para. 278.

2002 to March 2003 is also incorrect. To be sure, Kakwavu was responsible for the enlistment of his forces before his troops were incorporated into the FPLC, but once they joined forces the Accused became the sole supreme commander.³⁶ Contemporaneous reports at the time in fact record Kakwavu asserting that the Accused (or the Chief of Staff, Deputy Chief of Staff, tiger 1 or the G2) could give him orders.³⁷ Thus, within the FPLC Kakwavu's troops were subordinate to the Accused, and any subsequent use of Kakwavu's child soldiers in hostilities was the responsibility of the Accused.

27. Given the Accused's *de facto* control over the FPLC, the efficient level of communication up and down the chain of command, his regular meetings with his high level military officers (such as Kitembo and Bosco) and his visits to training and military camps, it is inconceivable he was unaware of what was taking place militarily during the period of the charges.
28. The evidence permits the only reasonable inference that the Accused adopted the policy of using soldiers under the age of 15, within the charged period, in furtherance of the common plan to take over Ituri. During that time the Accused was unquestionably fully responsible for UPC/FPLC policies and at any time had the ability to genuinely put an end to the commission of the crimes charged. Despite being constantly put on notice of the existence of children under the age of 15 in the FPLC he made no genuine efforts to stop recruiting and using under-aged children. Indeed, the Defence brief defends the absence of genuine effort by suggesting (para. 880) that it would have been a violation of his duty to stop the practice: it urges that the duty of a political or military leader to constitute an army sufficient to meet the security threat was more pressing than the duty to observe the law against recruiting child soldiers, and in a conflict between the two duties the former took precedence.

³⁶ #2748, para. 241.

³⁷ T.177, p.4, lines 7-9.

The Accused's Essential Contribution to Recruitment

29. The Defence (para. 814) takes the evidence of W-0055 regarding the recruitment by the commanders out of context. The process of recruitment and mobilisation of young people was undertaken by wise men and village elders.³⁸ W-0055 provides the example of Mafuta who would meet with the Accused.³⁹ The goal was to fill the ranks of the UPC/FPLC; the Defence urges that it would have been irresponsible in pursuing that goal to worry about legal niceties such as the age of the recruits, or to bar children from enlisting. The activities of some commanders need to be seen in this context, a context established by the Accused.
30. The Defence submission (para. 836) regarding the use of cadres and their training misstates and wrongly assesses the evidence. Firstly, the Defence is incorrect when it argues that W-0055's testimony that he did not know *how* the cadres were trained undermined his earlier, clear evidence that the Accused was responsible for the training.⁴⁰ The testimony is not inconsistent; it addressed two different aspects, one referred to the content or composition of the training, the other to the person responsible. Moreover, the Defence claim that the activities of cadres related to awareness programmes ignores the precise and detailed evidence provided by W-0055 concerning the working relationship between the FPLC G5 Mbabzi and the cadres in order to recruit young people for the army.
31. The Defence overstates the significance of W-0016's evidence that he never personally saw the G5 carry out recruitment. Just because W-0016 never saw it does not mean the G5 did not undertake recruitment – in fact [REDACTED], W-0016 provided evidence that the G5 was responsible for recruitment.⁴¹

³⁸ Regarding #2773, paras. 500-506, the Prosecution refers to #2478, paras. 180, 288 and 289. That there is no UPC document mentioning Mafuta does not undermine the evidence from W-0055 and W-0030 and exhibit EVD-OTP-00582.

³⁹ T.175, p.58, lines 2-7. In response to #2773, para. 499, the Prosecution uses the term "reports" to mean oral briefings or updates, not written reports.

⁴⁰ T.175, p.77, lines 16-19.

⁴¹ T.189, p.81, lines 9-10.

Other evidence also showed the G5's responsibility, such as W-0055's testimony and exhibits EVD-OTP-00518 and 00457.

32. Further, the Defence argument (paras. 760, 839, 887) that the G5 6 November 2002 monthly report merely relates to voluntary enlistment (an argument that curiously ignores that even voluntary enlistment of children is a crime), is taken out of context. In this regard, one particular sentence (7th sentence from the bottom of page 6) is particularly incriminating. It sets out the UPC agreement to try to leave one-fourth of the "children" to the population in the villages, which shows not simply that children were targeted, but also implies that the population gave their children reluctantly.⁴²
33. At the same time, the Defence also contends (para. 807) that there is no evidence that the Accused was informed of the 6 November 2002 G5 report. The inference to the contrary is inescapable. Firstly, the last page of the document refers to No.1, the military call sign for the Accused ("we are again requesting that you ask No.1 to think about civil servants even if only in words for consolation."). Secondly, the document contains information on topics fundamental to the UPC and its policies. Thirdly, the G5 reported to the Chief of Staff that the message from the Accused had been relayed to the population and soldiers and was received with "enthusiasm".⁴³ Lastly, the Accused is saluted at the end of the report.
34. Quite apart from the report, W-0055 also stated that the G5 met with the Accused and the Chief of Staff in relation to recruitment issues.⁴⁴ It is inconceivable, given the Accused's position within the UPC/FPLC that this document or its contents would not have been relayed to the Accused.⁴⁵
35. In response to the Defence assertions on self-defence forces, the Prosecution refers to paragraphs 349-355 of its Closing Brief.

⁴² T.182, pp.9-18; #2748, paras. 175-176.

⁴³ EVD-OTP-00457, p.-0139.

⁴⁴ T.175, p.76, lines 22-24.

⁴⁵ This is also in response to #2773, para. 840.

The Accused's use of child soldiers under 15 in his bodyguard unit

36. As head of the UPC/FPLC the Accused used children under the age of 15, setting by example the means by which Ituri was to be conquered.⁴⁶
37. The Defence cannot reasonably dispute that children under the age of 15 were present in the FPLC, and specifically within the Accused's personal guard. W-0016 testified that the Presidential guard included children under the age of 15, and as to that evidence the Defence only contests the exact number (a confusion attributable to a translation issue regarding whether there were four or fewer than four children under 15 in the Accused's bodyguard unit).⁴⁷ Moreover, W-0016, [REDACTED] the Protection Unit camp, knew well the composition of the Presidential Guard.⁴⁸ For example, he remembered that a child named Bahati also belonged to the Presidential Guard.⁴⁹ And, of course, videos show the Accused in the presence of what are indisputably under-aged bodyguards. See for example EVD-OTP-00573, EVD-OTP-00574, EVD-OTP-00575, EVD-OTP-00577, EVD-OTP-00585 and EVD-OTP-00586.⁵⁰
38. In the face of this evidence, DW-0011 and DW-0019's contrary testimony⁵¹ that all the bodyguards of the Accused were above the age of 18 is not credible.

III. THE ACCUSED'S MENS REA

39. The specific *mens rea* required for the crime of enlistment, as stipulated in Article 8 of the Rome Statute, is inapplicable in this case where the Accused is charged with co-perpetration based on joint control over the crimes. That the Accused, and all co-perpetrators, must be mutually aware of and accept the

⁴⁶ #2748, para. 298.

⁴⁷ T.189, p.35, line 25 to p.36, line 2. In the English transcript, W-0016 stated: "Amongst the ten, if you want to count the youngest, that is the 14-year-olds and the 13-year-olds, if there were many of them, there were *no more than four*" (emphasis added).

⁴⁸ #2748, para. 298; T.189, pp.36-39. See also T.189, p.28, lines 19 to p.29, line 4.

⁴⁹ T.189, p.32, lines 4-23. See *infra*, paras. 59-60.

⁵⁰ #2748, Annex 2.

⁵¹ DW-0019 states that he "used to see about 12 of them" and that all of them were adults: T.340, p.41, lines 16-17, p.42, line 19. DW-0011 similarly alleged that all the adult bodyguards were above 18: T.347, p.30, lines 1-3, p.69, lines 15-19.

likelihood that implementing the common plan would result in the execution of the objective elements of the crimes, renders the “should have known” standard redundant.⁵²

40. The Defence’s characterisation (paras. 881-882) of the Prosecution’s position on the criminal responsibility of the Accused is inaccurate. As the analysis in Section 9 of the Prosecution’s Closing Brief shows, the Accused (i) set in place circumstances that led to the recruitment of children under 15 in the ordinary course of events, and (ii) knew that this would occur, or was aware that there was a substantial likelihood that the crimes would occur.
41. The record is replete with evidence of the Accused’s intent and knowledge within the terms of Article 30. For example, the video of his visit to the Rwampara training camp⁵³ vividly captures the images of children under the age of 15 – some appear dwarfed by the adults surrounding them – who were highly visible in the crowd to whom the Accused’s morale-boosting speech was specifically directed:

You are used to seeing our commanders; they are helping us carry out training, managing the army. I see them everyday. But we have a lot to do, a lot. And from time to time I am asked to go out, hold conferences and meet people; it is difficult for me to always be in touch with you; the chief of staff, commander Bosco should come and see you here. Is he coming here? (the group answers yes, yes). So if he doesn’t come, he will be seen as an enemy but I think he cannot do that because he needs the troops. We have come to see you and encourage you. Why give you courage? Because the work we are doing, we are doing with you. The work you know, being enlisted in the army, trained, using weapons, is blessed.⁵⁴

42. This evidence demonstrates that the Accused directly contributed to the plan which involved the recruitment of children under 15 for their use in hostilities. By addressing the recruits, in front of high level FPLC commanders (for

⁵² See #796-Conf-tEN, para. 365. The Prosecution notes it may be possible that in some situations, when for example, individual commanders closer to the events on the ground are charged with co-perpetration, the “should have known standard” might be applicable in view of the direct role of the such field commanders in the perpetration of the physical elements of the crime.

