

1 INTERNATIONAL CRIMINAL COURT

2 SITUATION DEMOCRATIC REPUBLIC OF CONGO

3 Case No: ICC-01/04-01/06

4 Transcription No: ICC-01/04-01/06-T-44-EN

5 Friday, 24 November 2006 at 9.36 a.m.

6

OPEN SESSION

7

8

Before: His Honour Judge Claude Jorda (Presiding Judge)

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Her Honour Judge Sylvia Steiner

Her Honour Judge Akua Kuenyehia

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PRE-TRIAL CHAMBER I

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1 OPEN SESSION

ICC-01/04-01/06-T-44-EN

09:36:11 2 [9:36 a.m.]

09:36:11 3 THE USHER: All rise. The International Criminal Court is
09:36:23 4 now in session.

09:36:27 5 PRESIDING JUDGE JORDA (interpretation): Please be seated.

09:36:31 6 The Court is now in session. Please could you bring in

09:36:35 7 Mr Thomas Lubanga Dyilo. And, Mr Registrar, for the public,
09:36:42 8 please could you call the number of the case.

09:36:47 9 COURT OFFICER (interpretation): The situation in the
09:36:51 10 Democratic Republic of Congo, case the Prosecutor against
09:36:56 11 Thomas Lubanga Dyilo, ICC-01/04-01/06.

09:37:08 12 PRESIDING JUDGE JORDA (interpretation): Thank you. I would
09:37:10 13 like to greet the representatives of the Prosecutor, the
09:37:14 14 victims, as well as the Defence, and Mr Lubanga Dyilo. So
09:37:27 15 I think that we can take up our work again. Mr Flamme?

09:37:30 16 ME FLAMME (interpretation): Thank you, your Honour. Before
09:37:31 17 asking Ms Taylor to take up the points of law we have certain
09:37:34 18 questions with regards to yesterday's hearing. I tried to
09:37:40 19 find the details of a piece of evidence, which was a summary
09:37:49 20 evidence -- summary testimony, and when I said that I was a
09:37:55 21 bit confused, I basically lost the trace of the right number,
09:37:58 22 but my team had managed to found it and here we're talking
09:38:03 23 about number <#ERN-00066#>, <#DRC-OTP-0164-0291#>. WWW-38 is
09:38:26 24 the number of the witness.

09:38:28 25 PRESIDING JUDGE JORDA (interpretation): Thank you and --

09:38:30 1 MR FLAMME (interpretation): I just wanted to make a small
09:38:32 2 comment with regards to this witness -- witness BB is the
09:38:35 3 pseudonym attributed. I just wanted to state the Chamber, if
09:38:42 4 the information I have is correct, that the only reference in
09:38:49 5 terms of time that this witness gives us in the summary is
09:38:54 6 that in 2001 he was said to have joined the ranks of the UPC.
09:39:02 7 [9:39 a.m.]
09:39:05 8 He also speaks about the military wing of the UPC, and I would
09:39:09 9 like to point out that, according to the information contained
09:39:14 10 in the charging document in 2001, the FPLC didn't exist, first
09:39:22 11 point; secondly, 2001, that is outside the temporal
09:39:32 12 jurisdiction and, when we take into account the elements taken
09:39:35 13 up in the testimony, they are therefore not relevant to the
09:39:38 14 case before us.
09:39:41 15 [9:39 a.m.]
09:39:41 16 Also in this testimony apparently it said only -- and this is
09:39:50 17 an alternate point, but only children of 15 years and up were
09:39:55 18 trained in Mandro. This means as well that while we can find
09:40:02 19 an indication which would situate us within the period of
09:40:12 20 temporal jurisdiction, we will not be in the constitutive
09:40:20 21 elements of crimes which we are dealing with here.
09:40:24 22 Furthermore, this witness was not a witness of forced
09:40:27 23 enlistment. Here he's talked about children who were
09:40:33 24 abandoned and looked for protection with the troops.
09:40:39 25 [9:40 a.m.]

09:40:39 1 Finally -- and I would like to finish with a criticism of the
09:40:46 2 factual evidence -- when he speaks about Mr Kisémbó who was
09:40:52 3 said to have taken 36 children with him, we don't have any
09:40:55 4 mention of dates. And this is of fundamental importance --
09:41:00 5 because we will speak further, perhaps when it comes to the
09:41:05 6 pleadings, of an event which happened also outside the period
09:41:10 7 of temporal jurisdiction and before the constitution of the
09:41:16 8 FPLC where Mr Kisémbó withdrew with a certain number of young
09:41:26 9 people into the forest to protect them against the APC who
09:41:31 10 wanted to kill them.

09:41:32 11 [9:41 a.m.]

09:41:33 12 These children afterwards were taken to Uganda where an
09:41:39 13 attempt was made to demobilise them. At first sight the
09:41:45 14 witness speaks about that, but there is no precision either
09:41:48 15 with regards to the date or with regards to the place, so with
09:41:53 16 a view to avoiding confusion, I don't think we can take into
09:41:57 17 account this testimony.

09:41:58 18 [9:41 a.m.]

09:41:59 19 And a second point that I also have for the Chamber is that at
09:42:08 20 least I was -- I would say it was suggested that also members
09:42:14 21 of the UPC or the FPLC were -- enriched themselves, and this
09:42:22 22 was said to be one of the motives for taking power and for the
09:42:27 23 exercise of power. And we've also said that -- it was also
09:42:30 24 said that Mr Lubanga had paid certain things from his own
09:42:37 25 pocket, and this is a very serious allegation. I would like

09:42:43 1 to rectify things.

09:42:44 2 [9:42 a.m.]

09:42:45 3 Mr Lubanga does not have one franc and he's already had his
09:42:52 4 assets frozen for several months, and there should be a report
09:42:56 5 of the Registrar with regards to this procedure, which
09:43:00 6 possibly should have come to its end now. I think this is a
09:43:05 7 fundamental element to be able to judge this point.

09:43:08 8 [9:43 a.m.]

09:43:10 9 Mr Balembo spoke to you in the next point about the birth
09:43:15 10 certificates or birth records. We transmitted a model of an
09:43:20 11 official birth record, as they are drafted by the civil status
09:43:28 12 offices in the Congo, and you will see at the top of this
09:43:32 13 document that it mentions places to indicate where in the
09:43:39 14 register -- the original birth register -- this extract of the
09:43:44 15 register comes from.

09:43:46 16 PRESIDING JUDGE JORDA (interpretation): This is an extract
09:43:47 17 of the birth register of somebody who has nothing to do with
09:43:52 18 the dossier.

09:43:53 19 ME FLAMME (interpretation): Yes, we've redacted a name.

09:43:55 20 PRESIDING JUDGE JORDA (interpretation): I suppose that you
09:43:56 21 want that to be put into the dossier.

09:44:00 22 ME FLAMME (interpretation): Obviously we are outside the
09:44:01 23 time limits to be able to file evidence, but here I'm
09:44:04 24 waiting --

09:44:05 25 PRESIDING JUDGE JORDA (interpretation): I want to know if

09:44:06 1 the Prosecutor agrees. This is an important element, you've
09:44:11 2 understood, Mr Prosecutor.

09:44:12 3 MR WITHOPF: Thank you, Mr President. Thank you, your
09:44:15 4 Honours. Of course I very well understood the importance of
09:44:17 5 this matter, and my learned colleague from the Defence has
09:44:20 6 admitted, yes, it's outside the time filing evidence. For
09:44:24 7 that reason the Prosecution requests the Pre-Trial Chamber to
09:44:27 8 deny the request to file this additional piece of evidence.

09:44:35 9 ME FLAMME (interpretation): It's a bit regrettable, this
09:44:40 10 position. You really have to note, Mr Prosecutor, that the
09:44:44 11 Defence has had to work with a great deal of urgency, and
09:44:48 12 that's something that you said yourself. So if we want to
09:44:52 13 establish the truth in this courtroom, then a piece of
09:44:55 14 evidence like this seems fundamental to me, but obviously
09:44:58 15 I leave myself to the judgment of the Chamber.

09:45:01 16 PRESIDING JUDGE JORDA (interpretation): Certainly; I will
09:45:03 17 discuss this matter with my colleagues.

09:45:03 18 [9:45 a.m.]

09:45:08 19 [Pause while Chamber confers]

09:46:52 20 [9:46 a.m.]

09:46:52 21 PRESIDING JUDGE JORDA (interpretation): The judges and the
09:46:57 22 Chamber have decided to integrate this evidence to the
09:47:01 23 dossier, but it will just be an aid to the Court, such as a
09:47:06 24 map, for example, an exhibit.

09:47:09 25 ME FLAMME (interpretation): Thank you. Additionally,

09:47:13 1 Professor Balembo, who studied this question, has said that
09:47:18 2 the attestations of the birth -- of the Prosecutor -- were
09:47:21 3 only communicated on 8 November to the Defence. So -- and
09:47:25 4 here I will finish with my remarks -- my introductory remarks,
09:47:30 5 Mr President. We asked to submit a map.

09:47:36 6 PRESIDING JUDGE (interpretation): The Chamber has taken a
09:47:37 7 decision, I've got the impression. What do you have to add in
09:47:41 8 that regard?

09:47:43 9 MR WITHOPF: Mr President, thank you for the opportunity to
09:47:46 10 address --

09:47:46 11 PRESIDING JUDGE JORDA (interpretation): I don't like it when
09:47:48 12 somebody cuts the other party, so -- but if I didn't see you,
09:47:53 13 I have to excuse myself. Mr Withopf, with the authorisation
09:47:59 14 of Mr Flamme, please finish, but I would like to remind you
09:48:03 15 that it was Mr Flamme who was speaking. Please go ahead now.

09:48:08 16 MR WITHOPF: That's very well understood, Mr President.
09:48:09 17 I only want to clarify the point that it's wrong that the
09:48:12 18 birth certificates have only been disclosed on 8 November.
09:48:15 19 The birth certificates have been disclosed way ahead this
09:48:20 20 date. They have been disclosed at a certain point in time
09:48:22 21 weeks prior to 8 November in a redacted format, and at the
09:48:25 22 point in time where the redactions could be lifted they have
09:48:29 23 been disclosed in an unredacted format.

09:48:35 24 PRESIDING JUDGE JORDA (interpretation): Your comment has
09:48:37 25 been noted, Mr Withopf. I would just like to remind you that

09:48:41 1 the Chamber -- this is -- it's clear, to try and find the
09:48:48 2 truth, so within the procedural -- in strict procedural rules.
09:48:53 3 But with regards to these procedural rules, there are
09:48:57 4 standards Regulations of the Court; there are regulations
09:48:59 5 which make it possible to introduce a certain flexibility with
09:49:02 6 regards to exchanges for the parties. And that's something
09:49:04 7 that was done yesterday by asking a few questions, but here we
09:49:08 8 have just taken a decision with my colleagues. So -- so you
09:49:15 9 were cut off, Mr Flamme. I'm sorry, could you continue?

09:49:19 10 ME FLAMME (interpretation): Yes, I didn't really have much
09:49:21 11 more to say. You asked yesterday, also because Ms Pandanzyla
09:49:25 12 had made a reference to distances which appeared an important
09:49:29 13 point to me, and you asked us to be able to show that on a
09:49:33 14 map.

09:49:33 15 So we have transmitted to the Registrar this map, and this is
09:49:39 16 at a scale of 90 kilometres, so the scale that you have at the
09:49:49 17 bottom of the page represents 90 kilometres. So these
09:49:53 18 exhibits should be introduced into the dossier with the --
09:49:55 19 into the record with the reservations.

09:49:59 20 PRESIDING JUDGE JORDA (interpretation): Mr Walley, I see,
09:50:03 21 would like to -- is it related to the map with 90 kilometres
09:50:08 22 on it? I will allow him to finish. Had the Defence finished?
09:50:13 23 Yes?

09:50:16 24 MR WALLEYN (interpretation): Yes, I just want to take
09:50:18 25 advantage of the opportunity. We support the request of the

09:50:21 1 Defence, which aims -- that the -- to ask for a report from
09:50:26 2 the Registrar with regards to the results of the freezing of
09:50:30 3 the assets which was made several months ago. This is
09:50:34 4 something that would be of interest to the victims, and
09:50:37 5 possibly as well to envisage reminders with regards to certain
09:50:42 6 States, which perhaps haven't yet produced reports with
09:50:46 7 regards to this request.

09:50:48 8 PRESIDING JUDGE JORDA (interpretation): Okay, thank you.
09:50:50 9 The Chamber will decide on that at the given time.

09:50:53 10 Mr Registrar, have you included these documents -- the map and
09:50:58 11 the extract? Will there be a reference for it? Yes?

09:51:06 12 Thank you. Okay. I think that the preliminary issues have
09:51:09 13 been dealt with -- almost resolved -- almost, and so now --
09:51:14 14 I don't know, Mr Jean Flamme, did you want to give the floor
09:51:18 15 to Ms Taylor?

09:51:20 16 Okay, Ms Taylor you have the -- leave to address the Court.
09:51:24 17 We'll have the break at 11 o'clock, 11.30 we'll start up again
09:51:28 18 until 1 o'clock and, in principle, this afternoon Mr Flamme
09:51:30 19 has promised us that he will give the Chamber a bit of a
09:51:34 20 break. So, okay, please go ahead, but also take your time to
09:51:38 21 be able to explain all your points. Please go ahead. You
09:51:41 22 have leave to address the Court.

09:51:44 23 MS TAYLOR: Thank you very much, Mr President, your Honours.
09:51:46 24 Good morning, Mr President, your Honours, learned colleagues.
09:51:50 25 This morning I'll be addressing the Court in relation to three

09:51:54 1 topics, the first being the contours of the Defence pertaining
09:51:58 2 to child soldiers as set out in the charging document; the
09:51:58 3 second topic being our submission on the modes of liability,
09:52:02 4 and the third submission is pertaining to the form of the
09:52:04 5 charging document.

09:52:08 6 [9:52 a.m.]

09:52:08 7 Mr President, your Honours, Article 8, paragraph 2(f)(vii) --
09:52:15 8 PRESIDING JUDGE JORDA (interpretation): Could you try to
09:52:17 9 speak just a bit more slowly? You do speak very quickly,
09:52:22 10 Mr Roberts as well, so if you could think of the interpreting
09:52:28 11 booths, please try.

09:52:32 12 MS TAYLOR: [In French] [Problem with audio and change of
09:52:45 13 language channels] -- of children under the age of 15 years
09:52:49 14 into armed forces or groups or using them to participate
09:52:54 15 actively --

09:53:10 16 ENGLISH INTERPRETER: We don't have any interpretation, sorry.
09:53:11 17 PRESIDING JUDGE JORDA (interpretation): I don't have any
09:53:13 18 interpretation. There was a problem in the booth. I'm sorry,
09:53:13 19 there was a problem in the interpreting booth. If you could
09:53:13 20 just re-start again, I think that it has now been sorted out,
09:53:21 21 though, so if you could just start again.

