Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-01/04-01/06**
Date: **28 February 2013**

THE APPEALS CHAMBER

Before: **Judge Erkki Kourula, Presiding Judge**
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Anita Ušacka
Judge Ekaterina Trendafilova

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public Redacted Version
Defence reply to the "Prosecution's Response to Thomas Lubanga's Appeal against Trial Chamber I's Judgment pursuant to Article 74" and the "Prosecution's Response to the '*Mémoire de la Défense de M. Thomas Lubanga relative à l'appel à l'encontre de la "Décision relative à la peine, rendue en application de l'article 76 du Statut" rendu par la Chambre de première instance I le 10 juillet 2012*'", both filed on 4 February 2013

Source: **Defence team for Mr Thomas Lubanga Dyilo**

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

Office of the Prosecutor
Ms Fatou Bensouda
Mr Fabricio Guariglia

Counsel for the Defence
Ms Catherine Mabille
Mr Jean-Marie Biju-Duval
Mr Marc Desalliers
Ms Caroline Buteau

Legal Representatives of Victims
Mr Luc Walleyn
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Paul Kabongo Tshibangu
Mr Joseph Keta

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

Office of Public Counsel for Victims

Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

1. The purpose of this reply is not to present arguments which have already been set out by the Defence in Mr Thomas Lubanga's appellate brief against Trial Chamber I's 10 July 2012 Decision on Sentence pursuant to Article 76 of the Statute[1] and Mr Thomas Lubanga's appellate brief against the 14 March 2012 judgment pursuant to article 74 of the Statute;[2] rather, it is essentially to highlight the most significant inaccuracies and misrepresentations in the Prosecution's 4 February 2013 responses.[3]

2. Accordingly, the Defence essentially refers to the arguments already set out in its 3 December 2012 briefs.[4]

3. In addition thereto, the Defence submits as follows:

PART A: DEFENCE REPLY TO THE PROSECUTION'S RESPONSE TO THE DEFENCE BRIEF AGAINST THE DECISION ON SENTENCE

1 – THE DEFENCE'S SECOND GROUND OF APPEAL: REFUSAL TO TAKE ACCOUNT OF THE VIOLATION OF THE APPELLANT'S RIGHTS IN THE DETERMINATION OF THE SENTENCE

4. In paragraphs 43 to 46 of its response,[5] the Prosecution contends that the Chamber took some of the violations raised by the Defence into account "under the rubric of 'cooperation'".

5. And yet, contrary to that assertion, it is clear from the Decision on Sentence that the Chamber did not find that the violations of Mr Lubanga's rights raised by the Defence merited a reduced sentence.[6]

6. However, the Chamber did consider certain aspects of Mr Lubanga's conduct and his clear cooperation with the Court, "in circumstances when he was put under considerable unwarranted pressure by the conduct of the prosecution",

[1] ICC-01/04-01/06-2949-tENG.
[2] ICC-01/04-01/06-2948-Red.
[3] ICC-01/04-01/06-2969-Red and ICC-01/04-01/06-2968-Red.
[4] ICC-01/04-01/06-2949-tENG and ICC-01/04-01/06-2948-Red.
[5] ICC-01/04-01/06-2968-Red.
[6] See ICC-01/04-01/06-2901, para. 90.

as a mitigating factor to be taken into account by the Court during sentencing;[7] taking into account a mitigating factor pertaining to the personal circumstances of the accused can in no wise be likened to effective reparation for the violation of the rights of the accused, which must instead be reflected, in the event of a conviction, in a reduction in the sentence.[8]

7. Furthermore, the Chamber will note that the Prosecution has entirely omitted to respond to the Defence submissions in respect of the numerous violations of the Appellant's rights by the Prosecution. It has merely, in paragraphs 50 to 53 of its Response, compared the case at bar with *Barayagwiza*, *Semanza* and *Ndindiliyimana*, concluding that the violations claimed in the instant case are insufficiently serious to engender a reduction in the sentence.

8. And yet the Defence has never averred that those cases bear factual similarities to the case at bar. Instead it relied on the principle arising from the settled case law of the international criminal tribunals that "an accused whose rights have been violated is entitled to financial reparations in the event of acquittal or to a reduction in sentence if convicted".

