

1 International Criminal Court
2 Appeals Chamber - Courtroom 1
3 Situation: Democratic Republic of the Congo
4 In the case of The Prosecutor v. Thomas Lubanga Dyilo - ICC-01/04-01/06
5 Presiding Judge Erkki Kourula, Judge Sang-Hyun Song, Judge Sanji Mmasenono
6 Monageng, Judge Anita Ušacka and Judge Ekaterina Trendafilova
7 Appeals Hearing
8 Tuesday, 20 May 2014
9 (The hearing starts in open session at 9.28 a.m.)
10 THE COURT USHER: All rise.
11 The International Criminal Court is now in session.
12 PRESIDING JUDGE KOURULA: Good morning. Please be seated.
13 The hearing of the Appeals Chamber is now in session. I'd like again to welcome
14 everyone who is here in the courtroom or in the audience in the public gallery, as well
15 as everyone joining us via the internet or otherwise.
16 I'd like to ask the court officer to call the case, please.
17 THE COURT OFFICER: (Interpretation) Thank you, your Honour. Situation in
18 the Democratic Republic of Congo, in the case of The Prosecutor versus Thomas
19 Lubanga Dyilo, ICC-01/04-01/06. We are in open session.
20 PRESIDING JUDGE KOURULA: Thank you very much.
21 Also perhaps we may have a different audience from yesterday. I would like to
22 invite the parties and participants at this hearing to introduce themselves, beginning
23 with Office of the Prosecutor. Mr Guariglia, please introduce the members of your
24 team.
25 MR GUARIGLIA: Good morning, your Honours. It's Fabricio Guariglia, and today

1 appearing with me are: Ms Helen Brady, senior appeals counsel; Ms Nicole Samson,
2 trial lawyer; Mr Manoj Sachdeva, trial lawyer; and our case manager is Sylvie
3 Vidinha.

4 PRESIDING JUDGE KOURULA: Thank you, Mr Guariglia.

5 Next to the Defence team of Mr Lubanga. Maître Mabilie?

6 MS MABILLE: (Interpretation) The Defence of Mr Lubanga is composed of
7 Jean-Marie Biju-Duval, Caroline Buteau and myself, Catherine Mabilie.

8 PRESIDING JUDGE KOURULA: Merci. And I also recognise the presence of
9 Thomas Lubanga Dyilo.

10 Moving then to legal representatives of victims team V01, please.

11 MR WALLEYN: (Interpretation) Your Honour, my name is Luc Walley. I
12 represent the team of victims V01. I'm assisted by my case manager, Evelyne
13 Ombeni. Thank you.

14 PRESIDING JUDGE KOURULA: Thank you very much.

15 And then the legal representatives of victims team V02, please.

16 MR KABONGO: (Interpretation) Thank you very much, your Honour. The team
17 V02 is represented by myself, Maître Paul Kabongo, assisted by Madam Sylviane
18 Glodjinon. Thank you.

19 PRESIDING JUDGE KOURULA: Thank you very much.

20 I am Judge Kourula, Presiding Judge in the final appeal proceedings in the case of The
21 Prosecutor versus Thomas Lubanga Dyilo. Seated directly to my right is Judge Song
22 and then Judge Monageng, and to my left Judge Ušacka and then Judge Trendafilova.
23 Seated in front of the Bench are Volker Nerlich, legal adviser of the appeals division,
24 and Franziska Eckelmans, Mary-Anne Power and Erin Rosenberg.

25 We are joined today by the staff of the Registry, including the courtroom officers,

1 courtroom usher, interpreters, court reporters, stenographers and security officers,
2 who I welcome and thank for their assistance in advance. Apparently I forgot to
3 thank them yesterday afterwards. I do it now. Thank you very much for yesterday
4 as well.

5 For those watching us, I will briefly explain how today's hearing will be conducted.
6 Yesterday we heard the testimony of two witnesses for the Defence of Mr Lubanga.
7 Today we are hearing oral submissions from the parties and participants on issues
8 arising in this appeal.

9 At the end of today's hearing, Mr Lubanga will have the opportunity -- an
10 opportunity to personally address the Appeals Chamber.

11 The parties are reminded that they're expected to complete their submissions within
12 the time frame set by the Appeals Chamber.

13 As indicated in the scheduling order the Appeals Chamber may, if it considers
14 necessary, pose questions to the parties and participants.

15 Before beginning the hearing of submissions, there are a few procedural issues that
16 the Appeals Chamber would like to address.

17 The Appeals Chamber notes the Defence filing that was registered on 9 May 2014,
18 document number ICC-01/04-01/06-3086, in which the Appeals Chamber was notified
19 of the disclosure by the Prosecutor of certain materials relevant to the individuals
20 who were witnesses in the present case.

21 In that notice, the Defence indicated that it might make further written submissions
22 before the Appeals Chamber once the disclosed materials had been evaluated.

23 Maître Mabilie, the Appeals Chamber considers that a little over two weeks from
24 today would be sufficient time for you and your team to evaluate the materials and
25 prepare, if necessary, any submissions relevant to them. Would 5 June be an

1 agreeable time frame to you, Maître Mabilille?

2 MS MABILLE: (Interpretation) That's perfect, your Honour.

3 PRESIDING JUDGE KOURULA: Thank you very much.

4 Mr Guariglia, while you have already responded to the notice, you would of course

5 be able to file a response to any further submissions. The Appeals Chamber

6 considers that one week should provide adequate time for the Prosecutor to

7 formulate a response to any submissions of the Defence on this issue. Therefore, the

8 Prosecution shall file its response to any filing from the Defence on the issue of the

9 recently disclosed document by 12 June.

10 MR GUARIGLIA: That should be enough, your Honour, barring unforeseen

11 circumstances, but that should be enough.

12 PRESIDING JUDGE KOURULA: I appreciate. Thank you very much.

13 Next the Appeals Chamber notes that several filings have been made on a

14 confidential basis without public redacted versions also being filed. The parties are

15 hereby ordered to review their respective filings and to ensure that they have also

16 submitted public redacted versions and, if not, to do so as soon as possible. I would

17 say at the latest by 10 June this year.

18 So, unless the parties have any questions with respect to what I have just said, we will

19 now proceed with the hearing of submissions of the Defence for Mr Lubanga.

20 Maître Mabilille, you have the floor for 45 minutes. Please proceed.

21 MS MABILLE: (Interpretation) Your Honour, ladies and gentlemen of the Bench

22 making up the Appeals Chamber, here are my submissions. They're designed to

23 respond to matters raised in the Chamber featuring in its order of 25 March 2014.

24 I will also be broaching other crucial matters going to our appeals. My learned

25 colleague, Jean-Marie Biju-Duval, will then rise to his feet to talk about certain

1 grounds for appeal going to the individual criminal responsibility.

2 I will reply to the first and last question put by the Judges going to witnesses D-0040

3 and D-0041 during my general submissions that I'll be turning to in just a moment.

4 With regard to the second question in paragraph 2(d)(i) of your order of 25 March last,

5 Defence submits that the Prosecutor had ample opportunity to elaborate on his

6 submissions on his response filed on 17 January 2014.

7 With regard to the third question in paragraph 2(d)(ii) in your order of 25 March 2014,

8 Defence respectfully refers to its own answer dated 12 March 2013, reference 2997.

9 By way of introduction, your Honour, to our explanations, it strikes us as crucial to

10 recall to your Chamber the paradoxal nature of this case. This case - this case

11 file - goes to allegations speaking to enlistment, conscription and involvement in

12 combat of children of less than 15 years of age in an armed conflict.

13 The Prosecutor has called nine individuals describing themselves as former child

14 soldiers. In order to prove the existence of the crimes in question, all these

15 individuals were excluded by Trial Chamber because Trial Chamber determined that

16 they were by no means trustworthy. All these witnesses had been brought to the

17 Office of the Prosecutor by its own intermediaries. Regarding these intermediaries,

18 the Chamber has determined that it may well be that these individuals were guilty of

19 offences under Article 70, namely obstruction of justice, and that there were

20 reasonable grounds to believe that they had persuaded, abetted, or helped these

21 witnesses to lie.

22 Upon reading the judgment, Defence understands that the Chamber called upon the

23 Office of the Prosecutor to initiate prosecuting -- prosecution proceedings under

24 Article 70 because the Prosecutor alone can do so. Despite the crushing proof

25 against these intermediaries that were heard by Trial Chamber, the Prosecutor,

1 labouring under a manifest conflict of interest, elected to initiate no prosecution
2 proceedings.

3 So what do we say in respect of this today? When his own work is fundamentally
4 challenged, the Prosecutor obstructs the manifestation of truth.

5 It is the same when the Chamber determines that there is a genuine possibility that
6 the only three victims who had explicitly requested to appear to give testimony lied
7 before the Chamber. Their testimony was not admitted, their standing in the
8 proceedings was withdrawn by Trial Chamber and once again the Prosecutor, despite
9 irrefutable proof as to falsified identity, elected to take no initiative.

10 The Chamber therefore -- and this is the conclusion to my introduction. The
11 Chamber excluded therefore the proof in-chief and grounded its judgment on
12 evidence that we would describe as subsidiary, ancillary; namely footage - video
13 footage - or testimony, relying solely on a subjective appreciation and visual
14 appreciation, or understanding, or determination, with regard to the age of the
15 soldiers, and a document.

16 This in summary is how the case file has appeared before your Court, and everybody
17 will appreciate - after this introduction will appreciate - very easily why Witnesses
18 D-40 and D-41 were called to appear to provide testimony and how they go to the
19 heart of all our oral arguments because of the total exclusion of all the child soldiers
20 that came to provide testimony.

21 Today, and this is the paradox that I was referring to, there remains no precise and
22 verifiable example of the presence of soldiers aged under 15 years of age during the
23 period in question going to the charges in the FPLC.

24 We say as the Defence that the remainder of the evidence do not reach a degree of
25 adequate accuracy to arrive at the conclusion beyond any reasonable doubt and in

1 particular this goes to video footage retained by the Chamber.

2 I would now like to dwell on this particular point by drawing your attention to the
3 fact that the Prosecutor disclosed to Defence dozens of hours of video footage. After
4 that, he targeted 15 or so video footage excerpts, and the Chamber retained nine video
5 excerpts showing in the view of the Chamber individuals that were characterised as
6 children of less than 15 years of age. The Chamber retained the picture of Mr Mbogo
7 four times in its judgment.

8 The Prosecutor has produced no evidence going to the identity, the real age of all
9 these individuals who feature in this video footage excerpts. The Chamber has
10 attempted to appraise the age of the individuals featuring on video material
11 submitted tendered by the Prosecution.

12 The only individual that the Defence was able to find before the hearing of the -- for
13 giving judgment was Witness D-40. This witness, and I'm sure that the Appeals
14 Chamber will look at all this video footage, is the only witness that could be identified
15 at the time by Defence using his image featuring in this video because, and
16 this -- because it was able to clearly distinguish the features of his face, and this is the
17 only case in point. But on this particular picture, the Chamber -- the Trial Chamber,
18 I clarify, states that even by using a great margin for error in evaluating the age of
19 D-40, the Chamber never the less determined that he was of an age very much below
20 15 years of age, whereas according to the date at which this video footage was shot he
21 was either 19 or 20 years of age.

22 Of course, by looking at this particular picture, everybody could easily have believed
23 that he was genuinely young, which we say proves that appearances can be deceiving
24 and that an appearance in and of itself cannot prove the real age of a given individual.
25 Defence has been able to locate and meet for the first time Mr Mbogo, and this on 19

1 May 2012. Defence at that particular point in time elected to bring him before the
2 Court in order to prove when -- when the conviction was handed down in that
3 particular hearing, that it wasn't possible to prove the amount of individuals aged less
4 than 15 years of age present within the ranks of the FPLC only on the sole basis of
5 their physical appearance.

6 It felt that Mr Mbogo's testimony could prove relevant in the appeals proceedings in
7 order to support the argument according to which the physical appearance in and of
8 itself cannot prove beyond all reasonable doubt the age of a given individual.

9 Defence has attempted to locate other individuals that feature on the video footage in
10 question. D-41 was the only other individual who was able to be identified and met
11 by the Defence team.

12 Now, these -- this shows that the Chamber erred very gravely by relying on the
13 physical appearance of these individuals with a view to properly prove their age. Of
14 course, there exist other video footage, admitted Prosecution footage admitted by the
15 Judges, but it's not possible to properly make out the features of -- the facial features
16 of these individuals. Sometimes you only see them from their back. And so it's
17 worth noting, we say, that the Chamber has relied on one of the individuals featuring
18 in the video, and this is a, in its terms, a boy of less than 15 years of age, whereas one
19 of the Prosecution witnesses actually said that this individual was not a man at all but
20 a woman.

21 The witness, the testimony of Witness 40 and 41 show that the visual appraisal of the
22 age of these recruits are bereft of all reliability and as a consequence nothing in this
23 case file put before the Court enables it, enables it to be the case to prove beyond all
24 reasonable doubt that there were children under the age of 15 years of age in the
25 armed wing of the UPC.

1 Your Chamber asked us why Witnesses D-40 and D-41 were not brought to the trial
2 proceedings. In respect to this I'd like to make an initial submission. I don't think
3 we need to turn the tables. The accused enjoys the fundamental right of not seeing
4 the onus of the proof put on his shoulders as opposed to the Prosecution's shoulders.
5 It cannot be reasonably expected of Defence that it proves that each of the individuals
6 who feature on this video footage is aged 15 or more.

7 The Prosecution claims that Defence didn't show due diligence, it didn't properly
8 investigate to try to locate the children featuring in this video footage, but I turn the
9 question to the Prosecution: What about the Prosecution's duty to investigate for
10 exculpatory and inculpatory evidence?