09:53:21 22 MS TAYLOR: Certainly. Article 8, paragraph 2(f)(vii) of the
09:53:27 23 Rome Statute refers to the conscription or enlistment of
09:53:30 24 children under the age of 15 years into armed forces or
09:53:34 25 groups, or using them to participate actively in hostilities.

09:53:40 1 The Defence would like to emphasise that, first and foremost,
09:53:43 2 the Statute is a treaty, and as such it is subject to the
09:53:48 3 requirement under international law as recognised by the
09:53:51 4 Vienna Convention on the Law of Treaties. The treaty
09:53:54 5 provisions may not violate peremptory norms of international
09:54:00 6 law. In this regard the principle of legality has been
09:54:04 7 recognised as a peremptory norm of international law which
09:54:09 8 cannot be derogated from. In essence, the principle
09:54:13 9 stipulates that no-one should be convicted for conduct which
09:54:17 10 was not defined as criminal in the law at the time of the
09:54:20 11 conduct.

09:54:22 12 [9:54 a.m.]

09:54:23 13 However, Mr President, your Honours, it does not suffice to
09:54:28 14 say that there was a law at the time of the offence. As
09:54:31 15 stated by the ICTY trial judgment in the Vasiljevic case in a
09:54:37 16 judgment dated 29 November 2002, a criminal conviction should
09:54:42 17 indeed never be based upon a norm which an accused could not
09:54:49 18 reasonably have been aware of at the time of the acts, and
09:54:53 19 this norm must make it sufficiently clear what act or omission
09:54:58 20 could engage his criminal responsibility.

09:55:00 21 [9:55 a.m.]

09:55:01 22 Essentially, in order to satisfy the principle of legality,
09:55:05 23 any person who is charged with a crime should have been in a
09:55:08 24 position to know, at the time of his offence, that his conduct
09:55:12 25 would entail individual criminal responsibility. The

09:55:18 1 applicable legal norm must therefore comply with the
09:55:21 2 requirements or specificity, certainty, accessibility, and
09:55:27 3 foreseeability.
09:55:29 4 [9:55 a.m.]
09:55:31 5 The Defence therefore respectfully submits that the mere fact
09:55:35 6 that the offence is listed in the Rome Statute does not in
09:55:38 7 itself satisfy the principle of legality if the requirements
09:55:43 8 of specificity, certainty, and accessibility and
09:55:48 9 foreseeability have not been complied with. Indeed, to hold
09:55:53 10 otherwise would, in the words of the US military tribunal at
09:55:59 11 Nuremberg in the hostages case be a utilisation of power and
09:56:03 12 not of law.
09:56:05 13 [9:56 a.m.]
09:56:06 14 The Defence further submits that the requirements of legality
09:56:10 15 cannot be determined in abstracto. In this connection, in
09:56:16 16 assessing whether the accused or the person being charged was
09:56:20 17 in a position to assess the consequences of his action, the
09:56:24 18 ad hoc tribunals have taken into consideration whether the
09:56:27 19 underlying conduct of the offence was criminalised under
09:56:31 20 domestic law. Thus in the Furundzija judgment dated
09:56:41 21 10 December 1998 the Chamber observed that under domestic law
09:56:46 22 oral penetration was characterised as sexual assault rather
09:56:52 23 than rape. However, since the underlying conduct was
09:56:55 24 criminalised, the offender was put on notice that his actions
09:56:58 25 would entail criminal responsibility.

09:57:00 1 Similarly, the ICTR has looked at domestic provisions to
09:57:06 2 determine the scope of positive duties under Rwandan law.
09:57:09 3 However, it must be noted that the ad hoc tribunals were
09:57:12 4 concerned with conflicts governed by a relatively uniform set
09:57:18 5 of laws -- the respective laws ratified and published by
09:57:20 6 Rwanda and the Former Yugoslavia.

09:57:20 7 [9:57 a.m.]

09:57:20 8 In contrast, the Defence submits that in determining
09:57:24 9 foreseeability and certainty, the ICC should not apply a
09:57:29 10 one-size-fits-all approach to persons of different
09:57:32 11 nationalities in fundamentally different circumstances.

09:57:34 12 [9:57 a.m.]

09:57:35 13 To demonstrate this, I will refer to two hypothetical
09:57:41 14 examples. In the first example, in the year 2016, after
09:57:48 15 dozens of judgments have been issued by this Court, the Court
09:57:52 16 arrests a national commander of State X for conduct committed
09:57:57 17 in 2016. State X has, in addition to the Rome Statute,
09:58:06 18 ratified all applicable treaties concerning child soldiers.
09:58:10 19 It has implemented them into domestic law, and has published
09:58:14 20 them in military manuals.

09:58:16 21 The national commander was part of the government which
09:58:19 22 ratified these treaties several years ago, and was, in
09:58:25 23 addition, responsible for ensuring that his troops complied
09:58:29 24 with the standards set out in the military manuals.

09:58:32 25 [9:58 a.m.]

09:58:34 1 In this scenario, it would be possible for the Court to
09:58:38 2 conclude that the commander could be expected to know of the
09:58:42 3 existence of the criminal offence, since his government
09:58:45 4 ratified and implemented domestic laws to this effect and, in
09:58:49 5 addition, the contours of this offence, since they had been
09:58:56 6 elaborated in military manuals, which he was expected to
09:59:01 7 implement and in international judgments.
09:59:06 8 [9:59 a.m.]

09:59:06 9 The second example concerns the arrest of a regional
09:59:09 10 politician in the first case before the ICC for acts occurring
09:59:14 11 between July 2002 and December 2003. Neither at the time of
09:59:20 12 his arrest or prior to it has there been a single judgement
09:59:24 13 imposing individual criminal responsibility for the war crime
09:59:28 14 of the recruitment, conscription and enlistment of child
09:59:32 15 soldiers in any court of the world. This person comes from
09:59:35 16 State Y, which only ratified the Rome Statute in April 2002,
09:59:41 17 and has not yet enacted domestic-implementing legislation.
09:59:45 18 [9:59 a.m.]

09:59:46 19 State Y did not ratify Additional Protocol II to the Geneva
09:59:53 20 Conventions which governs internal conflicts until 12 December
09:59:56 21 2002, and it did not enter into force until six months later.
10:00:00 22 [10:00 a.m.]

10:00:00 23 Neither the offence of conscription of child soldiers and
10:00:04 24 using them in hostilities, or the underlying conduct of the
10:00:09 25 conscription of child soldiers and their use in hostilities is

10:00:13 1 criminalised under domestic law.

10:00:16 2 [10:00 a.m.]

10:00:18 3 The second example, Mr President, your Honours, is of course

10:00:22 4 Thomas Lubanga Dyilo, and the State is the DRC.

10:00:28 5 [10:00 a.m.]

10:00:31 6 Accordingly, the Defence respectfully submits that during the

10:00:34 7 time period set out in the charges the law setting out the

10:00:37 8 offence of the recruitment and enlistment of child soldiers,

10:00:41 9 and their active use in hostilities, was neither foreseeable,

10:00:46 10 accessible, or defined in certain terms for Thomas Lubanga

10:00:51 11 Dyilo.

10:00:51 12 [10:00 a.m.]

10:00:56 13 In terms of the foreseeability and accessibility of the law,

10:01:02 14 during the time period set out in the charges the area of

10:01:05 15 Ituri was governed by various political and military

10:01:08 16 formations, but its links to the government and the legal

10:01:12 17 authorities of the DRC were extremely tenuous. And during

10:01:16 18 some time periods the area was controlled by forces linked to

10:01:19 19 foreign governments.

10:01:19 20 [10:01 a.m.]

10:01:20 21 Accordingly, the fact that the government in Kinshasa may have

10:01:25 22 ratified international treaties has less relevance in an area

10:01:30 23 which was essentially isolated from the rest of the country

10:01:33 24 and subjected to a disarray of political and legal directives.

10:01:38 25 [10:01 a.m.]

10:01:41 1 The Prosecution witness, Ms Peduto, has noted at paragraph 127
10:01:47 2 of her statement that she met with Thomas Lubanga Dyilo in
10:01:51 3 2003 for the purpose of explaining the mandate of MONUC and
10:01:56 4 applicable rules concerning child soldiers.

10:01:59 5 [10:01 a.m.]

10:02:00 6 Ms Peduto provided him with a copy of Security Council
10:02:05 7 Resolution 1460, which, for reasons I will elaborate on
10:02:12 8 further, may have caused further confusion and ambiguity.

10:02:16 9 [10:02 a.m.]

10:02:17 10 Ms Peduto also mentioned the existence of the International
10:02:21 11 Criminal Court, but she did not have a copy of the
10:02:23 12 Rome Statute with her. We have to bear in mind in this regard
10:02:29 13 it was only early this year, through the kind services of the
10:02:33 14 ICC IT section, that Thomas Lubanga Dyilo received basic
10:02:36 15 computer training for the first time, so it's not feasible to
10:02:41 16 have expected him to simply Google the provisions of the
10:02:45 17 Rome Statute.

10:02:46 18 [10:02 a.m.]

10:02:47 19 Madame Court Usher, if I could kindly ask you to distribute
10:02:52 20 some documents. This document is confidential, so if it could
10:03:01 21 be distributed to the Chamber and to the Prosecution.

10:03:01 22 [10:03 a.m.]

10:03:39 23 Mr President, your Honours --

10:03:44 24 PRESIDING JUDGE JORDA (interpretation): The interpreters are
10:03:47 25 pointing out that they have not received a copy of this

10:03:49 1 document, but I would ask you to please speak slowly enough so
10:03:54 2 that they can at least follow what you say without the
10:03:57 3 document before them. Thank you.

10:03:58 4 MS TAYLOR: Yes, Mr President, your Honours, I will not be
10:04:01 5 reading from the contents of the document. In their
10:04:04 6 application for the arrest warrant, the Prosecution informed
10:04:07 7 the Chamber that Mr Thomas Lubanga Dyilo had contacted them to
10:04:11 8 obtain further information regarding the International
10:04:15 9 Criminal Court. So, in the view of the Defence, it was
10:04:19 10 obvious that Thomas Lubanga Dyilo was making a good faith
10:04:22 11 effort to obtain further information in relation to his
10:04:25 12 obligations.

10:04:26 13 However, in response to inquiries from the Defence, the
10:04:31 14 Prosecution responded in an email, which has just been
10:04:35 15 distributed, that they declined to meet with him. The
10:04:38 16 Prosecution therefore rejected an opportunity to meet with him
10:04:41 17 and explain his obligations under international law and the
10:04:44 18 Rome Statute.

10:04:45 19 [10:04 a.m.]

10:04:47 20 I will now address the issue of the certainty of the law.

10:04:52 21 Mr President, your Honours, the Defence further submits that
10:04:56 22 it is one thing to know that there is a law; it is another
10:04:59 23 thing to know what this law means in practice, and concretely
10:05:03 24 what conduct is and isn't criminalised.

10:05:05 25 [10:05 a.m.]

10:05:09 1 In terms of the certainty of the law, the Defence submits that
10:05:12 2 the position under international law was in fact contradictory
10:05:16 3 and ambiguous during the relevant time period. This would
10:05:20 4 have rendered it extremely difficult for a person, in the
10:05:24 5 midst of armed conflict, to ascertain which acts would entail
10:05:27 6 criminal responsibility.

10:05:29 7 [10:05 a.m.]

10:05:30 8 The Defence observes that the Prosecution has not at this
10:05:34 9 stage outlined the contours of the offence. The Defence is
10:05:39 10 therefore not in a position to ascertain where the contours of
10:05:43 11 the crime fall within the jurisdiction of the Court.

10:05:46 12 [10:05 a.m.]

10:05:46 13 However, since it will be necessary for the Chamber to
10:05:50 14 consider whether the materials put forward by the Prosecution
10:05:54 15 establish substantial grounds to believe that the person
10:05:59 16 committed the crime charged, it will be necessary to determine
10:06:02 17 the scope of this offence and what range of conduct triggers
10:06:07 18 responsibility.

10:06:08 19 [10:06 a.m.]

10:06:10 20 The Defence respectfully submits that the honourable Pre-Trial
10:06:13 21 Chamber should be guided by the following legal
10:06:15 22 considerations.

10:06:17 23 [10:06 a.m.]

10:06:18 24 Firstly, under international humanitarian law, if combatants
10:06:25 25 from an adverse party come within a party's control, the party

10:06:30 1 is entitled to detain them as prisoners of war for the
10:06:35 2 duration of the hostilities to ensure they do not take arms
10:06:39 3 against them. This rule applies to all combatants,
10:06:42 4 irrespective of their age, although Article 37 of the
10:06:48 5 Convention on the Rights of the Child provides that State
10:06:54 6 parties shall ensure that such detention shall only be used
10:06:57 7 when necessary.
10:06:58 8 [10:06 a.m.]
10:06:59 9 Accordingly, in practice, if armed force A is attacked by
10:07:05 10 armed force B, and armed force B uses child soldiers, armed
10:07:11 11 force A has the following choices: it can either treat the
10:07:16 12 children purely as combatants, in which case there is no
10:07:19 13 prohibition under international law in shooting at them.
10:07:27 14 Alternatively, armed force A can attempt to capture them and
10:07:31 15 detain them, in order to ensure that these child combatants do
10:07:35 16 not take arms against them again. As such, the presence of
10:07:40 17 child combatants in military camps is not in itself evidence
10:07:45 18 of the recruitment of child soldiers, since these children
10:07:50 19 could equally be prisoners of war.
10:07:52 20 [10:07 a.m.]
10:07:52 21 The fact that they may also be armed is also consistent with
10:07:58 22 the Cape Town principles, which expressly recommend against
10:08:01 23 requiring children to hand in any weapons in their possession
10:08:05 24 prior to the demobilisation process.
10:08:08 25 [10:08 a.m.]

10:08:11 1 The Defence submits in this regard that the law regarding
10:08:15 2 child soldiers must be construed in a manner which is
10:08:19 3 consistent with other obligations under international
10:08:22 4 humanitarian law, such as the obligation to limit the
10:08:27 5 possibility of harm to the civilian population. To release
10:08:34 6 child combatants in the midst of an armed conflict, when food
10:08:41 7 and amenities were scarce, and in the absence of an effective
10:08:45 8 and functioning demobilisation programme, would be potentially
10:08:50 9 dangerous for the civilian population and for the combatants
10:08:53 10 themselves.

10:08:54 11 [10:08 a.m.]

10:08:55 12 A UNICEF report to the Security Council in late 2001 noted
10:09:02 13 that: "Most child fatalities in armed conflict occur not as a
10:09:09 14 direct result of violence but because children are denied
10:09:12 15 access to such essential services as health care, food,
10:09:15 16 security and clean water."

10:09:19 17 [10:09 a.m.]