⁵³ EVD-OTP-00570.

⁵⁴ T.128, pp.36-41.

example Bosco) and high level UPC political persons (for example Tinanzabo), encouraging the training of the recruits and directing the allocation of weapons and uniform and underscoring his supreme role, the Accused knowingly created the circumstances that led to the recruitment of children under 15. As the supreme commander of the FPLC, seeing the presence of children, indeed being surrounded by them, put him on actual notice that the FPLC was training and using children. This was, moreover, shortly after the demobilisation decrees that allegedly reflected his sensitivity to the presence of children in the ranks. The evidence shows that he did not even enquire as to their age. This does not tally with the Defence's assertions (paras. 882-889) regarding the Prosecution's case whatsoever.

43. Additionally, the Defence also suggests (para. 880) a theory of justification – that the duty of a political or military leader to constitute an army sufficient to meet the security threat was more pressing than the duty to observe the law against recruiting child soldiers, and in a conflict between the two duties the former took precedence. While the conclusion itself is legally invalid, the argument appears to concede that the Accused – even under his protestation that he was a political and not a military leader – was responsible and accepted the “risk” that his recruitment drives would sweep up underage children.
44. As regards the evidence, in arguing that the voluntary enlistment of children under the age of 15 cannot be considered a “virtually certain consequence” (the Defence rephrasing of the Article 30(3) standard),⁵⁵ the Defence refers (para. 473, point 5) to the evidence of W-0038 concerning the recruitment in Mbidjo. However, W-0038 also testified about his own recruitment and explained that children under the age of 15 were recruited.⁵⁶
45. The Defence also argues (para. 877) W-0055 testified that commanders “drove them away” because the “youths” were too young. In fact, he testified that

⁵⁵ The standard is “le cours normal des événements”.

⁵⁶ T.114, p.10, line 21 to p.11, line 14.

some children were too young but others “were capable of it.”⁵⁷ He also testified that children too young to carry a weapon would be assigned to headquarters.⁵⁸ And he explained that “there were children who could not undergo training, and children like that were sent off to carry out other tasks”.⁵⁹ In other words, his evidence does not establish a practice to “drive away” underage children; to the contrary, they remained in the FPLC. Moreover, DW-0011 – called by the Defence presumably for his insider knowledge on the issues – testified that he was not aware of any official procedure to verify the ages of children.

The Accused and Demobilisation

46. The Defence stresses the Accused’s purported efforts to demobilise children. Of course, demobilisation would have been unnecessary if there were no children in the FPLC. Moreover, the evidence reflects overwhelmingly that demobilisation efforts were a sham done to silence or appease the critical international community. In that regard, the Defence wrongly assesses (para. 892) the evidence of W-0046. When asked whether the demobilisation efforts were honest, W-0046 answered: “I would refer to them as a masquerade,”⁶⁰ and “not very serious.”⁶¹ Far from considering the UPC June 2003 orders as being unique measures (para. 892), W-0046 described the lack of cooperation from the UPC/FPLC; all the more disappointing because the international community had deployed important efforts at that time to support demobilisation initiatives.⁶²
47. Furthermore, the Defence misstates (para. 892) W-0046’s evidence by alleging that she admitted that only the UPC – and no other militia – had issued such

⁵⁷ T.177, p.52, lines 14-22.

⁵⁸ T.178, p.69, lines 14-20.

⁵⁹ T.177, p.56, lines 4-6.

⁶⁰ EVD-OTP-00489, p.106, line 24 to p.107, line 25.

⁶¹ EVD-OTP-00491, p.109, lines 13-15.

⁶² T.206, p.55, lines 11-15 and T.209, p.6, line 15 to p.7, line 14. See also EVD-OTP-00489, p.102, line 10 to p.103, line 22, p.105, lines 8-25, p.107, lines 22-25. See also EVD-OTP-00491, p.110, lines 5-23, p.117, lines 16-21.

orders. Not true: she stated that she did not know.⁶³ More importantly, she testified that the orders were meaningless – children continued to be recruited in the ranks of the UPC/FPLC after the orders of June 2003 were issued,⁶⁴ and in September 2003, though “some of the groups gave statistics about the children”, “the UPC did not do so.”⁶⁵

48. Regarding the October 2002 orders, the Defence argues (para. 899) that there is no proof that the Accused was subject to pressure regarding the presence of children in the UPC at that time. This is inaccurate. The Accused’s own witnesses confirmed that the UN and other international organisations complained in October 2002 about the UPC/FPLC’s recruitment of children.⁶⁶ W-0046 and W-0031 also provided evidence on this matter,⁶⁷ which the Defence ignores.
49. The Accused never intended to implement the 21 October 2002 order; it was written only to deflect pressure about the UPC/FPLC’s use of child soldiers. The Defence concedes (paras. 379-380, 786) that the Accused routinely drafted false documents when it suited his purpose, particularly when he had a political agenda. That concession squares with the trial evidence that the demobilisation orders were done to persuade the public that the Accused intended to demobilise child soldiers, because it suited his purpose of appeasing the international community. Even on the evidence of DW-0019, the UPC/FPLC intended to disseminate the order to the public.⁶⁸
50. Contrary to the Defence assertion (para. 890), the evidence is that the demobilisation orders were *not* implemented. W-0024’s evidence makes it clear that the orders were sham; demobilisation was effected only for a limited number of children.⁶⁹ The evidence of DW-0019, relied on by the Defence,

⁶³ EVD-OTP-00491, p.117, lines 16-21.

⁶⁴ T.206, p.55, lines 16-18; EVD-OTP-00489, p.109, lines 9-10.

⁶⁵ EVD-OTP-00491, p.110, lines 21-23.

⁶⁶ #2748, paras. 320-322; DW-0037 at T.349, p.64, lines 1-6.

⁶⁷ #2748, paras. 314, 315 and 321.

⁶⁸ T.345, p.60, lines 10-13.

⁶⁹ T.170, p.53, lines 1-7.

concerning Ms Lumbulumbu, the national secretary for social affairs and her supposed role in demobilisation, is inconsistent and unreliable since he was unable to explain why she was given another portfolio after three months that had nothing to do with children's affairs.⁷⁰

51. The demobilisation documents of 27 January and 16 February 2003 were also shams, as is starkly shown by the Accused's subsequent visit to Rwampara.⁷¹ The Defence asserts (para. 917) that the Accused addressed the recruits in a friendly way, but such a claim is irrelevant – the video (EVD-OTP-00570) shows that the Accused, in military uniform and accompanied by armed soldiers, addressed and encouraged young recruits (whom he was purportedly demobilising) in their military training.
52. Nor does W-0031's evidence support the Defence contention (para. 636) that the Accused took steps to demobilise children in late 2002 and early 2003. In fact, the witness testified that the demobilisation programmes were not followed up and more importantly that the numbers of child soldiers *increased*.⁷² Furthermore, the Defence assertion that the demobilisation orders were implemented is contradicted by [REDACTED], who was not aware of such measures.⁷³
53. Though the Defence attempts to minimise it as merely his opinion (para. 591), W-0024 also established that the UPC/FPLC's demobilisation was a sham. Following the purported demobilisation in October 2002 he continued to see UPC/FPLC child soldiers between the ages of 9-18, armed and in uniform, in towns and cities, threatening everybody.⁷⁴ Though, as he testified, *some* UPC/FPLC demobilisations occurred, they "concerned a limited number of children"⁷⁵ and did not, to his recollection, involve *SOS Grands Lacs*.⁷⁶

⁷⁰ T.345, p.35, line 7 to p.36, line 11.

⁷¹ See #2748, paras. 333-339; EVD-OTP-00570.

⁷² #2748, para. 315.

⁷³ #2748, para. 311.

⁷⁴ T.170, p.52, line 17 to p.54, line 21.

⁷⁵ T.170, p.53, lines 5-6.

⁷⁶ T.170, p.53, lines 18-21, p.54, lines 15-17.

54. As regards the June 2003 decree, the Defence denies (para. 941) that it was issued because of pressure from the UN and NGOs and in so doing mischaracterises the evidence of W-0046. She met with the Accused on 30 May 2003 and notified him about the DRC's ratification of the Rome Statute and obligations of his military commanders.⁷⁷ After this meeting, W-0046 described the UPC/FPLC representatives as uncooperative,⁷⁸ and confirmed that children continued to be recruited into the UPC/FPLC at the same time that the orders of June 2003 were issued.⁷⁹
55. In fact, in May 2003, when the UPC/FPLC regained Bunia, far from being dismantled, the kadogo unit was incorporated into the main staff headquarters.⁸⁰ Some of the child soldiers were briefly disarmed under the pressure of external actors,⁸¹ but for "not more than ten days."⁸² W-0017 also testified about the killing of a child soldier the day before the Artemis attack.⁸³ This child was amongst the children who had been disarmed *and re-armed*.⁸⁴ At the time of the attack, on 6 June 2003, the Accused was in Bunia and fully exercising his powers as President of the UPC/FPLC.⁸⁵

⁷⁷ #2748, para. 342.