9. The case at bar is characterised by the fact that the Prosecution's numerous, repeated violations of the Appellant's fundamental rights under article 67 have had an irreparable effect on the Appellant's right to a fair trial.

10. Thus, the Prosecution's analysis at paragraph 51 of its Response is not material, as the Defence has never cited Mr Lubanga's detention conditions in the DRC prior to his transfer to the Court in support of its second ground of appeal.

11. What is more, the Prosecution has not cited any references in support of its allegation that he "*was not prevented from using a large number of documents*

[7] ICC-01/04-01/06-2901, paras. 97 and 91.
[8] The Defence refers to its analysis of the settled case law of the international criminal tribunals on this issue: ICC-01/04-01/06-2949-tENG, paras. 29-33.

containing potentially exonerating evidence for cross-examination purposes" and that "*[i]nstead, most documents were disclosed to him prior to the start of the Defence case*".[9] On the contrary, the Defence is of the view that the information in Annex 3 to its appellate brief against the Judgment[10] leaves no doubt as to the Prosecution's tardy disclosure of exonerating evidence, after the court appearance of the individuals to whom the evidence relates.

12. As for the Prosecution's example in relation to Witness P-0581, it should be noted that this is a perfect illustration of the Prosecution's deliberate refusal to disclose to the Defence documents which had been in its possession for several years, thereby depriving it of information essential for the defence of the Accused:

- P-0581's first court appearance was on 14-17 June 2010. On 11 June 2010, the Defence requested the Prosecution to disclose the list of individuals who were to be screened in November 2007, which was sent by Intermediary P-0321 to Witness P-0581. The Prosecution denied the Defence's request on the ground that <u>such lists had not been sent in written form</u>.[11]

- It was only on 30 June 2010, after Witness P-0581 had testified and the Defence had then repeated its request on the basis of information confirming the existence of the written lists, that the Prosecution finally agreed to disclose the requested material.

13. There is no doubt that this material was essential to demonstrate Intermediary P-0321's fraudulent machinations.[12] In its Judgment, the

[9] ICC-01/04-01/06-2968-Red, para. 52.
[10] ICC-01/04-01/06-2948-Conf-Anx3.
[11] Defence e-mail of 11 June 2010 at 15:22, and response from the Prosecutor of 11 June 2010 at 18:53 (EVD-D01-01077).
[12] The Chamber opined: "A significant issue as regards this area of the case is how the various alleged former child soldiers were selected" Judgment, para. 442.

Chamber relied on those inconsistencies when weighing the honesty of Intermediary P-0321.[13]

2 - THE DEFENCE'S THIRD GROUND OF APPEAL: ERROR OF FACT IN APPLYING ARTICLE 78(2) AND REFUSAL TO CONSIDER THE PERIOD SPENT IN DETENTION BY THE APPELLANT IN THE DRC

14. The Prosecution submits that Mr Lubanga's detention in the DRC was not connected to the <u>same conduct and the same crimes</u> for which he was charged by the ICC and that, as such, it cannot count for sentencing purposes.[14]

15. However, contrary to the Prosecution's view, article 78(2) does not require the Defence to demonstrate that the detention in the DRC was due to the "<u>same crimes</u>" but, more broadly, to <u>conduct underlying the crime</u>.

16. In the instant case, the responsibility of which Mr Lubanga stands convicted before the Court was founded on the same conduct as the responsibility ascribed to him by the Congolese judicial authorities, to wit, the exercise of leadership and control attributed to him as President of the UPC/RP.

PART B: DEFENCE REPLY TO THE "PROSECUTION'S RESPONSE TO THOMAS LUBANGA'S APPEAL AGAINST TRIAL CHAMBER I'S JUDGMENT PURSUANT TO ARTICLE 74"

1 – THE PROSECUTION'S RESPONSE TO THE DEFENCE REQUEST TO PRESENT ADDITIONAL EVIDENCE

A - D-0040 and D-0041

17. <u>Firstly</u>, the Prosecution arguments concerning the video excerpts tendered into evidence by the Prosecution confirm that the latter does not consider itself vested with the duty to contribute to establishing the truth by investigating incriminating and exonerating circumstances equally.

---

[13] Judgment, paras. 442-445.

[14] ICC-01/04-01/06-2968-Red, under "(a) Domestic detention that was not connected to the same conduct and same crimes for which the Appellant was charged by the ICC cannot count for the sentencing purposes" and paras. 69 *et seq*. [emphasis added].