11 The Prosecution, shouldn't he have not, using information in his -- within his
12 evidentiary holdings, I'll return to this later on -- through his investigations, couldn't
13 he have properly established the age and identity of individuals before himself
14 bringing them to the Court and showing them as children below the age of 15.

15 With regard to Mr Mbogo, if the Prosecutor had in showing due diligence used the
16 documents that he had in his evidentiary holdings going to the Presidential Guard,
17 then he will have noticed that Mr Mbogo was aged more than 15 years of age at the
18 time, and he would therefore never have wrongly presented as a child under 15 years
19 of age as a Prosecution witness.

20 But no evidence was given to Defence to enable this latter to run investigations on
21 these individuals. A Prosecutor generally concerned with bringing the truth to light,
22 would he himself have brought to trial proceedings Witnesses D-40 and D-41?

23 With regard to Defence, it goes without saying that if it had had the opportunity to
24 identify D-40 and D-41 before the end of trial proceedings, then obviously the
25 Defence would have brought them to trial as it has done with many other witnesses,

1 but this opportunity was not brought to our avail.

2 Of course, Defence did everything in its power following the guilty pronouncement,
3 did everything it could, but these efforts were crowned with success for two
4 individuals only. But Defence needs to be properly mindful, we say, and I would
5 reiterate this point, mindful of the major problems involved in this type of search.
6 D-41 showed this and the Chamber would have seen this directly. This witness was
7 "lost," inverted commas, and was only retrieved in extremis. You cannot ask of
8 Defence diligence and results that the Office of the Prosecutor, despite a thousand
9 times more resources than those at the Defence's avail, makes no attempt to
10 implement the requisite approach, and this deliberate omission of the Prosecutor is
11 one of the numerous breaches by the Prosecutor of his statutory obligations. I refer
12 to all our filings going to statutory breaches made by the Prosecution and this goes to
13 the heart of our first ground for appeal.

14 Indeed, one of the major innovations of the Rome Statute is to impose new duties and
15 obligations going to the Office of the Prosecutor with regard to investigations. If we
16 compare with the ICTR and ICTY, he must investigate -- and this is provided for in
17 the Statute. He must investigate for inculpatory, but also exculpatory evidence in
18 order to bring to the light the truth, but in its judgment Trial Chamber states that the
19 Prosecutor was particularly negligent in fulfilling his investigatory duty. It asserts
20 that the Prosecutor presented to Trial Chamber evidence for which he hadn't, the
21 Prosecution hadn't done properly verifications. It hadn't consulted the civil status
22 archives, had no -- had run no investigations with the independent electoral
23 commission. It hadn't attempted to contact the members of these -- of the
24 child -- alleged child soldiers' families.

25 The Chamber retained that the OTP hadn't undertaken the requisite measures to

1 establish the age of the evidence -- age of the children as objective proofs among these
2 nine child soldiers for which the Prosecutor hasn't brought the requisite proof, didn't
3 provide the requisite proof, proof beyond all reasonable doubt that the witness -- that
4 the witnesses were child soldiers in the FPLC.

5 In addition, the Chamber indicated to the Prosecutor that it shouldn't delegate to
6 intermediaries its responsibilities with regard to the investigation. This delegation
7 gave rise to presenting fraudulent evidence. It indicates in its judgment there exists
8 a risk the intermediaries P-0143, P-316 and P-321 persuaded, abetted and assisted
9 witnesses in providing false testimony, and it could be that these, what we'd like to
10 say to the Appeals Chamber -- that the Trial Chamber didn't draw the requisite
11 consequences of not abiding by the statutory obligations; the Prosecution not abiding
12 by the statutory obligations.

13 Indeed, the lack of any appropriate investigation being condemned by the Chamber
14 doesn't only go to the nine individuals presented to the Court as child soldiers, but it
15 goes to the entirety of the proof brought by the Prosecution.

16 Now, the Chamber didn't take into consideration the irreparable prejudice to Defence
17 in respect to this. The Chamber determined wrongly - we say determined wrongly -
18 that it had remedied all the prejudice suffered by Defence by ruling out of evidence
19 all these alleged child soldiers, but this remedy, namely to exclude all of the child
20 soldiers, only partially provides relief to the prejudice suffered by Defence.

21 But the Prosecutor, having used the same investigatory methods for the entirety of its
22 case, it's the entirety therefore of its case and proof that needs to be irrefutably
23 challenged and called into doubt, no reliability. This in addition to all the other
24 points raised in our filings makes, we say, the entire judicial process unfair.

25 The second point that I'd like to bring before your Chamber is the recurring problem

1 to which Defence has been confronted; namely the non-disclosure by the Office of the
2 Prosecutor of crucial material for Defence.

3 The overriding principle is clear, OTP disclosure must be done spontaneously and
4 without delay. This goes to the fundamental rights of the accused, but in the brief
5 that I'm referring to we stated the numerous occasions upon which we were obligated
6 to call for the help of the Chamber in order to make sure that this right of the Defence
7 be properly adhered to.

8 And I would recall to your Chamber the two rulings - procedural rulings - handed
9 down by the Chamber went to the OTP's non-abidance by his disclosure duties, but
10 I would like to turn to matters material that were disclosed by the Office of the
11 Prosecutor subsequent to Trial Chamber's handing down of its decisions and, in
12 respect of that, I'd like to turn to four documents that strike me as crucial in respect of
13 that.

14 First, the non-disclosure of the list of FPLC soldiers dated 9 December 2004. It is of
15 note that the Prosecutor had in its holdings this list since 10 February 2006 and it was
16 disclosed to Defence only on 29 October 2012 only because Defence discovered the
17 existence of that document and called for its disclosure, so the notion of
18 spontaneousness and without delay disclosure, well, we think that this has been a
19 rough shot over, and you will appreciate that this list was crucial because it went to
20 the FPLC soldiers and this was a matter that the Defence would have needed in order
21 to run its investigations.

22 Now, the second point goes to the non-disclosure of two documents that -- the
23 Chamber took cognizance of this yesterday because I submitted to D-40 yesterday this
24 document, the first document which goes to the photo and the name of 11
25 Presidential Guards, the second is a document involving a list of names, a list of

1 naming 33 people making up Thomas Lubanga's Presidential Guard.

2 Now, this material was disclosed to us only, I would say only, because -- well, how
3 can I put it, it was not spontaneous and it was tardy, and you will see in our filings
4 how we came across this material and how we called for this material of the OTP.

5 Now this information would enable us to run genuine investigations with regard to
6 the Presidential Guard of Mr Thomas Lubanga and on the soldiers, quite obviously,
7 making up said guard.

8 Now the Prosecutor had these documents in his holdings since 2004, despite that he
9 ran no Prosecution or exculpatory investigations relying on these documents, these
10 documents -- on these documents you can see the photo of Mr Mbogo and the fact
11 that he was a member of the Presidential Guard.

12 Now, this material, this point strikes me as pretty important, and if the list of the
13 members of the Presidential Guard and their photos had been properly disclosed to
14 Defence, Defence would have been able to identify, locate and called as witnesses a
15 number of the -- of the members of the said Presidential Guard.

16 The Defence, therefore, was -- it was impossible for the Defence to provide
17 exculpatory evidence in respect of this while the Prosecutor had in his holdings
18 crucial information to Defence but kept that secret at this point, in time at this
19 particular juncture, your Honour. It's no longer possible for Defence to use that
20 information that would have been crucial to it.

21 It so follows that we submit to your Chamber that the sole relief consonant with
22 fairness would be the following: To determine that no conclusion can be drawn
23 from the proof brought by the Prosecution going to the proof of the presence of
24 children of less than 15 years of age among Thomas Lubanga's bodyguard.

25 The third and last matter that I would like to -- that I would like to draw the

1 Chamber's attention to, even though this morning the President reminded us that
2 Defence had indicated that it had received ancillary statements of witnesses D-0017,
3 P-0017, P-0038 and P-0055, given to the Office of the Prosecutor in 2013, subsequent to
4 the handing down of the judgment, and -- this material was disclosed to Defence only
5 because we made the expressed request for that.

6 And we discovered in a case file, in a co-accused of Mr Lubanga and during the
7 confirmation of charges hearing, that there was necessarily additional interviews.

8 And so it was we who asked of the Office of the Prosecutor for it to disclose this
9 material - and I would reiterate to the Chamber the obligation of the Prosecutor is to
10 disclose information spontaneously and without delay - and (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 So we've had -- so these substantial statements have been in the possession of the
15 Office of the Prosecutor for more than seven months and, as for the others, he's
16 challenged the fact that he was under an obligation to disclose them to us, but for us it
17 is undeniable that this material should be disclosed to Defence at the very least under
18 Rule 77, particularly when Defence has seriously challenged the credibility of that
19 witness and the reliability of their statements.

20 The conclusion that I would draw -- that we would draw as Defence team is that these
21 recurring breaches by the Office of the Prosecutor of his statutory obligations and the
22 violations of the rights of the accused are in this particular case file of such
23 seriousness, when taken a whole, that they made the trial overall unfair. No
24 pronouncement of guilt could be pronounced at the end of a judicial proceedings
25 where such unfairness has been averred, acquittal therefore must be pronounced.

1 I will now hand over to my learned colleague, Mr Biju-Duval.

2 PRESIDING JUDGE KOURULA: Thank you very much.

3 Maître Biju-Duval, you may proceed.

4 MR BIJU-DUVAL: (Interpretation) Your Honours, I will just keep to a few
5 comments on the relevance of the testimony that we have heard yesterday.

6 With regard to certain grounds of appeal relating to the individual criminal
7 responsibility of Thomas Lubanga and, in particular, relating to psychological
8 element, that is to say criminal intent, did the accused -- was the accused fully aware
9 of participating personally in the commission of crime? Has evidence been shown
10 that the accused knew that he substantially contributed to the enlisting of children
11 under the age of 15? The Trial Chamber replied that he did.

12 And for a significant part thereof, it basis its conclusion on the statement challenged
13 by the Defence that the bodyguard of Thomas Lubanga was partly composed of
14 children under the age of 15. Thomas Lubanga is said to have had, before his eyes
15 and under his personal command, soldiers who were visibly under the age of 15. As
16 such, how could he claim that he didn't know that?

17 But the testimony that we heard yesterday radically challenged such false certainty.

18 They show proof that the soldiers within the Presidential Guard, who seemed so
19 young to us, are in reality young adults who were over the age of 18. This testimony
20 that we've heard yesterday, therefore, destroys any foundation to the claim of the
21 Trial Chamber according to which Thomas Lubanga knew about the presence of
22 children under the age of 15 in his personal guard. On the contrary, thanks to this
23 testimony, there is another reality which must take precedents, another certainty, the
24 certitude that it is precisely because Thomas Lubanga interacted on a daily basis with
25 the soldiers in his guard he knew them and he, therefore, could have no doubt that

1 none of them was a minor and, therefore, he could have the reasonable conviction
2 that none of those who seemed -- who were there, among the other young soldiers of
3 the UPC, that none of them were under the age of 15.

4 And this is the reason why these two testimonies, these two new witness testimonies
5 force us to re-evaluate, for example, the report of the visit of the Thomas Lubanga to
6 Rwampara camp on 12 February 2003. This visit and the video report made thereof
7 constitute the very basis of the conviction of Thomas Lubanga.

8 Thomas Lubanga gave a speech before young recruits on 12 February 2003, young
9 recruits who are presented in the judgment as visibly being under the age of 15. As
10 such, how could he ignore this? Well, today we have to re-evaluate this Rwampara
11 visit in the light of witnesses that we heard yesterday.

12 We have to re-examine this Rwampara visit in the light of the physical appearance of
13 these witnesses, the appearance they had when they were 18 and 19 years old in the
14 light of the visual example that they give of the appearance of young recruits of 18
15 and 19 years of old in the UPC in February 2003.

16 And furthermore, in the eyes of the Judges of the Trial Chamber what could seem to
17 establish beyond reasonable doubt the facts -- well, this suddenly crumbles and falls
18 into total uncertainty which, in the eyes of the Judges of the Trial Chamber, what
19 seem to be the solid foundation of the conviction of the accused crumbles and
20 collapses. Why? Because none of the Rwampara recruits seem younger than these
21 two young adults who were aged 18 and 19 and who, 10 years later, we heard
22 yesterday -- because in the light of the example given yesterday by these two
23 witnesses, none of the faces, none of the silhouettes of recruits in Rwampara makes it
24 possible to identify with sufficient certainty a child under the age of 15. Nothing
25 makes it possible to establish beyond reasonable doubt that Thomas Lubanga knew

1 about the presence of children under the age of 15 years in the armed wing of the
2 UPC.

3 In the light of these testimonies, the Court and the Appeals Chamber therefore must
4 annul the conclusion of the Trial Chamber according to which evidence was brought
5 to show that Thomas Lubanga knew about the presence of children under the age of
6 15 years by having personally seen them among his bodyguard or on other occasions.
7 But the Defence does not challenge that minors under the age of 18 years could have
8 been enlisted into the armed wing of the UPC.

9 This takes us to the last ground of appeal, which I would like to very briefly mention,
10 with regards to criminal intent. One cannot ascribe any criminal intent to the person
11 who used his powers and authority to prohibit the enlisting of minors and organise
12 their demobilisation because he refused that minors bear arms and expose themselves
13 in combat. Thomas Lubanga precisely, because of that, took measures to ban this
14 and demobilise them.

15 Now, the Trial Chamber does not challenge the existence of the decisions that were
16 taken. The Trial Chamber neither challenges the authenticity of the documents that
17 were produced - were produced - but it considers that these measures to ban this and
18 to demobilise the children were deliberately made ineffective and concludes that the
19 decisions and measures do not establish the sincere intention of the accused to ban the
20 enlisting of minors. It therefore mentions the hypothesis of a masquerade, pure
21 propaganda aimed at abusing international observers.