10:09:21 18 It has also been observed in a commentary sponsored by Norway
10:09:25 19 in relation to the criminalisation of the recruitment of child
10:09:29 20 soldiers in Africa, that to allow a child, who has volunteered
10:09:34 21 services, to remain in a military camp during an armed
10:09:37 22 conflict is potentially humane rather than wrongful.

10:09:41 23 [10:09 a.m.]

10:09:41 24 Secondly, the Defence submits that there's no legal
10:09:45 25 requirement that armed forces should take steps to ensure that

10:09:49 1 children do not defend themselves during hostilities. In this
10:09:55 2 regard Article 51 of the United Nations Charter provides that
10:10:02 3 nothing in the present Charter shall impair the inherent right
10:10:06 4 of individual or collective self-defence if an armed attack
10:10:12 5 occurs against a member of the United Nations, until the
10:10:14 6 Security Council has taken measures to maintain international
10:10:18 7 peace and security. This State prerogative is recognised as
10:10:22 8 an individual right in the preamble to the universal
10:10:26 9 declaration on human rights, which refers to recourse as a
10:10:30 10 last resort to rebellion against tyranny and oppression,
10:10:37 11 because everyone -- whether man, woman or child -- has the
10:10:40 12 right to life, liberty and security of the person.

10:10:44 13 [10:10 a.m.]

10:10:45 14 Article 31(1)(b) of the Rome Statute also provides that a
10:10:51 15 person shall not be criminally responsible if, at the time of
10:10:55 16 the conduct, the person acts reasonably to defend himself or
10:10:59 17 herself, or another person, against an imminent and unlawful
10:11:03 18 use of force.

10:11:04 19 [10:11 a.m.]

10:11:07 20 If the overarching objective of international norms pertaining
10:11:14 21 to children is to ensure their protection, then the law must
10:11:17 22 be interpreted in a manner which realistically promotes their
10:11:23 23 protection in an armed conflict.

10:11:26 24 [10:11 a.m.]

10:11:26 25 To give an example, if a village has been repeatedly attacked

10:11:31 1 by an adverse party, and isn't it logical that any vulnerable
10:11:37 2 persons in the area would prefer to seek protection at the
10:11:42 3 most well-guarded buildings in the area rather than being left
10:11:45 4 to fend for themselves? In the absence of United Nations
10:11:51 5 troops or police authorities who are willing and actually able
10:11:55 6 to protect the civilian populace, isn't it probable that the
10:12:00 7 most well-protected areas would be military barracks, or other
10:12:04 8 similarly defended areas?

10:12:04 9 [10:12 a.m.]

10:12:09 10 In such a situation, if you are being attacked by an armed
10:12:14 11 force which doesn't respect the Geneva Conventions and which
10:12:18 12 targets civilians, what should the persons in the military
10:12:22 13 barracks do? Should they simply turn away children and insist
10:12:28 14 that they disarm and rely solely on MONUC to protect them?
10:12:35 15 After the lessons of Rwanda and Srebrenica, can we really say
10:12:42 16 that such an approach would realistically promote the
10:12:45 17 protection of children in an armed conflict?

10:12:48 18 In this connection, the Defence further submits that the scope
10:12:51 19 of the prohibition against allowing children to actively
10:12:54 20 participate in hostilities should not be defined in such a way
10:13:00 21 that it impedes the right of children and armed forces to take
10:13:04 22 such measures as are necessary to defend themselves against an
10:13:07 23 armed attack.

10:13:08 24 [10:13 a.m.]

10:13:13 25 The ICRC commentary to Additional Protocol I of the Geneva

10:13:21 1 Conventions provides that direct participation in hostilities
10:13:27 2 means acts which, by their nature or purpose, are intended to
10:13:32 3 cause actual harm to enemy personnel and material. Such
10:13:38 4 participation also suggests a direct causal relationship
10:13:43 5 between the activity engaged in and harm done to the enemy at
10:13:47 6 the time and place where the activity takes place.

10:13:47 7 [10:13 a.m.]

10:13:51 8 The ICTR, in the Rutaganda trial judgment dated 6 November
10:14:01 9 1999, adopted the ICRC definition of "direct participation",
10:14:04 10 and held that: "To take a direct part in hostilities means
10:14:09 11 acts of war which, by their very nature or purpose, are likely
10:14:14 12 to cause actual harm to the personnel and equipment of the
10:14:18 13 enemy armed forces."

10:14:20 14 [10:14 a.m.]

10:14:22 15 Mr President, your Honours, if the ICC were to adopt the
10:14:26 16 broader standard of active participation, it would mean that
10:14:31 17 individuals could be criminally liable for conduct which would
10:14:35 18 not entail a breach of international law for States.

10:14:38 19 [10:14 a.m.]

10:14:40 20 It may also circumscribe legitimate civilian defensive
10:14:45 21 activities. The Defence observes that Additional Protocol I
10:14:51 22 to the Geneva Convention expressly provides for the
10:14:55 23 possibility of civilian defence organisations who may
10:14:58 24 undertake tasks to mitigate the loss, suffering and damage
10:15:04 25 inflicted on civilians. The Protocol does not impose any age

10:15:09 1 limit on participation in such organisations, and their
10:15:14 2 activities may be carried out under the direction or control
10:15:18 3 of the military -- and may, incidentally, benefit the
10:15:23 4 military. Moreover, civilian defence personnel are entitled
10:15:31 5 to bear light individual weapons for the purpose of
10:15:34 6 maintaining order or self-defence.
10:15:38 7 Thus, the fact that a civilian possesses small arms for the
10:15:43 8 purpose of self-defence does not, in itself, transform that
10:15:48 9 person into a combatant.
10:15:50 10 [10:15 a.m.]
10:15:52 11 In addition, the prohibition on recruiting child soldiers does
10:15:58 12 not apply to military academies, as recognised by Article 3
10:16:05 13 subsection (5) of the Optional Protocol on the Rights of
10:16:09 14 Children in Armed Conflict.
10:16:10 15 [10:16 a.m.]
10:16:14 16 The Defence further submits that a wide definition of child
10:16:18 17 soldiers could be extremely deleterious to the protection of
10:16:23 18 children in conflict, since, as noted above, a child combatant
10:16:28 19 can be lawfully targeted in hostilities and can be detained as
10:16:33 20 a prisoner of war.
10:16:40 21 THE INTERPRETER: Please slow down for the interpreter.
10:16:40 22 MS TAYLOR: Finally, the Defence submits that the certainty
10:16:45 23 in the law has been impeded by the fact that the international
10:16:51 24 community has adopted contradictory positions regarding the
10:16:56 25 legal responsibilities of non-State actors. In this

10:17:06 1 connection, the ICRC commentary to the provisions regarding
10:17:11 2 child soldiers in Additional Protocol II notes that these
10:17:16 3 provisions had their genesis in human rights law, a breach of
10:17:19 4 which does not attract criminal liability.

10:17:22 5 [10:17 a.m.]

10:17:26 6 Thus, for example, by using the phrase "should not" rather
10:17:32 7 than "shall not", Article 4 of the Optional Protocol on the
10:17:37 8 Rights of Children in Armed Conflict appears to impose a moral
10:17:43 9 rather than a legal obligation on non-State actors not to
10:17:46 10 recruit and use child soldiers. This can be contrasted to the
10:17:52 11 mandatory language directed at State parties at Article 2 of
10:17:58 12 the same Protocol.

10:17:59 13 [10:17 a.m.]

10:18:01 14 Similarly, the position of the Security Council towards
10:18:08 15 non-State actors appears to be skewed in favour of open
10:18:12 16 dialogue and progressive implementation, rather than the
10:18:15 17 imposition of immediate criminal sanctions.

10:18:19 18 [10:18 a.m.]

10:18:21 19 In this connection, the Defence submits that the approach of
10:18:26 20 the Security Council towards non-State actors in the DRC
10:18:32 21 appears to have been influenced by the Machel report, which
10:18:37 22 was commissioned by the General Assembly in 1996, and approved
10:18:42 23 in General Assembly Resolution 51/77.

10:18:47 24 [10:18 a.m.]

10:18:50 25 The report concludes that official acknowledgment of a child's

10:18:55 1 participation in conflict was vital, as without it there could
10:19:01 2 be no effective recognition of their special needs in
10:19:05 3 demobilisation programs.

10:19:09 4 [10:19 a.m.]

10:19:10 5 In her witness statement, the Prosecution witness
10:19:16 6 Ms Christine Peduto recalls that she provided Thomas Lubanga
10:19:21 7 Dyilo with a copy of Security Council Resolution 1460, which
10:19:26 8 was issued in 2003. As noted before, the Defence submits
10:19:34 9 that, in doing so, Ms Peduto could have further clouded Thomas
10:19:40 10 Lubanga Dyilo's ability to comprehend the applicable legal
10:19:44 11 standards.

10:19:44 12 [10:19 a.m.]

10:19:47 13 Security Council Resolution 1460 does refer to the Rome
10:19:53 14 Statute. However, it only states -- and I quote
10:19:59 15 verbatim -- that: "The conscription or enlistment of children
10:20:02 16 under the age of 15 into national armed forces or using them
10:20:09 17 to participate actively in hostilities is classified as a war
10:20:14 18 crime." Notably, it does not make any mention of the
10:20:19 19 recruitment of children under the age of 15 into armed
10:20:23 20 forces -- non-national armed forces, nor does it classify it
10:20:28 21 as a war crime.

10:20:29 22 [10:20 a.m.]

10:20:30 23 In terms of its approach towards non-national armed forces, it
10:20:35 24 expresses its intention to enter into dialogue, as
10:20:40 25 appropriate, or to support the Secretary-General in entering

10:20:46 1 into dialogue with parties to armed conflict in violation of
10:20:50 2 international obligations applicable to them in order to
10:20:54 3 develop clear and time-bound action plans to end this
10:21:00 4 practice.

10:21:00 5 [10:21 a.m.]

10:21:03 6 The Council also expressed its intention to consider taking
10:21:09 7 appropriate steps to further address the issue if it deemed
10:21:15 8 that insufficient progress had been made upon review of the
10:21:18 9 next Secretary-General's report -- a report which was only
10:21:24 10 finalised on 23 November 2003.

10:21:26 11 [10:21 a.m.]

10:21:30 12 The Defence respectfully submits that, in accordance with the
10:21:37 13 clear terms of the resolution, non-State entities were only
10:21:42 14 obliged to enter into open dialogue with representatives of
10:21:46 15 the United Nations, and devise methods to progressively end
10:21:51 16 the practice, in accordance with the time frame set out by the
10:21:55 17 Security Council. Thus, during the time period set out in the
10:22:04 18 charges, the Security Council seems to have sent the message
10:22:08 19 that, rather than imposing an automatic penal sanction regime,
10:22:14 20 the right of children to peace and security could best be
10:22:17 21 achieved by first encouraging non-State entities into meeting
10:22:24 22 with UN representatives to determine a practical regime for
10:22:28 23 protecting the interests of children.

10:22:30 24 [10:22 a.m.]

10:22:30 25 In this regard, the Defence submits that an automatic penal

10:22:38 1 regime, which would impose criminal liability on any armed
10:22:42 2 force that has child soldiers in its forces, could be
10:22:47 3 counterproductive to the demobilisation of these children. If
10:22:54 4 the army demobilises the children, it would, in effect, be
10:23:01 5 releasing potential witnesses against them. If any army seeks
10:23:05 6 help from the government or from the United Nations for
10:23:09 7 resources to demobilise children, it would be incriminating
10:23:12 8 itself.

10:23:12 9 [10:23 a.m.]

10:23:15 10 Security Council Resolution 1460 appears to have addressed
10:23:21 11 this problem by imposing a time frame of until the end of
10:23:26 12 2003, during which the entities listed in the annex to the
10:23:30 13 resolution should take measures to ensure their compliance
10:23:34 14 with any applicable legal obligations.

10:23:37 15 [10:23 a.m.]

10:23:40 16 This approach may also have been influenced by the fact that
10:23:44 17 during the drafting of the Rome Statute some States, including
10:23:48 18 the United States, argued that the provisions regarding child
10:23:55 19 soldiers were more human rights provisions than individual
10:23:59 20 criminal law.

10:23:59 21 [10:23 a.m.]

10:24:02 22 Mr President, your Honours, that concludes my submissions on
10:24:04 23 the topic of the offence of child soldiers. I will now move
10:24:10 24 on to my submissions regarding the different modes of
10:24:14 25 liability.

10:24:28 1 [10:24 a.m.]

10:24:28 2 Mr President, your Honours, in the Prosecution motion dated
10:24:37 3 28 August 2006, which was filed with the document containing
10:24:41 4 the charges, the Prosecution submitted that: "Thomas Lubanga
10:24:47 5 Dyilo is criminally responsible as a joint perpetrator
10:24:51 6 pursuant to Article 25(3) (a)."

10:24:58 7 [10:24 a.m.]

10:24:59 8 They also referred to a prior finding of the Chamber dated
10:25:04 9 10 February 2006 that indirect co-perpetration was also a
10:25:12 10 potentially viable theory.

10:25:17 11 [10:25 a.m.]

10:25:17 12 Finally, the Prosecution submitted that, based on the facts
10:25:22 13 set out in the charging document, "common purpose" in terms of
10:25:27 14 Article 25(3) (d) of the Statute could properly be considered
10:25:36 15 as a third applicable mode of liability.

10:25:39 16 [10:25 a.m.]

10:25:41 17 In their filing dated 28 August 2006, the Prosecution further
10:25:48 18 requested the Chamber to make findings that the legal
10:25:52 19 requirements of these three modes of liability are either
10:25:56 20 satisfied or not satisfied, based on its review of the
10:26:02 21 material submitted at the confirmation hearing.

10:26:05 22 [10:26 a.m.]

10:26:08 23 Mr President, your Honours, the charging document itself only
10:26:12 24 refers to co-perpetration, and only cites Article 25(3) (a).

10:26:21 25 [10:26 a.m.]

10:26:23 1 In a motion dated 20 September 2006, the Defence argued that
10:26:31 2 the Prosecution's references to modes of liability, which were
10:26:34 3 not contained in the charges, should be disregarded for the
10:26:38 4 purposes of the confirmation hearing. The Defence also
10:26:43 5 referred to the right of the Defence to be informed in detail
10:26:48 6 of the nature of the charges.

10:26:49 7 [10:26 a.m.]

10:26:53 8 The Defence therefore submitted that if the Prosecution
10:26:56 9 intended to elaborate on the requirements to invoke liability
10:27:00 10 under Article 25, it should do so in written form prior to the
10:27:05 11 confirmation hearing, otherwise the Defence would be unable to
10:27:10 12 determine which acts or conduct the Prosecution was relying on
10:27:16 13 to ground individual liability and to organise its preparation
10:27:22 14 in advance of the hearing accordingly.

10:27:24 15 [10:27 a.m.]

10:27:27 16 The Prosecution declined to file such a document, and only
10:27:31 17 addressed the question of modes of liability on the third day
10:27:36 18 of the Prosecution case during the confirmation hearing
10:27:39 19 itself.

