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Date: **1 June 2011**

TRIAL CHAMBER I

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

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

PUBLIC REDACTED VERSION

**Closing Submissions for Victims a/0001/06, a/0002/06, a/0003/06, a/0007/06
a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08,
a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09,
a/0292/09 and a/0398/09**

Source: Team for V01 group of victims

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

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1. Noting the *Decision on the confirmation of charges* issued by the Pre-Trial Chamber on 29 January 2007;¹
2. Noting the *Order on the timetable for closing submissions* (the “Order on the timetable”) issued by Trial Chamber I on 12 April 2011;²
3. The victims will herein attempt to respond to the questions put by the Chamber, while summarising their position on the charges against the accused after a 28-month trial.

A. IN LAW

1. The armed conflict in Ituri between 1 September 2002 and 13 August 2003

4. The existence of one or more armed conflicts in Ituri during the period covered by the decision on the confirmation of charges is common knowledge and is not disputed by the Defence. The duration and intensity of the hostilities, the number of victims, and the organisation and arming of the forces involved were such that the conflict could certainly no longer be characterised as “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”.³
5. The issue as to whether the conflict was national and/or international is more complex. The distinction between an international and a non-international armed conflict is becoming increasingly blurred,⁴ and ‘hybrid’ conflicts involving State and non-State actors and, in some instances, international troops

¹ ICC-01/04-01/06-803-tEN.

² ICC-01/04-01/06-2772.

³ Article 8(2)(f) of the Statute.

⁴ Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*. Cambridge University Press, 2002.

are now the rule rather than the exception, not only in Africa but also elsewhere, for example in Kosovo, Afghanistan, Iraq, Lebanon and Libya.⁵

6. The situation in Ituri is a textbook example of this trend. During the material period, there were several successive and/or parallel conflicts in the region,⁶ including:

- a non-international conflict from 1998 onwards between the Congolese government and several groups rebelling against the central authority;⁷
- until June 2003,⁸ an international conflict between the DRC and two neighbouring countries, Rwanda and Uganda, which intervened militarily in the DRC to support the rebellion and occupied part of the DRC's territory;
- an international conflict between Uganda and Rwanda, which clashed militarily on the territory of the Congo from August 1999 onwards, directly in Kisangani,⁹ and indirectly in Ituri via their Congolese allies and agents;
- armed conflicts between rebel groups (including a split and conflict between the UPC and the APC¹⁰);

⁵ See R. Bartels, *Timelines, borderlines and conflicts. The historical evolution of the legal divide between international and non-international armed conflicts*, International Review Red Cross. No. 873, March 2009, p. 35, www.ikrk.org/eng/assets/files/other/irrc-873-bartels.pdf.

⁶ See the report by Mr Garreton, which mentions ten international and domestic conflicts at the time Joseph Kabila came to power, six of which took place entirely or partly on the territory of Ituri (ICC-01/04-01/06-1655-Anx-tENG 20-02-2009, p. 10). At page 14 of the same report, he also mentions "numerous national and foreign conflicts" in Orientale province, where Ituri is located.

⁷ Pursuant to the Pretoria Agreement of 17 December 2002, a transition government including the main rebel groups was formed on 30 June 2003. The UPC was one of the armed groups which did not participate in the peace process and remained in opposition to the central government.

⁸ The precise date on which the international conflict actually ended is debatable, since foreign troops intervened again on the territory of the DRC after the date on which they officially withdrew.

⁹ Both countries' troops had direct military clashes in Kisangani on several occasions, including in May 2000.

¹⁰ *Armée Populaire Congolaise*, the armed wing of the RCD/KML rebel movement.