22 We argue that this conclusion has no reasonable basis. It is not based on any
23 necessary deduction. We argue that this conclusion is based on an erroneous and
24 unfair assessment of the evidence produced and on an erroneous assessment of the
25 chaotic situation that existed in Ituri in 2002 to 2003.

1 The hypothesis of masquerade is based on the statement that the decisions taken,
2 because they were made public by the use of radio stations in Bunia, that they could
3 only have the objective - the single objective - of fooling international observers.
4 This conclusion is doubly erroneous. Firstly, it is clear that the effectiveness of the
5 ban on enlisting minors required the public dissemination of this ban via radio such
6 that it could be known by all the population, including in the most remote villages.
7 The public dissemination of the ban is therefore the proof that Thomas Lubanga
8 personally took great care to ensure that this measure was known by everybody to be
9 executed by everybody everywhere. The publicity of the decisions taken is not a
10 manoeuvre aimed at propaganda. It is proof of the sincere will of Thomas Lubanga
11 to assure the effectiveness throughout Ituri.
12 Secondly, the Trial Chamber refused to take into consideration the fact - the
13 unchallengeable fact - that the documents setting out the decisions taken, as well as
14 the measures - the execution measures - in the military structure, remained
15 confidential right up to the trial in the sense that they have never been shown to
16 persons outside the UPC.
17 The very existence of these documents is not challenged and these internal measures,
18 nor is their confidential nature. This takes all plausibility from the thesis of
19 masquerade away. Quite on the contrary, the only possible explanation for the
20 existence of these documents and their content, the only reasonable deduction that
21 can be made, is the sincere concern and constant concern of Thomas Lubanga to make
22 his ban on the enlisting of minors effective.
23 The position of the Trial Chamber is also based on an erroneous assessment of the
24 complex and chaotic situation which prevailed in Ituri, 2002 to 2003.
25 The Chamber of first instance considers that the persistence of enlisting of minors,

1 parallel to the enactment of measures to ban this and to demobilise children, is proof
2 of the lack of sincerity of these measures, but this approach presupposes that Thomas
3 Lubanga exercised throughout Ituri and on all the military units an absolute
4 mastery - an absolute control - at all times.

5 We argue that this approach is not reasonable. The chaos that reigned during this
6 period made such control illusory and it makes it possible to suppose that certain
7 military leaders were able to act on their own initiative in violation of the orders that
8 they received and the decrees that were published.

9 The persistence of hypothetical enlistings could therefore conclude to other
10 deductions, rather than the supposed insincerity with regards to the banning and
11 demobilisation measures taken by Thomas Lubanga. Quite on the contrary, it's
12 precisely because the risk of enlisting minors occurred or reoccurred with the chaotic
13 situation in May 2003 that from 1 June 2003, by immediate public decree, Thomas
14 Lubanga renewed his formal ban on the enlisting of minors.

15 The Appeals Chamber can therefore conclude that the Trial Chamber could not
16 reasonably ascribe criminal intent to the accused where the proof has been shown that
17 throughout the whole period of the charges he took measures to sincerely prevent the
18 commission of a crime, and this is the reason we would ask your -- that is why with
19 confidence we would ask your Court to pronounce the acquittal of Thomas Lubanga.

20 PRESIDING JUDGE KOURULA: Thank you very much, Maître Mabilie, Maître
21 Biju-Duval.

22 We now turn to the Prosecutor side. Mr Guariglia and Ms Brady proceed, please.

23 MR GUARIGLIA: Thank you, your Honours.

24 Your Honours, I will address the evidence of Witnesses D-40 and D-41, as well as the
25 availability of the evidence at trial. Ms Brady will make brief submissions on the

1 fairness of the trial, in particular relating to disclosure, and also address the points
2 raised in your scheduling order at subparagraphs 2(d)(i) and (ii).
3 Your Honours, the evidence of Witnesses D-40 and D-41 is incapable of altering in
4 any way the Trial Chamber's findings on the enlistment, conscription and use of child
5 soldiers by Thomas Lubanga and the UPC/FPLC. The evidence, even if accepted by
6 the Appeals Chamber, could not have been a decisive factor in the Trial Chamber's
7 judgment, but the evidence in addition presents serious credibility problems which
8 should lead to its rejection. Lastly, it should be beyond any discussion that the
9 evidence was fully available at trial to counsel acting with due diligence.

10 Your Honours, I will deal briefly with the last point first; that is the issue of
11 availability. I will not repeat our detailed submissions on the criteria for
12 admissibility of evidence on appeal. I will, however, emphasise the importance of
13 the Appeals Chamber adopting strict requirements for the admission of this type of
14 evidence in a manner consistent with the corrective nature of the appeals process and
15 the particular role of the Appeals Chamber in this process.

16 If the Chamber were to adopt relaxed criteria allowing for the liberal admission of
17 additional evidence on appeal, diluting the corrective nature of the appellate process
18 and eroding the principle of deference to Trial Chambers on factual matters, this
19 could have long-lasting damaging consequences for the fair and expeditious conduct
20 of appellate proceedings before this Court.

21 Finality and predictability, your Honours, are central elements of the Court's criminal
22 process and, whereas in this case the Defence has produced a limited amount of
23 material, the experience of the ad hoc tribunals shows that appeals in international
24 cases may well involve vast volumes of additional evidence on appeal.

25 Relaxing the requirements of admissibility in this case may well mean opening the

1 flood-gates for future appellate cases before this Court and, with respect, this is not
2 we submit the legacy that this Appeals Chamber should leave.

3 In this case, your Honours, there is no doubt that the evidence was wholly available
4 at trial to counsel acting with due diligence and, your Honours, the Defence does not
5 really claim that the evidence was unavailable. Rather, their arguments appear to be
6 first that they couldn't have anticipated that the Trial Chamber would consider the
7 video evidence in its judgment for the purposes of verifying the age of child soldiers
8 in the UPC/FPLC.

9 Second, they seem to claim that they were in no position to identify from the many
10 children depicted in the videos which were the ones that the Prosecution was relying
11 on.

12 Finally, they claim that it was the Prosecution's duty, not the Defence's, to identify the
13 two children in question and to make inquiries about their age.

14 Your Honours, we have dealt with these arguments in our response and we have
15 demonstrated why these arguments must fail. First, the Defence had ample notice
16 that the Prosecution was relying on the video evidence to allow for the on-screen
17 identification by the Trial Chamber of children visibly under the age of 15, and this is
18 shown inter alia by the fact that the Defence itself recognises this in its closing brief
19 when they recognised that the Prosecution was relying on, and I quote, "various video
20 excerpts," end of quote, to prove the presence of children, quote again, "visibly under
21 the age of 15 years," end of quote, and the Defence then proceeds to address that
22 evidence in its closing brief at paragraphs 703 to 707 of the closing brief.

23 Second, your Honours, the Defence was also in possession of a lengthy annex which
24 pointed out which minutes and seconds the Prosecution was relying on in relation to
25 each footage of evidence and, when a child would appear in any of those excerpts, the

1 Prosecution would include in the annex precisely the minutes and the seconds in
2 which that child was present.

3 If this was not enough, your Honours, the manner in which the video evidence was
4 presented in court also provided clear notice. If a child appears amongst other
5 children, the Prosecution would freeze the image and then would ask the witness
6 through which the evidence was being tendered specific questions in relation to the
7 children that was being shown in the centre of the image. This was also done in
8 relation to Witnesses D-40 and D-41.

9 But in addition, your Honours, it has to be stressed that D-40 and D-41 were members
10 of the accused's Presidential Guard, so the very same body in charge of providing
11 custody to Mr Lubanga, and in the evidence that you heard yesterday from D-40 he
12 claimed that he was a -- that basically he was part of a group of around 11 individuals
13 providing custody to Mr Lubanga. When he appears in his video, D-40 is
14 surrounded by a group of around seven additional individuals. In turn, D-41 told
15 you that he knew Mr Lubanga and Mr Lubanga knew him.

16 So we are not talking here about child soldiers fighting in a distant front line in a
17 company. We're talking about the same children that the accused would see every
18 day as part of his personal guard. There is no question that Mr Lubanga knew who
19 formed part of his Presidential Guard, or at least surely he had the means to find out.
20 It is clear then, your Honours, that the Defence had all necessary information in its
21 possession allowing them to make inquiries as to the identity and age of the children
22 relied upon, including the two witnesses. For whatever reason, they decided not to
23 make those inquiries at trial. This was their prerogative. However, they cannot
24 escape the consequences of the decision that they made at trial by distorting the
25 record and advancing now hollow claims of lack of notice.

1 The argument on the alleged duty of the Prosecution to identify the two Defence
2 witnesses distorts the purpose and the scope of the principle enshrined in Article
3 54(1)(a) of the Statute, and the Defence does so in an effort to transfer responsibility to
4 the Prosecution for a task that squarely belonged to the Defence.

5 Your Honours, the duty of objectivity means that the Prosecution must give equal
6 regard to incriminating and exonerating circumstances during its investigations and
7 its goal is to prevent a partisan or biased investigation conducted by the Prosecution,
8 but the principle does not mean that the Prosecution is expected to do the Defence
9 work, or conversely that the Defence can derelict its own investigative duties and
10 expect the Prosecution to conduct inquiries on its behalf.

11 Now, in the instant case the Prosecution collected the video evidence for the purposes
12 of supplementing a body of evidence that according to the same Trial Chamber was
13 already voluminous. It didn't collect the video evidence to explore the identity and
14 personal circumstances of the children shown in the videos, but simply to show
15 images of children under 15 in the rank and file of the UPC/FPLC and to present that
16 evidence alongside with the other evidence that the Prosecution was relying upon.

17 This was a perfectly valid choice and the Prosecution had no duty to go further. In
18 the end, it is the Prosecution's prerogative to present its case in the manner it deems
19 fit. The Defence may disagree with investigative and prosecutorial choices made by
20 the Prosecution during the conduct of this case and this is their right, but this does not
21 relieve the Defence of its own duties at trial or of its burden as a party seeking
22 additional evidence on appeal.

23 And I would like to note here that, your Honours, the role of the Defence as an
24 appellant now adducing additional evidence is not to raise a reasonable doubt as to
25 the findings of the Trial Chamber. It's to establish that no reasonable Trial Chamber

1 would have reached the factual conclusions that the Trial Chamber did on the basis of
2 that record and the additional evidence if that evidence is admitted.

3 Now, to finish on the issue of availability, your Honours, it is apparent that the
4 Defence made a wrong tactical choice at trial. That choice may have been based on
5 wrong assumptions as to the state of the evidence, or as to the future reliance by the
6 Trial Chamber on that evidence, but be it as it may the Defence cannot now seek to
7 disguise as a genuine case of unavailability what was the natural outcome of a choice
8 made by the Defence at trial.

9 And as the ICTY Appeals Chamber has stated in a decision quoted in our appeal
10 brief -- in our response briefs, excuse me, in the Kupreskic case, and I quote, "The
11 Defence has no right to assume what a Chamber will or will not accept in making its
12 findings. It must put forward its best case in the first instance," end of quote.

13 Putting forward its best case in the first instance is precisely what the Defence failed
14 to do and this is the first reason why the additional evidence is inadmissible, but in
15 addition, your Honours, no miscarriage of justice will occur if you consider the
16 evidence to be inadmissible. The evidence lacks credibility and, in addition, even if
17 accepted it's incapable of altering the Trial Chamber's findings which are firmly
18 rooted in the evidence before the Chamber.

19 Let me start first with the issue of credibility, your Honours. You heard yesterday
20 the testimonies of both D-40 and D-41. They both presented common and serious
21 credibility problems. In both cases, the key evidence that would support their claims
22 as to their dates of birth has not been filed with this Chamber. D-40's student card,
23 which would constitute the main support for the voter's card that has been relied
24 upon, is alleged to be lost and cannot be shown to the Appeals Chamber.

25 In turn at the heart of D-41's version of events lies his birth certificate, through which

1 he learned his age and thanks to which he obtained his 2006 voter's card which
2 subsequently allowed him to obtain the 2011 voter's card. However, this critical
3 document has not been produced before the Appeals Chamber either.

4 Second, your Honours, both testimonies have confirmed the rebuttal evidence
5 presented by the Prosecution pertaining to the serious problems of reliability
6 pertaining to the information contained in DRC election cards and the process by
7 which these cards were obtained.

8 Let me take you back to the testimony of D-40. According to his own version of
9 events, his voter's card contains a wrong place of birth and also his mother's name as
10 included in the card is incorrect. Indeed, he claims that the reliable information in
11 his voting card is conveniently his date of birth.

12 He admits that the public officer in charge of issuing the voter's card refused to
13 correct serious errors pertaining to critical information, his place of birth and the
14 name of his mother, and that he did so because he was in a rush to process the
15 application due to the amount of people still to be registered and because he
16 considered that the errors in question were not serious. Now, this further shows the
17 unreliable nature of the document and of the process by which it was obtained.

18 In turn, your Honours, D-41's claim that he could to go Lopa, 32 kilometres away
19 from Bunia, and obtain a voter's card in a place completely different from his location,
20 his place of residence, without any obstacles other than a couple of uncomfortable
21 questions by the officer, also shows that the process whereby voter's cards were
22 obtained was inherently flawed. He claims that the only reason why he could go to
23 Lopa -- he went to Lopa to obtain his voter card was because it was quicker to do it in
24 Lopa than to do it in his place of residence and yet he could obtain this card without
25 any difficulty far away from his place of residence.

1 Now, if we delve into the testimony of the witnesses yesterday, your Honour, both of
2 them contain serious inconsistencies and omissions which cast serious doubts as to
3 their credibility. D-40's testimony showed confusion and uncertainty about basic
4 information. The witness never saw his birth certificate. He cannot remember how
5 and when he first got to learn his age. He was asked twice: First by the
6 Prosecution and then by the Defence.