18. The Prosecution indicates that, in discharging its burden of proving beyond reasonable doubt that children under the age of 15 years were present in the FPLC, it could have tried to identify, locate and call as witnesses the persons appearing in the video excerpts, <u>but that it was not required to do so</u>.[15] The Prosecution submits that it is "entitled to rest its case if it believes its evidence is sufficient and that it has adequately complied with its duties under article 54(1)(a)".[16]

19. The Prosecution thus admits that, although it had the possibility of doing so, it did not even consider it necessary to verify whether the individuals it presented to the Chamber as child soldiers in the video excerpts were, or were not, under 15 years of age. The Prosecution even adds that it considers that this evidence was, in its opinion, "fully available at trial to counsel acting with due diligence".[17]

20. However, article 54(1)(a) imposes an obligation on the Prosecutor for the purposes of <u>establishing the truth</u>, to extend the investigation to cover <u>all</u> facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute, and, in doing so, investigate incriminating and <u>exonerating</u> circumstances equally.

21. The obligation to investigate incriminating and exonerating circumstances equally to establish the truth is meaningless if the Prosecution restricts its investigations solely to evidence which, in its opinion, is sufficient to establish the guilt of the Accused.

22. The Prosecution submits that it did not have the opportunity to put questions to D-0040 during this witness's appearance before the Court. Such a claim is

[15] ICC-01/04-01/06-2969-Red, para. 65.
[16] ICC-01/04-01/06-2969, para. 65.
[17] ICC-01/04-01/06-2969, para. 49.

inaccurate. The Chamber in fact asked the Prosecution whether it wished to question the witness, but the Prosecution declined.[18]

23. Furthermore, it is unacceptable and contrary to the most basic procedural rules for the Prosecution to refer to the factual findings made by a Chamber in another case in order to support its allegations.[19]

B – Letter dated 30 January 2013 from the Congolese authorities

24. Faced with the Prosecution's refusal to execute its request for disclosure, the Defence filed an application to obtain disclosure of the cooperation request from the Office of the Prosecutor which had prompted the letter from the Congolese authorities.[20] The Defence submits that disclosure of the cooperation request is necessary to enable it to make any meaningful submissions concerning the letter from the Congolese authorities. As matters currently stand, the following points can at least be made:

- The letter of 30 January 2013 from the Congolese authorities is a direct reply to a question raised by the Office of the Prosecutor; the letter is thus equivalent to a statement given by an unsworn witness, who has not appeared before the Court, and who, therefore has not been subject to Defence cross-examination; as such, it is inadmissible;

- Even were the letter from the Congolese authorities to be admitted into evidence, it merely confirms that the data relating to the civil status of D-0040 and D-0041 are consistent with the data on their voting cards.[21] In light of this, the Prosecution cannot reasonably call into question the statements made by D-0040 and D-0041 concerning their ages on the basis of mere generalities and in the absence of any specific objective evidence connected to these witnesses.

---

[18] T-360-CONF-FRA-CT, p. 32, lines 15-16.
[19] ICC-01/04-01/06-2969, para. 70.
[20] ICC-01/04-01/06-2988-tENG.
[21] EVD-D01-01111; DRC-D01-0003-5983.

25. The Prosecution has not carried out any specific investigation to verify the age of the individuals concerned.

C – Evidence concerning Witness P-0297

26. At paragraph 77 of its Response, the Prosecution implies that P-0297's membership of [REDACTED] close to President Kabila post-dated its investigations into that witness. The Prosecution claims:

> "The materials indicate that P-0297 was armed at the time of his arrest (a fact already in the trial record) and that he was a member of an organisation called [REDACTED] in [REDACTED], <u>after</u> P-0297 first met with the Office of the Prosecutor in 2007. The witness' <u>post-investigation</u> political affiliation [REDACTED] does not indicate a broader infiltration by the Congolese government in the Prosecution's investigations."(Emphasis added.)

27. The Prosecution omits to mention, however, that P-0297 was questioned by representatives of the Office of the Prosecutor on two other occasions prior to the witness's testimony before the Court: on 15 March 2008[22] and on 11 and 12 May 2010.[23] The Prosecution cannot seriously dispute that the witness was first placed under its protection and under its responsibility from [REDACTED] 2007 until at least [REDACTED] 2008.