- ethnic conflicts (mainly between the Hema and the Lendu and Ngiti ethnic groups), which became military conflicts when organised militias (such as the UPC and FNI) were formed;
 - conflicts within these militias and armed groups (internal rebellions within the UPC, establishment of PUSIC in late 2002 and the FAPC in January 2003);¹¹ and
 - intervention of international pacification forces (ARTEMIS and later MONUC), which occasionally intervened militarily.
7. Many of these conflicts were interlinked. The international conflict itself arose from a domestic conflict (the Banyamulenge Tutsi rebellion in Kivu); rebels and armed groups often sought the support of neighbouring States, which in turn used those groups to extend their own influence. Armed groups organised along ethnic lines would, as the UPC did, change allegiance in mid-conflict to suit their own or their allies' agenda.
8. The Pre-Trial Chamber considered that the accused could be prosecuted for war crimes committed in the context of an international conflict as from early September 2001 until 2 June 2003, and in the context of a non-international conflict between 2 June and 13 August 2003, which suggests that there was an international conflict at one point, followed by a non-international conflict.
9. In its "Order on the timetable", the Chamber contemplates partially re-characterising the charges, and asks what factors should be taken into account if it were to find that, during the first period, the conflict was not of an international character.¹²
10. The view that the character of the conflict changed abruptly on a specific date does not strike the participating victims as corresponding with any specific

¹¹ See *Decision on the confirmation of charges*, paras. 185-186.

¹² ICC-01/04-01/06-2722, para. 4(iv).

event. Whilst some of the victims did fight the Ugandan armed forces directly in Bunia in March 2003, most of the fighting in which they participated was against other Congolese militias, both before and after June 2003.

11. Although the Rome Statute makes a distinction between crimes committed within the context of an international conflict and those committed in the context of a non-international conflict, it was never the intention of the negotiators of the Statute to make the prosecution of war crimes conditional on being able to place the crimes exclusively in the context of an armed conflict of an entirely international or entirely non-international character – quite the contrary.

12. Just as the ICTY held in the *Tadić* judgment,¹³ the Pre-Trial Chamber itself, in the grounds for its *Decision on the confirmation of charges*, explicitly reserved the possibility that both types of conflict may exist in parallel on the same territory during a given period:

[A]n internal armed conflict that breaks out on the territory of a State may become international – or, depending upon the circumstances, **be international in character alongside an internal armed conflict** – if (i) another State intervenes in that conflict through its troops (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention)¹⁴

13. This is all the more surprising as, in the operative part of that decision, the Pre-Trial Chamber re-characterised the charges brought by the Prosecution, finding that before 2 June 2003, the armed conflict was of an international character, without considering the possibility that a non-international conflict existed in parallel. It also did not provide its reasoning for finding that the internal conflict did not exist before 2 June 2003.

14. In light of the foregoing, the Legal Representatives consider that, during the period of September 2002 to June 2003, both an international armed conflict and

¹³ *Prosecutor v. Duško Tadić*, Appeals Chamber, 15 July 1999, Case No. IT-94-1-A, para. 84.

¹⁴ ICC-01/04-01/06-803-tEN 14-05-2007 73/157 SL PT, para. 209.

a non-international conflict existed concurrently and in parallel in the territory of Ituri. If this Chamber is contemplating re-characterising the charges for the period before 2 June 2003, the Legal Representatives suggest that the Chamber should find that the crimes were committed within the context of an international armed conflict (article 8(2)(b)(xxvi)) between 1 September 2002 and 2 June 2003, and within the context of a non-international armed conflict (article 8(2)(e)(vii)) from 1 September 2002 to 13 August 2003.

2. Presence of children under the age of 15 years in armed forces and groups within the context of an armed conflict

15. The issue as to whether the armed conflict was international or non-international is not a purely abstract one, since the wording of article 8(2)(b)(xxvi) and 8(2)(vii) is not identical.

16. The differences in the terminology of those provisions reflect the terminology used in Additional Protocols I and II of 8 June 1977 to the Geneva Conventions, which govern the protection of victims in international and non-international armed conflicts respectively.

17. In article 77(2) of Protocol I, the protection of children as a particularly vulnerable group of civilians is reflected as follows:

The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them **into their armed forces**.

18. In article 4(3)(c) of Protocol II, the same principle is worded thus:

[C]hildren who have not attained the age of fifteen years shall neither be recruited **in the armed forces or groups** nor allowed to take part in hostilities.