⁷⁸ T.206, p.55, lines 11-15; T.209, p.6, line 15 to p.7, line 14. See also EVD-OTP-00489, p.102, line 10 to p.103, line 22, p.105, lines 8-25, p.107, lines 22-25. See also EVD-OTP-00491, p.110, lines 5-23.

⁷⁹ T.206, p.55, lines 16-18; EVD-OTP-00489, p.109, lines 9-10. See also *supra*, para. 47.

⁸⁰ #2748, para. 210. See also T.158, p.24, lines 2-5, p.45, lines 5-10, p.47, lines 1-9 and 20-25, p.54, lines 19-21 ("But those with whom we arrived, the majority of them stayed at headquarters, and they were there when the fighting started at the time Artemis arrived, and they were provided with weapons again").

⁸¹ #2748, paras. 342-343: The disarming of the kadogo unit happened at the time when the MONUC delegation visited the Accused and explained to him the prohibition against the use of child soldiers, and when journalists started to investigate the phenomenon.

⁸² T.158, p.53, line 24 to p.54, line 2, p.55, lines 2-7.

⁸³ T.158, p.46, lines 12-18.

⁸⁴ T.158, p.56, lines 21-24.

⁸⁵ Contrary to the Defence's allegations (para. 448), when asked whether the Accused had left Bunia when the child soldiers were re-armed, he replied "I don't think so" (see T.160, p.52, line 22 to p.53, line 2). See also T.160, p.56, lines 12-16: "When Artemis arrived, first there was that battle, and then afterwards it was calm, and they asked us to leave the town, at least the soldiers. So the soldiers left the town and the Chief of Staff at issue as well. The president was in town and he then left for Kinshasa."

THE COMMISSION OF THE CRIMES

I. THE PRESENCE AND USE OF CHILDREN UNDER THE AGE OF 15 IN HOSTILITIES

56. The trial record is replete with evidence from UPC/FPLC insiders, former UPC/FPLC child soldiers, persons who had a close connection to the UPC/FPLC and individuals who worked with demobilised child soldiers in Ituri that the UPC/FPLC enlisted, conscripted and used children under the age of 15 to participate actively in hostilities.
57. The Defence's contention that the Prosecution witnesses did not give a sufficient basis for their testimony on the age of child soldiers in the UPC/FPLC is unsustainable.
58. W-0016 testified that the majority of the recruits in Mandro training camp were children⁸⁶ and repeatedly referred to a "young army" and "young soldiers".⁸⁷ Contrary to the Defence allegation of lack of detail and confusion, W-0016 provided a clear, logical and coherent basis for the assessment of the age of the child soldiers in the camp.
59. In the year he spent in the UPC/FPLC, W-0016 became familiar with the physical appearance and demeanour of the recruits: "You could always see that they were children [...] everything they did resembled what children do [...] They were always on the ground and playing little games. You could see that they were children. [...] for example, they would make toys for themselves."⁸⁸
60. It is in this context that he remembered a child named Bahati, who was "really too small" and whom he often used for errands.⁸⁹ Asked if he recalled the age of this child soldier, W-0016 answered: "Yes. Bahati was 13 years old."⁹⁰

⁸⁶ T.189, p.15, line 20 to p.16, line 3.

⁸⁷ See for example T.189, p.11, lines 16 and 18, p.15, lines 14-16.

⁸⁸ T.189, p.16, line 23 to p.17, line 8; and p.24, lines 10-13: "[...] you can know, detect a man from -- a child from the way they behave. There were boys and girls who were underaged. Even their physical appearance. The height of the person would determine the age of that person sometimes."

⁸⁹ T.189, p.16, lines 7-14.

⁹⁰ T.189, p.16, line 14.

61. W-0041 was assigned 12 bodyguards, none of whom had reached the fourth year of secondary school; he testified that two or three of them were about 13 or 14.⁹¹ He testified that Tchaligonza or Bagonza⁹² advised him that these children would be sent to combat duty.⁹³ Further, though the Defence fails to acknowledge the fact, another of W-0041's UPC child bodyguard, whom the witness described as a "small child who was trained in Mandro",⁹⁴ told W-0041 that he was 14 years old.⁹⁵ This 14-year old child had an even younger brother who was also a bodyguard serving in Mongbwalu.⁹⁶
62. As a senior UPC official,⁹⁷ W-0041 was in an undeniable position to know about the use of young persons by the UPC as bodyguards and about the young age of these bodyguards. W-0041 also confirmed that it was common in Ituri that families would be obligated to give boys to armed groups;⁹⁸ he heard that families that did not comply would be subject to punishment or military fines.⁹⁹ As to the obligation to give boys to the UPC army when it was in control of Bunia, the witness responded that in Bunia "there was no visual systematic recruitment, but the practice was common elsewhere after the 2nd of September" and he confirmed that there was training.¹⁰⁰ In short, his evidence revealed a practice and policy within the UPC to recruit and use young persons, including children under the age of 15.¹⁰¹
63. W-0017's evidence on the age of children in the UPC and how he arrived at the assessment, is substantiated and reliable.¹⁰² W-0017 specifically recalled an

⁹¹ T.125, p.50, lines 15-21.

⁹² T.125, p.53, lines 22-25.

⁹³ T.125, p.53, line 1 to p.54, line 14.

⁹⁴ T.125, p.48, line 25 to p.49, line 1.

⁹⁵ T.125, p.49, line 8, p.56, lines 9-10; T.126, p.56, lines 22-24.

⁹⁶ T.125, p.56, lines 11-14.

⁹⁷ T.124, p.69, line 13 to p.70, line 6.

⁹⁸ T.125, p.65, lines 1-10.

⁹⁹ T.125, p.66, lines 3-5.

¹⁰⁰ T.125, p.65, line 17 to p.66, line 2.

¹⁰¹ T.125, p.54, line 15 to p.55, line 20, p.56, line 17 to p.57, lines 1-7.

¹⁰² T.154, p.41, lines 14-25, p.82, lines 1-8; T.157, p.63, lines 17-22.

incident with a child soldier whose mother claimed he was only 12 years old¹⁰³ and another child soldier who was “[a]t the most 13.”¹⁰⁴

64. The fact that W-0055 did not specifically ask the children their age¹⁰⁵ in no way makes his evidence unreliable. W-0055 was an experienced officer,¹⁰⁶ who interacted with adults and children,¹⁰⁷ and who was able to make reliable assessments of the ages of the children he saw in the UPC. As the Defence point out, W-0055 said that kadogos in the army were ones who could carry a weapon but omits that W-0055 confirms that this could include children under the age of 15.¹⁰⁸ W-0055 makes it clear that even if the children were too young to carry a weapon they would still be kept at headquarters.¹⁰⁹ As regards the registration of the recruits, the Defence attributes an ambitious inference to W-0055’s evidence that the age of recruits would be recorded. He does not state that the recording of age is undertaken as a control or a way to filter out under-age children from the army, rather, as a means of identification.¹¹⁰
65. W-0017, W-0055 and W-0038 testified that the term kadogo included children under the age of 15 and, concerning the composition of the kadogo unit, W-0017 stated that “people knew they were kadogos”, meaning “[t]hey were less than 15 years old”.¹¹¹ Contrary to the Defence assertions (paras. 442-444), W-0017 described at length the military training underwent by the children composing this unit,¹¹² and particularly referred to “their commanders”, who ensured that they did not “run away into the bush”.¹¹³

¹⁰³ T.157, p.84, lines 20-24.

¹⁰⁴ #2748, para. 343; T.158, p.49, line 11.

¹⁰⁵ For example, T.174, p.39, lines 4-9 (at Kandoyi).

¹⁰⁶ T.171, pp.55-60.

¹⁰⁷ T.176, p.50, lines 21-25.

¹⁰⁸ T.178, p.68, lines 9-25.

¹⁰⁹ T.178, p.69, lines 14-18.

¹¹⁰ T.175, p.80, lines 10-19.

¹¹¹ See T.158, p.23, lines 5-9; T.114, p.39, lines 23-25 (W-0038); and T.174, p.40, lines 5-8 (W-0055).

¹¹² #2748, para. 209. See also T.158, p.24, line 20 to p.25, line 22, p.28, line 25 to p.29, line 2, p.29, lines 13-20, p.31, line 18 to p.33, line 3, p.47, lines 23-25.

¹¹³ T.158, p.29, lines 17-18.

66. W-0024 stated that child soldiers told him their age and date of birth.¹¹⁴ He also taught children ranging from the ages of 12-18¹¹⁵ and at *SOS Grand Lacs*, he worked with children aged 8 to 18.¹¹⁶ Though the Defence states (para. 58) that W-0024 did not verify the age of the children and did a mere visual assessment of their age, his own daily interactions with children over a long period of time enabled the witness to testify with expertise about their age.
67. Before going on her first mission to Bunia in early September 2002, W-0046 worked on an identification programme for children, including child soldiers, “with very experienced persons.”¹¹⁷ It was therefore “easy” for her “to distinguish between a young man and a young child.”¹¹⁸ It is in this context that she was able to conclude that the child soldiers she saw in the streets of Bunia at that time were younger than 15.¹¹⁹ W-0046 further confirmed during cross-examination that one child had personally told her that he was 9 years old.¹²⁰
68. W-0046 personally interviewed UPC/FPLC child soldiers in Uganda¹²¹ who told her they were under the age of 15.¹²² She met with persons, including members of different armed groups, who confirmed the presence of child soldiers amongst the combatants.¹²³
69. As to her mission to Ituri in March 2003,¹²⁴ W-0046 was assisted by representatives of the Human Rights Section, the Civil Police Section,

¹¹⁴ T.170, p.47, lines 18-25.