28. Furthermore, the Prosecution cannot reasonably maintain that Defence counsel failed to exercise due diligence by not putting any questions to P-0297 at trial concerning the witness's political affiliations.[24] The Prosecution presented P-0297 as an extremely vulnerable witness,[25] and the Defence was not at all aware of the additional evidence relating to P-0297 during the latter's testimony before the Court. The Defence was not in possession of any

---

[22] EVD-D01-00154.
[23] EVD-D01-00149.
[24] ICC-01/04-01/06-2969, para. 74.
[25] ICC-01/04-01/06-2345-Conf, para. 5.

evidence to lead it to suspect that P-0297 belonged to [REDACTED] which was loyal to President Kabila.

29. It was for the Prosecution, and not the Defence, to ensure the integrity of the evidence that it intended to present to the Court. What is more, the Prosecution evidently did not carry out any investigation following the Registry's disclosure of additional evidence regarding P-0297 in order to verify the extent of the influence of the Congolese government over the latter.

D – List of FPLC names

30. Firstly, the Prosecution maintains that the Defence was informed of the existence of the list of FPLC names in May 2010.[26] This claim is incorrect.

31. It is standard practice that when the investigators from the Office of the Prosecutor use a document in an interview with a witness, the record or the recording of that interview states the precise reference (ERN number) and the exact name of the document, which is then disclosed to the Defence along with the witness's statement.

32. However, it is a matter of concern to note that, of all the documents used by the Prosecution during its interview of 18 March 2010 with P-0089,[27] that list is the only one for which no ERN reference was given by the investigators.[28] Furthermore, the investigators referred to this document incorrectly as being a list of persons who were demobilised from the FPLC.[29] Not only is this document not a list of persons demobilised by the FPLC, but its portrayal as such misled the Defence. In fact, one of the documents tendered into evidence in relation to this witness and Witness D-0023 referred specifically to a list of those who had been demobilised,[30] and the Defence naturally believed

[26] ICC-01/04-01/06-2969-Red, para. 83.
[27] EVD-D01-00985.
[28] See, for example, EVD-D01-00985, p. 13, lines 435 *et seq*.
[29] EVD-D01-00985, p. 5, lines 166-167.
[30] EVD-D01-00127, p. DRC-D01-0003-2283, see T-266-CONF-FR p. 62, lines 8 *et seq*.

that the investigators were referring to that document. It is self-evident that if the investigators had correctly identified the document shown to the witness as being the "[TRANSLATION] list of FPLC names" dated December 2004, the Defence would have called for immediate disclosure.

33. However, the Prosecution's Response[31] and the correspondence of 25 October 2012 addressed by the latter to the Defence,[32] show clearly that the non-disclosure of a document used by the Prosecution in the investigations did not result from a simple error, but was very much a deliberate choice by the Prosecution.

34. Secondly, the Prosecution mis-presents the Appellant's position by maintaining that the latter "is proffering this evidence not for the purposes of demonstrating that the verdict (i.e. the finding of guilt) was unsafe, but to support an argument that the Prosecution persistently violated its disclosure obligations, for which the Chamber should have brought a remedy" (emphasis added).[33] On this point, the Defence refers to paragraphs 59 to 61 and 278 of its appellate brief against the judgment.[34]

35. Thirdly, the arguments put forward by the Prosecution maintaining, erroneously, that the list does not contain all the names of FPLC members as of December 2004[35] are not supported by any evidence. The French term "*liste nominative*" signifies that it is a list which expressly sets out the names of all the individuals listed, and is not, as the Prosecution claims, a list which "selects" a group of persons.[36] The Prosecution's groundless assumptions

[31] ICC-01/04-01/06-2969, para. 83: the Prosecution maintains, wrongly, that "[n]ot only was this document facially not exculpatory (and thus not subject to disclosure obligations) […]", completely disregarding its disclosure obligations under rule 77, which does not refer to exonerating evidence, but to all the evidence material to the preparation of the Defence; at para. 84, the Prosecution states that it considers this document to be irrelevant to the instant case.
[32] See Annex 8, ICC-01/04-01/06-2942-Red.
[33] ICC-01/04-01/06-2969-Red, para. 86.
[34] ICC-01/04-01/06-2948-Conf-tENG.
[35] ICC-01/04-01/06-2969-Red, para. 89.
[36] ICC-01/04-01/06-2969-Red, para. 89.

merely confirm the fact that the list should have been shown to the witnesses, so that the exact nature of the list could have been canvassed at trial.