19. This does not of course mean that children under the age of 15 years are afforded less protection against recruitment into armed groups (other than the national armed forces of a State Party) in the context of an international conflict

than they would be in the context of a non-international conflict. The reference to the armed forces of the Parties is not restrictive, since article 77 of Protocol I comprehensively prohibits any participation of children under the age of fifteen years in hostilities – an objective which the Parties must pursue “**in particular**” by refraining from recruiting them into their own forces.

20. Like the drafters of Protocols I and II, the drafters of the Statute undoubtedly did not intend to legitimise the recruitment of children under the age of 15 years into armed groups other than those belonging to the “national forces”, and nothing in the preparatory works suggests that this was their intention.
21. On the contrary, as the Pre-Trial Chamber rightfully recalled, “[t]he drafters of the Statute wanted to include under article 8 of the Statute a larger array of criminal conduct committed in the context of an international armed conflict”.¹⁵
22. Furthermore, the drafters not only included in the Statute the criminalisation of grave breaches of the Geneva Conventions and Additional Protocols, but also incorporated grave breaches of “the laws and customs applicable in [...] armed conflicts” – whether of an international or a non-international character.¹⁶ In fact, international custom prohibits any recruitment of children under the age of 15 years into a military organisation, regardless of the nature of the conflict.¹⁷
23. Finally, even if it were to be considered that the UPC troops intervened exclusively in an international conflict during a given period, they should be categorised in the same way as national armed forces. The Pre-Trial Chamber also endorsed this reasoning.¹⁸

¹⁵ *Decision on the confirmation of charges*, para. 284.

¹⁶ Article 8(2)(b) and 8(2)(e).

¹⁷ Special Court for Sierra Leone, *Prosecutor v. Samuel Hinga*. Even in his dissenting opinion, Judge Robertson concedes that, at least since the adoption of the Rome Statute, the recruitment of children under the age of 15 years has become an international crime “in every kind of serious armed conflict”.

¹⁸ *Decision on the confirmation of charges*, paras. 268-285.

3. Enlistment and conscription of children under the age of 15 years and participation in hostilities

24. It is generally accepted that the concept of “enlistment” refers to voluntary recruitment and “conscription” to forcible recruitment.¹⁹ However, this distinction has no bearing in the case of minors, although it may play a part in deliberations on sentencing.
25. The prohibition of any recruitment of children under the age of 15 years is part of the protection of children in armed conflicts, during which they become particularly vulnerable civilians. This prohibition has become a fundamental principle in the law of armed conflict, and is reflected in numerous international conventions, including the two 1977 Additional Protocols to the Geneva Conventions.
26. The prohibition covers any and all absorption of children into a military organisation, regardless of the terms employed by those responsible. In fact, in child protection circles, the term “child soldiers” is increasingly being replaced with “children associated with armed forces or groups”.²⁰ The various international instruments prohibiting the recruitment of children and the criminalisation of such conduct in the Rome Statute also protect young girls who are often recruited by armed groups but used mainly as servants or sex slaves of the commanders (whilst often also participating in actual military activities).²¹
27. The negotiators of the Statute preferred the concept of “participat[ing] actively in hostilities” to that of “tak[ing] a direct part” used in Protocol I to the Geneva Conventions²² in order to cover a wider range of functions:

¹⁹ *Decision on the confirmation of charges*, paras. 246-248.

²⁰ See report of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, ICC-01/04-01/06-1229-AnxA, p. 4, footnote 8.

²¹ See the testimony of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, ICC-01/04-01/06-T-223-ENG, p. 16, lines 19 *et seq.*

²² Article 77(2).

With children, it was considered that a phrase should be used that could be capable of wider interpretation. At the Preparatory Committee, prior to the Rome Conference, a footnote had been inserted in the text providing guidance for the interpretation of this phrase.²³ While this footnote, as with all such interpretative footnotes contained in the Preparatory Committee's Report, did not appear in the text of the Statute, it was clearly in the minds of delegates both in Rome itself and when the elements themselves came to be drafted.²⁴

28. The Legal Representatives also refer to the Pre-Trial Chamber's position on this matter.²⁵

4. Nexus between the armed conflict(s) and the crimes

29. There can be no participation in hostilities without a nexus to an armed conflict. The recruitment of child soldiers was also carried out within the context of an armed conflict, since the overall objective of such recruitment was to use the recruits in ongoing and future hostilities.