¹¹⁵ T.170, p.36, line 25 to p.37, line 2.

¹¹⁶ T.170, pp.42-43, p.47, lines 5-11.

¹¹⁷ EVD-OTP-00489, p.31, lines 17-19. Moreover, W-0046 recorded 687 cases of child soldiers up to May 2004, including 220 cases of children who were under the age of 15 (T.205, p.72, lines 2-8).

¹¹⁸ EVD-OTP-00489, p.31, lines 13-14.

¹¹⁹ See also EVD-OTP-00489, p. 29, lines 13-18, p.30, lines 24-25.

¹²⁰ EVD-OTP-00490, p.90, lines 5-18; EVD-OTP-00489, p.29, lines 17-18.

¹²¹ EVD-OTP-00489, pp.45-46. See also T.206, p.45, lines 7-13.

¹²² EVD-OTP-00489, p.44, lines 12-25, p.47, lines 8-18.

¹²³ EVD-OTP-00489, p.43, line 21 to p.44, line 1; EVD-OTP-00491, p.16, line 9 to p.17, line 2: W-0046 met with displaced people from Ituri, including victims and witnesses of the Alur, Hema and Bira ethnicity, civil society representatives, religious leaders and people that had belonged to different armed forces.

¹²⁴ EVD-OTP-00491, p.25, lines 12-13; EVD-OTP-00489, p.55, lines 9-25, p.56, line 14 to p.57, line 22.

MONUC representatives and military observers,¹²⁵ she spoke with more than 1,000 victims and interviewed more than 400 people,¹²⁶ including 27 UPC child soldiers from Rwampara camp,¹²⁷ and more than 20 from Mandro camp.¹²⁸

70. In Rwampara,¹²⁹ W-0046 spoke with many of the child soldiers who told her that they were less than 15 years old.¹³⁰ She asked their name, age, origin and membership in military groups.¹³¹
71. W-0116 knew the age of child soldiers based on the children's own statement of age,¹³² and the fact that their stories were verified against the chronology provided by MONUC.¹³³ When possible, the workers would verify the information the children gave them by approaching the parents.¹³⁴ Additionally, W-0116 worked with youth and testified that it was not difficult to determine a child's age from the child's size, including in relation to the uniform and the weapon he or she was forced to carry.¹³⁵
72. W-0031 provided factors he considered when assessing ages of children he saw in the UPC: oversized shoes or uniforms, weapons that are out-of-proportion to the size of the child.¹³⁶ W-0031 stated that "it's easy to detect the difference between a child and an adult".¹³⁷ He worked with child soldiers in Ituri aged 9 to 16¹³⁸ and he paid particular attention to child soldiers in this age

¹²⁵ EVD-OTP-00489, p.56, lines 4-6.

¹²⁶ EVD-OTP-00489, p.58, lines 2-11.

¹²⁷ EVD-OTP-00489, p.59, lines 7-14. W-0046 carried out a more detailed identification of 12 of those children; see p.60, lines 14-17.

¹²⁸ EVD-OTP-00489, p.67, lines 22-24.

¹²⁹ When talking about her mission to Rwampara, W-0046 said that the UPDF was occupying the area at that time and that the child soldiers "were no longer at that point in time under the control of an armed group" but used to belong to the UPC/FPLC (see T.206, p.50, lines 2-8). W-0046 explained that the commander of the camp she met, Commander Barongo, belonged to the UPC/FPLC (see EVD-OTP-00491, p.32, lines 10-12).

¹³⁰ EVD-OTP-00489, p.63, lines 1-21.

¹³¹ EVD-OTP-00489, p.59, line 7 to p.60, line 24, p.62, lines 4-15.

¹³² T.203, p.8, lines 7-11.

¹³³ T.208, p.29, lines 6-22.

¹³⁴ T.203, p.36, line 18 to p.37, line 1.

¹³⁵ T.208, pp.63-64.

¹³⁶ T.199, p.16, lines 8-14. See also T.201, p.65, lines 17-24.

¹³⁷ T.199, p.16, lines 14-15.

¹³⁸ T.199, p.15, line 23 to p.16, line 5.

bracket as he carried out his daily tasks,¹³⁹ and in some cases his assessments were subsequently confirmed by the children themselves.¹⁴⁰

73. DW-0004 testified that children aged 12 and 14 years old were in the UPC/FPLC.¹⁴¹

II. DOCUMENTARY EVIDENCE

74. The Defence attempts to undermine the reliability of individual documents that substantiate the presence of children under 15 in the UPC/FPLC. Not only is its assessment incorrect, the Defence also disregards the totality of evidence that corroborates the documentary evidence.

Videos

75. The video footage of children in the UPC/FPLC is vivid evidence substantiating the charges. Because it is so persuasive, the Defence aggressively argues (paras. 703-707) that the Chamber cannot rely on that evidence to find the presence and use of child soldiers under 15. It ignores critical evidence, including the fact that W-0010, [REDACTED] (EVD-OTP-00570), identified two other child soldiers whom she stated were under 15.¹⁴² W-0030, [REDACTED] testified to the presence of children as young as 9 in the UPC/FPLC and pointed to the video images of young child soldiers as confirmation of his evidence.¹⁴³ He [REDACTED] the scenes in videos EVD-OTP-00570, EVD-OTP-00571, EVD-OTP-00573, EVD-OTP-00574, and EVD-OTP-00586, which depict the Accused escorted by UPC/FPLC armed and uniformed soldiers, some of whom are visibly under the age of 15.¹⁴⁴ W-0030 spoke of 9-10 year old children, as opposed to children aged 15 and above.¹⁴⁵

¹³⁹ See for example, T.199, p.7, line 21 to p.8, line 3, p.15, line 23 to p.16, line 5, p.25, lines 2-23, p.32, lines 14-16, p.35, lines 15-16.

¹⁴⁰ T.199, p.16, lines 8-19.

¹⁴¹ T.243, p.21, line 25 to p.22, line 3, p.24, line 13 to p.25, line 13. The official interpretation of the witness's evidence does not support the Defence's construction.

¹⁴² T.145, p.10, line 14 to p.26, line 14.

¹⁴³ T.131, p.8, line 2 to p.9, line 9, T.128, p.21, lines 3-4, p.63, lines 13-14.

¹⁴⁴ See #2748, para. 29 and Annex 2.

¹⁴⁵ T.128, p.21, lines 3-4, p.48, lines 12-14, p.63, lines 13-14.

Regarding his assessment on age, W-0030 stated: “the images also speak. If you doubt what I say, I think that by looking at the image that the image can help you see that there were kadogos.”¹⁴⁶ W-0030 had singular access to the Accused, visiting his residence two to three times a week.¹⁴⁷ [REDACTED] the child soldiers guarding his residence and interacted with them.¹⁴⁸ It is on a solid footing that W-0030 could make an assessment on their age.

NGO or UN Documents

76. The Defence suggests that NGO and UN records – contemporaneously made – are unreliable because the sources are not credible and the information is unreliable (paras. 708-716, 725).
77. The Defence’s argument that the records are unreliable because of a suggestion that W-0031 manipulated evidence to convict the Accused is without merit or foundation. These documents were created in the normal course of business (at a transit centre for demobilised youth)¹⁴⁹ and record contemporaneous events with no litigative purpose.¹⁵⁰ Oddly, the Defence argues (para. 725) that documents lack reliability if they were not created “for the purpose of being used in criminal proceedings”. In fact, documents created specifically to be introduced in a trial may be regarded as less reliable.
78. The Defence postulates (para. 714) that because documents EVD-OTP-00476 and EVD-OTP-00739 record each child’s age rather than date of birth, and the ages as recorded were not verified, the information is unreliable. W-0031 testified at length about the methods to log and verify information from the former child soldiers in the demobilisation centre, in particular regarding age.¹⁵¹ Moreover, the documents list the level of schooling reached by each child, an additional factor in assessing the ages. To be sure, there may well

¹⁴⁶ #2748, para. 165 (T.131, p.8, line 2 to p.9, line 9).

¹⁴⁷ T.128, p.20, lines 2-6.

¹⁴⁸ T.129, p.57, lines 14-18 (commenting on video EVD-OTP-00577).

¹⁴⁹ T.201, p.32, lines 8-18.

¹⁵⁰ EVD-OTP-00469, EVD-OTP-00470, EVD-OTP-00474, EVD-OTP-00475, EVD-OTP-00476, EVD-OTP-00739.

¹⁵¹ T.200, p.14, line 8 to p.17, line 4; T.202, p.42, line 12 to p.45, line 18.

have been isolated instances of error, but they do not render the logbook unreliable in its entirety. All four witnesses who worked in the demobilisation of child soldiers confirmed that children under 15 were in the UPC/FPLC in elevated numbers,¹⁵² thereby undermining any suggestion that these were isolated cases or that the contemporaneous records capturing this reality are inaccurate.