7 He does not know -- he does not know the age at which he joined either the primary
8 or secondary school. He does not know the age of any of his eight siblings. He
9 could provide no clear explanation as to how he could obtain a student card from a
10 university in 2000 -- in time for his 2006 voter's card considering that his high school
11 diploma was issued in January 2007.

12 Further, the diploma itself states that the witness participated in the 2006 session for
13 the examen d'etat, which would make it practically impossible to obtain a student
14 card and subsequently a voter's card in time for the July 2006 elections if these were
15 the elections that the witness was referring to. We don't know.

16 The evidence of D-41 also raises serious credibility issues. First, the witness had a
17 highly significant change in his evidence as to his place of birth without providing
18 any explanation whatsoever as to why this happened.

19 As the Chamber will recall, during the Defence questioning the witness has stated
20 that he knew his date of birth because his mother had shown him a birth certificate
21 issued by the hospital where he was born. This was consistent with the version of
22 events that the witness had provided the Prosecution in a pre-testimony interview the
23 day before, where he said that he had been born in a hospital in Mudzipela known as
24 l'hôpital des Blancs and that he knew this fact from his mother.

25 However, in cross-examination the witness claimed that he had made an error as to

1 these very significant facts and, when pressed by the Prosecution, the witness said
2 that his mother had never told him that he had been born in the l'hôpital des Blancs
3 and he said that he had been born in Dheu instead, but he didn't provide any further
4 details; no mention of any hospital in the area or any other relevant detail supporting
5 the existence of the alleged birth certificate.

6 This is the certificate through which the witness got to know his date of birth and on
7 the basis of which his first voter's card was issued, so it's a critical item of evidence.

8 So, as a result of this, not only this Chamber has not been shown the birth certificate,
9 but it has only been left in the dark as to where and by whom it was issued, assuming
10 this document exists.

11 But, your Honours, even if the Chamber were minded to admit the evidence as at
12 least prima facie credible, despite all these flaws, this would not affect the Trial
13 Chamber's findings and would at best discredit the two excerpts of video evidence
14 depicting D-40 and D-41. Therefore, the evidence could have no impact on the
15 judgment.

16 Your Honours, the Trial Chamber's findings regarding the presence of children below
17 the age of 15 within the ranks of the UPC/FPLC were based on, using the Trial
18 Chamber's words, "sheer volume of credible evidence presented and discussed at
19 trial." This included the Chamber's analysis of the testimonies of both Prosecution and
20 Defence witnesses, including the insiders witnesses, witnesses who were in Bunia
21 during relevant periods of time and had worked with the -- closely with the
22 UPC/FPLC, witnesses that had worked with demobilised child soldiers in and around
23 Bunia and also a letter from the UPC secretary of education to the G5 FPLC
24 commander, who was in charge among other things of recruitment, related to a
25 so-called DDRRR programme. That is a programme for in French (Interpretation)

1 Demobilisation, Disarmament, Demobilisation and Reinsertion, (Speaks English) a
2 programme that was to be applied as the letter explains to FPLC soldiers aged ten to
3 15 or 16 who were willing to return to civilian life.

4 The two excerpts challenged by the Defence were used by the Trial Chamber
5 primarily to corroborate the evidence from trial witnesses and the UPC/FPLC
6 document I have just referred to.

7 In addition, your Honours, the two excerpts are part of a much wider body of video
8 evidence. The Trial Chamber was shown around 20 video scenes depicting children
9 which the Prosecution considered were under the age of 15, and the Chamber relied
10 at least on eight of those video scenes in addition to the scenes or to the excerpts
11 allegedly involving D-40 and D-41. These scenes include, for instance, a video of the
12 Rwampara training camp, shot during a visit by Mr Lubanga, where the Chamber
13 was able to identify beyond a reasonable doubt a number of recruits clearly under the
14 age of 15. This is paragraph 792 of the judgment.

15 In relation to the specific use of bodyguards by Mr Lubanga, the Trial Chamber
16 analysed the available witness evidence which the Chamber considered to be
17 consistent, credible and reliable alongside the video footage.

18 The Chamber concluded the following, "On the basis of the accounts of P-16, P-30,
19 P-41 and P-55, as well as the video footage, the Chamber is satisfied that between
20 September 2002 and 13 August 2003 Thomas Lubanga, as president and
21 commander-in-chief of the UPC/FPLC, used a significant number of children under
22 the age of 15 within his personal escort and as his bodyguards." This is paragraph
23 869 of the judgment.

24 Here again the video evidence is only a component of a wider body of evidence
25 capable of supporting autonomously the conclusion that Mr Lubanga personally used

1 child soldiers as escorts and bodyguards, and again the scenes depicting D-40 and
2 D-41 are only a segment of the totality of the video evidence relied upon by the
3 Chamber. For instance at paragraphs 861 and 862 the Chamber makes other
4 findings including three children other than D-40 and D-41, and at paragraphs 1247 to
5 1262 of the judgment the Chamber makes further findings which contain further
6 references.

7 In the end, your Honours, the Defence is asking you to disregard all these factual
8 findings on the basis of a purely speculative and extraordinarily far-reaching
9 proposition; namely that because the Trial Chamber allegedly erred in relation to the
10 age of these two children it also necessarily erred in its identification of all other
11 children in all other videos examined by the Chamber and, further, that so did the
12 multiple witnesses who testified before the Trial Chamber that they had seen children
13 under the age of 15 in the UPC/FPLC.

14 So for instance, according to this logic, the Defence evidence would somehow render
15 unsafe the evidence of P-46, an officer in the MONUC child protection programme,
16 who before arriving in Bunia had been involved in identifying child soldiers in
17 northern Congo and in Kenya and who testified that 167 children whose cases she
18 had recorded had been associated with the UPC and that 71 of them were below the
19 age of 15 when they were recruited or used between mid-2002 and mid-2003.

20 And this evidence would be rendered unsafe despite the fact that the witness had, as
21 the Chamber established, ample personal experience in working with demobilised
22 child soldiers in the region and could explain to the Trial Chamber the multiple
23 methods used to determine a child's age, noting the physical appearance was taken
24 into account but was not the determine -- was not the main criteria.

25 And this would simply mean, your Honours, that the judicial evidence would

1 somehow render unsafe the evidence of critical UPC/FPLC insider witnesses such as
2 P-38, a member of the UPC/FPLC who acted as a military trainer and who personally
3 saw children under 15 when he was training soldiers in Mongbwalu, or P-55, a
4 high-ranking UPC/FPLC officer, close to Lubanga, who testified about the extended
5 use of child soldiers as bodyguards by the UPC/FPLC main staff and provided
6 specific evidence on Mr Lubanga's use of child soldiers in his personal guard.
7 Now, these are only some examples of the voluminous nature -- of the voluminous
8 evidence before the Trial Chamber, your Honour, but they suffice to show the
9 fundamental flaws at the core of the Defence's position on the impact of the additional
10 evidence on the Trial Chamber's findings.
11 Ultimately, your Honours, at the core of the Defence's position lies the same position
12 that the Defence advanced at trial and that the Trial Chamber rightly rejected; namely
13 that personal assessments of age are inherently unreliable and that non-expert
14 witnesses cannot differentiate between a child over 15 and a child under 15.
15 Now we have dealt with this position in our response to the Defence appeal brief, but
16 I would only note that the Defence provides no authority whatsoever to support this
17 sweeping and rigid proposition which effectively would undermine a Trial
18 Chamber's free assessment of the evidence and constrain its ability to exercise its own
19 powers of observation and to freely evaluate the evidence of witnesses. There is no
20 basis in the Statute, the Rules, or the Regulations of the Court for a limitation of this
21 type, and there isn't because it defies experience and common sense and it would be
22 clearly detrimental to the fair and efficient use of a Trial Chamber's powers during
23 trial.
24 In contrast, your Honour, the Trial Chamber's approach expressing caution and
25 recognising a wide margin of error when assessing the evidence of the images of child

1 soldiers and their age is a proper exercise, we submit, of a Trial Chamber's authority
2 under the Statute to evaluate, and I quote from Article 74, "... the evidence and the
3 entire proceedings."

4 Your Honours, to conclude, the Trial Chamber took pains to adequately examine a
5 significant body of evidence tendered during a trial that lasted over two years and
6 during which the Trial Chamber had ample opportunity to assess the credibility and
7 reliability of the evidence before it.

8 The Chamber provided a detailed and well-documented judgment where all critical
9 credibility matters are adequately analysed. The conclusions reached in the
10 judgment on the conscription, enlistment and use of children under 15 years by the
11 UPC/FPLC and by Mr Lubanga himself are the product of a careful analytical process
12 and they are solid.

13 The Defence evidence, even if accepted, is incapable of demonstrating that the
14 Chamber somehow made unsafe findings, or much less that the evidence could show
15 that no reasonable Trial Chamber would have reached the same factual conclusions.
16 The Chamber's findings, your Honours, should be confirmed in their entirety, and I
17 will now accede the floor to Ms Brady.

18 PRESIDING JUDGE KOURULA: Thank you, Mr Guariglia.

19 Ms Brady, you have got the floor.

20 MS BRADY: Good morning, your Honours. In the time that remains I will be
21 addressing Madam Mabilie's sweeping challenges to the fairness of the trial, in
22 particular the challenges to the Prosecution's investigative methods and disclosure
23 practices. In doing so, I will address you on, in particular, the documents that she
24 mentioned today, which are the two documents disclosed on appeal coming -- that
25 are Presidential Guard documents as well as the FPLC document that she also

1 mentioned, and in this regard, I'll be touching on some of the issues arising in
2 subparagraph 2(d)(ii) in your 25 March scheduling order.

3 Your Honours, the Lubanga trial will be remembered for many things: For being the
4 first trial heard at the ICC, for being the first case in international criminal law to
5 focus solely on the crime of using child soldiers among other matters, but it will also
6 be remembered for the scrupulous manner in which the Trial Chamber ensured that
7 the trial ran fairly and that the rights of the accused were upheld.

8 Your Honours Mr Lubanga had a fair trial. He was properly informed of the charges
9 against him and that the -- and the evidence the Prosecution was calling in its case.

10 He had adequate time and facilities to prepare his Defence case and, indeed, called a
11 robust one. He was given every opportunity to raise issues about the conduct of the
12 proceedings with the Trial Chamber and did so frequently, including a vigorous
13 challenge to the fairness of the whole process halfway through his own case, which
14 the Trial Chamber meticulously examined.

15 When disclosure or other issues arose, the Trial Chamber ensured they were properly
16 and fairly remedied and after fully testing the Prosecution's case, and calling his own
17 and having made full submissions about the evidence, Mr Lubanga was convicted by
18 the Trial Chamber in a careful and fully-reasoned judgment.

19 Your Honours, contrary to what we've heard today, an examination of the Trial
20 Chamber -- of the trial record contradicts his claim that the Prosecution repeatedly
21 and seriously violated his fundamental rights under Article 67 of the Statute, thereby
22 causing irreparable prejudice. We've set this out in our briefs but, in short, the
23 record shows, firstly, that the Prosecution's disclosure practice in this case, despite
24 what may be called some shortcomings, were effectively resolved at trial and they do
25 not call into question the methodology of the Prosecution's disclosure practices or the

1 fairness of his trial.

2 Second, the Prosecution did not generally breach its duty to investigate both
3 incriminating and exonerating the evidence under Article 54(1)(a), as my colleague,
4 Mr Guariglia, has already submitted on.

5 While some things in hindsight may have been done differently, most notably the
6 manner in which the Prosecution used the intermediaries, at all times the Prosecution
7 remained independent, impartial and fair. And finally, most critically, to the extent
8 problems did occur, and I'm referring here to the evidence which was affected by the
9 Prosecution's use of the intermediaries, to the extent those problems occurred at trial,
10 the Trial Chamber was able to effectively remedy them and, when necessary,
11 considered the matters when evaluating the evidence and the witnesses so as to
12 ensure that Mr Lubanga received a fair trial.

13 Now, your Honours, the appellant has fully ventilated these same arguments that he's
14 making in the appeal, and he repeats today in the hearing, at least three times before
15 the Trial Chamber which rightly dismissed them, and simply by rearguing, rehashing
16 them today again on appeal, he does not meet his burden of showing that the Trial
17 Chamber erred in law, or in fact, or in exercising its discretion when it found that the
18 accused had had a fair trial.

19 Your Honours, I could point you to the entirety of the record on this point, but the
20 three main decisions of the Trial Chamber that I would point Your Honors to are,
21 firstly, the Trial Chamber's well-reasoned and lengthy decision dated 23 February
22 2001, which adjudicated his request to stay proceedings for abuse of process; there,
23 after comprehensively considering all these matters about unfair trial, they were not
24 persuaded, the Trial Chamber was not persuaded that it would either be repugnant to
25 allow the proceedings to continue, dealing with the integrity issue, or that the

1 accused's rights had been breached to the extent that a fair trial had been rendered
2 impossible.

3 Your Honours, the attention that the Trial Chamber gives to these matters in that
4 decision demonstrates in no uncertain terms the importance it gave to the Defence's
5 allegations and the need to ensure that the trial process was fair and, it stressed, that it
6 would consider these matters again at the end of the trial when it was evaluating the
7 evidence.

8 This takes me to the second-most important decision of the Trial Chamber which is, of
9 course, the trial judgment because it did just that in the trial judgment.