B. RESPONSIBILITY OF THE ACCUSED

1. Individual criminal responsibility under article 25(3)(a)

30. Under article 25(3)(a) of the Statute, the perpetrator of a crime is responsible, even if he acted jointly with or through another person.

²³ See Herman von Hebel and Darryl Robinson, *supra*, footnote 1, at 118. The text of this footnote reads: "The words 'using' and 'participate' have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology."

²⁴ C. Garraway, "Article 8(2)(b)(xxvi) – Using, conscripting or enlisting children", in: R. S. Lee *et al.* (eds.), *The international criminal court. Elements of crimes and rules of procedure and evidence*, pp. 205-207, Ardsley, NY 10502, 2001.

²⁵ *Decision on the confirmation of charges*, paras. 261-263.

31. Under the Elements of Crimes, the following constitute the crimes with which the accused is charged:

1. The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an [...] armed conflict.
5. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

32. The UPC command, of which the accused was President and Commander-in-Chief, formed a militia and launched a recruitment campaign, without formally setting forth the selection criteria pertaining to the age, gender, physical condition or even the consent of the recruits, which resulted in the widespread recruitment of minors. Numerous witnesses, including witnesses for the Defence,²⁶ confirmed that many of those minors were under the age of 15 years.

33. From 2002 onwards, the presence of child soldiers under the age of 15 years within the UPC was also public knowledge. Some months after the capture of Bunia, the UPC's first large-scale action, the organisation was already included on the list of States and organisations that recruit child soldiers, which is annexed to the report of the UN Secretary-General.²⁷

34. This conduct continued throughout the entire material period. Whereas the parties to the Lusaka Agreement had informed the United Nations of their intention to demobilise child soldiers even before the Rome Statute had entered into force, this was not the case for the UPC.²⁸

35. Admittedly, the UPC did demobilise a limited number of children under the age of 15 years under pressure from the international community – thereby also

²⁶ See [REDACTED]. Also, [REDACTED].

²⁷ Report S/2002/1299 of 26 November 2002, Annex. www.un.org.

²⁸ See the report of the Secretary-General S/2002/1299 of 26 November 2002. www.un.org.

proving that they had previously been recruited. A document dated 12 February 2003 from the '*Secrétariat national à l'éducation nationale*' [National Secretariat for National Education] of the UPC, which was copied to the accused, mentions the intention of the organisation "[TRANSLATION] and of its president" to initiate a demobilisation programme "[TRANSLATION] for child soldiers aged from 10 to 15/16 years who willingly agree to return to civilian life to be reintegrated according to their future plans".²⁹

36. The accused himself did sign demobilisation decrees, but these were after the fact, did not announce any punishment for these crimes, and appear not to have been implemented. When Kristine Peduto was asked in court about the decree of 1 June 2003 on the demobilisation of children, she responded as follows:

I would refer to them as a masquerade, given that recruitment was going on in other parts of Ituri by UPC troops. Indeed, there was an official statement. Some children were instructed to approach the NGOs specialising in child protection but, at the same time, recruitment continued and the UPC never had only 70 child soldiers amongst its troops. Yes, the operation -- I don't know -- well, yes, perhaps a public relations operation, which was absolutely not sincere [...].³⁰

37. Not one of the victims in our group has said that he or she was demobilised as a result of one of these decrees.

38. Even if the accused had not participated in the decisions on recruiting a militia, which he did, it would have been entirely possible to prosecute and convict him under article 25(3)(b) or (c) of the Statute, for having induced³¹ or facilitated the commission of such crimes, or even under article 28 for not having exercised the requisite control over his forces whilst he knew or should have known that the forces were committing the crimes with which he is charged. Indeed, the orders announced at a certain point to demobilise children recruited by the UPC do not constitute what is meant in the Statute by "tak[ing] all necessary and reasonable

²⁹ DRC00113.070.