79. The Defence also supposes (para. 714) that the logbooks are unreliable because children may falsely have posed as former child soldiers to receive financial assistance. When asked by the Defence if this ever occurred, W-0031 explained that in his experience the issue was not that children lied about their experience but that they sometimes tried to register at a second transit centre.¹⁵³ As a result, W-0031 [REDACTED] organisations¹⁵⁴ shared information on the children in the centres which then made it “difficult to have false information”.¹⁵⁵
80. Regarding EVD-OTP-00739, the Defence argues (para. 715) that the name of the armed group was not listed. EVD-OTP-00476 records demobilised child soldiers who entered a transit centre, including from the UPC/FPLC and EVD-OTP-00739 records those children who left the same centre to be reunited with family or other persons.¹⁵⁶ There exists a high degree of overlap in the names recorded in the two documents,¹⁵⁷ which is logical considering that both documents record the passage of children through the centre upon their

¹⁵² W-0031: T.199, p.80, lines 3-6, p.25, line 2 to p.26, line 6, p.27, lines 1-8; W-0046: T.205, pp.72-73, T.206, pp.2-3; EVD-OTP-00489, p.48, line 22 to p.49, line 1; W-0116: T.203, p.29, line 22 to p.30, line 7, p.42, line 25 to p.43, line 3; W-0024: T.170, p.41, line 22 to p.42, line 14.

¹⁵³ T.202, p.41, line 9 to p.42, line 11.

¹⁵⁴ T.202, p.41, line 11 to p.42, line 11.

¹⁵⁵ T.202, p.43, lines 2-11.

¹⁵⁶ T.198, p.94, line 11 to p.95, line 2; T.199, p.24, lines 9-15; EVD-OTP-00476 (T.201, p.25, line 12 to p.26, line 18); EVD-OTP-00739 (T.201, p.39, lines 6-22).

¹⁵⁷ For example, for the months of July 2003 to 30 October 2003, 40 of the names recorded in EVD-OTP-00476 as entering the CTO between June-December 2003 under 15 years and from the UPC/FPLC, re-appear in EVD-OTP00739. In EVD-OTP-00476 see entries 5, 7, 8, 9, 11, 12, 19, 24, 25, 26, 27, 33, 36, 38, 39, 40, 41, 49, 50, 52, 53, 55, 64, 65, 67, 69, 78, 79, 81, 84, 85, 88, 89, 90, 93, 96, 97, 101, 109, 111 and corresponding entries in EVD-OTP00739: 37, 12, 8, 117, 8 p.0017, 19, 15, 64, 106, 3, 45, 14, 16, 53, 1, 6, 82, 59, 10, 23 p.0016, 58, 62, 36, 65, 29, 86, 01 p.0019, 32, 49, 42, 41, 109, 114, 75, 104, 87, 16 p.0018, 30, 69, 18 p.0016.

arrival and then completion of the program. It stands to reason that the identity of the armed group to which the children belonged remained the same.

6 November 2002 G5 Report (EVD-OTP-00457)

81. The Defence's assertions (paras. 717-720) regarding the 6 November 2002 monthly G5 report are illogical. The only reasonable inference from the report is that the FPLC was actively seeking to recruit children from villages.¹⁵⁸ The so-called awareness-raising campaign was designed to recruit. It was not necessary, in that context, that the report expressly acknowledge the recruitment goal, since that driving purpose was widely understood and did not have to be stated.¹⁵⁹ The unambiguous meaning of the sentence in the G5 report, "their friends and these deserters are discouraged and therefore we no longer have the means of obtaining more children for the army", is to update the leadership on the current difficulties in recruiting children.
82. Furthermore, the argument (para. 719) that the term "children" means something else – recruits, or soldiers – is meritless. When the report referred to recruits or soldiers, it used those terms. DW-0019's contrary opinion evidence should be given no weight, since he did not draft the document and had not seen it before.¹⁶⁰

EVD-OTP-00518 – 12 February 2003 Letter

83. The Defence's argument (paras. 726-731) that the reference to child soldiers aged 10 to 16 does not refer to UPC/FPLC children does not withstand scrutiny. The letter was drafted by a UPC/FPLC minister to be sent to a UPC/FPLC G5 and copied to the Coordinator of the UPC/FPLC Executive.

¹⁵⁸ #2748, para. 290.

¹⁵⁹ Indeed, as noted previously (paras. 3, 27, 42), the Defence asserts (para. 880) that it would have been a "serious neglect of duty" for the Accused, in the context of the "widespread and systematic massacres of defenceless civilian populations", to have qualified recruitment efforts by imposing restrictions on the conscription or enlistment of children. The Prosecution notes only that the excuse offered illustrates that establishing and maintaining a sufficient armed force was the single overriding goal.

¹⁶⁰ See instead, the evidence of FPLC officer DW-0037, cited in #2748, paras. 291, 305.

There is no reason to suppose that this letter was written in order to identify officers *from other military groups*¹⁶¹ over whom the UPC/FPLC had no control to participate in demobilisation training for *non-UPC/FPLC children*. This internal letter addresses a UPC/FPLC internal issue.

FLAWS IN THE DEFENCE ANALYSIS OF WITNESS TESTIMONY

I. THE CREDIBILITY AND RELIABILITY OF THE FORMER CHILD SOLDIER WITNESSES

84. Details in the accounts of these witnesses are corroborated by the evidence from insider and overview witnesses, as well as by video and documentary evidence. It has not been proven that these witnesses made manifestly mendacious statements (para. 5), nor that they were manipulated or otherwise incited to lie by Prosecution intermediaries (paras. 5, 7). Inconsistencies within their evidence are a factor to be borne in mind by the Chamber in determining the credibility of each witness and the weight to be afforded to evidence based on an evaluation of the totality of the *of the relevant evidence in the trial*.¹⁶²
85. By challenging the testimony of the former child soldiers, the Defence attempts to establish that: i) their evidence cannot prove that the UPC/FPLC recruited or used children in hostilities, ii) the alleged perjury of these witnesses casts doubt on the reliability of all the evidence presented by the Prosecutor in support of his charges, and iii) the presentation of manifestly mendacious evidence before the Chamber was compounded by the serious failure on the part of the Office of the Prosecutor to fulfil its obligations to investigate exculpatory circumstances and its disclosure obligations.

¹⁶¹ T.347, p.53, line 23 to p.54, line 2.

¹⁶² On this point, see Pre-Trial Chamber II in the Bemba confirmation decision, ICC-01/05-01-08-424, at para. 58 and fn. 77. See also ICTY and ICTR: *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 334; *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, 26 May 2003, para. 207; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker, 23 May 2005, para. 4; *Prosecutor v. Fofana*, SCSL-04-14-T-371, Appeal against Decision refusing Bail, 11 March 2005, paras 22-24.

Evidence from the Former Child Soldiers was Not the Result of Interference or Manipulation

86. The Defence maintains that Prosecution witnesses were part of an elaborate ruse to mislead the Court (para. 5), despite presenting almost no additional evidence to substantiate such a claim beyond what was argued in its application.¹⁶³
87. The only additional evidence relied on for such an illogical conclusion comes from DW-0036, whose testimony is highly circumspect.¹⁶⁴ In any event, even were his testimony to be accepted by the Chamber, there is still no evidence that the Prosecution knew, or should have known, of any alleged malfeasance.¹⁶⁵
88. Nevertheless, the Defence persists in identifying internally inconsistent or contradictory testimony from the witnesses to claim that their evidence is unreliable, and in some cases, deliberately false. In doing so, it relies on materials outside the record or on unsupported or misconstrued factual assertions.

The Defence Relies on Materials and Information Not Admitted into Evidence

89. The following information relied upon to substantiate the position that evidence of witnesses is inconsistent and contradictory should be disregarded:
 - applications for reparations, which are not on the record;¹⁶⁶
 - applications for victim participation.¹⁶⁷ Other than those discrete portions read out in Court during the questioning of a witness, and the

¹⁶³ “Requête de la Défense aux fins d’arrêt définitif des procédures”, ICC-01/04-01/06-2567-Conf. The Defence’s claim that involvement in the ICCPP provides a financial motivation for witnesses to lie on oath is wholly unsupported. When giving statements to the OTP, no assurance is given concerning acceptance into the ICCPP. If, as the Defence alleges, the children were already presenting fabricated accounts of being child soldiers in the UPC or regards their age in their statements, then its position is flawed.

¹⁶⁴ On this issue, the Prosecution refers to relevant submissions discounting the reliability of the evidence of DW-0036 in #2748, see particularly paras. 474-476, 491.

¹⁶⁵ The Prosecution relies on “Prosecution’s Response to the Defence’s « Requête de la Défense aux fins d’arrêt définitif des procédures »”, ICC-01/04-01/06-2678-Conf (public redacted version filed on 29 March 2011), and relevant submissions in #2748.