10 Addressing the Defence's final submissions this time which pressed the same fair trial
11 points again made during the appeal, the Trial Chamber said it was unpersuaded that
12 the Prosecution had violated its duties, particularly since it, itself, had taken measures
13 throughout the trial to mitigate any possible prejudice to the Defence when those
14 concerns were expressed and kept the Prosecution obligations permanently under
15 review. And after summarising the many steps that it took, in terms of dealing with
16 prejudice, the Trial Chamber then highlighted the most significant remedy of all that
17 it had taken in this case and that is that it had evaluated whether or not the issues that
18 were raised affected the reliability of the evidence. And we can see -- of course time
19 doesn't allow me, but we can see numerous instances throughout the judgment where
20 it did just that. And if I could just give two examples: most notably, refusing to
21 rely, or not relying on the evidence given by all of the child soldier witnesses -- all of
22 the Prosecution's witnesses called as child soldiers in this case who had been
23 introduced to the Prosecution by the intermediaries, and also many examples of
24 considering the impact of any late disclosed evidence on the credibility of witnesses.
25 And, finally, your Honours, it dealt with it again -- the Trial Chamber dealt with it

1 again a third time, these same submissions, when sentencing the accused, rejecting
2 that these violations were such, were serious enough to give a further reduction to his
3 sentence beyond the reduction already given to him in the sentencing judgment for
4 what they called, quote, "particularly onerous circumstances", which included some
5 of the matters that had arisen at trial, and that's the sentencing judgment at
6 paragraphs 90 to 91.

7 Now, your Honours, there is simply no merit to the argument that we heard by
8 Madam Mabile this morning to the effect that the Trial Chamber erred in finding that
9 the -- the Trial Chamber was wrong to find that the Prosecution did not generally
10 violate its duties to investigate both incriminating and exonerating circumstances and
11 that where it did occur, in the relation to the child soldiers, its non-reliance on their
12 evidence was an effective remedy for the prejudice.

13 The argument that she has made that the Prosecution's failure to not properly verify
14 or scrutinise the evidence of the child soldiers, that it also tainted other witnesses and
15 evidence is completely speculative and not borne out by the evidence. The Trial
16 Chamber quite rightly saw this issue as one affecting the child soldier witnesses, the
17 nine witnesses that were called, and its remedy that it chose by placing no reliance
18 whatsoever on their evidence was an abundantly fair and proper exercise of Trial
19 Chamber discretion. And, in any event, we can see that the Trial Chamber gave very
20 thorough reasons for accepting the evidence it relied upon.

21 So to repeat, contrary to his assertion that the Trial Chamber didn't properly address
22 or provide an appropriate remedy for this use of intermediaries, without what the
23 Trial Chamber called -- without proper supervision or verification, in fact the Trial
24 Chamber directly issued it and it provided a robust remedy and his argument that the
25 Trial Chamber should have found that this established such a lack of independence or

1 impartiality on the part of the Prosecution so as to taint the integrity of the whole trial
2 must fail. His arguments simply don't show that the Trial Chamber erred in
3 exercising its discretion in adopting the course that it took.

4 In short, your Honours, the appellant has not shown, either in argument today or in
5 the briefs, that his rights were violated so as to render the trial unfair. The Trial
6 Chamber was able to remedy any demonstrated problems, either procedurally during
7 trial, or at the end of the trial when it evaluated the evidence, even going so far as to
8 reject a significant portion of the Prosecution's evidence.

9 The Trial Chamber addressed all the matters he now raises and found that they did
10 not jeopardise the fairness of his trial. As the appellant in this matter, he has to show
11 that the trial was unfair so as to affect the reliability of the Trial Chamber's decision
12 convicting him. We can see that from Article 83(1) of the Rome Statute. He has not
13 done so and for this reason his unfair trial arguments should be dismissed.

14 I'll turn now to discuss the submissions on the Prosecution's alleged disclosure
15 violations and that they prejudice his Defence. Your Honours, again, I will quickly
16 remind you of the three most essential steps, as it were, that the Trial Chamber took in
17 this regard to deal with all these disclosure issues that happened at trial; the first
18 being in the abuse of process decision, the second articulating all the remedies that it
19 took to address disclosure problems as they arose during trial and then the third - and
20 as I've stressed most critically for ensuring the fairness of his trial and the safety of his
21 conviction - it fully considered the matters that were raised at trial when evaluating
22 the reliability of any affected witnesses.

23 Now, the examples he has raised about the two Presidential Guard documents and
24 the document on FPLC - the FPLC document that we also disclosed on appeal - do
25 not support the far-reaching and speculative claim he makes that the Prosecution

1 didn't carry out its disclosure duties properly at time and somehow that this
2 encroaches on the Trial Chamber's ability to have limited the prejudice.

3 Your Honours, I won't go into the point about Annex 3 to the appeal brief. We think
4 that it's dealt with sufficiently in the brief. I'll just concentrate on the documents that
5 were disclosed at trial.

6 Your Honours, contrary to his claim, the record shows that the Prosecution took its
7 disclosure obligations seriously and diligently, disclosing some 6,000 documents to
8 the Defence in these proceedings, providing the Defence the opportunity to give input
9 on search terms relevant to their case and taking a variety of steps to ensure it met its
10 obligations, including commissioning regular searches and reviews of its evidence
11 collection and, when in doubt about a particular document, raising it ex parte with
12 the Trial Chamber if necessary.

13 Now, your Honours, that some lateness or even oversights may have occurred in the
14 course of this sizeable undertaking is not surprising when we bear in mind the
15 breadth and nature of the case, the size of the evidence collection and the
16 Prosecution's developing understanding of the Defence case.

17 In a process like this there is always the possibility of isolated good faith oversights,
18 but to the extent they may have occurred they were marginal in nature and did not
19 detract from the overall fairness and efficiency of the disclosure practice.

20 And most importantly for your Honours, now that we are at the appellate review
21 stage, the question we have to ask is whether any of the instances of late disclosure,
22 including the documents not that have been disclosed on appeal, caused such
23 irreparable harm to the Defence as to render his trial unfair and so affect the reliability
24 of the conviction? The answer to this we would suggest is no.

25 Now, I'll come immediately to the documents - the two documents - disclosed in the

1 appeal proceedings concerning the Presidential Guard. These are the documents
2 that he used yesterday in examining D-40 and they are annexes 5 and 6 to his second
3 additional evidence motion.

4 At the trial the Prosecution did not disclose these two documents and only recently
5 have we done so when brought to our attention on appeal.

6 Now, your Honours, in hindsight this may or may not have been the correct call
7 about these documents. We rely on our briefs in terms of the reason why they were
8 not disclosed earlier, but this is not the question now. The important question now
9 is, because we're here at the appellate review stage, we have to ask whether the
10 Defence was materially prejudiced in defending himself at trial by not having had
11 these two documents? And the answer to that is no.

12 Now, he says they would have helped him to identify the members of his Presidential
13 Guard, that he couldn't have known of let alone obtained these two documents
14 because they were held by the Prosecution and that he couldn't have possibly
15 remembered the names of any of the -- or all of his bodyguards in the list or the
16 photos, but this overlooks a fundamental point when assessing his prejudice claim.

17 My colleague, Mr Guariglia, touched on the same issue this morning when he dealt
18 with the question of the availability of D-40 and 41. It comes to the same point.

19 The point is this: Why couldn't the Defence have obtained this very same
20 information - maybe not these two exact documents, but the same information in
21 these two documents - simply by carrying out relatively routine investigations? As
22 the commander-in-chief of the FPLC - UPC/FPLC - he would either have known
23 personally, or at least by name, at least some of his personal bodyguards to make the
24 necessary inquiries and thereby find either the ones he knew, or to find the others by
25 name by making the appropriate inquiries if necessary through his Defence

1 investigator, or even by asking two witnesses, Defence witnesses, D-11 and D-19.

2 Now to consider this, you have to understand that the Presidential Guard was a
3 relatively small group of people. If we look at the transcript, P-16 said that there
4 were about 60 people during the relevant time. D-40 said that that number had even
5 gone down further by the time that the French had arrived. I think he used the
6 figure of 11. We also --

7 PRESIDING JUDGE KOURULA: Ms Brady, you have two minutes.

8 MS BRADY: Thank you.

9 We also heard yesterday that D-41 said that they personally knew each other, and in
10 addition the Prosecution had already disclosed other documents to him containing
11 the names of two -- at least two of the people depicted in the photos and one person
12 in the Presidential Guard who is not in the photos or the list, and he never informed
13 the Trial Chamber that he had difficulty in understanding or knowing the identities of
14 those in his close circle.

15 Your Honours, on the specific points on his prejudice in terms of cross-examining
16 P-299 and finding D-40, I think they have been covered amply in our briefs.

17 I'll just go right to the FPLC list of soldiers. Again, this does not show some wider
18 failing in the Prosecution's disclosure practices. While reasonable minds may differ
19 as to whether the Prosecution's assessment of this document as incriminatory, as we
20 first said, and not falling within disclosure obligations was correct at the time, the real
21 question again is whether he was materially prejudiced by not having had that.

22 And, again, it's the same argument. Yes, it may have been helpful to him to track
23 down FPLC soldiers, but why is it that as the former FPLC commander he would
24 have been as well-placed to know or at least identify those soldiers? He cannot say
25 his trial was unfair by not having had it.

1 So even if for argument's sake the Prosecution should have disclosed this document
2 and even if it should have disclosed the other two Presidential Guard documents, the
3 counter-argument that we've made defeats his prejudice argument.

4 In conclusion, your Honours, he cannot show that the Prosecution's -- he has not
5 shown, rather, that the Prosecution's investigative or disclosure practices at trial
6 prejudiced his ability to defend himself. When problems arose the Trial Chamber
7 itself took effective measures to address any potential prejudice, and he fails to show
8 any error in that Trial Chamber approach, or that the Prosecution doesn't carry out its
9 duties properly. His claim that his trial was so tainted as to undermine the reliability
10 of his conviction must fail.

11 And, your Honours, those conclude my submissions.

12 PRESIDING JUDGE KOURULA: Thank you very much. Thank you, Mr Guariglia.
13 Thank you, Ms Brady.

14 Let me now turn to the legal representatives. We have 20 minutes left. That's
15 exactly the time for you, Maître Walley, to make observations on behalf of the
16 victims represented by team V01. You are reminded that your observations are
17 limited insofar as they must relate to the submissions of counsel for Mr Lubanga, or
18 the Prosecutor, and must only address issues affecting the personal interests of the
19 victims that you represent.

20 You have got the floor.

21 MR WALLEYN: (Interpretation) Thank you very much, your Honour. Your
22 Honour, ladies and gentlemen of the Bench, it's been 12 years now that the Rome
23 Statute has been in force. Twelve years from the time when the events in question
24 that go to the heart of our arguments took place.

25 Article 8 of this Statute, 8(2)(b), 8(2)(e), confirm the fact that enlisting into an army

1 children of less than 15 years of age, or allowing them to participate in combat, is a
2 crime under international law. For the armies fighting at that time, fighting in the
3 DRC, this date of entry into force did not go unnoticed, particularly because two
4 years beforehand a decree number 0666 -- 66 rather of 9 June 2009 had prohibited
5 enlisting children into armed forces up until the age of 18 years of age of said children,
6 building in therefore the convention of the rights of the child.

7 But this didn't forbid warlords in Ituri that brought bloodshed and strife to Ituri to
8 continue to recruit after the date of 1 July 2002 thousands of child soldiers, nor did it
9 prevent them sending them into combat as cannon fodder.

10 The phenomenon of child soldiers in this conflict became widespread, and I make
11 reference to an adjective that was used by the Trial Chamber - Trial Chamber II - in its
12 judgment of 18 December 2012. All observers have acknowledged that these groups,
13 all these groups, all these combatant groups involved in the conflict, recruited
14 hundreds and even thousands of children of less than 15 years of age and that the
15 UPC was no exception to that rule. Quite the contrary.

16 During the trial proceedings the scale of this phenomenon was attested to not only by
17 former child soldiers, but also by a number of neutral observers, staff of international
18 institutions, journalists, staff of NGOs, national -- both national and international, and
19 experts, as well as written documents, photos and audio and video footage.

20 And even Mr Lubanga himself had implicitly acknowledged the existence of -- of this
21 by demobbing orders - specific demobbing orders - that he signed and that we've just
22 heard about. Defence witnesses D-0032 and D-0033 confirmed in this very room that
23 they had been recruited in the FPLC before reaching the age of 15. The first was
24 enlisted by force.

25 However, the appeal motion and the submissions made by Defence for the most part

1 are focussing on the presence of children of less than 15 years of age in the UPC
2 militia, saying in the appeal motion that it was inconceivable to envisage the
3 possibility of arriving at a determination of guilt of the accused without one single
4 victim being accurately identified. To say that the presence of members of a certain
5 category of people in an armed group can only be proved by identifying these people
6 strikes me as just as absurd as to say that a massacre, or a population displacement,
7 can only be proven by identifying the victims. Victims -- not all victims, but some
8 victims have been identified and not only those who were part of these proceedings,
9 but also those that gave oral testimony at the behest of OTP and Defence.

10 Now, if Trial Chamber set aside the testimony of these people as by saying that their
11 witness testimony wasn't credible, it doesn't necessarily mean that it's proven that
12 their testimony in their involvement in the combat or their enlistment was erroneous
13 or false. This has been recalled to your memory that it's the possibility that -- that
14 the possibility of this eventuality exists, that is what prompted the Chamber to
15 undertake the measure which it did.

16 Ms Brady has already said that the work incumbent upon the Prosecutor in this
17 instant case was performed correctly, but in reality a fair trial doesn't depend on the
18 work conducted by parties but on the work conducted by the Chamber, and this
19 particular Chamber in this instant case had an attitude which I would characterise as
20 scrupulously respectful of Defence entitlements. It actually decided to halt
21 proceedings twice and if these -- if this decision had gone to appeal, well, the Defence
22 actually received disclosure which actually proved without relevance.

23 So it's with specific severity that the proofs submitted by the Office of the Prosecutor
24 were tested, and it's the total adherence to Defence rights that prompted the Chamber
25 to set aside the entirety of testimony of former child soldiers.

1 Now, Honourable Judge Odio Benito which approved this approach determined in
2 its -- in his dissenting opinion that the majority of the Chamber erred in finding that
3 this should also entail their exclusion from the procedures -- proceedings, rather, as
4 victims. And for those who were brave enough to be involved in the proceedings,
5 whilst accepting to come before the Court to testify, this Chamber decision was a
6 disappointment, and it wasn't the first for these young victims.