³⁰ Testimony of Kristine Peduto at the confirmation hearing, ICC-01/04-01/06-T-37-EN [15Nov2006 ET WT], p. 107, lines 2-11.

³¹ *Inter alia* by his visits to the training camps, where children paraded in front of him.

measures within his or her power to prevent or repress [...] commission [of the crimes]’’.³²

1. Criminal intent (article 30 of the Statute)

39. Article 30 states that the material elements of a crime must be committed with intent and knowledge. The accused can be found criminally responsible only if he knew (or should have known) that his conduct would lead to the commission of war crimes.

40. However, this principle does not imply that doubt as to the age of the children recruited would preclude a conviction:

Element 1 is covered by the *mens rea* requirement that follows from article 30. There were, however, differing views as to the extent of knowledge of the age of the child required by the perpetrator. Some States considered that there should be no knowledge requirement at all. Thus the burden would be on someone who conscripted or enlisted to satisfy himself as to the age of those who came to him. However, others thought that this would, in effect, contravene article 67(1)(i) of the Statute, which provides that no reversal of the burden of proof or onus or rebuttal can be imposed upon the accused. Despite this, there was a considerable body of opinion that a strict application of article 30, requiring that the perpetrator had knowledge of the age of the person conscripted or enlisted, would impose too high a burden on the prosecution. This view was accepted even by those who considered that any deviation from the terms of article 30 was outside the terms of the Statute and, indeed, the authority of the Preparatory Commission. The compromise was to require that the accused “knew or should have known that such person or persons were under the age of 15 years.” Those with reservations as to the *vires* of this provision were reassured by article 9(3) of the Statute providing that elements “shall be consistent” with the Statute. Any inconsistent element would be struck down by the judges. However, all delegations considered that it was important to signify to the judges what the international community considered that the appropriate test was in these particular circumstances, in order to ensure the protection of children.³³

41. In a country or region where the majority of births are not registered in a civil status registry, where minors do not hold an identity document stating their age,

³² Article 28(b)(iii).

³³ C. Garraway, “Article 8(2)(b)(xxvi) – Using, conscripting or enlisting children”, in R. S. Lee *et al.* (eds.), *The international criminal court. Elements of crimes and rules of procedure and evidence* p. 205-207, Ardsley, NY 10502, 2001.

and where many children and even adults do not know their own age, the issue arises as to how a recruiter must act when faced with a child whose age is unknown.

42. The Special Representative responded as follows:

[T]his is not even a theoretical issue because what we believe is that when children come, [...] there is a duty of due diligence to check into their background, their family and friends [...] ³⁴

43. In this case, however, the Court is not adjudging the responsibility of an individual recruiter, but of a leader accused of having recruited an entire army consisting mainly of minors, many of whom were children under the age of 15 years. Therefore, the concepts of intent and knowledge must be contemplated differently. The Chamber must consider whether by organising, either alone or with others, the recruitment of a militia of several thousand people in the conditions that obtained in Ituri at the beginning of the millennium, and in light of the manner in which that recruitment campaign was devised and conducted, the accused knew or should have known that that would necessarily entail the recruitment of children under the age of 15 years.

44. The phenomenon of child soldiers was seen in the Democratic Republic of the Congo as from the time of the war triggered by the AFDL³⁵ in 1996-1997. The vast majority of the children recruited came from the east of the country, where Laurent Désiré Kabila's troops began their advance to seize power in Kinshasa. The name given to those child soldiers was "*kadogo*", a Swahili word often used in the east of the country,³⁶ and in Ituri in particular.

45. The spread of the phenomenon in the east of the Congo was confirmed by the Defence in the opening statements by one of its counsel, Mr Bijou-Duval:

³⁴ ICC-01/04-01/06-T-223-ENG, p. 32, lines 18-21.

³⁵ *Alliance de Forces Démocratiques pour la Libération du Congo*.

³⁶ See the testimony of WWW-0019, ICC-01/04-01/06-T-345-FRA of 6 April 2011, p. 11, line 2.