10:27:40 20 [10:27 a.m.]

10:27:43 21 During this hearing -- on 14 November 2006 -- the Prosecution
10:27:52 22 at various times referred to Thomas Lubanga Dyilo as a
10:27:56 23 personal perpetrator, a co-perpetrator and an indirect
10:28:01 24 perpetrator through another. They also referred to de facto
10:28:07 25 and de jure power which is normally relevant to command

10:28:15 1 responsibility and to common purpose.

10:28:17 2 [10:28 a.m.]

10:28:17 3 The Defence respectfully submits that it would be entirely to
10:28:21 4 the detriment of Thomas Lubanga Dyilo and to the Defence to
10:28:25 5 adopt a buffet approach such that the Prosecution lays out an
10:28:32 6 array of conduct and liabilities and suggests that the Chamber
10:28:35 7 pick and choose from them.

10:28:36 8 [10:28 a.m.]

10:28:37 9 For the purposes of the confirmation hearing, in determining
10:28:42 10 whether the elements of liability are satisfied, the Defence
10:28:46 11 respectfully submits that the Chamber should also consider
10:28:51 12 whether the Prosecution has pled this conduct with sufficient
10:28:56 13 detail and clarity to enable the Defence to challenge the
10:29:00 14 Prosecution case at the confirmation hearing and to properly
10:29:05 15 comment on the scope of liability before the Chamber issues
10:29:09 16 its decision.

10:29:09 17 [10:29 a.m.]

10:29:14 18 If that is not the case, then in accordance with
10:29:17 19 Article 61(6)(b), the Defence respectfully requests the
10:29:22 20 Chamber to dismiss the charges or, alternatively, under
10:29:27 21 Article 61(6)(c), adjourn the hearing and request the
10:29:32 22 Prosecution to prepare a new charging document. In this
10:29:37 23 sense, the use of the word "adjourn" in Article 61(6)(c)
10:29:43 24 clearly implies that the Chamber should not do so after the
10:29:47 25 hearing itself, since to do so would deprive the Defence of

10:29:50 1 the right to be heard and to challenge the reformulated
10:29:54 2 charging document.
10:29:56 3 [10:29 a.m.]
10:29:58 4 I will now turn to the Defence's submissions regarding
10:30:01 5 charging requirements. Article 67(1)(a) of the Statute sets
10:30:11 6 out the right of the Defence to be informed promptly and in
10:30:16 7 detail of the nature, cause and content of the charge in a
10:30:21 8 language which the person fully understands and speaks.
10:30:28 9 [10:30 a.m.]
10:30:29 10 The Defence incidentally observes that the motion dated
10:30:33 11 28 August 2006, which was filed in connection with the
10:30:37 12 charging document, was filed in English, and has yet to be
10:30:42 13 translated into French.
10:30:43 14 [10:30 a.m.]
10:30:46 15 The scope of the right to be informed of the nature, cause and
10:30:50 16 content of the charge has been considered in detail at the
10:30:55 17 ad hoc tribunals. The Defence submits that the following
10:31:00 18 findings are of particular relevance: it has been firmly
10:31:07 19 stated that pleading individual responsibility by reference
10:31:12 20 merely to all the terms set out in the Statute is likely to
10:31:17 21 cause ambiguity, unless the Prosecution intends to rely on all
10:31:22 22 such forms of liability. The nature of the Prosecution case
10:31:28 23 should thus not be dependent upon such an ambiguity.
10:31:32 24 [10:31 a.m.]
10:31:33 25 In this connection, the ICTR Appeals Chamber in the Semanza

10:31:40 1 judgment of 20 May 2005 expressly criticised the Prosecution
10:31:48 2 practice of simply citing the different modes of individual
10:31:50 3 liability in the Statute, and allowing the Chamber to pick and
10:31:55 4 choose from them.

10:31:57 5 [10:31 a.m.]

10:32:02 6 The Defence respectfully submits that if the Prosecution is
10:32:05 7 relying on two different forms of liability, then the charging
10:32:10 8 document itself should separate the acts pertaining to the
10:32:14 9 respective forms of liability if the same facts cannot
10:32:18 10 simultaneously give rise to the two types of responsibility.

10:32:24 11 [10:32 a.m.]

10:32:27 12 The Defence further submits that the Prosecution cannot rely
10:32:31 13 on material given during the discovery process to fill in any
10:32:36 14 gaps in the material facts pleaded in the charging document
10:32:41 15 unless all the witness statements identify uniformly, and with
10:32:46 16 precision, the circumstances in which the offence charged it
10:32:50 17 is alleged to have occurred, which, your Honours, is very
10:32:54 18 rarely the case, and the Defence disputes it is the case in
10:32:58 19 the present circumstances.

10:32:59 20 [10:32 a.m.]

10:33:00 21 In addition, the ICTY Appeals Chamber held in the Kvočka
10:33:10 22 judgment dated 28 February 2005 that if the Defence is not
10:33:16 23 properly notified of the material facts of the accused's
10:33:21 24 alleged criminal activity until the Prosecution files its
10:33:25 25 pre-trial brief or until the trial itself, it will be

10:33:29 1 difficult for the Defence to conduct a meaningful
10:33:32 2 investigation prior to the commencement of the trial.
10:33:35 3 [10:33 a.m.]
10:33:38 4 The proceedings at the ICC do not directly correspond to the
10:33:43 5 Pre-Trial phase of the ad hoc tribunals. However,
10:33:48 6 Mr President, your Honours, the import of the
10:33:53 7 Appeals Chamber's statement to the current proceedings is
10:33:55 8 clear: the Prosecution cannot cure any material defects in
10:34:00 9 the charging document through its pleadings at the
10:34:03 10 confirmation hearing, since the Defence will have been
10:34:06 11 deprived of the ability to properly investigate and respond to
10:34:11 12 the charges.
10:34:11 13 [10:34 a.m.]
10:34:16 14 Mr President, your Honours, I will now turn to the mode of
10:34:19 15 liability referred to as "common purpose". The Defence
10:34:35 16 respectfully submits that if the Prosecution wishes to rely
10:34:40 17 on "common purpose", then the charges should expressly set out
10:34:44 18 its intention to rely on this mode of liability as a material
10:34:48 19 fact. Merely utilising the words "common purpose" or "common
10:34:55 20 scheme" do not suffice.
10:34:55 21 [10:34 a.m.]
10:34:58 22 In this regard, the ICTR has held that: "Proceeding to state
10:35:05 23 that the accused participated in the common scheme by his own
10:35:11 24 affirmative acts or through persons he assisted or by his
10:35:15 25 subordinates with his knowledge and consent", the indictment

10:35:19 1 could be read to invoke three established modes of liability
10:35:22 2 other than joint criminal enterprise: committing through
10:35:27 3 direct personal perpetration; aiding and abetting; and Article
10:35:34 4 6(3), superior responsibility.

10:35:34 5 [10:35 a.m.]

10:35:37 6 The appellant could have interpreted the paragraph as a whole
10:35:41 7 to refer only to those modes of liability and not to joint
10:35:43 8 criminal enterprise, and he cannot, therefore, be said to have
10:35:49 9 been given clear notice of the joint criminal enterprise
10:35:54 10 theory. This is especially so because at the time of the
10:35:57 11 indictment, the joint criminal enterprise theory was still an
10:36:04 12 unfamiliar mode of liability in this tribunal.

10:36:06 13 [10:36 a.m.]

10:36:06 14 The Defence submits that the ICC should not automatically
10:36:10 15 adopt modes of liability which were applied at the ad hoc
10:36:14 16 tribunals. However, if the Prosecution were to rely on a
10:36:20 17 common purpose/joint criminal enterprise theory, then the
10:36:25 18 following material facts should have been set out in the
10:36:28 19 charges: the category of joint criminal enterprise; the
10:36:35 20 material facts of the enterprise; the identity of the
10:36:38 21 participants; and the nature of Thomas Lubanga Dyilo's
10:36:41 22 participation in the enterprise.

10:36:43 23 [10:36 a.m.]

10:36:48 24 In relation to the identity of the members of the enterprise,
10:36:52 25 even if it is not possible to ascertain the identity of every

10:36:57 1 single member, it must be pled with sufficient precision to
10:37:02 2 enable the Defence to identify them as a specific group which
10:37:09 3 share a common purpose. For example, reference in an
10:37:15 4 indictment to unknown persons who, as members of the Kosovo
10:37:21 5 Liberation Army has been held to be "so general that it cannot
10:37:24 6 provide a sufficient categorisation to identify the
10:37:27 7 participants in the joint criminal enterprise".

10:37:30 8 [10:37 a.m.]

10:37:34 9 The Defence further submits that the identity of the actual
10:37:39 10 physical perpetrators should be pled in order to enable the
10:37:44 11 Defence to be informed of the alleged nexus between the
10:37:47 12 physical perpetrators and the person charged, and to
10:37:52 13 distinguish between participants in the joint criminal
10:37:56 14 enterprise and opportunistic participants, for example,
10:38:02 15 persons who may have taken advantage of a situation to commit
10:38:06 16 offences for reasons unrelated to the objectives or plans of
10:38:12 17 the common group.

10:38:13 18 [10:38 a.m.]

10:38:15 19 In this regard, the Defence respectfully submits that the
10:38:20 20 Prosecution is expected to know its case before going to trial
10:38:25 21 and cannot plead in ambiguous terms with the aim of moulding
10:38:30 22 the case against the Defence in the course of the trial,
10:38:33 23 depending on how the evidence unfolds.

10:38:36 24 [10:38 a.m.]

10:38:38 25 Moreover, the Defence respectfully submits that the fact that

10:38:45 1 the Prosecution have set out some elements regarding their
10:38:49 2 theory of co-perpetration in the charging document does not
10:38:53 3 put the Defence on notice regarding the elements of liability
10:38:57 4 for common purpose, because the two are two separate forms of
10:39:03 5 liability.

10:39:03 6 [10:39 a.m.]

10:39:06 7 The question as to whether co-perpetration and joint criminal
10:39:10 8 enterprise could be assimilated was expressly considered
10:39:16 9 by Judge Shahahudeen in his separate opinion in the Gacumbitsi
10:39:29 10 judgment. Judge Shahahudeen observed that: "The contribution
10:39:32 11 of an accused to a joint criminal enterprise does not have to
10:39:37 12 be the sine qua non of the commission of the crime. By
10:39:45 13 contrast, under the co-perpetratorship theory, since the
10:39:49 14 non-fulfillment by a participant of his promised contribution,
10:39:55 15 would 'ruin' the accomplishment of the enterprise as
10:39:58 16 visualised, the making of his contribution would appear to be
10:40:02 17 a sine qua non. Therefore, although the two theories overlap,
10:40:08 18 they arrive at a point of incompatibility touching guilt or
10:40:13 19 innocence. At that point one theory is wrong, the other
10:40:19 20 right. This would seem to indicate that only one of these two
10:40:23 21 theories can prevail in the same legal system."

10:40:27 22 [10:40 a.m.]

10:40:30 23 Mr President, your Honours for these reasons, since the
10:40:35 24 Prosecution has failed to plead the necessary elements
10:40:40 25 concerning the theory of common purpose, the Defence

10:40:44 1 respectfully submits this mode of liability should be
10:40:48 2 disregarded for the purposes of the confirmation hearing.
10:40:50 3 [10:40 a.m.]
10:40:54 4 I will now turn to the mode of liability, "Indirect
10:40:59 5 Perpetration". Regarding the notion of indirect perpetration,
10:41:10 6 as noted above, the Defence submits that the Prosecution
10:41:14 7 failed to expressly plead this theory in the charging
10:41:19 8 document.
10:41:19 9 [10:41 a.m.]
10:41:19 10 Furthermore, the Defence respectfully submits the prejudice
10:41:26 11 caused to Defence preparation cannot be cured by presenting
10:41:30 12 submissions on the material elements for the first time at the
10:41:34 13 confirmation hearing, particularly since the Prosecution
10:41:39 14 themselves described the manner of presentation as " cursory".
10:41:47 15 [10:41 a.m.]
10:41:48 16 In any case, the Defence respectfully submits that the
10:41:53 17 definition of "indirect perpetration" utilised by the
10:41:56 18 Prosecution goes beyond the forms of liability set out in the
10:42:01 19 Statute.
10:42:01 20 [10:42 a.m.]
10:42:05 21 The Defence firstly notes that Article 25(3)(a) expressly
10:42:12 22 states that a person shall be criminally responsible and
10:42:18 23 liable for punishment under the Statute -- punishable for a
10:42:24 24 crime within the jurisdiction of the Court, if that
10:42:27 25 person "commits a crime, whether as an individual, jointly

10:42:33 1 with another, or through another person, regardless of whether
10:42:37 2 that other person is criminally responsible."

10:42:43 3 [10:42 a.m.]

10:42:43 4 The Defence would like to expressly note that the statutory
10:42:47 5 language is clearly expressed in the singular form. The
10:42:53 6 Article refers to "another person", not "other persons".

10:43:01 7 [10:43 a.m.]

10:43:01 8 This language can be clearly contrasted to the language of
10:43:05 9 Article 25(3)(d) which expressly refers to the contribution to
10:43:13 10 the commission or attempted commission by a "group of
10:43:17 11 persons".

10:43:19 12 [10:43 a.m.]

10:43:21 13 The Defence thus submits that the reference to "person" in the
10:43:27 14 singular tense in Article 25(3)(a) was not a drafting
10:43:31 15 oversight, but a clear intention to ensure a close nexus
10:43:37 16 between the person charged and the physical perpetrator of the
10:43:42 17 crime. The rationale for such a nexus is clear. In the case
10:43:50 18 of Article 25(3)(a), the person charged is liable as an actual
10:43:55 19 perpetrator for the crime itself, not merely as a participant
10:44:01 20 or accomplice.

10:44:03 21 [10:44 a.m.]

10:44:04 22 The language of Article 25(3)(e) -- (a) -- can also be
10:44:12 23 contrasted to Article 25(3)(b), which sets out responsibility
10:44:15 24 for ordering, soliciting, or inducing the commission of a
10:44:19 25 crime.