7 The eight years of the proceedings was an age, felt like an age to them. They had to
8 take on the shocks of the decision to halt proceedings and to release the accused.

9 You can imagine how difficult it was to explain what that involved to them. Some
10 fell prey to threats and acts of violence because of their involvement in the
11 proceedings. Some had to be taken into a protection programme, sometimes over
12 many years. Some are isolated within a family which continues to support the
13 accused. All have lost in terrible conditions their innocence, the innocence of
14 childhood, and have experienced a traumatising youth. Some of them have been
15 able to slot back into society, but many others today are jobless, have no academic
16 qualifications, have no permanent home and live in the margins of society, and they
17 are perceived as a danger right across the region and are the police's first port of call if
18 any crime is committed in the region.

19 Former child soldiers have become now adult men and women, sometimes mothers
20 and fathers. The prospect of remedy for the loss of their schooling, their wounds
21 and their suffering, which is an essential feature to the Rome Statute, is now a more
22 remoter prospect than the day when they actually signed their participation form to
23 participate in proceedings.

24 Our clients should be able to expect that their former commander-in-chief tries to play
25 down his role and that he draws upon difficult circumstances in a merciless conflict,

1 but if he's denying what each inhabitant of Ituri saw and experienced and that he
2 portrays these victims as liars, swindlers and profiteers, insults them and wounds
3 them once again, the new witnesses that were brought yesterday before you should
4 make inoperative the entirety of the proofs that were brought to the trial.

5 Counsel Biju-Duval says that in the light of these testimonies, these convincing
6 testimonies, we should say that even the Rwampara visit, all these children, all these
7 people of small stature in these pictures, well, they could be 18 years of age like those
8 we saw yesterday.

9 And this recalls to memory somewhat this statement made by a previous Defence
10 counsel who said that in that photo you could see soldiers that had the stature of a
11 child of less than 15, perhaps these aren't Hema children, a population who's reputed
12 for high stature, but possibly pygmies.

13 And so now we're asked to believe that they are all people who are -- who look under
14 15 years of age but in reality are actually, what, 18 or 19 or 20 years of age. Are these
15 credible witnesses? Because everything relies on, everything pivots on that
16 particular question.

17 Is it by happenstance that the voter's card of these witnesses bears erroneous
18 information? In both cases the place of the birth is erroneous according to the
19 admission of the bearers themselves. Well, what about the dates? What can we say
20 about them? Should we not deal with these witness testimonies in the same way as
21 the Chamber dealt with the child soldiers' testimonies who came to the Court at the
22 behest of the Prosecutor?

23 These are inconsistencies and contradictions that called for the setting aside of the
24 entirety of these testimonies. In addition, there was a particular reason for this at the
25 time for young people who were asking for a voter's card at a time when in reality

1 they didn't have -- they weren't 18 years of age to give them obviously that -- if they
2 were 18, they would have had a status of an adult because in 2006 it was the first
3 election campaign seen in DRC and the voter's card, therefore, was an identity card.
4 Therefore, it was very important for a young person to have this card because it
5 conferred upon that "child", inverted commas, the status of an adult.
6 Now, can we not imagine that some have had feature on their card a wrong place of
7 residence so that any checks can be impeded? Now, in any case, the Trial Chamber
8 was right -- it remains the case that it had -- that there was a video where we saw
9 young people who looked less than 15 years of age, and this was true for other
10 material. I don't want to go over what the Office of the Prosecutor has just stated.
11 Your Honour, your Honours, we are therefore calling for the confirmation of the
12 pronouncement of guilt of the accused as the Trial Chamber determined which would
13 re-establish historical, social, legal veracity and would give to victims an initial round
14 of relief and remedy of course ahead of any further remedy and relief.
15 We've also been given leave to be involved in the appeal proceedings against the
16 decision on conviction, but we -- the conviction decision will be made -- the sentence
17 will be made against Mr Lubanga, but we're disappointed about the way that the
18 Trial Chamber refused to take into consideration the circumstances of the crime and
19 more particularly the suffering of the victims.
20 Even though this is particularly specified to Rule 145 of the Rules of Procedure and
21 Evidence, the majority of our clients didn't wish to go off to the front to fight, even
22 though their families were under threat. Some, however, went voluntary in order to
23 seek revenge of the death of members of their family or out of necessity, but all were
24 confronted with living conditions more similar to a concentration camp than barracks,
25 deprived of food and medical -- medical care, receiving blows, locked into

1 inhuman -- inhumane conditions in a hole in the ground full of water, for example,
2 summary executions as a disciplinary measure, rape and sexual slavery of girls. This
3 was widespread.

4 At a given point of time during the proceedings we suggested to the Trial Chamber to
5 envisage a recharacterisation of the charges to make sure that this latter corresponded
6 more properly with the facts in question.

7 The decision of the Trial Chamber went about it in that direction, but the decision was
8 overturned in appeal without any recharacterisation being ruled out by your
9 Chamber for all that.

10 Trial Chamber, however, continued with their proceedings without leaving an open
11 door for fresh characterisation but leaving open the door potential for victims'
12 suffering to be taken into consideration during the sentencing, but this in the end of
13 the day wasn't the case any more was taken into consideration the absence of any
14 regret or apologies or any -- any initiative to repair the damage on the part of the
15 accused.

16 And this is why we also sought involvement in this appeals proceeding by calling
17 upon you to take into consideration 143, take into consideration the condition -- the
18 considerations mentioned in paragraph 1 of Article 78, the scale of the damage
19 incurred, in particular prejudice caused to victims and members of their family as
20 provided for in Rule 145 of the Rules of Procedure and Evidence.

21 Thank you very much.

22 PRESIDING JUDGE KOURULA: Thank you very much, Maître Walleyne.

23 Due to the lateness of the hour, I think we move to the second legal -- part of the legal
24 representatives in the course of the afternoon and I see that it is time for the scheduled
25 break. The hearing is hereby adjourned and we will reconvene for the second

1 session at 2 p.m.

2 THE COURT USHER: All rise.

3 (Recess taken at 11.24 a.m.)

4 (Upon resuming in open session at 1.59 p.m.)

5 THE COURT USHER: All rise.

6 Please be seated.

7 PRESIDING JUDGE KOURULA: Good afternoon.

8 Today's second session is called to order. We will continue with the hearing of
9 submissions from the parties and participants and we are starting with you, Maître
10 Kabongo. You have 20 minutes to make observations on behalf of the victims
11 represented by team V02.

12 As I instructed Maître Walley, you're similarly reminded that your observations are
13 limited insofar as they must relate to the submissions of counsel Lubanga or the
14 Prosecutor and must only address issues affecting the personal interests of the victims
15 that you represent.

16 Maître Kabongo, you have got the floor.

17 MR KABONGO: (Interpretation) Thank you, Mr President.

18 Mr President, your Honours, Judges of the Appeals Chamber, allow me, your Honour,
19 to draw your attention to the evidence of age of a child in Congolese law. In other
20 words, my contribution will mainly concern this point so as not to repeat what the
21 previous parties have already said here in response to the Defence submissions.

22 But before I proceed, Mr President, I would like to dwell on certain crucial points.

23 During the period from September 2002 to December 2003, having cognizance of his
24 unique role within the UPC in his capacity as president and commander-in-chief,
25 Mr Thomas Lubanga Dyilo, together with other members of the FPLC, recruited

1 children under the age of 15 years who were subsequently trained in various training
2 camps for the purpose of using them actively in hostilities. This recruitment, as well
3 as the mode of participation in hostilities, was conducted on the basis of methods
4 adopted and implemented by the UPC/FPLC, which was a hierarchically organised
5 armed group.

6 On the basis of these facts, Trial Chamber I in its judgment delivered on 14 March
7 2012 declared the accused person guilty and handed down a sentence against him on
8 10 July 2012.

9 Both the Defence and the Prosecution lodged appeals against the two decisions and
10 filed accompanying briefs in support of their appeals.

11 In its submission in support of its appeal, the Defence alleges that Trial Chamber I
12 found the accused guilty incorrectly and they also allege that the Trial Chamber made
13 serious errors of law and fact. These grounds are totally unfounded.

14 In point of fact regarding the alleged errors of law, the Defence submits that the
15 Chamber - the Trial Chamber - erred in its findings of the existence of criminal intent,
16 whereas this was not established in the case of the accused within the meaning of
17 Article 32(b) of the Statute.

18 The V02 group of victims submits that it is absolutely -- there is absolutely no doubt
19 that the accused was privy to the recruitment of children under 15 years of age within
20 the FPLC for the purpose of using them in hostilities. TC I was therefore quite
21 correct in ruling that there was this moral element on the part of the accused.

22 With regard to the alleged errors of fact, the Defence faults the Chamber - the Trial
23 Chamber - for finding -- arriving at a finding of actus reus and according to it, even if
24 this had been established, the accused did not perpetrate these material facts directly
25 or indirectly.

1 The V02 group of victims submits that, apart from the fact that the accused was aware
2 of the common plan, he knew that this was being implemented and it involved a risk
3 in the normal course of events and so Trial Chamber I was correct in its findings.

4 As the appeal proceedings come to a close, the victims are relieved in the expectation
5 of the commencement of the reparation phase which will enable them to present the
6 intricate details of their suffering, the scars of which they still bear.

7 In fact, in light of the evidence and witness statements adduced in this case, there is
8 no doubt at all that there was enlistment, conscription and use of child soldiers under
9 15 years old within the armed wing of the UPC (the FPLC) and the accused was its
10 commander.

11 The victims are of the opinion that the testimonies of the two witnesses heard before
12 the Appeals Chamber, in order to rebut that thesis, did not undermine in any way the
13 grounds underpinning the judgment of Trial Chamber I.

14 In Congolese law, Mr President, the age of a child can be established by the
15 presentation of a birth certificate issued by the Civil Status Registry. In the event of
16 failure to produce a birth certificate, Congolese law provides that this situation can be
17 remedied by the presentation of court -- a court declaration in lieu of the birth
18 certificate.

19 Accordingly the victims hope that the testimonies of Witnesses 40 and 41 of the
20 Defence, based on voter's cards obtained for electoral purposes and which were not
21 established on the basis of the aforementioned official documents that should have
22 established their civil status at birth, cannot affect the sincere conviction of the Judges
23 of the Appeals Chamber.

24 In light of the foregoing, at this stage of the proceedings the V02 group of victims
25 request the Appeals Chamber to confirm all the operative paragraphs of the judgment

1 on the guilt of the accused, as well as the sentence handed down by Trial Chamber I.

2 Thank you.

3 PRESIDING JUDGE KOURULA: Thank you, Maître Kabongo.

4 Mr Guariglia, from the Prosecution, if needed you have ten minutes to respond to the
5 observations made by the legal representatives of victims V01 and V02. You have
6 the floor.

7 MR GUARIGLIA: Thank you so much, your Honour. I don't think I will need the ten
8 minutes. I'm only going to address three points raised by Mr Walleyne early this morning.

9 The first one relates to the Rwampara video and we fully agree with Mr Walleyne that
10 the Defence position related to the supposed impact of the evidence of D-40 and D-41
11 in relation to the Rwampara video is untenable. Neither witness appears in that
12 video and there is no other connection between the witnesses and the video in
13 question. The Rwampara video is completely unrelated to D-40 and D-41.

14 What the video does, it depicts Mr Lubanga in a training camp - the Rwampara
15 training camp - in the presence of dozens of young people, some of them who the
16 Chamber determined beyond a reasonable doubt were under the age of 15 - that is at
17 paragraph 1242 - and the video then shows Mr Lubanga addressing these young
18 recruits, including the children, and encouraging them to complete their training in
19 order to become soldiers and to receive their weapons so that they would be ready to
20 fight. That is at paragraph 1269.

21 The probative value of that video was also bolstered by witness evidence before the
22 Trial Chamber confirming the existence of that visit by Mr Lubanga to the Rwampara
23 camp and of the speech. Nothing in the evidence of D-40 and D-41 can have any
24 impact on these specific findings.

25 But in the end, your Honour - and you heard this from Mr Biju-Duval this

1 morning - the Defence is not even asking your Honours to substitute your assessment
2 of the age of the children depicted in the Rwampara video for that of the Trial
3 Chamber, which already would be impermissible on appeal. Rather, what they are
4 asking you to do is to substitute the Defence's assessment of the age of those children
5 for that of the Trial Chamber and this is clear by the manner in which the argument is
6 framed.

7 They're not saying that the findings must be overturned because no reasonable trier of
8 fact could have reached the same conclusions on the basis of the evidence before the
9 Trial Chamber, but rather what they're saying is that the findings must be overturned
10 because the Defence considers that none of the children depicted in the video could
11 possibly be under the age of 15. With all due respect to my learned colleagues from
12 the other side, on this basis no error of fact can be demonstrated and the Trial
13 Chamber's findings in relation to the Rwampara video must be confirmed.

14 Your Honours, we also agree with Mr Walley in relation to the -- his accurate
15 conclusions that the inconsistencies and omissions in the evidence of D-40 and D-41
16 yesterday were such that this would have unavoidably led to their full rejection at
17 trial.

18 If your Honours examine the Trial Chamber's judgment, it is clear that the Chamber
19 has been extremely thorough in the assessment of the credibility and reliability of all
20 evidence before it and in particular witness evidence.

21 The Chamber rejected on a systematic fashion witness evidence that the Chamber
22 concluded was not safe enough, was not reliable enough and therefore could have no
23 probative value. This included also witnesses, as it is well-known, that the
24 Prosecution intended to rely upon. So the Trial Chamber erred on the side of
25 caution by discarding every evidence that was controversial and ensuring that its

1 findings would be safely grounded on credible and highly probative evidence.