[TRANSLATION] Who, in the chaos of the Great Lakes region of Africa, gave terrible prestige to these children swept away by war? Laurent-Désiré Kabila, driving out Mobutu, leading his army of *kadogos*, his army of children. Who was the commander of operations of that army of shame, that army of children? His son, Joseph Kabila, today the leader of the country. Again, even as I speak, which army is enlisting child soldiers and sending them to fight in the hills of the Kivus? The Congolese armed forces of President Joseph Kabila, the army of the man who delivered Thomas Lubanga over to you, Madam Prosecutor. Now Thomas Lubanga is to become the scapegoat for a criminal phenomenon whose origins and spread are not of his making and for which those who bear the greatest responsibility are not being prosecuted.³⁷

46. At the time of the second rebellion in the east of the DRC, the rebel forces revived the practice of recruiting child soldiers, as did the majority of the armed groups which emerged from or were created on the sidelines of that rebellion.³⁸

47. Therefore, when the UPC army was established, the use of child soldiers in armed groups was the rule, not the exception. Nothing indicates that the UPC command, and the accused in particular, intended to break with this general practice – quite the contrary.

48. The accused must have known that forming a new armed group without strict instructions to prevent the recruitment of child soldiers would necessarily lead to the practice within his movement.

49. The UPC's recruitment of child soldiers was clearly a deliberate policy, given that the organisation even resorted to recruiting demobilised former *kadogos* in order to take advantage of their expertise as "instructors".³⁹

50. Similarly, the accused could not have been unaware of the unlawful and criminal nature of this practice. From 1999 onwards, the DRC took measures to demobilise and reintegrate child soldiers, and created a national office for this

³⁷ ICC-01/04-01/06-T-109-FRA WT 27-01-2009, p. 32, line 14.

³⁸ See, *inter alia*, the testimony of Mr Garreton: "[TRANSLATION] This problem of recruitment of child soldiers exploded in full force more after the second war than after the first war... there was recruitment of children elsewhere, but at that time the case of the Congo was truly scandalous ...". ICC-01/04-01/06-T-194-FRA ET, p. 3, line 13.

³⁹ See the testimony of Witness [REDACTED].

purpose.⁴⁰ The international community focused on the phenomenon, and the Security Council took a series of resolutions explicitly referring to the situation in the DRC.⁴¹

51. By dint of his university education and experience as a civil-society activist and politician (having been Minister of Defence and later President and Commander-in-Chief of an armed militia), Thomas Lubanga could not have been unaware that the presence of children under the age of 15 years in the armed forces was prohibited, or that, as of 1 July 2001, their recruitment constituted a crime falling within the jurisdiction of the International Criminal Court – especially given that a widespread international outreach campaign for the demobilisation of child soldiers was launched and received extensive media coverage throughout the DRC, and given that it emerged in court that this issue had in fact been the subject of contact between the accused and MONUC's child protection officer.⁴²

2. TESTIMONY OF VICTIM A/002/06

52. The Defence has called into question the testimony of one of the victims of the V01 group, Witness OTP-WWW-0298 (Victim a/002/06). Admittedly, this young, traumatised witness did cause confusion on the first day of the trial by changing his version of events:

[REDACTED]⁴³

He then went on to testify that he had never been a child soldier, that he had never gone to a training camp, and that everything that he had previously stated had been suggested by the NGO which had taken him in after his demobilisation.

⁴⁰ Legislative Decree No. 066/2000 to demobilise children and other vulnerable groups from combatant forces. This decree established BUNADER (*Bureau National de Démobilisation et de Réinsertion* [National Office for Demobilisation and Reintegration]).

⁴¹ Resolutions 1261 (1999), 1314 (2000) and in particular 1379 (2001). www.un.org.

⁴² See [REDACTED].

⁴³ [REDACTED].