10:44:23 1 Article 25(3) (b) places no restriction on the number of
10:44:29 2 persons who commit the crime, but the person is charged is
10:44:34 3 someone who ordered, solicited or induced, and not as someone
10:44:37 4 who committed the offence themselves.
10:44:40 5 [10:44 a.m.]
10:44:41 6 As such, it is logical that the nexus between the person
10:44:45 7 charged and the perpetrator may be more attenuated.
10:44:49 8 [10:44 a.m.]
10:44:52 9 In the case of indirect perpetration, the Defence respectfully
10:44:57 10 submits that this clear nexus is only satisfied if the
10:45:01 11 Prosecution is able to establish that the person charged
10:45:06 12 exercised direct control over the conduct of a single physical
10:45:11 13 perpetrator, such that the person charged knew what the
10:45:17 14 physical perpetrator was doing and intended that the conduct
10:45:21 15 of the physical perpetrator produced the final result.
10:45:24 16 [10:45 a.m.]
10:45:29 17 The Defence observes that the concept of indirect perpetration
10:45:34 18 through means, or indirect co-perpetration, has been raised by
10:45:38 19 the Prosecutor at the ad hoc tribunals. It has also been
10:45:45 20 utilised by academic observers who argue that it is an ideal
10:45:51 21 way of addressing scenarios of collective criminality and
10:46:01 22 organised structures of power, for example, the Mafia, in
10:46:04 23 which you have the man in the white gloves, the godfather,
10:46:08 24 pulling the strings behind the scenes. However, a person who
10:46:12 25 is godfather to the outside world could equally be King Lear a

10:46:19 1 doddering old fool who clutches at his last vestiges of
10:46:24 2 control, whilst his courtiers whisper lies in his ears
10:46:29 3 signifying nothing.

10:46:31 4 The point is, Mr President, your Honours, the law should not
10:46:33 5 be moulded to facilitate the greatest number of Prosecutions
10:46:37 6 or to fit the crime model du jour.

10:46:43 7 [10:46 a.m.]

10:46:43 8 Liability should also not be expanded in order to cover
10:46:47 9 evidentiary shortfalls in the Prosecution case, such as a lack
10:46:51 10 of direct evidence or insider witnesses. The wider the Court
10:46:54 11 casts the net of criminal liability, the greater the chance
10:46:58 12 that it will catch innocent and guilty persons alike.

10:47:01 13 [10:47 a.m.]

10:47:02 14 The Defence therefore strongly submits that criminal liability
10:47:07 15 for a perpetrator should be based on clear and accessible
10:47:11 16 indicia of criminal intent and conduct, and irrespective of
10:47:18 17 whether the person charged acts themselves or through another,
10:47:21 18 there must be a direct causal link between their actions and
10:47:25 19 the crime charged.

10:47:27 20 [10:47 a.m.]

10:47:29 21 Under Article 21 of the Statute, the Court is obliged to apply
10:47:38 22 in the first place the Statute, element of crime and Rules of
10:47:42 23 Procedure and Evidence. As previously mentioned,
10:47:48 24 Article 25(3)(a) defines indirect perpetration as committing
10:47:53 25 an act through another person -- "person" being in the

10:47:58 1 singular tense. The Defence thus submits that there is no
10:48:02 2 ambiguity in the Statute which would require the Court to have
10:48:06 3 recourse to additional sources of law.

10:48:09 4 [10:48 a.m.]

10:48:13 5 In the second place -- that is, if the Statute, elements of
10:48:18 6 crime and Rules of Procedure and Evidence did not address the
10:48:21 7 issue -- the Court may apply applicable treaties and
10:48:26 8 principles and rules of international law. In this regard,
10:48:31 9 the status of the broad definition of indirect perpetration
10:48:34 10 under customary international law has been considered at the
10:48:39 11 ICTY.

10:48:39 12 [10:48 a.m.]

10:48:41 13 In the Ojdanic case, the Prosecution sought to amend the
10:48:46 14 indictment to state that the accused could be liable if "he
10:48:51 15 has an agreement with others, plays a key role in the
10:48:55 16 agreement, and one or more participants used others to carry
10:48:59 17 out the crimes".

10:49:00 18 [10:49 a.m.]

10:49:01 19 The Prosecutor purported to rely on the ICTY Stakic trial
10:49:12 20 judgment, which was in itself heavily influenced by the
10:49:16 21 writings of Claus Roxin, a German legal theorist. The Trial
10:49:24 22 judge -- Chamber eventually held there was nothing in either
10:49:26 23 the Stakic trial judgment or Roxin's writing which supported
10:49:32 24 the broad definition proposed by the Prosecution, and noted in
10:49:35 25 particular that neither Stakic nor Roxin mentioned the use by

10:49:41 1 one of the participants in a common agreement or persons -- of
10:49:46 2 other persons outside the agreement to physically perpetrate
10:49:49 3 crimes.

10:49:50 4 [10:49 a.m.]

10:49:52 5 The Chamber also concluded that the broad form of indirect
10:49:57 6 co-perpetration was not supported by customary international
10:50:00 7 law.

10:50:01 8 [10:50 a.m.]

10:50:07 9 As a third source of law, the ICC may apply general principles
10:50:11 10 of law derived from national laws of legal systems of the
10:50:15 11 world. In this regard, the ICTY Appeals Chamber in the Tadic
10:50:25 12 judgment concluded that in order to rely on a mode of
10:50:29 13 liability under the doctrine of general principles of law
10:50:33 14 recognised by all nations of the world, it would be necessary
10:50:38 15 to show that most, if not all countries, adopt the same notion
10:50:43 16 of that form of liability. More specifically, "It would be
10:50:51 17 necessary to show that in any case the major legal systems of
10:50:55 18 the world take the same approach to this motion."

10:51:01 19 [10:51 a.m.]

10:51:03 20 The ICTR Appeals Chamber has also held that "it would be both
10:51:08 21 unnecessary and unfair to hold an accused responsible under a
10:51:13 22 head of responsibility which has not clearly been defined
10:51:18 23 under international criminal law".

10:51:21 24 [10:51 a.m.]

10:51:22 25 The Defence thus respectfully submits that, in order to rely

10:51:30 1 upon this source of law, it would be necessary for the
10:51:34 2 Prosecution to demonstrate that the major legal systems of the
10:51:37 3 world not only have the concept of indirect perpetration but
10:51:43 4 also define it in the same terms as the broad approach, which
10:51:51 5 has being suggested by the Prosecutor.

10:51:57 6 [10:51 a.m.]

10:51:57 7 In this connection, the Defence observes there's a clear
10:52:01 8 divergence between the approach adopted by common law
10:52:05 9 countries and civil law countries in relation to indirect
10:52:08 10 perpetration. for example in the United Kingdom and the
10:52:14 11 United States the notion of indirect perpetration is linked to
10:52:17 12 the notion of innocent agency.

10:52:19 13 [10:52 a.m.]

10:52:22 14 In contrast, the broader definition of "indirect
10:52:27 15 perpetration", which includes the doctrine of hegemony over
10:52:35 16 the act has been primarily developed by German legal writers.
10:52:40 17 In this regard, the Defence submits that the Court should be
10:52:43 18 extremely cautious in transplanting domestic concepts from one
10:52:47 19 country to an international judicial environment in which it
10:52:50 20 may not have roots, and in a particular case in which the mode
10:52:55 21 of liability might not have been foreseeable or accessible to
10:53:00 22 the person at the time of the alleged offence.

10:53:02 23 [10:53 a.m.]

10:53:08 24 The Defence further submits that there are important policy
10:53:13 25 considerations for eschewing a broad definition of indirect

10:53:16 1 perpetration. These will, however, be addressed in connection
10:53:22 2 with the concept of co-perpetration.

10:53:27 3 [10:53 a.m.]

10:53:28 4 Mr President, your Honours, I'm now moving on to the next mode
10:53:30 5 of liability, but would this be a good opportunity to have the
10:53:33 6 break, or should I continue?

10:53:39 7 PRESIDING JUDGE JORDA (interpretation): You can continue for
10:53:44 8 another six minutes, but we should try to stick to the
10:53:49 9 timing -- to find the right time to break, but you started on
10:53:52 10 co-perpetration, so continue, please.

10:53:55 11 MS TAYLOR: Thank you, Mr President, your Honours. I will
10:53:58 12 turn to the notion of co-perpetration as set out in
10:54:02 13 Article 25(3)(a) of the Statute.

10:54:04 14 [10:54 a.m.]

10:54:07 15 The Defence respectfully submits that, in accordance with the
10:54:10 16 clear terms of the Statute, in order to attribute
10:54:14 17 responsibility as a co-perpetrator to Thomas Lubanga Dyilo, it
10:54:18 18 is necessary for the Prosecution to establish that
10:54:22 19 Thomas Lubanga Dyilo possessed the intention to commit the
10:54:25 20 specific offence which is set out in the charging document,
10:54:29 21 and that his conduct resulted in the commission of the
10:54:33 22 offence, in the sense that, without his conduct, the offence
10:54:36 23 could not have been committed.

10:54:37 24 [10:54 a.m.]

10:54:40 25 The Prosecution sets out the mens rea and the actus reus for

10:54:50 1 the offence in its charging document, and further elaborated
10:54:53 2 on them during the hearing of 14 November 2006.
10:54:56 3 [10:54 a.m.]
10:54:59 4 In terms of the components of liability. At paragraph 21 of
10:55:05 5 the charging document the Prosecution asserts that
10:55:09 6 Thomas Lubanga Dyilo coordinated the efforts of the other
10:55:13 7 joint perpetrators and controlled the execution of the common
10:55:17 8 plan.
10:55:18 9 [10:55 a.m.]
10:55:20 10 In this regard, the Defence observes that the Prosecution
10:55:24 11 appears to be employing the notion of joint control of the
10:55:28 12 crime, which is also derived from the theories of Claus Roxin
10:55:35 13 and was referred to in the Stakic trial judgment.
10:55:39 14 The Defence observes, firstly, that the Appeals Chamber
10:55:43 15 subsequently held that the notion of co-perpetration, as set
10:55:46 16 out in the Stakic judgment, was not supported by customary
10:55:51 17 international law.
10:55:51 18 [10:55 a.m.]
10:55:53 19 As such, the Defence respectfully submits there is no basis
10:55:58 20 for expanding the notion of co-perpetration beyond the clear
10:56:03 21 terms of the Statute.
10:56:04 22 [10:56 a.m.]
10:56:06 23 Secondly, the Defence submits the definition of
10:56:13 24 co-perpetration employed by the Prosecution is far broader and
10:56:18 25 goes beyond the concept which was used in the Stakic trial

10:56:23 1 judgment.

10:56:24 2 [10:56 a.m.]

10:56:27 3 The notion of joint control, as described in the Stakic trial

10:56:33 4 judgment, was employed in the sense that the acts of each

10:56:38 5 co-perpetrator "depend on the co-perpetration of others. The

10:56:43 6 reverse side of this is, inevitably, that by refusing to

10:56:48 7 participate, each person individually can frustrate the

10:56:52 8 action."

10:56:54 9 [10:56 a.m.]

10:56:54 10 The Stakic trial judgment also emphasises that co-perpetration

10:57:02 11 should be based upon the same degree of control over the

10:57:05 12 execution of common acts and, as such, each co-perpetrator is

10:57:13 13 equally liable.

10:57:14 14 [10:57 a.m.]

10:57:16 15 Accordingly, the actions of each co-perpetrator are the

10:57:25 16 sine qua non of the crime. Thus, in order to be characterised

10:57:31 17 as a co-perpetrator, the persons must have made an essential

10:57:35 18 contribution to the commission of the offence. It is not

10:57:37 19 enough that they significantly or substantially contributed to

10:57:41 20 its commission.

10:57:42 21 [10:57 a.m.]

10:57:46 22 If this is the case, Mr President, your Honours, why is it

10:57:49 23 that the Prosecution has failed to identify each

10:57:54 24 co-perpetrator in the charging document? Surely, if their

10:57:59 25 actions were an essential component of the commission of the

10:58:03 1 crime, it would be possible to identify them. Without such
10:58:09 2 information, the Defence is not able to properly identify the
10:58:14 3 links in the chain of causation, nor is it able to examine how
10:58:20 4 Thomas Lubanga Dyilo's alleged contribution fits into the
10:58:25 5 overall scheme of the commission of the offence.

10:58:28 6 [10:58 a.m.]

10:58:33 7 The degree of control over the execution of the crime would
10:58:36 8 also be diluted if there are so many co-perpetrators that it
10:58:42 9 is not possible to identify them, which raises the question as
10:58:45 10 to whether the Prosecution is charging co-perpetration or
10:58:49 11 perpetration by association.

10:58:50 12 [10:58 a.m.]

10:58:55 13 Your Honours, would that be a good moment to -- to break?

10:58:59 14 PRESIDING JUDGE JORDA (interpretation): Well, even if
10:59:04 15 there's one minute left, well, I think it would be the right
10:59:07 16 time, and we will have a 30-minute break.

10:59:13 17 THE USHER: All rise.

10:59:13 18 [10:59 a.m.]

10:59:18 19 [Short adjournment]

11:37:44 20 THE USHER: All rise.

11:38:07 21 PRESIDING JUDGE JORDA (interpretation): The hearing is
11:38:07 22 resumed. Please be seated and please make Mr Thomas Lubanga
11:38:11 23 Dyilo enter the room.

11:38:12 24 [11:38 a.m.]

11:38:13 25 [Mr Thomas Lubanga Dyilo entered the courtroom]

11:38:21 1 [11:38 a.m.]

11:38:27 2 PRESIDING JUDGE JORDA (interpretation): Ms Taylor, you have
11:38:32 3 the floor.

11:38:32 4 MME TAYLOR: Mr President, your Honours.

11:38:39 5 PRESIDING JUDGE JORDA (interpretation): I would like to ask
11:38:40 6 you to ask -- I would like to ask you to speak even slower.
11:38:45 7 Moreover, we have a problem with the Court reporters. One has
11:38:51 8 a medical problem, and there is a replacement for her,
11:38:54 9 however, she isn't as used to working for the Court as the
11:38:58 10 other one, so please be kind to her in the
11:39:05 11 speed -- speed-wise. Thank you.

11:39:06 12 MME TAYLOR: Certainly, Mr President.

11:39:06 13 [11:39 a.m.]

11:39:09 14 As I observed in the context of indirect perpetration, the
11:39:15 15 emphasis on Article 25(3)(a) on committing a crime jointly
11:39:21 16 with another, as opposed to a group of persons, clearly
11:39:26 17 indicates the intention that there should be a very direct
11:39:30 18 link between the perpetrators. However, the Defence
11:39:37 19 respectfully submits that there is nothing in the charging
11:39:40 20 document which suggests that the conduct listed in
11:39:46 21 paragraph 22 of the charging document were necessary
11:39:52 22 components in the specific instances of the recruitment of
11:39:55 23 child soldiers and their use in hostilities which are set out
11:39:58 24 in the charging document.

11:39:59 25 [11:39 a.m.]

11:40:02 1 The Defence further observes that the description of liability
11:40:08 2 as set out in the Stakic judgment, refers to the
11:40:12 3 co-perpetrators exercising joint control over the execution of
11:40:16 4 the acts which constitute the crime, and not control over
11:40:24 5 persons or an organisation.

11:40:25 6 [11:40 a.m.]

11:40:27 7 In this connection, the acts attributed to Thomas Lubanga
11:40:33 8 Dyilo at paragraph 22 of the charging document, seem to be
11:40:37 9 geared towards creating an alleged criminal organisation
11:40:40 10 per se, rather than constituting direct contributions to the
11:40:45 11 enlistment and conscription of child soldiers.