2 The evidence of D-40 and D-41, with the level of inconsistencies and omissions that
3 were presented yesterday, would have not survived this scrutiny by the Trial
4 Chamber. In this sense, the representative of the group of victims V01 is absolutely
5 right.

6 This further shows that first the evidence should not have made it to the appeal
7 because it lacks credibility, but second and perhaps equally importantly that it would
8 have not made any difference at trial had it been adduced at trial.

9 This concludes our submissions for today, your Honours. Thank you very much.

10 PRESIDING JUDGE KOURULA: Thank you, Mr Guariglia.

11 I am now turning to the Defence. Maître Mabilie, you have 20 minutes, if needed, to
12 respond to the observations made by the legal representatives and the response of the
13 Prosecutor. Proceed, please.

14 MS MABILLE: (Interpretation) Jean-Marie Biju-Duval, my colleague, is going to respond to
15 the various points raised by the Prosecutor and the legal representatives, your Honour.

16 PRESIDING JUDGE KOURULA: Thank you.

17 Maître Biju-Duval?

18 MR BIJU-DUVAL: (Interpretation) Thank you, Mr President, your Honours. I will
19 respond briefly to the various points raised by the Prosecutor to begin with and then by the
20 legal representatives of the victims.

21 To begin with, this morning the Prosecutor stated that, if the witnesses that we heard
22 yesterday - that is 40 and 41 - had not been called during the trial proceedings, or
23 rather were not called, it means it was a tactical choice of the Defence. It means that
24 the Defence took a tactical decision not to call those witnesses.

25 Obviously the Court will understand that that is incorrect. As Maître Mabilie

1 already said this morning, it is clear that the Defence would have called those
2 witnesses if the Defence had been able to identify them and meet with them before
3 the end of the trial.

4 The Defence did that with many other witnesses, particularly witnesses who were
5 members of the FPLC. We did that because we had had the opportunity to meet
6 with those witnesses before the end of the trial proceedings. It is therefore totally
7 wrong to claim that this is a tactical choice on the part of the Defence.

8 Secondly, the Prosecutor submits in regard to the witnesses who testified yesterday,
9 that is Witnesses 40 and 41, that it is not incumbent on the Prosecutor to carry out
10 investigations in lieu of the Defence. The Prosecutor is saying, "It is not up to us to
11 do the work of the Defence."

12 I believe that the Prosecutor does not understand his obligations under the Rome
13 Statute, so there is a problem of shifting the burden of proof here.

14 You have Witness D-40 and D-41. These are two individuals who are described by
15 the Prosecutor using video footage as incriminating witnesses; that is individuals who
16 are on video footage produced by the Prosecutor. Why did they do that? Because
17 that was the core of the Prosecution case; that is the age of the soldiers that we can
18 view - that we can see - on this footage.

19 So this is the very heart of the duty of investigation of the Prosecutor. The
20 Prosecutor has the obligation to carry out in-depth investigation both in incriminating
21 and exonerating circumstances. This means that the Prosecutor has to gather all the
22 best proof possible relating to the age of the individuals in question and these
23 investigations are exclusively the responsibility of the Prosecutor. It is definitely not
24 the responsibility of the Defence, which cannot even carry out these investigations
25 given the limited resources at its disposal.

1 Thirdly, I will talk about the assessment of the credibility of the witnesses who
2 testified yesterday; that is Witnesses 40 and 41. I realise that the OTP, just like one of
3 the legal representatives, is imposing on the Defence an extremely high threshold of
4 evidence which is much higher than the standards set by the Prosecutor for his own
5 witnesses or for the victims who came to testify.

6 Next, this morning, on several occasions, I realised that the statements of the
7 Prosecutor misrepresented the testimonies that we heard yesterday. Several times
8 the Prosecutor claimed that there were errors on the dates of birth on the voter's cards
9 of the witnesses. This is incorrect. He also claimed that there were errors on the
10 places of birth on the two voter's cards. That is incorrect. It is true that there was
11 an error on one of the voter's cards, but not the other.

12 I would like to make the following observation to the Court: The voter's cards that
13 were produced have not been challenged in relation to their authenticity. None of
14 my learned colleagues dispute the fact that these were indeed voter's cards that were
15 issued to the two witnesses who testified yesterday. Both of them came and
16 explained to us how those cards were issued.

17 Those voter's cards as we know for each of the witnesses, the first card was issued in 2006.
18 In 2006, there was the process of the issuance of voter's cards for the purpose of the
19 presidential elections. So there was an election and there was a need to identify those who
20 have a right to vote. And who are those who have a right to vote? Congolese citizens over
21 18 years old. They have to be over 18 years old. That is what the electoral officials have to
22 confirm and cross-check. This is the main reason for the issuance of voter's cards in Ituri in
23 2006.

24 Consequently, what the officials have to confirm is the date of birth. We can suppose that
25 this official can carry out this cross-checking of the dates of birth on the very difficult

1 circumstances in light of the events that took place in the preceding years.

2 Obviously, he must have received different supporting materials, but what we must
3 understand is that the official who issues these cards attaches great importance to the
4 date of birth. What we know is that when D-40 went before this officer, he had the
5 same chance of having that card as Witness 41. So you can claim that there was no
6 court declaration and no birth certificate produced in the courtroom, but one thing is
7 sure, the Congolese official who issued these voter's cards to D-40 and 41 must have
8 cross-checked with the means at his disposal and issued those cards to the two
9 witnesses.

10 And you cannot tell the Defence that you have not produced the evidence in relation to
11 Congolese law and so on and so forth. Of course, we do not have the same burden of proof
12 as the Prosecutor. We do not have to prove anything as the Prosecutor has to prove beyond
13 reasonable doubt. So there is a shifting of the onus of proof here.

14 The Prosecutor has also attempted to discredit the witness in relation to his certificate;
15 whereas, Witness 40 explained that the diploma was actually issued a long time after the
16 completion of the studies.

17 I will make one last observation on Witnesses D-40 and D-41. Ever since June 2012,
18 for D-40, and November 2012 for D-41, the Prosecutor has been in possession of the
19 complete details and addresses of those witnesses because the Defence disclosed
20 those details to them.

21 From those dates on, the Prosecutor had every possibility, who is looking to ascertain the
22 truth, to go and investigate. They could propose to the Defence let us get together as quickly
23 as possible to confirm the details about witnesses 40 and 41, but they did nothing up 'til
24 March 2014.

25 So what are we saying about this Prosecutor who did nothing about these details of

1 the witnesses that were communicated or disclosed to the Prosecution in 2012?

2 There was a single verification with the Congolese authorities. It is true that this
3 confirmed the authenticity of all the statements disclosed by the Defence. We are
4 being told, well, the rest of the evidence is largely sufficient.

5 In the letter of the 12 February 2003 -- and I believe that the Chamber should not be misled
6 here because the Prosecutor is misrepresenting something here. This morning the
7 Prosecutor claimed that in this mail of 12 February 2003 there was a deliberate mention of the
8 demobilisation of children under 15 years within the ranks of the FPLC. That is totally
9 wrong. This letter does not mention the FPLC.

10 We were dealing here -- they were referring here to foreign soldiers fighting on
11 Congolese territory, and particularly Rwandan soldiers. So you have witnesses,
12 observers from various organisations who came and told us, well, we saw individuals
13 who, from their physiognomy, looked like they were under 15 years old. That is
14 what their claims were based on. So there were suspicions.

15 So the Prosecutor has had an obligation to go and verify those allegations, to investigate those
16 allegations, but today the Chamber knows that that was not the case and that so far we have
17 only that video footage that the Prosecutor has produced, which as far as we are concerned do
18 not have any value at all.

19 Regarding disclosure, the Prosecutor says that they disclosed 6,000 documents, but
20 we do not need 6,000 documents, we need only a few crucial documents, but those
21 documents were concealed.

22 We have seen this document that was recently disclosed with the photographs and
23 names of the bodyguards of the accused. From the very outset, this document was
24 at the core of the proceedings, but the Prosecutor only disclosed this document in
25 November 2013. And he -- and the Prosecution disclosed that document only at the

1 request of the Defence after having resisted for a long time. That is how the
2 Prosecutor understands their obligations for disclosure.
3 I will say one word in response to the observations of Mr Walley, legal
4 representative of the victims. Yes, we have to pay tribute to the victims of Ituri.
5 We have to pay tribute to all those who suffered, that is correct, but we should look
6 more closely at the individuals who claimed to be victims of Thomas Lubanga.
7 Let us look at those victims. But it is not possible that what they said was true because
8 almost all of them were anonymous. They were 141 victims who filled application files.
9 And out of that number, we know the names of only 15 of them. We know nothing about
10 the others. Out of the 15, nine took the risk to come and testify before this Court. And all
11 their testimonies were set aside by the Trial Judges because these Trial Judges realised that
12 there was false testimony, tampering with evidence and many other defects.
13 So all those testimonies were rejected because there were manoeuvres for corrupting
14 witnesses on the part of the Prosecution because when you look very closely you have to
15 investigate, and if you investigate closely those people who are claiming to be victims,
16 everything collapses.
17 It is for that reason, Mr President, that we appeal to your court to be more cautious
18 and vigilant, and we are appealing for the liberation or the release of Mr Thomas
19 Lubanga. Thank you.

20 PRESIDING JUDGE KOURULA: Thank you very much, Maître Biju-Duval.

21 I've been invited to ask a couple of questions on behalf of the Judges. And I will give
22 you a couple of minutes' time for -- if you need to confer your colleagues, and they're
23 addressed to both parties.

24 I'm speaking in relation to the FPLC list mentioned earlier this morning, document ICC, 1
25 April to 1 June, 2942, annex 7, and that should, I hope, appear on the screen before us. It is

1 annex 7.

2 I start with you, Mr Guariglia, the Prosecution side. The Defence will then be given the
3 opportunity to make submissions on these two brief questions.

4 The first question: Can you please explain the circumstances surrounding how you
5 came into possession of the FPLC list that is the subject of Mr Lubanga's first
6 additional request?

7 And, secondly, a related question reads: In your response to the document in
8 support of the appeal, you say at paragraph 89, and I quote, "The list does not include
9 all members of the FPLC as of December 2004. According to the Prosecution's
10 understanding, the document lists only those FPLC members who were nominated
11 for a process whereby soldiers from rebel armed groups would join DRC national
12 army," unquote.

13 These assertions are not footnoted in any manner. Can you please explain your basis
14 for your, quote, "understanding", unquote?

15 And as I indicated, I would like to start with you, Mr Guariglia.

16 MR GUARIGLIA: Ms Brady will lead with -- will deal with this question, your Honour.

17 PRESIDING JUDGE KOURULA: Thank you so much.

18 Ms Brady?

19 MS BRADY: Yes. Your Honour, if I can turn to both questions, the first question is you've
20 asked to explain the circumstances as to how the Prosecution came into possession of this
21 document. This document was part of the Article 54(3)(e) materials that were taken into the
22 office relatively early in the proceedings. I believe it may be back in 2004 or 5. And at that
23 stage an assessment was made of the documentation -- of the document, and it was
24 assessed -- in a certain way, and it was assessed as being something that could be
25 incriminatory because of the -- it showed a certain structure in the FPLC, and attempts were

1 made to lift the protection -- to ask for the consent of the provider to lift the -- to allow it to be
2 disclosed.

3 Now, at that point the decision was not -- consent wasn't provided by the provider of
4 the document, and it was considered that for the case not to go further with that
5 document.

6 Now, the question as to whether or not that is a correct one or not in terms of its value
7 for the Defence, as I said in my submission, reasonable minds may differ on whether
8 that was a correct call or not, but the Prosecution made its call on that document
9 because it was created 16 months after the indictment period and given that there
10 were several splits in the faction of the FPLC along factional lines and the uncertainty,
11 it being created 16 months later, as to whether or not it reflected accurately the
12 membership in the period of the indictment, 2002-2003.

13 And that's why when I answered the question -- or when I made my submissions this
14 morning, I wasn't concentrating so much on the reasons why or why not this document
15 wasn't disclosed at the time, because I think that was covered in our brief, but more whether
16 or not he was materially prejudiced by not having had it.

17 So the second question, your Honour, is relating to paragraph 89 of our appeal brief.

18 Your Honours, I believe that the determination that it was a document from which
19 soldiers would go into the national army was made, it's really an inference by the
20 Prosecution because the title of the document is "Liste Nominative", and in light of the
21 evidence on the record about the splits and what happened during that time period
22 where soldiers were then placed or could put themselves into the national army, that
23 the inference of the Prosecution was that that document was a list of soldiers that
24 could be taken into the national army.

25 If I could consult with my colleagues, I would appreciate it, but I believe that's the answer to

1 your questions.

2 (Pause in proceedings)

3 MS BRADY: Your Honour, the only thing I'll add of course is that the list itself is a list of
4 names. It's a lengthy list of names. There is -- there are splits in the list. It is not clear
5 from this list whether there are -- whether it is a complete list. And there's no indication in
6 that list of age of the soldiers in that list. And these are all some of the factors that were
7 taken into account by the office when it made its initial assessment of this document.
8 If I can assist your Honours further, I'd be happy to. Thank you.

9 PRESIDING JUDGE KOURULA: Thank you very much, Ms Brady.

10 Maître Mabilille, do you have any submissions to make on this matter? And please refrain
11 from going into other topics at this stage. I am only inquiring if you have any submissions
12 on these specific questions or the Prosecutor's response. You've got the floor.

13 MS MABILLE: (Interpretation) Mr President, two comments. First of all, initially the
14 Prosecutor indicated that he had not disclosed, and I am referring to his filing, that he had not
15 disclosed that document because it was of no interest whatsoever, be it inculpatory or
16 exculpatory or be it in relation to the preparation of the appellant's defence filing 2969. That
17 was the Prosecutor's first argument.