¹⁶⁶ See references in #2773 at paras. 110, 183, 190 and footnotes 129, 347, 371 to annexes to filing ICC-01/04-01/06-2270.

birth certificates attached as annexes thereto, the information contained in these applications has not been admitted into evidence (at the request of the Defence);¹⁶⁸

- prior witness statements.¹⁶⁹ Only those discrete portions read out in Court during the course of questioning a witness, or paragraphs the admission of which was specifically granted, are in evidence and may be relied upon; and
- inter partes and other correspondence, not admitted into evidence.¹⁷⁰

The Defence Asserts Facts for Which it Offers No Evidence

90. There is no evidence cited to substantiate (or the evidence cited by the Defence does not support) that:

- video EVD-OTP-00571 was filmed during “la seule rencontre au stade de Bunia” (para. 125, last point);
- vehicles were unable to reach Mandro training camp (paras. 124, 223, 425; footnotes 172, 437);¹⁷¹

¹⁶⁷ See references in #2773 at paras. 103, 106, 112-114, 152, 160, 162, 190, 349, 360 and footnotes 101, 105, 116, 132, 136, 141, 233-234, 258-259, 261, 263, 269, 371, 802 (incorrectly indicated as #2518 instead of #1518), 833, 836, 838: W-0007 (ICC-01/04-01/06-216-Conf-Exp/MFI-D-00077 & suppl. info MFI-D-00078), W-0008 (ICC-01/04-01/06-217-Conf-Exp/MFI-D-00050), W-0010 (EVD-D01-00218/ MFI-D-00071, only page -0272 admitted), W-0011 (ICC-01/04-01/06-221-Conf-Exp/MFI-D-00057& suppl. info MFI-D-00062), and W-0298 (ICC-01/04-01/06-1518-Conf-Anx/MFI-D-00004).

¹⁶⁸ “Requête de la Défense aux fins de reconsidération de l’ordonnance de la Chambre de première instance I portant le numéro ICC-01/04-01/06-2432, datée du 12 mai 2010”, 11 October 2010, ICC-01/04-01/06-2584-Conf, in particular para. 13 (point 2) and para. 19 (for objection to admission of MFI-D-00077, MFI-D-00078, MFI-D-00050, MFI-D-00057, MFI-D-00062 and MFI-D-00004 and para. 21 (for admission of MFI-D-00071 extract only). See the metadata notes in eCourt which confirm the withdrawal of EVD numbers for (or limited admission of) these documents.

¹⁶⁹ See for example, #2773, para. 110 where the Defence refers to 10 October 1991 as the date given by W-0007 at the time of his 2005 interview. This is not in evidence. See also para. 229 where the Defence refers generally to information provided by W-0213 in his November and December 2007 statements (which he did not provide in Court). See also paras. 301 (point 1), 302, and 310 (point 2), referring to W-0297’s 2007 and 2008 statements. Only para. 14 of the 2007 statement was used during questioning and admitted for that limited purpose; see metadata note in eCourt and T.288, p.19, line 23. See also para. 349 (point 2) referring to W-0298’s 2008 statement.

¹⁷⁰ See references in #2773 at paras. 196, 317-318 and footnotes 382, 717, 719-721.

¹⁷¹ W-0016 said it was difficult terrain and “You had to have a four-wheel drive vehicle to get through there” (T.191, p.37, lines 7-13). W-0299 did not give evidence *in Court* supporting this assertion (T.119, p.69, lines 7-10); in fact, he *testified* that he would go to Mandro by pick-up truck (T.119, p.54, line 25 to p.55, line 3).

- “il est de notoriété publique” that Commander Pepe died in Beni in 2001 while he was in the APC (paras. 162, 223; footnotes 264, 439);¹⁷²
- the UPC did not have an armed force over a 3 year period (para. 251);
- DW-0006 mentioned that he and W-0010 were merely friends at the time DW-0005 and W-0010 were living together (para. 166);
- W-0294 claimed not to have seen his brother whilst in the UPC army (para. 273, point 2);
- the APC did not exist in 2000; regarding the death of Commander Claude; or that over a year separated the deaths of commanders Pepe and Claude (para. 275, points 1, 2, 4);
- senior FPLC staff were not responsible for enlisting and training recruits (para. 315, point 1); and
- W-0157 claimed that he could not read,¹⁷³ that he made statements in a bid to attract sympathy,¹⁷⁴ that he deliberately obscured his evidence.¹⁷⁵ The suggestion that he employed subterfuge to avoid answering certain questions and thereby hide the truth is meritless.

91. Finally, there is no evidence to support the suggestion that W-0011 tried to hide his true identity to impede the Defence in checking his statements (para. 170), or that he narrated false accounts in his 2005 interview that someone

¹⁷² The evidence cited by the Defence proves only that a Commander Pepe died in Beni whilst serving with the APC. The Defence unjustly claim that this is a ‘matter of public knowledge’. It does not prove that the Commander Pepe being referred to by the witnesses is one and the same, as W-0010 mentions herself (T.145, p.62, lines 20-22). W-0157 also mentions a Commander Pepe (T.186, p.9, lines 14-23).

¹⁷³ As well as not being able to rely on it as evidence (see *supra*, para. 89), the email referred to in footnote 382 does not prove that W-0157 claimed he could not read, nor does it offer any explanation as to the reasons behind VWU’s recommendation.

¹⁷⁴ Travelling to a foreign country and appearing before a courtroom of people, in the presence of the Accused, cannot be compared to teaching a group of primary school students in your hometown.

¹⁷⁵ Many witnesses – prosecution and defence, young and old – admitted to not recalling specific dates and timeframes. Moreover, contrary to the Defence contention (para. 196), W-0157 did testify about his presence within the FNI (see e.g. T.188, pp.49-50) and his request to concentrate on issues in this case is not unreasonable (T.188, p.23, lines 6-7).

taught him (para. 188). Inconsistencies are an insufficient basis to allege false testimony.¹⁷⁶

The Defence Misrepresents the Evidence

92. Further, the Defence assesses the evidence by taking it out of context and not considering the full import of the evidence given by the witness or other evidence presented. For example, it continues to rely on discrepancies which the witnesses themselves gave reasonable and plausible explanations for at the time of their testimony, which were often corrected or supplemented at the time of a second interview,¹⁷⁷ and which may be the natural result of the fallibility of human memory and the passage of time.
93. The Defence repeatedly point to the names used by witnesses at different times as being an indicator of a witness's deliberate deception.¹⁷⁸ CHM-0004 testified that people in the DRC can have several names.¹⁷⁹ He explained that members of the family might refer to someone using certain names,¹⁸⁰ and that a person can be given different names, nicknames, respect names, etc. by colleagues and friends.¹⁸¹ Its own witness stated that his signature represented his nickname.¹⁸²
94. Similarly, the evidence that W-0007 and W-0008 gave about their filial relationship does not automatically taint the balance of their testimony.

¹⁷⁶ See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, dismissing a Defence request for perjury charges against W-0279: ICC-01/04-01/07-T-190-Red-ENG, p.1, line 22 to p.5, line 24. See also *The Prosecutor v. Alfred Musema*, ICTR-96-13-A, Judgement, 27 January 2000, paras 98-99.

¹⁷⁷ See for example, para. 125 (point 8), regarding W-0008 and [REDACTED]. W-0008 explained this in Court (see #2678, para. 118, point 2). See also para. 181 (points 2, 6 and 7), referring to information contained in his 2005 statement corrected by W-0011 during in his second OTP interview (see T.140, p.12, line 23 to p.13, line 8). His testimony was consistent with his second statement. The Defence consistently ignores the fact that witnesses provided additional information and clarifications following their initial interviews but prior to testimony, and the explanations given by witnesses in Court to this effect.

¹⁷⁸ W-0007 and W-0008, paras. 105-109; W-0011, para. 173; W-0213, para. 232; W-0297, paras. 293-29.

¹⁷⁹ T.223, p.67, lines 8-17.

¹⁸⁰ T.223, p.69, line 6 to p.70, line 9.

¹⁸¹ T.223, p.70, line 12 to p.71, line 1. W-0008, for example, stated that [REDACTED] was a respect name (T.149, p.48, lines 16-18).

¹⁸² T.275, p.63, lines 2-6.

95. The Defence rely on an extract from the ‘individual case story’ document to undermine W-0010’s credibility, and cite DW-0005 to support the inference that W-0010 did in fact meet a MONUC agent and provide the information recorded in the extract (paras. 151, 155-156). The Defence ignores the disparity between the extract and DW-0005’s testimony. The extract¹⁸³ contains notes from an interview conducted by someone from [REDACTED] in 2003. DW-0005 testified that she met a MONUC agent, at [REDACTED], in 2005.¹⁸⁴
96. Relying on the evidence of W-0031 and DW-0025, the Defence insist that W-0157 was never in the UPC, but was only ever a soldier in the FNI (paras. 214-218). Neither W-0031 nor DW-0025 denies that W-0157 was a member of the UPC, all they do is confirm that he was in the FNI/FRPI – a fact that W-0157 acknowledged. W-0157 also explained in Court why he had not mentioned his time in the UPC in his *first* interview with the OTP.¹⁸⁵
97. The Defence ignores (para. 268) that W-0294’s evidence about starting school in the 2nd year at age 4 is corroborated by his mother, W-0293.¹⁸⁶ Furthermore, W-0294 did not state that he did not wish to answer any questions about his age (para. 270); rather, he said that the questions were complicated and disturbing and that the Defence should ask his parents, a logical answer given his earlier evidence.¹⁸⁷
98. Regarding the assertions on the level of detail given by W-0294 and DW-0026 on EVD-OTP-00390 (para. 276), the difference is slight. Moreover, the Defence chose not to challenge W-0294’s evidence during questioning.
99. W-0293 does not corroborate DW-0026’s assertion that W-0294 fled with his family to [REDACTED] (para. 279). In fact, W-0293 testified that W-0294 was

¹⁸³ EVD-D01-00082.

¹⁸⁴ T.261, p.31. DW-0005 also stated that she did not know if W-0010 met the MONUC agent (T.261, p.31, lines 9-14).