36. Lastly, the Prosecution maintains that the Appellant never disputed his status as Commander-in-Chief of the FPLC, and that, in that capacity, he was best-placed to have access to information relating to his own troops.[37] Such a claim is inaccurate, and cannot be used to justify the Prosecution's disclosure failings.

37. The Appellant has always maintained that he occupied the post of Commander-in-Chief of the FPLC *de jure*, that he merely held an essentially political role in the UPC/RP, and that *de facto* control over the FPLC and management of the troops were the preserve of the Staff.[38] Moreover, the Prosecution cannot reasonably suggest that the Appellant, who has been absent from Ituri since 13 August 2003,[39] had sufficient information on the 8600 persons on the list of FPLC members of 9 December 2004.

38. The Prosecution cannot circumvent its statutory disclosure obligations towards an Accused person on the pretext that the Accused was, in its opinion, "best-placed to access information".[40] The same principle also applies to the document referred to in paragraphs 127 and 128 of the Prosecution's Response.

2 – THE PROSECUTION RESPONSE TO THE 8 DEFENCE GROUNDS OF APPEAL AGAINST THE JUDGMENT

A. First ground of appeal: violation of fair-trial rules

- *Violation of the Appellant's right to be informed in detail of the nature, cause and content of the charges against him*

---

[37] ICC-01/04-01/06-2969, para. 92.
[38] For example, ICC-01/04-01/06-2773-tENG, paras. 561 and 802 *et seq*.
[39] See ICC-01/04-01/06-2949, para. 84.
[40] ICC-01/04-01/06-2969-Red, para. 92.

39. Contrary to what the Prosecution maintains in paragraph 100 of its Response, the Defence complaint is not limited to reproaching the Prosecution for not having identified by name an unspecified number of victims. The Defence submits that the Prosecution was under an obligation to indicate in the "Document containing the charges", not only the identity of the victims, but also the place and approximate date of the alleged crimes, and the means by which they were committed, in order to allow the Accused to prepare his defence.[41]

40. In this regard, the Defence notes that the Prosecution argument[42] that it was not under an obligation to identify the victims of the crimes alleged against the Accused in view of the fact that they were allegedly committed on a large scale is unfounded.

41. As the Prosecution notes in paragraph 105, "if the Prosecution is in a position to name the victims, it should do so".[43] However, when that opportunity was presented to the Office of the Prosecutor, it chose not to research that information, thereby depriving the Defence of the possibility of preparing properly. Indeed, the Prosecution presented certain individuals appearing in the video footage as FLPC soldiers under 15 years of age, without seeking to identify them, even though it admits that it had the possibility of doing so.[44] The Prosecution deliberately chose not to investigate those persons,[45] even though it was under an obligation to do so. The Prosecution has not demonstrated in the instant case <u>that it was not in a position</u> to disclose to the Defence the identity of the victims and information pertaining to the circumstances in which the crimes were committed.

---

[41] ICC-01/04-01/06-2948-Conf-tENG, paras. 1-20.
[42] ICC-01/04-01/06-2969-Red, para. 100.
[43] Citing the *Kupreškić* case, Appeals Judgment, para. 90.
[44] ICC-01/04-01/06-2969-Red, para. 65.
[45] ICC-01/04-01/06-2969-Red, para. 65.

42. The Prosecution therefore attempts to justify the lack of evidence relating to the identity of victims and the circumstances in which the crimes were committed by contending that the crimes were committed on a large scale, even though it maintained, from the pre-trial phase onwards, that it had fulfilled its obligation to transmit to the Accused information concerning the identity of the victims by informing it of the existence of "individual cases".[46]

43. Furthermore, the excerpt from the *Decision on the confirmation of the charges* cited by the Prosecution in paragraph 101 of its Response substantiates the Defence argument that the Pre-Trial Chamber confirmed the charges against Mr Lubanga by relying for the most part on witness statements subsequently rejected by the Trial Chamber; the Prosecution omits to state that the Pre-Trial Chamber's findings cited at paragraph 101 were based specifically on the statements of Witnesses P-0010, P-0015, P-0007 and P-0008, which were all excluded by the Trial Chamber, and of Witness P-0009, whom the Prosecutor withdrew from the list of witnesses before the start of the trial.[47]