11:40:50 12 [11:40 a.m.]

11:40:53 13 For example, the Prosecution allege that, as the President of
11:40:59 14 the UPC and Commander-in-Chief of the FPLC, Thomas Lubanga
11:41:06 15 Dyilo played an overall coordinating role by providing the
11:41:09 16 organisational, infrastructural and logistical framework. He
11:41:15 17 appointed the higher ranks in the FPLC, he guaranteed the
11:41:19 18 continuity of the UPC and FLPC by securing their financial
11:41:24 19 means and negotiated the provision of weapons and other
11:41:30 20 military equipment.

11:41:31 21 Similarly, during the confirmation hearing on 14 November
11:41:41 22 2006, the Prosecution asserted that in cases of crimes
11:41:45 23 committed through organised structures of power, the person
11:41:50 24 who controls the organisation should be considered as a
11:41:54 25 co-perpetrator as a result of his functional control of the

11:41:59 1 crime.

11:41:59 2 The Prosecution therefore seems to be, firstly, alleging that
11:42:09 3 members of an organisation committed crimes; secondly,
11:42:14 4 attributing those alleged crimes to the organisation; and,
11:42:18 5 finally, attributing the acts of an organisation to a n
11:42:23 6 individual as a result of their position within the
11:42:28 7 organisation.

11:42:28 8 [11:42 a.m.]

11:42:31 9 In effect, this broad definition of co-perpetration is
11:42:37 10 strikingly similar to the offence of membership of a criminal
11:42:41 11 organisation, except in the view of the Defence it goes
11:42:48 12 further in the sense that the person isn't charged with the
11:42:52 13 offence of being a member; he is charged as a result of being
11:42:55 14 a member with all offences which can be attributed to the
11:42:59 15 organisation.

11:43:01 16 [11:43 a.m.]

11:43:01 17 In response to this theory of liability, the Defence refers to
11:43:08 18 the statement issued during the Nuremberg proceedings that
11:43:13 19 crimes against international law are committed by men, not by
11:43:16 20 abstract legal entities. The alleged recruitment of child
11:43:24 21 soldiers in their use in hostilities can only have been
11:43:29 22 committed by specific persons and not by an abstract criminal
11:43:34 23 enterprise.

11:43:34 24 [11:43 a.m.]

11:43:36 25 The raison d'etre of individual responsibility is to eliminate

11:43:43 1 collective guilt. It is for that reason that notions of group
11:43:49 2 or organisational criminality have always proved to be
11:43:53 3 controversial. For example, during the Nuremberg trials the
11:43:58 4 notion of conspiracy was extremely contentious and, due to the
11:44:02 5 objections of the French Judge de Vabres, was not applied in
11:44:09 6 the resulting judgment.

11:44:10 7 [11:44 a.m.]

11:44:10 8 Similarly, although the notion of criminal organisations was
11:44:14 9 applied under Control Council Law 10, Professor Bassiouni has
11:44:21 10 argued that because these Tribunals were constituted by
11:44:24 11 occupying powers, the law regarding crime of membership in a
11:44:29 12 criminal organisation has no subsequent validity under
11:44:34 13 international law.

11:44:34 14 [11:44 a.m.]

11:44:35 15 In addition, in its commentary on Article 75, paragraph 4(b)
11:44:46 16 of the first additional protocol to the Geneva conventions,
11:44:51 17 the International Committee for the Red Cross has observed
11:44:55 18 that since World War II, international public opinion has
11:45:00 19 condemned convictions of persons on account of their
11:45:04 20 membership in a group or organisation, and further cited the
11:45:11 21 now universally accepted principle that no-one may be punished
11:45:19 22 for an act he has not personally committed.

11:45:21 23 [11:45 a.m.]

11:45:22 24 This requirement is also to be found in the constitution of
11:45:25 25 the DRC, which provides in Article 17, paragraph 7, that

11:45:32 1 criminal responsibility is individual; no-one can be
11:45:38 2 prosecuted, arrested, detained or condemned for an act
11:45:43 3 committed by someone else.
11:45:44 4 [11:45 a.m.]
11:45:49 5 The notion of individual responsibility is enshrined in the
11:45:54 6 Rome Statute in Article 25, which also provides that the Court
11:46:01 7 shall only exercise jurisdiction over natural persons, not
11:46:05 8 entities or criminal organisations.
11:46:07 9 [11:46 a.m.]
11:46:12 10 The Defence submits in this regard that, if the concept of
11:46:17 11 criminal organisations do not fall within the jurisdiction of
11:46:21 12 the Court, it also follows the concept of, for instance,
11:46:27 13 aiding and abetting or being the leader of a criminal
11:46:30 14 organisation is also excluded from the jurisdiction of the
11:46:34 15 Court.
11:46:34 16 [11:46 a.m.]
11:46:36 17 In this connection, the ICTY Appeals Chamber has emphasised
11:46:44 18 that mere membership of a criminal organisation would not
11:46:50 19 render the accused responsible for crimes committed by that
11:46:55 20 organisation.
11:46:55 21 [11:46 a.m.]
11:46:56 22 Similarly, the Appeals Chamber has also observed that it would
11:47:03 23 be inaccurate to speak of aiding and abetting a joint criminal
11:47:08 24 enterprise. The Prosecution cannot rely on the existence of a
11:47:13 25 criminal enterprise to avoid having to establish that the

11:47:17 1 person aided and abetted the actual perpetrators.

11:47:23 2 [11:47 a.m.]

11:47:25 3 The Defence therefore submits that the Prosecution cannot cite

11:47:30 4 the alleged existence of organised structures of power within

11:47:35 5 the UPC to avoid having to prove that Thomas Lubanga Dyilo

11:47:41 6 committed specific acts which directly caused the children in

11:47:46 7 question to be conscripted or enlisted and actively used in

11:47:50 8 hostilities.

11:47:50 9 [11:47 a.m.]

11:47:55 10 The Defence is also concerned that, in repeatedly referring to

11:48:01 11 Thomas Lubanga Dyilo's position within the UPC, the

11:48:05 12 Prosecution is attempting to conflate command responsibility

11:48:11 13 with individual responsibility. By alleging that Thomas

11:48:15 14 Lubanga Dyilo's contribution to the execution of the offence

11:48:20 15 was his position and the authority exercised, the Prosecution

11:48:25 16 is, in effect, creating a form of strict liability for

11:48:28 17 commanders, such that commanders will be held liable for acts

11:48:33 18 committed by their subordinates, not just as a commander, but

11:48:38 19 as a perpetrator.

11:48:38 20 [11:48 a.m.]

11:48:39 21 In terms of the elements of mens rea, the Defence submits that

11:48:50 22 the requirements to establish co-perpetration have been

11:48:53 23 further blurred by the manner in which the Prosecution has

11:48:57 24 described "intent". During the hearing of 14 November 2006,

11:49:03 25 the Prosecution asserted that the goal of the joint

11:49:09 1 perpetrators was to raise an army of which children under
11:49:15 2 15 years of age were an integral component.
11:49:17 3 [11:49 a.m.]
11:49:21 4 In this regard, the defence commits that there is a clear
11:49:26 5 distinction between, on the one hand possessing the intent to
11:49:30 6 recruit or enlist child soldiers and intending to actively use
11:49:35 7 them in hostilities, and, on the other hand, the intent to
11:49:41 8 achieve a lawful aim -- the establishment of an army -- which
11:49:46 9 may have the incidental consequence of enlisting and
11:49:51 10 conscripting child soldiers and using them actively in
11:49:54 11 hostilities.
11:49:55 12 [11:49 a.m.]
11:49:55 13 In the first case, one can say that the person possessed the
11:50:02 14 necessary intent to be considered as a perpetrator. In the
11:50:07 15 second case, at the most, one can only say that the person
11:50:13 16 knew or could have known that their conduct which was intended
11:50:18 17 to result in a legal action could have incidentally
11:50:24 18 contributed to and illegal act.
11:50:26 19 [11:50 a.m.]
11:50:26 20 Accordingly, the Defence submits that the person could only be
11:50:29 21 considered to be an accomplice, or, in the words of Article
11:50:34 22 25(3)(c), someone who aids, abets or otherwise assists in the
11:50:40 23 commission of the crime under the Statute.
11:50:42 24 [11:50 a.m.]
11:50:47 25 The acts in question, as described in the charging document

11:50:52 1 and during the hearing on 14 November 2006, appear to be
11:50:58 2 geared towards the establishment and continuity of a political
11:51:02 3 party, which is not, in itself, a crime under the Statute. At
11:51:10 4 best, the OTP seemed to infer that the recruitment of child
11:51:15 5 soldiers was an incidental consequence of the aims of the UPC
11:51:21 6 and not a necessary consequence, which Thomas Lubanga Dyilo
11:51:25 7 directly intended to resulted from his actions.

11:51:28 8 [11:51 a.m.]

11:51:28 9 There is also nothing to suggest that Thomas Lubanga Dyilo
11:51:35 10 knowingly committed the acts in question with the intention
11:51:39 11 that their consequence would be the recruitment of child
11:51:41 12 soldiers and their active use in hostilities.

11:51:45 13 [11:51 a.m.]

11:51:48 14 For example, at the hearing of 14 November 2006, the
11:51:54 15 Prosecution refer to the fact that Thomas Lubanga Dyilo was
11:51:58 16 informed of all military and political activities and that
11:52:03 17 nothing could happen without him knowing and giving an
11:52:06 18 opinion.

11:52:06 19 [11:52 a.m.]

11:52:10 20 Mr President, your Honours, the Defence submits that mere
11:52:12 21 knowledge does not suffice to prove intent, and the fact that
11:52:18 22 someone expresses an opinion on something does not, in itself,
11:52:22 23 create a causal link between that manner -- between that
11:52:27 24 opinion and the manner in which the event occurs.

11:52:29 25 [11:52 a.m.]

11:52:33 1 Similarly, their reference to coordinating and hiring and
11:52:38 2 firing persons is not directly linked to the charged offence.
11:52:44 3 For example, Prosecution have not pleaded, but he refused that
11:52:52 4 he fired persons who refused to recruit child soldiers, or
11:52:56 5 that he hired persons on the basis of their track record in
11:53:00 6 recruiting child soldiers.

11:53:04 7 [11:53 a.m.]

11:53:05 8 Similarly, the question of receiving funds from businessmen is
11:53:09 9 a question of physical policy, ensuring that the UPC had an
11:53:14 10 adequate budget to achieve its political goals and is not
11:53:17 11 linked to the charged offence.

11:53:20 12 [11:53 a.m.]

11:53:23 13 In terms of the Prosecution's allegation that Thomas Lubanga
11:53:27 14 Dyilo organised the negotiation of the procurement of arms,
11:53:32 15 again, the Defence submits this allegations has no direct link
11:53:38 16 to the charged offence. One cannot infer from the allegation
11:53:44 17 that his intention of negotiating the procurement of weapons
11:53:47 18 was to ensure the recruitment of child soldiers.

11:53:51 19 [11:53 a.m.]

11:53:52 20 Finally, the Prosecution refer to the fact that Thomas Lubanga
11:53:57 21 Dyilo allegedly maintained links with persons who were
11:54:02 22 involved in the child recruitment campaign. For example, the
11:54:09 23 Prosecution referred to meetings with Kisembo and Ntganda in
11:54:16 24 his office. The Prosecution does not, however, plead that the
11:54:18 25 purpose of these meetings was to discuss the recruitment of

11:54:22 1 child soldiers, nor does the Prosecution plead that the
11:54:26 2 recruitment of child soldiers was ever discussed between these
11:54:29 3 persons during the meetings in question.

11:54:33 4 [11:54 a.m.]

11:54:35 5 In this connection, the Defence respectfully submits that the
11:54:42 6 mere fact that there was an opportunity to do something does
11:54:45 7 not mean that you can then make the inference that the
11:54:49 8 opportunity was actually utilised.

11:54:51 9 [11:54 a.m.]

11:54:53 10 Thus, for example, in the Krstic case, the ICTY Appeals
11:55:02 11 Chamber reversed the trial Chamber's conclusion that one could
11:55:08 12 infer intent on the basis of the fact that General Krstic had
11:55:14 13 met with General Mladic and if General Mladic knew about the
11:55:18 14 killings, it would be natural for Krstic to know as well.

11:55:18 15 [11:55 a.m.]

11:55:23 16 The Appeals Chamber's ultimate conclusion on this point was
11:55:27 17 that General Krstic's contacts with those who appeared to be
11:55:31 18 the main participants in the executions established, at most,
11:55:35 19 that Krstic was aware that those executions were taking place.

11:55:39 20 Radislav Krstic's knowledge of those executions is
11:55:46 21 insufficient to support an inference that he shared the
11:55:51 22 intent.

11:55:51 23 [11:55 a.m.]

11:55:52 24 The Defence also reiterates its earlier comment that the
11:55:55 25 Prosecution's mode of liability appears to be closer to

11:56:03 1 perpetration by association, rather than co-perpetration, and
11:56:07 2 in this connection refers to the following statement of the
11:56:10 3 ICTY Trial Chamber in the Kordic and Cerkez case.

11:56:17 4 [11:56 a.m.]

11:56:20 5 The expansion of mens rea is an easy but dangerous approach.
11:56:28 6 The trial Chamber must keep in mind that the jurisdiction of
11:56:31 7 this international tribunal extends only to natural persons
11:56:34 8 and only the crimes of those individuals may be prosecuted.
11:56:38 9 Stretching notions of individual mens rea too thin may lead to
11:56:43 10 the imposition of criminal liability on individuals for what
11:56:46 11 is actually guilt by association, a result that is at odds
11:56:53 12 with the driving principles behind the creation of the
11:56:59 13 International Tribunal.

11:57:01 14 [11:57 a.m.]

11:57:01 15 Indeed, the Defence respectfully submits that the only act
11:57:06 16 cited in either the charging document or during the
11:57:08 17 confirmation hearing which have any relationship to the
11:57:13 18 recruitment of child soldiers, are the following allegations:
11:57:17 19 firstly, that Thomas Lubanga Dyilo personally recruited child
11:57:22 20 soldiers; secondly, that Thomas Lubanga Dyilo visited camps in
11:57:28 21 which he encouraged young children to fight; thirdly, that
11:57:32 22 Thomas Lubanga Dyilo announced that each Hema family should
11:57:38 23 contribute to the war effort by giving a cow, money or a
11:57:44 24 child; and, finally, that he used children as personal guards
11:57:48 25 and bodyguards in Bunia.

11:57:50 1 [11:57 a.m.]

11:57:52 2 Regarding the first allegation, that Thomas Lubanga Dyilo
11:57:57 3 recruited personally child soldiers, the Defence notes that in
11:58:02 4 accordance with the charging practices of the ad hoc
11:58:06 5 Tribunals, if the Prosecution wishes to rely on such conduct,
11:58:10 6 then they should clearly set out the fact that they consider
11:58:13 7 him to be a physical perpetrator in the charging document. In
11:58:17 8 order to meet the requirements of specificity, they should
11:58:24 9 also include details which explain this allegation such as the
11:58:30 10 identity of the victim, the time and place of the events and
11:58:34 11 the means by which the offence was committed.