¹⁸⁵ T.188, p.47, line 19 to p.48, line 12. In court, W-0157 only talks about this issue in the context of the initial 2005 interview (T.188, p.47, line 19 to p.49, line 5: “first meeting”, “first day”). The Defence cannot make an assertion relying on the second statement which is not in evidence.

¹⁸⁶ T.153, p.35, lines 7-10.

¹⁸⁷ T.151, p.83, lines 20-25.

not amongst the children that fled with her,¹⁸⁸ and said that she and her husband thought at the time that W-0294 might be dead.¹⁸⁹

100. Regarding W-0297, contrary to the Defence's assertions (para. 321), the evidence establishes that:

- W-0297 [REDACTED] because they were part of [REDACTED] (not to obtain information about their testimony);¹⁹⁰
- It was [REDACTED] who suggested they meet;¹⁹¹
- [REDACTED] told [REDACTED] what he said in Court. [REDACTED]'s impropriety should not be held against W-0297, who at that stage was not expected (nor was he expecting) to testify; and
- W-0297 asked [REDACTED] not to say that W-0297 was not a child soldier. It is only the Defence's theory that this was a request to be "untruthful".

101. The Defence claims that W-0299's evidence is unreliable because, *inter alia*, he did not know where Largu camp was despite claiming that he went there to collect his son (paras. 358-359, 361). In fact, W-0299 never said he went to Largu camp; rather, he said he went to Largu, and found W-0298 in the centre/market.¹⁹²

Other Defects in the Defence's Analysis

102. The Defence argues the explanations given by W-0007, W-0008 and W-0010 regarding the circumstances in which they obtained their electoral cards are implausible; this, despite the fact that all three explanations independently corroborate each other, and are consistent with other evidence.¹⁹³

¹⁸⁸ #2678, footnote 251.

¹⁸⁹ T.153, p.51, line 18 to p.52, line 13.

¹⁹⁰ T.291, p.43

¹⁹¹ T.291, p.42, lines 19-20.

¹⁹² T.117, p.34, line 7.

¹⁹³ See #2678, footnote 263. The Prosecution notes in that footnote that the reference to T.151 p.24, lines 3-8 is incorrect. The correct cite is ICC-01/04-01/07-T-151 p.24, lines 3-8.

103. Regarding the allegations against W-0011 concerning his memory (para. 188), it is reasonable that the witness could not recall exactly what he told investigators four years ago, and that he thought it was important to recall what he had said during those previous interviews.
104. The argument (paras. 227-228, 236, 243, 264) that a witness who asks to review his statement must be lying ignores the fact that witnesses are permitted to review statements prior to testimony.
105. The Defence relies on information in the [REDACTED] school register to contradict W-0213's evidence on his age and schooling (paras. 233-235). The Defence conveniently ignores that the information in this register does not accord with their continued insistence that it was only possible to start school at age 6 (footnote 353 and para. 268/footnote 572).
106. The Defence impermissibly refers to W-0294's screening note prepared by W-0581 in 2007 (para. 273). This is not a prior statement. It is an internal *screening* note, unsigned and unverified by the witness.
107. In arguing that W-0297's fear and discomfort at being questioned by Defence counsel in December 2009 is not 'convincing' (para. 286), the Defence ignores similar testimony from DW-0032, who stated that he initially lied to the Defence resource person about having been a UPC child soldier because he did not understand why he was being asked the question.¹⁹⁴

The Prosecution Discharged Its Investigative and Disclosure Obligations

108. To the extent that the Defence reargues its previous complaints, the Prosecution relies on its response to the Defence's application for a stay of proceedings.¹⁹⁵ The few new points raised by the Defence do not prove that the Prosecution failed to fulfil its investigative and disclosure obligations.
109. Notably, the contention that the Prosecution should have requested more UPC archive materials from MONUC, that the Defence was entirely dependent on

¹⁹⁴ T.276, p.9, line 21 to p.10, line 4.

¹⁹⁵ #2678.

the Prosecution for access, and therefore the Prosecution's failure deprived the Defence of the possibility of discovering additional material to support its case (para. 15), is meritless. The agreement between the OTP and the UN allowed the Defence (directly or through the Registry/Chamber) to seek access to those materials. See "Prosecution's Notification of Information Pursuant to Trial Chamber I's Instructions of 12 April 2011".¹⁹⁶

110. Finally, the Defence allegation (para. 848) that the Prosecution prejudicially "concealed" exculpatory evidence from the Accused related to his bodyguard unit by a late disclosure is wholly without merit. Firstly, the late disclosure of the note was inadvertent, not deliberate. Secondly, it was disclosed on 21 October 2010, in ample time before the Defence called its witnesses (in April 2011) to have met with and arranged the testimony of this witness, especially because the issue to which the witness was likely to testify about was known to the Accused from the start of the case.

II. THE CREDIBILITY AND RELIABILITY OF OTHER PROSECUTION WITNESSES

111. The Defence alleges bias and hostility towards the Accused on the part of all witnesses linked to the DRC government (paras. 405-407), the United Nations (paras. 617, 645, 675-677), PUSIC (para. 169) or FAPC (paras. 478-481). These are nothing more than speculative and unsupported assertions, which additionally were not put to the witnesses concerned.¹⁹⁷ Not surprisingly, the Defence also generally insists that nearly every Prosecution witness lacks credibility.
112. The Defence states that the W-0055 was in the FPLC for "[REDACTED]" (para. 476); thus, presumptively his evidence has no value. There is no doubt that W-0055 was in a prime position to observe, and provide helpful and reliable evidence on the activities of the UPC/FPLC.

¹⁹⁶ ICC-01/04-01/06-2725.

¹⁹⁷ When asked its position by the Chamber on the sole occasion the Defence appeared to be nearing such a suggestion, the Defence was clear it was not suggesting bias: "*Je ne peux pas imaginer que, devant la Chambre, M. Prunier défende des intérêts particuliers*" (T.157-CONF-FRA, p.26, lines 9-17). Having taken this position the Defence has nonetheless alleged that W-0360 was biased (paras. 665-666).

113. As for W-0017, W-0015 corroborated that he had been a soldier in the UPC/FPLC assigned as a [REDACTED] and participated in military attacks, such as the Mongbwalu and Kobu battles.¹⁹⁸
114. W-0038 steadfastly rejected any allegation that he lied or that W-0316 induced him to lie.¹⁹⁹ Despite W-0038's testimony and its failure to put these specific allegations to the witness himself,²⁰⁰ the Defence proffers a speculative theory that W-0316 *could have* persuaded W-0038 to lie.²⁰¹ The Defence's vague assertion of a connection between W-0038, [REDACTED] and W-0183 does not substantiate its conclusion that W-0038 lied.
115. If the Defence suggests (para. 454) that W-0038 may have been financially motivated to testify, there is no evidence to support that allegation. The Defence wrongly assesses W-0038's evidence regarding his involvement in the UPC/FPLC. W-0038 explained that the school year usually ended in July, however, during the war time, there was no precise date.²⁰² He further stated that he did not take any exams which were normally taken at the end of the school year and that he was allowed to repeat this school year in 2003.²⁰³
116. Contrary to the Defence contention (paras. 524-525), the evidence demonstrates that W-0299 was the Accused's bodyguard from August 2002.²⁰⁴ The witness said that he was sent to Mandro in his capacity as the Accused's bodyguard whilst the President arrived in Mandro from Kinshasa.²⁰⁵ Moreover, at no time did W-0299 claim that he was the Accused's bodyguard

¹⁹⁸ T.265, p.27, lines 1-7, p.39, lines 19-23.

¹⁹⁹ 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".

²⁰⁰ T.337, pp.26-29. 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.

²⁰¹ #2678, paras. 69-70.

²⁰² T.114, p.49, lines 15-18.

²⁰³ T.114, p.52, lines 11-18.

²⁰⁴ T.117, p.13, lines 16-20, p.32, lines 9-11. It is noted that no suggestion of lying was put to W-0299 during questioning.

²⁰⁵ T.117, p.13, lines 16-20; T.122, p.49, lines 20-21.

until August 2003 (para. 526). On the contrary, the witness testified that he left the army after January 2003.²⁰⁶

117. The Defence challenges the reliability of W-0014's and W-0012's testimony because they were not in Ituri continuously in 2002 or 2003 (para. 562). That, the Prosecution submits, is an irrelevant criticism. The Defence ignores W-0014's participation in meetings with the Accused in [REDACTED] in [REDACTED] 2002 and regular attendance at the "UPC Headquarters" in [REDACTED] 2002,²⁰⁷ and that he traveled to Ituri five times in 2002,²⁰⁸ and remained informed of events in Ituri.²⁰⁹ For any information obtained from the third parties, the witness identified the sources²¹⁰ and that he verified the information.²¹¹ W-0012's evidence is corroborated by other testimony,²¹² and where he obtained information from third parties, it was from the co-perpetrators themselves.²¹³
118. The Defence claims (para. 615) that W-0116 is not credible in part because it is implausible that Rwandan soldiers or weapons were transported into Kasenyi for training. This ignores the testimony of W-0038,²¹⁴ W-0041,²¹⁵ W-0012,²¹⁶ W-0055²¹⁷ and W-0014²¹⁸ that Rwanda provided weapons to the UPC/FPLC or transported them by air to Ituri. The Defence speculates (para. 615, point 3) that military training could not have taken place at night, but cites no evidence for this assertion.

²⁰⁶ T.119, p.60, line 23 to p.61, line 5.