- The Prosecution's violation of its statutory obligations

44. Contrary to what the Prosecution suggests, the Defence does not restrict itself to the three examples referred to in paragraphs 48 to 65 of its submissions on the Prosecution's failure to meet its disclosure obligations. The Defence stated that it raised before the Chamber numerous difficulties concerning this issue, as illustrated in the correspondence appended in Annex 3 of its Brief. The Defence refers to the three examples in paragraphs 48 to 65 to demonstrate the <u>limits of the Chamber's power</u> on this issue.

---

[46] See ICC-01/04-01/06-2948-Conf-tENG, paras. 10-11.
[47] See ICC-01/04-01/06-796-Conf-tENG, footnotes 324-326; these footnotes were omitted from the quotation by the Prosecution. In relation to P-0009, the Defence notes that it tendered evidence which demonstrates that this witness, introduced by intermediary P-0143, provided false information about her age. See EVD-D01-00763.

45. The information provided in response by the Prosecution as regards its failure to inform the Chamber in an impartial manner of the information in its possession concerning P-0316 and P-0157 is incorrect:

- With regard to intermediary P-0316, although the information in paragraph 99 of the Defence Brief was actually discovered by the Prosecution during its investigations,[48] the Prosecution did not question the intermediary on those specific subjects during the intermediary's testimony before the Chamber, and did not inform the latter in a timely manner of the fact that it had in its possession information contradicting the position of its intermediary on those matters. On the contrary, the Prosecution expressed reservations about the possibility of the Defence questioning P-0316 about statements made by this intermediary to the effect that P-0183 had died, although the Prosecution knew for a fact that the latter was alive;[49]

- Concerning P-0157, the Prosecution indicated that it had taken a decision on the basis of information gathered during the Defence cross-examination of P-0157, to desist from calling this witness in the *Katanga* case as a child soldier under the age of 15 years at the material time.[50] This information should have been disclosed to the Defence in accordance with rule 77. The latter was only informed of it following discussions with the Defence team for Mr Katanga on 31 March 2010. Yet the Prosecution had indicated, at the hearing of 5 March 2010, that the Defence team for Mr Lubanga had received all the information that the Defence teams for Mr Katanga and Mr Ngudjolo had received, and even more.[51]

---

[48] See EVD-D01-01039; EVD-D01-01042, no. 147.
[49] T-332-CONF-FRA ET, p. 4, lines 22 *et seq*.
[50] ICC-01/04-01/06-2393, para. 2.
[51] ICC-01/04-01/06; T-254-Conf-Fra-ET, p. 22. See ICC-01/04-01/06-2416.

B. Second ground of appeal: Grounds of appeal pertaining to the crimes of enlistment, conscription and use of child soldiers under the age of 15 years

- The Trial Chamber's determination of age on the basis of video footage

46. The Prosecution seems to consider that the Defence committed an error by referring to footnote 1249. However, the reference is correct: the Defence emphasised in paragraphs 176 to 178 of its Brief the two contradictory positions adopted by the Chamber concerning the same video excerpt. The Chamber stated that the excerpt showed a child who was manifestly under 15 years of age, but also stated at footnote 2432 that the children's appearance in the excerpt was too brief to be able to determine their age with certainty.

47. The jurisprudence cited at paragraph 162 is irrelevant in the instant case, since the Defence has never claimed that the video footage could not, in any circumstances, be admitted as evidence in a criminal case.

48. The Defence instead submits that the video evidence presented in the instant case in order to prove the age of the persons who appeared therein is not decisive: mere physical appearance of individuals, who, furthermore, were fully clothed, does not allow the Bench or any person to assess their age. Thus, contrary to the video evidence presented in cases from the international criminal tribunals cited by the Prosecution at footnote 273, the video footage presented by the Prosecution in the instant case does not "speak for itself". It is not in dispute that video footage may confirm that an individual was present in a specific place or that contact existed between two persons filmed in the same footage.[52] The same is true of cases where an accused or a suspect has been filmed in the act of committing an offence or where images have been used to identify a suspect.[53] Any comparison between those cases and the instant case is completely irrelevant.