53. However, it emerged that the witness was deeply perturbed that day and clearly influenced by the presence of the accused, his former Commander-in-Chief, whom he had to look in the eye. When he was subsequently able to resume his testimony in improved circumstances (protected by a curtain from the accused's line of sight⁴⁴) he testified without duress and confirmed the entirety of his previous statements. Better still, for one hour (from 9:47 to 10:48), he recounted his story without a single question being put by counsel from the Office of the Prosecutor and provided a multitude of details to supplement what he had previously stated.⁴⁵ This makes his testimony highly credible, especially considering how young he was, at the time both of the events (about 11 years old) and of his testimony (about 18 years old). Furthermore, during the cross-examination by the Defence, which lasted two half-days, he maintained his testimony.

54. Moreover, the core of his testimony (that he was recruited at a very young age along with several friends of his age, went to the [REDACTED] camp, was demobilised by [REDACTED], etc.) was corroborated by the testimony of [REDACTED], Witness WWW-0299, and even partly by [REDACTED], with whom he did not get on, who was examined as a witness for the Defence (D01-WWW-0015). That witness also confirmed that OTP-WWW-298 had returned from [REDACTED] with a firearm.⁴⁶ Some information from his testimony (such as the name of his camp commander) was confirmed by Witness OTP-WWW-0017.⁴⁷

3. For all intents and purposes, Victim a/0002/06 hereby declares that he maintains the entirety of the testimony he gave before the Court on 10 and 11 February 2009.

⁴⁴ [REDACTED]. Subsequently, all witnesses requesting protective measures were granted this measure.

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

4. THE VICTIMS' EXPERIENCES AND THE EVIDENCE PRESENTED AT TRIAL

55. During the presentation of the case for the Prosecution, numerous witnesses testified before the Chamber that they had been recruited voluntarily or forcibly into the UPC troops before they had reached the age of fifteen years. The existence of such practices was also confirmed both by independent witnesses, such as representatives of international organisations or non-governmental organisations, and by members of the UPC itself and those closely associated with it.

56. Before commencing the case for the Defence, its Lead Counsel stated: “[TRANSLATION] the Defence intends to indicate that we will not endeavour to show that there were no minors amongst the ranks of the FPLC”⁴⁸ and “[TRANSLATION] the Defence witnesses will also shed light on Thomas Lubanga’s role with regard to the presence of minors amongst the soldiers of his organisation...”⁴⁹ and therefore did not seriously challenge the UPC/FPLC’s practice of recruiting child soldiers.

57. The Defence initially attempted to prevent the Chamber from ruling on the guilt or innocence of the accused by requesting that the proceedings be stayed on the grounds of abuse of process on the part of the Office of the Prosecutor. However, that application was dismissed by the Chamber on 23 February 2011.

58. Although the presence of child soldiers under the age of fifteen years in the armed group led by the accused had been confirmed by numerous testimonies, which the Defence has at no time alleged to be falsified or flawed,⁵⁰ and had even been confirmed by a number of its own witnesses,⁵¹ the Defence

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ See [REDACTED].

⁵¹ See [REDACTED].

subsequently presented a further series of witnesses with the aim of suggesting that the accused was not responsible for the recruitment of children and that, having learned of the presence of children in his militia, he immediately took the necessary measures to remedy the situation.

59. The Representatives of the Victims refer to the submissions to be filed by the Prosecution to show that this claim is unfounded. The victims always knew the accused as the Commander-in-Chief of the UPC, who even had a certain personality cult surrounding him. They cannot conceive that he would have been unable to take decisions and command respect. For the victims, the recruitment of children under the age of fifteen years and their use in hostilities was the rule, not the exception, within the UPC. They also experienced the consequences of the practice.

60. Accordingly, one of the concerns of the victims participating in the proceedings was that the evidence presented during the trial should be consistent with what they themselves experienced. As far as the victims represented by the V01 team are concerned, corroborating testimonies have amply confirmed what they experienced during their time in the UPC army.

61. Testimonies spoke not only to the presence of minors under the age of 15 years among the UPC troops,⁵² but also to the fact that their recruitment was often forcible, characterised by violence and a complete lack of free and informed consent on the part of those concerned (taking account of their very young age) and of their parents.⁵³

62. Testimonies also provided evidence of a set of circumstances mentioned in the applications for participation, including:

- the existence of military training centres for young recruits;

⁵² See [REDACTED].