²⁰⁷ T.179, p.62, lines 21-25, p.65, lines 13-24.

²⁰⁸ T.184, p.11, lines 1-6.

²⁰⁹ T.181, p.51, lines 20-24.

²¹⁰ T.179, p.57, lines 3-20; T.184, p.36, lines 17-25.

²¹¹ T.179, p.49, lines 5-8, p.53, lines 10-16

²¹² Composition of the UPC: T.168, p.46, lines 1-15; meeting in Kasese: T.168, p.39, lines 17-21; Accused's arrest in June 2002 and transfer to Kinshasa: T.168, p.41, lines 22-24.

²¹³ See T.168, p.19, lines 3-14, p.44, lines 1-25.

²¹⁴ T.114, p.18, lines 15-21.

²¹⁵ T.125, p.71, lines 4-16.

²¹⁶ T.168, p.44, lines 11-25, p.61, lines 7-10.

²¹⁷ T.175, p.65, lines 5-15.

²¹⁸ T.179, p.46, lines 2-12.

119. No witness testified that W-0031 manipulated, coached or encouraged witnesses to lie to the Prosecution or to the Court. The Defence questioned 16 Prosecution witnesses about W-0031²¹⁹ and none gave any evidence of his wrongdoing.²²⁰
120. The Defence takes innocuous information and tries to spin it into something sinister (paras. 618, 621), but none of the points, taken separately or together, constitutes evidence that W-0031 motivated witnesses to lie to the Court.
121. The Defence fails to establish that W-0031 was biased in his testimony.²²¹
122. As of February 2002, W-0046 was a MONUC child protection adviser,²²² responsible for the northeastern part of the DRC, and in August 2002 became specifically in charge of the Ituri region.²²³ Although initially based in Kisangani, her office received many briefings and daily reports from a variety of reliable sources.²²⁴ The conclusions in these reports prompted her first two missions to Bunia in September 2002 and, according to W-0046's evidence, corresponded very accurately to what she witnessed on the ground.²²⁵

²¹⁹ Six of the 16 witnesses questioned did not know or recall W-0031: W-0010 (T.145, p.74, lines 9-12); W-0089 (T.198, p.43, line 24 to p.44, line 1); W-0024 (T.171, p.19, line 19 to p.20, line 1); W-0213 (T.133, p.42, lines 9-14); W-0316 (T.333, p.24, lines 22-24); W-0297 (T.292, p.11, lines 9-19).

²²⁰ W-0321: T.310, p.85, line 4 to p.87, line 18; T.320, p.6, line 18 to p.62, line 2; T.322, p.11, line 13 to p.12, line 9; T.324, p.17, line 6 to p.19, line 3. (Also, in response to questioning by the Prosecution, W-0321 denied that W-0031 asked him to find children and instruct them to pretend to be child soldiers or lie about their age: T.308, p.61, lines 9-18). W-0157: T.188, p.71, line 17 to p.77, line 10. W-0007: T.150, p.30, line 17 to p.31, line 24. W-0581: T.301, p.78, line 21 to p.80, line 24. W-0008: T.138, p.10, line 2 to p.12, line 16. W-0294: T.152, p.39, line 18 to p.45, line 9. W-0293: T.153, p.53, line 19 to p.54, line 20. W-0583: T.336, p.20, line 19 to p.21, line 3. W-0011: T.142, p.11, lines 5-23. W-0582: Rule68Deposition, 18/11/2010, p.10, line 15 to p.12, line 18. (Also, in response to questioning by the Prosecution, W-0046 and W-0321 also described the work done by W-0031: T.205, p.58, line 8 to p.60, line 16; T.308, p.32, line 21 to p.35, line 10, p.36, lines 1-19, p.51, line 22 to p.54, line 7, p.61, line 2 to p.64, line 10, p.79, lines 11-22).

²²¹ W-0031 did not seek to embellish his account; see e.g. T.199, p.35, line 4 to p.37, line 12; T.200, p.86, lines 6-15. See also T.200-CONF-FRA, p.88, lines 3-9.

²²² EVD-OTP-00489, p.10, line 21 to p.11, line 2.

²²³ EVD-OTP-00489, p.14, lines 8-10.

²²⁴ EVD-OTP-00489, p.13, line 21 to p.14, line 14, p.19, lines 1-13, p.27, lines 5-25, p.90, lines 10-16. See also EVD-OTP-00490, p.62, line 7 to p.63, line 25; T.205, p.43, lines 17-25, p.51, lines 8-18.

²²⁵ See for example EVD-OTP-00489, p.30, lines 18-22, p.33, lines 2-15.

123. W-0046 verified information provided by child soldiers by cross-checking references, comparing facts, places and dates, asking for supplementary information from partners or referring to MONUC reports.²²⁶

ON THE EXISTENCE AND NATURE OF THE ARMED CONFLICT

THE CONFLICT IS PROPERLY CHARACTERISED AS NON-INTERNATIONAL

124. The Defence's argument (paras. 396, 440, 483, 684-686, 688) regarding evidence of foreign involvement is insufficient to establish "overall control", which is a necessary element of indirect intervention.²²⁷ The Prosecution adheres to its submissions on occupation.²²⁸
125. It is also established that non-international armed conflicts cease only upon "peaceful settlement".²²⁹ Reduction in hostilities (paras. 695, 697) is not peaceful settlement: "[a]n armed conflict may continue to exist after the hostilities in an area have ceased."²³⁰ Lack of territorial control (para. 697) is not an element of armed conflict under the Rome Statute²³¹ and its absence does not of itself constitute peaceful settlement.
126. The evidence indicates that there was no "peaceful settlement" before 13 August 2003. Firstly, many organised armed groups were still in existence and operating in Ituri during this period.²³² For example, the FNI was identified as having perpetrated massacres in June and July 2003;²³³ PUSIC was based in

²²⁶ T.205, p.38, line 5 to p.40, line 23; T.206, p.8, line 22 to p.9, line 9; and T.208, p.24, lines 11-16. See also EVD-OTP-00491, p.17, lines 13-21, p.18, lines 5-25, p.24, lines 14-21, p.81, line 20 to p.83, line 17.

²²⁷ #2748, para. 38.

²²⁸ #2748, paras. 48-49.

²²⁹ *Prosecutor v. Tadić*, IT-94-1, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70, see also paras. 67 and 69; *Prosecutor v. Gotovina, Čermak and Markač*, IT-06-90-T, Judgment, 15 April 2011, para. 1694.

²³⁰ *Prosecutor v. Halilović*, IT-01-48-T, Judgment, 6 November 2005, footnote 72.

²³¹ ICC-01/05-01/08-424, para. 236; ICC-01/04-01/06-803-tEN, para. 233. See also, inter alia, *Prosecutor v. Tadić*, IT-94-1, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70; *Prosecutor v. Đorđević*, IT-05-87/1-T, Judgment, 23 February 2011, paras. 1522 and 1526.

²³² As to the organisation of the UPC/FPLC, RCD-ML, FRPI and FNI, see #2748, para. 24. As to the organisation of PUSIC and FAPC, see: EVD-OTP-00623, pp.0448-0450; 0454-0455; 0459; 0461-0463; 0465; 0468-0469; EVD-OTP-00405, pp.0025-0026; and T.169, p.41, line 23 to p.43, line 18.

²³³ EVD-OTP-00623, pp.0449, 0452.

Kasenyi in June and July 2003²³⁴ and opposed the UPC/FPLC in Tchomia in November 2003;²³⁵ FAPC fought the FNI and FPDC to take control of the town of Mahagi in June 2003²³⁶ and received ammunition and prepared for hostilities with the UPC/FPLC in July 2003;²³⁷ it also joined Ngiti forces to attack Fataki in July 2003;²³⁸ and members of the UPC/FPLC attacked MONUC several times, leading MONUC to protest to the Accused.²³⁹ Secondly, the international community considered the conflict to be ongoing;²⁴⁰ IMEF was present between June and September and MONUC was granted a Chapter VII mandate on 28 July 2003.²⁴¹ Factors signifying the beginnings of peaceful settlement occurred at the very end of, or outside, the indictment period.²⁴²

CONCLUSION

127. The evidence establishes beyond reasonable doubt that the Accused is responsible for the crimes of enlistment, conscription and use of children under the age of 15 to participate actively in hostilities in the UPC/FPLC.



Luis Moreno-Ocampo,

Prosecutor

Dated this 1st day of August 2011
At The Hague, The Netherlands

²³⁴ EVD-OTP-00623, p.0449; EVD-OTP-00625, p.0215.

²³⁵ EVD-OTP-00625, p.0217; EVD-OTP-00403, p.0113.

²³⁶ EVD-OTP-00623, p.0469.

²³⁷ EVD-OTP-00625, p.0222.

²³⁸ EVD-OTP-00623, p.0449-0450; EVD-OTP-00625, p.0216; EVD-OTP-00403, p.0112.

²³⁹ EVD-OTP-00403, pp.0113-0114.

²⁴⁰ *Prosecutor v Dorđević*, IT-05-87/1-T, Judgment, 23 February 2011, para. 1535; ICC-01/04-01/06-803-tEN, para. 235.

²⁴¹ EVD-OTP-00623, p.0482. See also EVD-OTP-00625, pp.0215-0217.

²⁴² EVD-OTP-00403, p.0113; EVD-OTP-00405, pp.0025-0026; EVD-OTP-00625, pp.0217-0218.