---

[52] *Krstić* and *Karadžić* cases, cited by the Prosecution, footnote 273.

[53] See the examples cited at footnotes 274-277.

49. Lastly, the jurisprudence cited at paragraph 163 of the Prosecution's Response is not applicable to the instant case, since it concerns only the specific cases in which it was possible to determine, through viewing photographs and videos of unclothed children, that those children presented with the physical characteristics of prepubescent children, before development of the sexual characteristics of the subjects involved;[54] such a determination is evidently impossible in the instant case.

- The crime of conscription

50. Contrary to what the Prosecution maintains, the factual evidence cited in paragraphs 184 to 186 of its Response does not demonstrate that children under the age of 15 years were forced to join the FPLC. With regard to P-0055's testimony, cited by the Chamber at paragraph 763 of the Judgment, the Defence would emphasise the ambiguous nature of the witness's statement, which precludes any finding of forceful enlistment; what is more, the witness confirmed the demobilisation of the individual concerned.

51. The Prosecution severely distorts the Chamber's Judgment by stating that the Chamber concluded that "[t]he case against the Appellant involved mobilization campaigns [331] that included both compulsory conscription through the use of physical force (such as abductions), as well as by psychological pressure and fear or threats of harm exerted by elders and wise men, the cadres and the army. [332]"[55] (Emphasis added). In particular, it should be stressed that the Chamber did not at any time conclude that the mobilisation campaigns involved acts of abduction by use of force. Furthermore, the Prosecution added to the confusion by citing the testimony given by Ms Radhika Coomaraswamy in support of this assertion, although her statement was of a general nature and did not specifically refer to the FPLC.

[54] See the examples cited at footnotes 278-281.
[55] ICC-01/04-01/06-2969-Red, para. 178.

52. The Prosecution further distorts the findings of the Chamber by stating that "In particular, 'rallies, recruitment drives and mobilisation campaigns' can - and did- lead to both (voluntary) enlistment and (forceful) conscription".[56] At no time did the Chamber state that the mobilisation campaigns led to forceful conscription. On the contrary the Chamber noted, in this context, at paragraph 784 of the Judgment, that "recruitment does not necessarily involve the conscription of children by force, given the many alternative, non-forceful ways of persuading children to join the military "voluntarily" that were available".

53. Lastly, with regard to the reference to P-0041's testimony, the Defence emphasises that the French version - the language in which the witness testified - was as follows: "*Mais il paraîtrait qu'il y a certains qui avaient été particulièrement recrutés dans des familles avec une certaine — comment dirais-je — que c'était une <u>obligeance</u>*."[57] ["[TRANSLATION] But it would seem that some had been recruited from families with a certain – how shall I say – that it was willingness."] On the same issue, the Prosecution continued, "[TRANSLATION] During the time that the UPC controlled Bunia, was there an obligation to give boys?", and P-0041 replied "[TRANSLATION] I could not really say <u>that there was ... anyone requiring any specific recruitment obligation; no</u>".[58] Contrary to the allegations of the Prosecution, this statement confirms that P-0041 made no reference to forceful recruitment into the FPLC.

- The crime of active participation in hostilities

54. Contrary to what was implied by the Prosecution at paragraph 219 of its Response, P-0028's testimony before Trial Chamber II in the case of *Katanga*

---

[56] ICC-01/04-01/06-2969-Red, para. 183.
[57] The word "*obligeance*" refers to readiness to provide a service voluntarily, but does not entail any obligation.
[58] T-125-CONF-FRA-CT, p. 68, lines 13-16.

and Ngudjolo, and the information relating to [REDACTED] and [REDACTED] were all tendered as evidence in the instant case.[59]

C. Third ground of appeal: Grounds of appeal relating to individual criminal responsibility

1 – The form of criminal responsibility adopted by the Trial Chamber

55. Like the Trial Chamber, the Prosecution fails to explain how the alleged "contribution", which it imputes to the Appellant, characterises the act of commission under article 25(3)(a), which differs from the other modes of criminal participation provided for under paragraphs (b), (c), and (d) of the same article and command responsibility provided for by article 28.