11:58:36 12 [11:58 a.m.]

11:58:38 13 In this connection, the Defence observes that the hearing of
11:58:44 14 14 November 2006 was the first time that the Prosecution had
11:58:50 15 intimated that Thomas Lubanga Dyilo was a physical
11:58:53 16 perpetrator. The document cited by the Prosecution --
11:59:00 17 DRC-OTP-0152-0274, at 277 and 278 -- in support of this
11:59:11 18 allegation, does not specify the date of the events and the
11:59:18 19 names of the alleged victims have been redacted. The incident
11:59:21 20 is also not referred to in the charging document.

11:59:24 21 [11:59 a.m.]

11:59:26 22 In this regard, the Defence submits that the Prosecution
11:59:30 23 cannot fail to plead material facts in order to give them
11:59:35 24 breathing space to collect further details or evidence. The
11:59:39 25 Defence is also of the view that if the Prosecution formed the

11:59:43 1 opinion that it did not have enough evidence on 28 August 2006
11:59:48 2 to support the allegation that he may be a physical
11:59:56 3 perpetrator, then what weight does this specific allegation
12:00:01 4 have now in relation to other modes of liability?

12:00:01 5 [12:00 p.m.]

12:00:05 6 Regarding the allegation that Thomas Lubanga Dyilo went to
12:00:10 7 training camps to encourage children to fight, the Defence
12:00:16 8 submits that this allegation, even if proved by the
12:00:20 9 Prosecution, would not meet the standards of co-perpetration.
12:00:28 10 As stated previously, in order to be considered a
12:00:32 11 co-perpetrator, there must be a direct causal link between his
12:00:36 12 conduct and the specific offence charged and his conduct must
12:00:43 13 play an essential component of this offence.

12:00:45 14 [12:00 p.m.]

12:00:47 15 To apply it to the allegation at hand, the Prosecution would
12:00:51 16 have to assert and establish that if Thomas Lubanga Dyilo
12:00:58 17 hadn't encouraged the children to fight, they would have
12:01:01 18 refused to participate in hostilities.

12:01:01 19 [12:01 p.m.]

12:01:09 20 However, Mr President, your Honours, there is no evidence that
12:01:13 21 Thomas Lubanga Dyilo's alleged encouragement played such a
12:01:16 22 direct and instrumental role over the allegation that children
12:01:20 23 actively participated in hostilities.

12:01:22 24 [12:01 p.m.]

12:01:25 25 Regarding the allegation that Thomas Lubanga Dyilo announced

12:01:31 1 that each Hema family should contribute to the war effort by
12:01:36 2 giving a cow, money or a child, as submitted by Me Flamme
12:01:43 3 yesterday, this allegation is purely an unsubstantiated rumour
12:01:48 4 and, as such, has no evidential value.

12:01:50 5 [12:01 p.m.]

12:01:52 6 The Defence further notes that there is no direct link between
12:01:57 7 the alleged statement of Thomas Lubanga Dyilo and the acts of
12:02:01 8 enlistment and conscription set out in the charging document.

12:02:05 9 For example, regarding enlistment, at paragraph 31 of the
12:02:16 10 charging document, the Prosecution assert that the
12:02:20 11 "willingness of the children to join the FPLC was determined
12:02:24 12 by, inter alia, the desire for revenge of orphans whose
12:02:30 13 families were killed or allegedly killed by the militias
12:02:35 14 opposing the FPLC, the wish to acquire social status and/or
12:02:42 15 coercive circumstances in which the children found themselves,
12:02:45 16 such as basic, urgent needs for protection and food."

12:02:52 17 Thus, the Prosecution has not pleaded that families sent their
12:02:59 18 children for enlistment because Thomas Lubanga Dyilo suggested
12:03:02 19 that it would be for the good of the Hema community.

12:03:06 20 [12:03 p.m.]

12:03:07 21 Similarly, in terms of the acts of conscription described at
12:03:12 22 paragraph 32 of the charging document, the Prosecution assert
12:03:19 23 that the FPLC forces systematically abducted children. This
12:03:25 24 alleged conduct thus occurred completely independently of the
12:03:30 25 statements which the Prosecution have attributed to Thomas

12:03:35 1 Lubanga Dyilo.

12:03:35 2 [12:03 p.m.]

12:03:40 3 Finally, regarding the allegation that Thomas Lubanga Dyilo
12:03:46 4 used children as bodyguards -- in accordance with the law
12:03:52 5 regarding child soldiers, elaborated previously, the Defence
12:03:57 6 submits that using a child as a bodyguard at a domestic
12:04:02 7 residence would not fall within the offence of enlisting or
12:04:05 8 conscripting child soldiers into an armed force or group, or
12:04:10 9 using them actively in hostilities. It is therefore hard to
12:04:13 10 see how the use of children as bodyguards, as alleged, was a
12:04:17 11 direct and essential component of the incidents of the
12:04:24 12 enlistment and conscription of child soldiers and their use in
12:04:29 13 active hostilities that are set out in the charging documents.

12:04:32 14 [12:04 p.m.]

12:04:33 15 The Defence, therefore, respectfully submits that even if the
12:04:41 16 allegations set out in the charging document were not disputed
12:04:44 17 by the Defence -- which they are -- the allegations would not
12:04:49 18 support the conclusion that Thomas Lubanga Dyilo could, if the
12:04:54 19 case went to trial, be convicted as a co-perpetrator for the
12:04:59 20 specific acts pertaining to the enlistment and conscription of
12:05:03 21 children and their active use in hostilities, which are set
12:05:07 22 out in the charging document.

12:05:09 23 [12:05 p.m.]

12:05:16 24 I will now turn to my submissions regarding the form of the
12:05:19 25 charging document. If I could kindly ask the court officer --

12:05:25 1 court usher to display the charging document.

12:05:56 2 PRESIDING JUDGE JORDA (interpretation): Please, we need to

12:05:58 3 take care as regards the public version of the document; is

12:06:01 4 that not so, Mr Withopf? Perhaps that's what you wanted to

12:06:07 5 point out? Yes, this is also what my colleague was saying to

12:06:11 6 me. Court officer, please take care.

12:06:15 7 COURT OFFICER (interpretation): Indeed, we are going to

12:06:20 8 display the redacted version of the charging document.

12:06:25 9 MME TAYLOR: Thank you, Mr President, your Honours.

12:06:27 10 In terms of preliminary comments regarding the form of the

12:06:30 11 charging document, as previously stated, Thomas Lubanga Dyilo

12:06:37 12 has a right to be promptly informed of the nature and cause of

12:06:42 13 the charge. The nature of the charge refers to the precise

12:06:48 14 legal qualification of the offence, and the cause of the

12:06:55 15 charge refers to the facts underlying it.

12:06:56 16 [12:06 p.m.]

12:06:57 17 In terms of the cause of the charge, the Prosecution must

12:07:00 18 plead all material facts which, to the extent possible, should

12:07:07 19 include the identity of the victims, the place and approximate

12:07:12 20 date of the acts and the means by which the offences were

12:07:17 21 committed.

12:07:17 22 [12:07 p.m.]

12:07:21 23 If I could refer to paragraph 5 of the charging document.

12:07:36 24 This paragraph refers to the fact that Thomas Lubanga Dyilo

12:07:40 25 allegedly founded the FPLC. The Defence respectfully submits

12:07:45 1 that the term "founded" is impermissibly vague.

12:07:59 2 [12:07 p.m.]

12:08:04 3 As I mentioned, the Defence submits that the term "founded" is
12:08:09 4 impermissibly vague. It does not allow the Defence to
12:08:13 5 ascertain through which acts and conduct he's alleged to have
12:08:15 6 "founded" the FPLC.

12:08:16 7 The Defence further submits that the term "others" is
12:08:20 8 impermissibly vague. The Prosecution have alleged
12:08:24 9 co-perpetration. The Defence therefore submits that it is
12:08:28 10 necessary for the Prosecution to specify who these "others"
12:08:32 11 are, particularly in relation to a key element of the charge,
12:08:36 12 the founding of the FPLC and its links to the UPC.

12:08:39 13 [12:08 p.m.]

12:08:41 14 If I could turn now to paragraph 7 of the charging document
12:08:44 15 which refers to the nature of the armed conflict.

12:08:50 16 The offence of the recruitment of child soldiers into an armed
12:08:54 17 force as set out in Article 8(2)(e)(vii) of the Statute
12:09:02 18 applies to "armed conflicts that take place in the territory
12:09:05 19 of a State, when there is a protracted armed conflict between
12:09:10 20 governmental authorities and organised armed groups, or
12:09:14 21 between such groups."

12:09:17 22 The Defence therefore submits that the Prosecution should
12:09:20 23 plead the identity of the armed groups as a material fact.

12:09:26 24 [12:09 p.m.]

12:09:27 25 Moreover, in light of the fact that the Prosecution have not

12:09:34 1 charged an international armed conflict, any acts or conduct
12:09:38 2 which is attributable to a national armed force, such as the
12:09:44 3 UPDF, should be excluded.

12:09:49 4 Alternatively, the Defence submits that the Prosecution should
12:09:52 5 plead the two separate conflicts clearly. In this sense, for
12:09:59 6 any acts attributable to the UPDF, the Prosecution should
12:10:04 7 plead the existence of an international armed conflict. And,
12:10:08 8 furthermore, that the acts and conduct pertaining to this
12:10:12 9 conflict fall under Article 8(2)(b)(xxvi), which governs the
12:10:24 10 conscription or enlistment of children under the age of 15
12:10:29 11 into national armed forces.

12:10:31 12 [12:10 p.m.]

12:10:38 13 Regarding the background section of the charging document.

12:10:45 14 The Defence respectfully submits that the Prosecution should
12:10:49 15 plead all material facts, including the fact that
12:10:53 16 Thomas Lubanga Dyilo was in detention during certain periods
12:10:57 17 of the charging document and then plead the acts of conduct
12:11:02 18 which could lead to the conclusion that he committed or
12:11:08 19 undertook certain actions whilst in detention. Otherwise, the
12:11:12 20 Defence submits that the charges are misleading.

12:11:15 21 [12:11 p.m.]

12:11:16 22 For example, the charges reiterate that certain actions
12:11:21 23 emanated from Bunia during the time period of the charging
12:11:26 24 document, but they don't reconcile this with the fact that
12:11:30 25 Thomas Lubanga Dyilo was not in Bunia during the entire

12:11:32 1 period.

12:11:36 2 [12:11 p.m.]

12:11:36 3 If I could turn to paragraph 11 of the charging documents.

12:11:45 4 The Defence submits that the Prosecution appears to be

12:11:47 5 creating the impression that the persons who are the

12:11:50 6 subordinates of Thomas Lubanga Dyilo were, in effect,

12:11:56 7 "fungibles" or interchangeable and could be replaced at will.

12:12:00 8 They have also asserted that this is a key component in their

12:12:03 9 case regarding the nature of Thomas Lubanga Dyilo's

12:12:07 10 responsibility.

12:12:08 11 However, without any specific dates, persons, or incidents,

12:12:15 12 the defence does not have sufficient information to defend

12:12:19 13 itself against the allegation that he suspended, dismissed and

12:12:25 14 expelled such persons.

12:12:26 15 [12:12 p.m.]

12:12:28 16 The Defence therefore submits that either this paragraph

12:12:31 17 should be deleted, for being overly vague, or the Prosecution

12:12:35 18 should be requested to provide further particulars.

12:12:38 19 [12:12 p.m.]

12:12:44 20 If I could turn to paragraph 12 of the charging document.

12:12:55 21 The Defence respectfully submits that these allegations

12:13:00 22 regarding ethnic discrimination are not relevant to the

12:13:03 23 charged offence and, as such, are highly -- in addition, are

12:13:08 24 highly prejudicial.

12:13:09 25 [12:13 p.m.]

12:13:10 1 Thomas Lubanga Dyilo has not been charged with ethnic
12:13:17 2 cleansing or persecution. The charging document should thus
12:13:20 3 not include such allegations unless the Prosecution is
12:13:23 4 prepared to link them to an offence under the Statute and to
12:13:26 5 properly charge the offence in question.

12:13:28 6 [12:13 p.m.]

12:13:32 7 Similarly, if I could turn to paragraph 13 of the charging
12:13:37 8 document.

12:13:40 9 The Defence notes that the Prosecution is not charging
12:13:43 10 Thomas Lubanga Dyilo for attacks on protected persons. These
12:13:49 11 allegations should therefore be deleted on the grounds that
12:13:52 12 they are prejudicial and irrelevant.

12:13:54 13 [12:13 p.m.]

12:13:57 14 Regarding paragraph 14 of the charging document.

12:13:59 15 The Defence submits that incorporation is not the same as
12:14:06 16 enlistment or conscription. The Prosecution should therefore
12:14:12 17 be ordered to clarify this vague term, which has ambiguous
12:14:17 18 legal connotation and clearly specify whether the FPLC
12:14:23 19 enlisted or conscripted these people after July 2002, or
12:14:26 20 delete the allegation.

12:14:28 21 [12:14 p.m.]

12:14:32 22 If I could turn to paragraph 23 of the charging document.

12:14:44 23 The Defence respectfully submits that the last sentence
12:14:47 24 referring to "bodyguards" should be deleted as it is
12:14:51 25 prejudicial and irrelevant to the charged offence of

12:14:53 1 conscription and enlistment of child soldiers.

12:14:56 2 [12:14 p.m.]

12:14:59 3 If I could refer to paragraph 25. The Defence submits that
12:15:07 4 the word "soon" is too vague. It does not provide the Defence
12:15:13 5 with a clear reference point for the conduct referred to and
12:15:16 6 it does not allow the Defence to ascertain whether the conduct
12:15:21 7 falls within the jurisdiction of the Court. If I could refer
12:15:26 8 to paragraph 26. The Defence respectfully submits that, under
12:15:34 9 Article 11 of the Rome Statute, the jurisdiction of this court
12:15:40 10 was limited to crimes committed after the Statute entered into
12:15:43 11 force.

12:15:43 12 [12:15 p.m.]

12:15:45 13 The Statute also articulates the temporal limitation in
12:15:51 14 Article 24, which provides that no-one shall be criminally
12:15:53 15 responsible under the Statute for conduct prior to the entry
12:15:57 16 into force of the Statute.

12:15:58 17 [12:15 p.m.]

12:16:02 18 The Defence therefore submits that any acts or omissions,
12:16:05 19 which took place prior to July 2002, should be deleted from
12:16:10 20 the charges.

12:16:15 21 [12:16 p.m.]

12:16:16 22 If I could refer to paragraph 27.