⁵³ See [REDACTED].

- the participation of children under the age of 15 years in certain battles; and
- abuse suffered by the victims, such as mistreatment, administration of cannabis and other psychotropic substances, and sexual abuse.

63. Some examples of these situations are set out below:

- The presence of children in the Mandro camp was confirmed by Witnesses OTP-WWWW-0038⁵⁴ and OTP-WWWW-0007,⁵⁵ which corroborates the accounts of several victims represented by the V01 team.
- The presence of children there was confirmed by Witnesses OTP-WWWW-0038, OTP-WWWW-298, OTP-WWWW-0011 and OTP-WWWW-0213, which corroborates the account of Victim a/002/06, who underwent training at that camp. That victim's presence at the camp was even confirmed by a witness for the Defence, D01-0015.⁵⁶
- The presence of child soldiers in the Rwampara camp was confirmed, amongst others, by Witness OTP-WWWW-0010,⁵⁷ who at the same time attested to a filmed visit to the camp by the accused, Thomas Lubanga, thus corroborating the accounts of Victims a/0407/08, a/0007/08 and a/056/07, who underwent training at that camp.
- Witness OTP-WWWW-0010 also testified to the actual physical presence of the accused, who visited the Rwampara camp in person to boost the morale of the "recruits",⁵⁸ thereby corroborating the account of Victim a/156/07, who saw the accused at that camp.

⁵⁴ See [REDACTED].

⁵⁵ See [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

- Witnesses OTP-WWWW-0007⁵⁹ and OTP-WWWW-0017⁶⁰ confirmed the participation of children in the fighting which took place in Bunia, which corroborates the accounts of the victims represented by the V01 team who participated in those hostilities.
- Witnesses OTP-WWWW-0041⁶¹ and OTP-WWWW-0017⁶² confirmed the widespread consumption of cannabis amongst the child soldiers as a means of giving them courage, which corroborates the accounts of several victims represented by the V01 team.
- Finally, Witnesses OTP-WWWW-0010,⁶³ OTP-WWWW-0046⁶⁴ and OTP-WWWW-0038⁶⁵ confirmed the sexual abuse suffered by the female recruits who served as sex slaves to their commanders, which corroborates, amongst other, the account of Victim a/0007/08, who suffered such treatment.
- Multiple testimonies⁶⁶ confirmed the mistreatment suffered by the young recruits in the training camps (being whipped, being imprisoned in a well as punishment, a lack of medical care and adequate food, and so on).

64. Thus the trial has shown the Court and thereby also the general public of the DRC and elsewhere, that in the UPC (FPLC), recruitment of children under the age of 15 years was not just a problem of their age: the conditions in the camps were closer to those found in a concentration camp than in a barracks, and were

⁵⁹ [REDACTED].

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

⁶² [REDACTED].

⁶³ [REDACTED].

⁶⁴ See [REDACTED].

⁶⁵ For example, [REDACTED].

⁶⁶ One example is Witness WWW-0017: “[TRANSLATION] That was what was explained to me, because I did not witness the scene, how it happened, but I saw him put on the ground and being whipped like that” [REDACTED].

completely unacceptable for children; these children were sent into combat without any consideration whatsoever for their lives or physical integrity and were used to terrorise the civilian population. Many of those children, who have now reached adulthood, are still suffering from both physical and psychological trauma.

65. The accused's conviction for the crimes with which he is charged will be a first step towards redress for the victims.

FOR THESE REASONS,

MAY IT PLEASE THE CHAMBER:

To find the charges well-founded, if necessary after amending the material time to cover charges of crimes committed within the context of a non-international conflict, in particular with respect to the victims.

To take into account the victims' considerations by establishing the individual criminal responsibility of Thomas Lubanga Dyilo.

Dated this 1 June 2011
At The Hague, Paris and Kinshasa

For the V01 team of victims,
[signed]

Luc Walley, Counsel

[signed]

Franck Mulenda, Counsel

[signed]

Mr Mulamba Nsokoloni, Counsel

[signed]

Hervé Diakiese, Counsel