56. As Presiding Judge Fulford in his Separate Opinion and Judge Van den Wyngaert in her Concurring Opinion annexed to the Judgment issued in the *Ngudjolo* case correctly state,[60] adoption of the controversial theory of "control over the crime" is unlawful and creates confusion; the theory, which indiscriminately covers multiple hypotheses of indirect participation in a crime, was not adopted by the drafters of the Statute; similarly, the decisions of the ICTY cited by the Prosecution are irrelevant because they are based on the notion of joint criminal enterprise, which form of responsibility was excluded by the drafters of the Statute.[61]

57. Only the clear and precise terms used by the drafters of the Statute should prevail: article 25(3) clearly distinguishes the act of <u>committing</u> (article 25(3)(a), which alone was imputed to the Appellant, from the act of ordering, soliciting or inducing (article 25(3)(b)), or the act of aiding and abetting (article 25(3)(c)) and, lastly, from the act of contributing to a crime "in any other way" (article 25(3)(d)); as Judge Van den Wyngaert rightly mentioned in

[59] Witness P-0028: EVD-D01-01084 and EVD-D01-01085; [REDACTED] and [REDACTED]: EVD-D01-00384, p. DRC-OTP-0232-0276 and EVD-D01-00370.
[60] Separate Opinion of Judge Adrian Fulford, paras. 6 *et seq.*; Concurring Opinion of Judge Christine Van den Wyngaert, ICC-01/04-02/12-4, paras. 5 *et seq.*
[61] See: ICC-01/04-01/06-803-tEN, paras. 323 and 334-335.

her Concurring Opinion, this categorisation of the different forms of responsibility leads necessarily to the conclusion that criminal responsibility for "commission" provided in article 25(3)(a) requires direct participation in the crime;[62] she emphasised in particular that, "(…) only those persons who are directly involved in the realisation of the material elements of a crime can be said to have jointly perpetrated it. What is required by a 'direct' contribution is an immediate impact on the way in which the material elements of the crime are realised".[63]

58. It follows that, in considering that the form of responsibility provided for under article 25(3)(a) could be held against "those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed",[64] the Trial Chamber erred in law.

59. Contrary to what the Prosecution maintains in paragraphs 274 and 276, the Appellant never stated that he raised on appeal errors which had no influence on the Judgment. The Appellant stated instead that he would not examine each error systemically in his brief, even though they <u>necessarily influenced</u> the conviction of the judges.[65]

2- The mental element adopted by the Trial Chamber

60. Contrary to what was maintained by the Prosecution, the Trial Chamber founded the individual criminal responsibility of the Appellant on "*dolus eventualis*", which was, however, clearly rejected by the drafters of the Statute; moreover, such was the analysis developed by Judge Van den Wyngaert in her Concurring Opinion, annexed to the Judgment issued in the *Ngudjolo* case;[66] the Judge emphasised in particular that: "the Statute does not contain a

[62] Concurring Opinion of Judge Christine Van den Wyngaert, ICC-01/04-02/12-4, para. 44.
[63] *Idem*, paras. 45-46.
[64] Judgment, para. 1003.
[65] ICC-01/04-01/06-2948-tENG, para. 339.
[66] Concurring Opinion of Judge Christine Van den Wyngaert, ICC-01/04-02/12-4, paras. 36 *et seq*.

form of criminal responsability that is based on the mere acceptance of a risk that a crime might occur as the consequence of personnal or collective conduct."[67]

61. Lastly, concerning the facts alleged by the Prosecution: the assertion that the first demobilisation order was issued two weeks before the Appellant's visit to the Rwampara camp in February 2003 is incorrect.[68] Indeed, on 21 October 2002, the Appellant wrote to the Chief of General Staff of the FPLC to prohibit the enlistment of minors into the FPLC.[69]

Confidential nature of the present reply

62. The Defence files this reply as confidential in order not to disclose the identity of witnesses protected by the Court, in accordance with article 68. The Defence intends to file a public redacted version shortly.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO

TAKE NOTE of the present submissions;

DECLARE inadmissible the letter of 30 January 2013 from the Congolese authorities;

And

ALLOW the Defence Appeals.

[signed]

Ms Catherine Mabille, Lead Counsel

Done this 28 February 2013, at The Hague

[67] *Idem*, para. 39.
[68] ICC-01/04-01/06-2969, para. 306.
[69] EVD-OTP-00696.