12:16:25 23 As stated previously, the Defence submit that the charges
12:16:29 24 should specify the identity of the joint-perpetrators,
12:16:34 25 otherwise the Defence cannot challenge the links between them.

12:16:39 1 In this connection, the Defence submits the reference to "a
12:16:44 2 variety of high-level and mid-level subordinate commanders" is
12:16:49 3 extraordinarily vague.

12:16:50 4 [12:16 p.m.]

12:16:52 5 If I could refer to paragraph 30.

12:17:01 6 The Defence respectfully submits that the Prosecution should
12:17:05 7 specify dates, because anything committed prior to July 2002
12:17:09 8 falls outside the jurisdiction of the Court.

12:17:18 9 If I could turn to paragraph 32. Again, the Defence submits
12:17:25 10 that the Prosecution should provide more specific information
12:17:29 11 on the dates of the alleged abductions. Otherwise, the
12:17:33 12 defence cannot verify whether they fell within the
12:17:36 13 jurisdiction of the Court.

12:17:37 14 [12:17 p.m.]

12:17:43 15 If I could turn to paragraph 37.

12:17:54 16 The Defence submits that in light of the fact that the
12:17:57 17 Prosecution are relying on such conduct to establish
12:18:01 18 Thomas Lubanga Dyilo's individual responsibility, the
12:18:05 19 Prosecutor should plead the dates and places of the alleged
12:18:09 20 visits. If I could turn to paragraph 40.

12:18:23 21 The Defence respectfully submits that the Prosecution should
12:18:26 22 expressly specify whether the children in question were under
12:18:29 23 the age of 15 years of age. In addition, if the Prosecution
12:18:36 24 is of the view that the tasks performed by these children
12:18:39 25 qualify them as child soldiers, then the Defence submits that

12:18:43 1 they should plead that allegation. If not, the Defence
12:18:47 2 submits that the allegation should be deleted as being
12:18:51 3 irrelevant.
12:18:51 4 [12:18 p.m.]
12:18:54 5 If I could turn to paragraph 41.
12:19:05 6 The Defence submits that the Prosecution should specify the
12:19:09 7 identity of the persons or at least some of the persons that
12:19:14 8 the victim in question met in order to verify whether they
12:19:19 9 were in fact members of the FPLC, and not opportunistic
12:19:24 10 persons outside the FPLC. The Defence also reiterates its
12:19:31 11 position that the Prosecution should plead the identity of all
12:19:34 12 alleged co-perpetrators -- without the identity of the persons
12:19:39 13 in question the cannot ascertain whether they shared the same
12:19:44 14 intent as Thomas Lubanga Dyilo, or whether their actions form
12:19:51 15 part of the same criminal transaction.
12:19:52 16 [12:19 p.m.]
12:19:55 17 If I could turn to paragraph 45.
12:20:03 18 The Defence submits that its objections regarding paragraph 41
12:20:07 19 apply equally to paragraph 45.
12:20:11 20 If I could turn to paragraph 49.
12:20:19 21 The Defence reiterates that in light of the fact that the
12:20:24 22 Prosecution are relying on such conduct to establish
12:20:27 23 Thomas Lubanga Dyilo 's individual responsibility, the
12:20:30 24 Prosecution should provide further details of the alleged
12:20:34 25 visits, such as the dates. Without such dates, the right of

12:20:40 1 the Defence to rely on alibi Defence is rendered meaningless.

12:20:45 2 [12:20 p.m.]

12:20:49 3 If I could turn to paragraph 58.

12:20:58 4 The Defence submit that its objections to paragraph 41 apply

12:21:03 5 equally to paragraph 58. They also apply equally to

12:21:09 6 paragraph 64.

12:21:10 7 [12:21 p.m.]

12:21:19 8 If I could turn to paragraph 69.

12:21:29 9 The Defence reiterates its objection regarding the lack of

12:21:32 10 dates and the impact this has on the ability of the Defence to

12:21:35 11 rely on an alibi.

12:21:37 12 [12:21 p.m.]

12:21:43 13 If I could turn to paragraph 77.

12:21:52 14 The Defence submits that the reference to the second half of

12:21:55 15 2002 is impermissibly vague. It does not allow the Defence to

12:22:01 16 verify whether the alleged abduction falls within the

12:22:05 17 jurisdiction of the Court, and it does not allow the Defence

12:22:08 18 to cross-reference the alleged abduction to the conduct

12:22:13 19 attributed to Thomas Lubanga Dyilo.

12:22:15 20 [12:22 p.m.]

12:22:19 21 The Defence further submits that its objections to paragraph

12:22:23 22 41, regarding the failure to specify the identity of the

12:22:27 23 abductors, applies equally to paragraph 77.

12:22:33 24 [12:22 p.m.]

12:22:34 25 If I could turn to paragraph 84.

12:22:36 1 The Defence submits that the reference to the UPDF implies
12:22:45 2 that the conflict in question was an international conflict.
12:22:48 3 As such, the Defence submits the alleged incidents fall
12:22:52 4 outside the scope of the charges.
12:22:53 5 [12:22 p.m.]
12:22:56 6 Mr President, your Honours, that concludes my submissions on
12:23:00 7 the form of the charging document. With the permission of the
12:23:06 8 Chamber, Mr Geoff Roberts would just like to provide some
12:23:09 9 brief observations on the status of outstanding disclosure
12:23:14 10 issues.
12:23:23 11 PRESIDING JUDGE JORDA (interpretation): Mr Roberts, you have
12:23:24 12 the floor.
12:23:25 13 MR ROBERTS: Thank you very much, Mr President. There are
12:23:28 14 just a few outstanding --
12:23:32 15 PRESIDING JUDGE JORDA (interpretation): Please also do
12:23:34 16 moderate your speech; your pace of speech.
12:23:40 17 MR ROBERTS: Certainly. There are just a few outstanding
12:23:43 18 disclosure issues that pre-date the decision of the Pre-Trial
12:23:47 19 Chamber last Friday, to file all requests on the record; so
12:23:51 20 consequently I would just like to speak of these.
12:23:56 21 Firstly, on 12 November 2006, the Defence requested from the
12:24:01 22 Prosecution an unedited original copy of a video with the ERN
12:24:08 23 <#DRC-OTP-0148-0302#>. The Prosecution replied, stating that
12:24:20 24 Channel 4 would be providing the materials in the near future
12:24:23 25 and that they would be disclosed immediately to the Defence.

12:24:26 1 This hasn't happened as yet.

12:24:27 2 [12:24 p.m.]

12:24:30 3 Secondly, there are two documents which were subject to

12:24:35 4 Article 54(3)(e) "redactions", that mention an operation by

12:24:43 5 Uruguayan forces in September 2003. Again, the Prosecution

12:24:48 6 has requested lifting of these redactions in an e-mail of

12:24:54 7 21 November, and we haven't received those materials as yet.

12:24:57 8 [12:24 p.m.]

12:25:00 9 And, thirdly, there are two NGO reports covered by Article

12:25:06 10 54(3)(e) "restrictions", that fell under the Pre-Trial

12:25:11 11 Chamber's decision of 2 November. Again, according to the

12:25:16 12 Prosecution in an e-mail response they would seek the lifting

12:25:20 13 of these restrictions on an expedited basis. This e-mail is

12:25:25 14 3 November, but, once again, we have not received these

12:25:28 15 materials.

12:25:28 16 [12:25 p.m.]

12:25:31 17 And, finally, in relation to the Prosecution, there is the --

12:25:36 18 there are the documents referred to in the Prosecution

12:25:38 19 information of 6 November. This relates to 33 documents that

12:25:46 20 were not disclosed to the Defence due to Article 54(3)(e)

12:25:52 21 "restrictions", but which did fall under Article 67(2) or

12:25:58 22 Rule 77.

12:25:59 23 [12:25 p.m.]

12:26:00 24 According to the information in that -- in that filing by the

12:26:05 25 Prosecution, they had contacted the majority of the providers,

12:26:07 1 but as yet had no answer.

12:26:09 2 [12:26 p.m.]

12:26:11 3 In the same information, there were seven documents which were
12:26:16 4 disclosed to the Defence with redactions, and the Prosecution
12:26:21 5 was ordered to contact the information providers to seek
12:26:25 6 lifting of these restrictions.

12:26:26 7 [12:26 p.m.]

12:26:27 8 In relation to all these documents, the Defence would request
12:26:32 9 information from the Prosecution about the status of these
12:26:35 10 requests, and also, as we have unfortunately not received
12:26:40 11 these documents in time to be able to use during the
12:26:42 12 confirmation hearing, would request that if we do receive them
12:26:47 13 before 6 December, that we be permitted to make reference to
12:26:51 14 them in our brief.

12:26:52 15 [12:26 p.m.]

12:26:57 16 Also, in relation to the Registry: there was a decision last
12:27:01 17 Friday of 17 November, which ordered the Registrar to send a
12:27:07 18 cooperation request to the United Nations to obtain notes of
12:27:11 19 interviews. Apparently this request should be treated
12:27:19 20 confidential and an answer be provided as soon as practicable
12:27:22 21 and no later than 23 November -- which was yesterday. So we
12:27:26 22 would request information from the Registrar about the status
12:27:29 23 of that request.

12:27:30 24 [12:27 p.m.]

12:27:33 25 These are -- this ends my submissions; it was very brief.

12:27:38 1 Thank you very much, your Honour.

12:27:45 2 PRESIDING JUDGE JORDA (interpretation): Mr Withopf, I have
12:27:52 3 noted a number of points -- notably the original version of
12:27:58 4 the video, et cetera -- there are a number of points which you
12:28:04 5 might want to respond to. Can you provide any guarantees or
12:28:08 6 further clarification to the Defence today or in the coming
12:28:14 7 hours on those points?

12:28:15 8 MR WITHOPF: I'm very happy, Mr President, your Honours, that
12:28:17 9 I can address these matters. What has been -- what the
12:28:20 10 Chamber has been informed by my learned friends from the
12:28:28 11 Defence is correct. The status has been correctly reflected
12:28:31 12 and the situation is as follows: As my learned colleague from
12:28:33 13 the Defence knows, the Office of the Prosecutor is in contact
12:28:37 14 with Channel 4 to receive the additional materials. The
12:28:41 15 Defence has been informed. As stated, once the Office of the
12:28:46 16 Prosecutor has received the additional materials, they will be
12:28:49 17 handed over immediately to the Defence.

12:28:50 18 [12:28 p.m.]

12:28:51 19 In respect to the various documents which are, at this stage,
12:28:56 20 still under Article 54(3)(e) "protection". The Defence has
12:29:01 21 been informed in detail as to when the respective requests
12:29:06 22 were sent to the various information providers. Obviously,
12:29:10 23 once the Office of the Prosecutor has received the answers of
12:29:13 24 the information providers, the materials will be disclosed to
12:29:18 25 the Defence, provided that the information providers grant the

12:29:23 1 lifting of the Article 54(3)(e) "restrictions".

12:29:29 2 [12:29 p.m.]

12:29:29 3 In respect of the two documents that have to do with the

12:29:33 4 Uruguayan battalion of MONUC in Bunia; the respective requests

12:29:42 5 were sent out just recently following the recent requests of

12:29:45 6 the Defence. Again, once the Prosecutor receives the

12:29:48 7 responses, we will inform the Defence accordingly. Thank you,

12:29:56 8 Mr President, your Honours.

12:30:04 9 PRESIDING JUDGE JORDA (interpretation): Mr Roberts --

12:30:11 10 Mr Flamme, I see -- I see that you have an answer, perhaps not

12:30:15 11 to all your questions. You may confer, if you wish.

12:30:51 12 Mr Roberts?

12:30:52 13 MR ROBERTS: I can agree with what Mr Withopf said. I would

12:30:57 14 just like a response to our request to be able to use these

12:31:00 15 materials in the brief, if we do receive them before

12:31:03 16 6 December.

12:31:20 17 PRESIDING JUDGE JORDA (interpretation): Mr Flamme?

12:31:22 18 ME FLAMME (interpretation): Just one more question before we

12:31:29 19 possibly suspend. The schedule for next week, is that -- does

12:31:34 20 that stand?

12:31:34 21 PRESIDING JUDGE JORDA (interpretation): No, that shan't be

12:31:36 22 adapted. Mr Roberts, we shall respond to that point, but the

12:31:43 23 question being whether you will remember that you have -- you

12:31:50 24 are entitled to submit a written document by 4 December for

12:31:55 25 the Prosecutor and 6 December by the Defence, and in fact the

12:31:58 1 question, if I've understood rightly, is to know whether you
12:32:01 2 may make use of these materials in that document. We shall
12:32:05 3 give a decision on this later.
12:32:06 4 [12:32 p.m.]
12:32:07 5 I would first like to know whether the Prosecutor has any
12:32:09 6 comments on that matter? No comments?
12:32:13 7 MR WITHOPF: Mr President, your Honours, we would not oppose
12:32:16 8 to the extent that the materials would be available prior to
12:32:20 9 4 November [sic], which is obviously the deadline for the
12:32:24 10 Prosecution to file its written observations.
12:32:31 11 [12:32 p.m.]
12:32:36 12 PRESIDING JUDGE JORDA (interpretation): Okay, yes, that's a
12:32:37 13 condition which seems to be clear. Okay. Well, we will speak
12:32:41 14 about that next week at the beginning of next week. Where it
12:32:43 15 concerns now the schedule, have you finished? Do you have
12:32:47 16 more for this afternoon, Mr Flamme?
12:32:51 17 ME FLAMME (interpretation): No, Mr President, no, we have
12:32:54 18 finished.
12:32:55 19 PRESIDING JUDGE JORDA (interpretation): Good. I would like
12:32:56 20 to thank you. Monday morning we will have the response of the
12:32:59 21 Prosecutor. I think we are all in agreement with regards to
12:33:01 22 the evidence from the Defence. And so we have the closed
12:33:07 23 session with the conclusions of the Defence, which have to be
12:33:11 24 had on Monday afternoon. And so on Tuesday we will have the
12:33:14 25 conclusions of the victims, and the conclusions of the

12:33:18 1 Prosecutor, the conclusions of the victims and the conclusions
12:33:22 2 of the Defence in our two hour programme, which has already
12:33:27 3 been pointed out to you. But Monday morning we should be back
12:33:31 4 here at 9.30 to be able to give the Prosecutor leave to
12:33:34 5 address the Court with regards to the evidence that the
12:33:37 6 Defence has provided. Are we all in agreement on that? So we
12:33:42 7 would like to thank the Defence -- that's giving us a longer
12:33:47 8 weekend. Everybody really does need it; I think perhaps even
12:33:50 9 the public, as well. We will now adjourn the session until
12:33:54 10 9.30 on Monday morning.
12:33:57 11 THE USHER: All rise.
12:33:58 12 [12:33 p.m.]
12:34:00 13 [At 12.33 p.m. the hearing was adjourned to Monday,
12:34:14 14 27 November 2006 at 9.30 a.m.]

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