18 Then secondly, the OTP went on to argue that this list was of no interest because it lay outside
19 the scope of the charges in 2004, and that is the argument by OTP, and at the time Defence
20 responded by saying that we had received several other documents that lay outside of the
21 scope, at least in terms of time, of the charges, and that they were used by the Chamber in
22 determining Mr Lubanga's responsibility.

23 Now, the third argument which I find out today about is that the document fell under
24 54(3)(e). And this has never, never at any time whatsoever been stated by the
25 Prosecutor in any arguments made regarding the nondisclosure of this document.

1 Never has any reference been made to 54(3)(a). I would love to believe what the
2 Prosecutor is saying, but I want to draw the Chamber's attention to the fact that we
3 have had so many 54(3)(e) documents which were all generally identified as
4 confidential 54(3)(e). I do not see that seal or that mention on this particular
5 document.

6 These are the few comments I would like it make in regard to this particular item. Thank
7 you.

8 PRESIDING JUDGE KOURULA: Thank you very much.

9 Judge Ušacka would like to ask a question.

10 JUDGE UŠACKA: I would like to ask question of Prosecutor. It was mentioned that
11 Prosecutor office was in possession of information regarding Witness 40 and 41 since June,
12 November 2012, but did not do anything. Could you elaborate about this?

13 PRESIDING JUDGE KOURULA: Mr Guariglia?

14 MR GUARIGLIA: Thank you, your Honour. Only to clarify, we were not in possession of
15 any information pertaining to D-41, and we're still not in possession of any information
16 pertaining to D-41.

17 In relation to D-40, there is a discussion of the FPLC lists which the Defence claims we should
18 have consulted and we should have, on the basis of that list, made further inquiries as to the
19 age of D-40.

20 Initially, your Honour, the Prosecution did not make a match between the image of
21 D-40 in the video and the (indiscernible) of the name in the list. The name of D-40
22 was only known to us as a potential witness of some accelerated nature when the
23 Defence attempted to bring this witness in the sentencing hearing. At that point in
24 time we commenced to perform searches related to the name of this witness. Those
25 initial searches for some technical difficulties in the metadata of the evidence did not

1 generate any hits.

2 The evidence in question was then identified by the Prosecution in the context of a
3 separate but related case, and it is this context that the Defence came to know about it,
4 and when it requested the document, they obtained it.

5 It wasn't a situation of the Prosecution sitting on a document or much less a situation
6 of the Prosecution turning a blind eye to information in its possession. It was simply
7 a situation where the -- there was no connection between that document and the
8 video evidence the Prosecution was relying upon.

9 But that was also, your Honour, because, going back to my argument of this morning,
10 the video evidence was not presented at trial to tell the story of the children depicted
11 in those videos. The Prosecution was bringing specific evidence for that purpose in
12 addition to the insiders witness evidence and the witness -- the evidence of other
13 witnesses who had worked with children in the area.

14 The video evidence was brought primarily to illustrate to the Chamber the extended
15 nature of the conscription enlistment, the use of child soldiers in the UPC/FPLC rank
16 and file. It was presented to show the images and to allow the Chamber to conduct
17 its own assessment of the use of children in the -- in the rank and file of the
18 UPC/FPLC.

19 I hope I have dealt with your Honour's question.

20 PRESIDING JUDGE KOURULA: All right. Thank you very much.

21 Do you wish to have a short observation on the Defence side, or no? Monsieur
22 Biju-Duval?

23 MR BIJU-DUVAL: (Interpretation) Just one word, Mr President, and I stated this before
24 already. In June 2012, D-40, Witness D-40, appeared for the very first time. At that time the
25 Prosecution was in possession of all information, information that was made available to the

1 Defence. The Prosecutor had the opportunity to cross-examine the witness, but he didn't do.
2 So as of November 2012, the written statement of the witness was disclosed to the -- to the
3 Prosecutor. So it was -- it was possible for the Prosecutor to conduct an in-depth
4 investigation. They did not do anything. All they did was simply cross-check that the
5 information from Defence regarding the voter's card was correct. And I have nothing further
6 to say, Mr President.

7 PRESIDING JUDGE KOURULA: Thank you to both parties.

8 Judge Ušacka.

9 JUDGE UŠACKA: I have one more question to Prosecutor.

10 When I'm reading a case and looking to evidence regarding these videos, could you describe
11 technical characteristics of video, because it's different systems what I understood is making
12 this video, taking in account time when these videos were produced, whether there was some
13 expertise or -- not identity, but quality.

14 PRESIDING JUDGE KOURULA: Thank you.

15 Mr Guariglia?

16 MR GUARIGLIA: Your Honour, I can give you two answers in open court and probably for
17 one I would need to go in private session. Most of these videos are UPC/FPLC videos.

18 They were videos prepared by the same body that we were investigating. They were
19 propaganda videos, videos that were used to bolster the image and the -- of a militia group.

20 Most of the videos have some type of date stamp and time stamp which tends to use
21 the basically -- tends to provide some level of accuracy as to when the images were
22 obtained and in what particular manner.

23 Of course, we conducted a critical assessment of the evidence when we examined and
24 analysed the videos and satisfied ourselves that the evidence was credible and
25 probative.

1 And the last point I'm afraid that I have to make it in private session or closed session.

2 PRESIDING JUDGE KOURULA: Court officer, could I invite that, with your assistance, we
3 move to private session. Thank you.

4 (Private session at 2.50 p.m.)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

1 (Open session at 2.52 p.m.)

2 THE COURT OFFICER: (Interpretation) We're in open session, Mr President.

3 PRESIDING JUDGE KOURULA: Mr Guariglia?

4 MR GUARIGLIA: Thank you, your Honour.

5 My understanding from the discussions with the team is that they were originally
6 videotapes and that they have been turned into digital evidence for the purposes of
7 their use in the Court's proceedings.

8 PRESIDING JUDGE KOURULA: Thank you so much.

9 Maître Mabilie, whether you have anything to add?

10 MS MABILLE: (Interpretation) One comment, Mr President.

11 THE INTERPRETER: "No comment, Mr President," says Maître Mabilie.

12 PRESIDING JUDGE KOURULA: Thank you so much. Thank you, both parties.

13 At this time I would like to invite Mr Lubanga to address the Appeals Chamber.

14 Mr Lubanga, you have 30 minutes. Would you be so kind as to start.

15 MR LUBANGA: (Interpretation) Your Honour, your Honours, to date I have spent nine
16 years in preventative detention. It is long and terrible for a human being. It is all the more
17 terrible to do so 10,000 kilometres from my natural environment, from my family and my
18 children.

19 During these lengthy judicial proceedings, which have been very long - without
20 doubt too long because it was the first case of this new institution - I sometimes had
21 the feeling I was a victim of a fledgling legal process.

22 How much time do I still have to wait to know my fate for once and for all? That,
23 I don't know. It's still terrible.

24 However, beyond the length of the proceedings, the word that comes to mind on
25 reading the decision of Trial Chamber I is incomprehension. I feel this painful

1 feeling of not having been understood whether in my actions or in my intentions.
2 The image that has been portrayed of me is particularly negative. Am I really the
3 Machiavellian figure described during this trial?
4 Your Honour, your Honours, my lawyers have said what needed to be said and I
5 thank them for that, but today I have to admit that I did not listen to them a lot
6 because my spirit was elsewhere.
7 Yes, yesterday at the hearing I saw again two of those people who were alongside me
8 during the years 2002 and 2003 and who have come back ten years later to testify in
9 my defence: Mbogo and Nembe, soldiers from my bodyguard, UPC soldiers.
10 I cannot know what you thought when you saw them, when you heard them, but I
11 myself was very moved. Firstly I was moved by their courage, because in Joseph
12 Kabila's Congo you need courage to publicly testify in my defence, but moved also
13 because they are among those for whom I accepted the responsibilities when I took
14 them up in all humanity in 2002 to 2003.
15 They embody through their very person the *raison d'être* of my political
16 commitments during that period. They represent these young people whose youth
17 has been devastated by war and massacres since 1999, whose families have been
18 decimated, whose villages have been burned. They were 19 years old and with so
19 many others in the same situation they put their trust in me and joined the UPC
20 forces.
21 I thank them for coming quite simply to say who they were, who they are and also in
22 this way showing the reality of young FPLC soldiers. I've said it here, reality,
23 because beyond misleading appearances, against biased propaganda, against the
24 ignorance of those who are too far away to understand, they themselves have
25 demonstrated my innocence and however it is their images which convinced the

1 Judges of my guilt. It was their images which were misunderstood, wrongly
2 interpreted, interpreted incriminatingly, which for the most part decided my guilt.
3 What makes me despair in these proceedings, your Honour, is that it is the
4 incomprehension, a massive lack of understanding against which my sincerity and
5 my good faith crashed like waves against a sea cliff, a wall of incomprehension.
6 I would like to speak, for example, of this difficulty the Judges had in convincing
7 themselves that the faces of Mbogo and Nembe on the videos of the Prosecutor, these
8 tender and young faces, are those of 19 year old soldiers and not those of children of
9 12, 13, or 14 years -- 14 years of age.
10 Throughout these proceedings I had the feeling that in this Court, which is so far from
11 Ituri, nobody could understand what really happened. Nobody could understand
12 these young people, fleeing massacres and organising their defence. Nobody could
13 understand what I was in the middle of them all.
14 Mr President, your Honours, I can understand this incomprehension because, in
15 order to understand that in this Court, you have to be able to imagine the chaos, the
16 massacres, the pillaging. You have to imagine Nyankunde in September 2002 with
17 its countless deaths. You have to imagine Drodro, the horrifical (sic)
18 human -- horrific human slaughter there, Bogoro in February 2003, Tchomia. You
19 have to imagine these multitudes of villages. The only remains left today are
20 distressing remains of wood and bones which have been burned.
21 But we don't imagine them. Drodro is not imagined. Nyankunde is not imagined.
22 It's quite simply unimaginable for those who have not lived and experienced those
23 moments in Ituri.
24 Your Honour, your Honours, I can understand that international judges are troubled
25 by pictures that they do not understand. I can understand that they are abused,

1 misled by appearances which are not familiar to them. I can understand that they
2 are not capable of understanding situations that they have never experienced, but I
3 cannot admit that doubt is cast on facts which have been perfectly established by all
4 possible forms of proof. I cannot admit that scorn be poured on the acts of which I
5 am most proud, actions that I carried out for peace and reconciliation firstly, and my
6 fight which was sometimes completely alone against the enlisting of minors into
7 armed groups. People talk about a masquerade. This term, as far as I'm concerned,
8 is absolutely intolerable.

9 Mr President, your Honours, this is what I have done. On 21 October 2002, just one
10 month after taking up my responsibilities, I gave the army a clear instruction in these
11 terms and I quote --

12 PRESIDING JUDGE KOURULA: Mr Prosecutor?

13 MR GUARIGLIA: Your Honours, I regret to have to take the floor, but the witness is
14 giving -- the accused is giving evidence. This is what we -- that was our main concern when
15 this announcement was made that he was going to make a submission. He can address the
16 Court, but he had ample opportunity at trial to make -- to take the stand, to give evidence on
17 his behalf and to subject himself to cross-examination.

18 The Office of the Prosecutor is profoundly concerned about the accused abusing this
19 opportunity to give his version of events at a time where we cannot cross-examine
20 him and at a time where basically all proceedings are over. So I'm afraid that I have
21 to object to this procedure.

22 PRESIDING JUDGE KOURULA: Thank you very much.

23 Maître Mabilie?

24 MS MABILLE: (Interpretation) Mr President, what I can say in a very level-headed manner,
25 with the most efficiency possible, I am scandalised by what the Prosecutor is attempting to do.

1 It is absolutely unbelievable that today he would interrupt Mr Lubanga's statement.
2 The Statute provides that the accused person has the right to make such a statement.
3 He is not tendering any evidence that the Prosecution would be unaware of, because
4 all what Mr Lubanga is dealing with is material that is available in the case file. I
5 therefore do not see how the Prosecutor can raise himself to the level of a judge in
6 relation to Mr Lubanga's statement. I feel particularly offended by the fact that he
7 interrupts Mr Lubanga. It is a scandal.

8 PRESIDING JUDGE KOURULA: Thank you very much. I'm sure that Mr Lubanga has
9 paid attention to the extensive views.

10 Could you please proceed, Mr Lubanga.

11 MR LUBANGA: Thank you, your Honour. I was saying, therefore, that on the 21 October
12 2002, just one month after taking up my responsibilities, I gave the army a clear instruction in
13 the following terms, and here I quote, "In recent days, against our ideology, a practice is
14 developing of enlisting minors of both sexes within the combat forces and in certain armies
15 with a revolutionary nature with a view to increasing the numbers of their soldiers on the
16 front. Where it concerns our armed wing known as the FPLC, I formally prohibit this
17 practice, which goes against our former activities with the NGO SOS Grands Lacs within the
18 framework of the demobilisation of child soldiers. In this regard I would like to point out
19 that I attach particular importance to the implementation of this order which must be entirely
20 complied with," end of quote.

21 This measure, Mr President, I considered it necessary, not due to fear of judicial
22 prosecution, but because it corresponded with a true conviction on my part. I
23 considered that the children had no role to play in an armed conflict which they were
24 often the primary victims of, and furthermore a weapon in the hands of a child means
25 insecurity both for the child and for those around him. I am totally aware of that.

1 These reasons make my instructions all the more relevant. As such on the 27

2 January 2003, to check its good implementation, I addressed myself once again to the

3 army, and here I quote, "Mr Chief of Staff, after my letter of the 21 October 2002 in

4 which I formally prohibited the enlisting in the FPLC army of children under the age

5 of 18, I would ask you to provide me with as soon as possible the detailed report on

6 this issue to which I attach more importance," end of quote.

7 This report, Mr President, I received from the deputy chief of staff on the 16 February

8 assuring me that the instruction had been correctly passed on to all the major units.

9 On the 24 February 2003, I even went outside the strict framework of our armed

10 forces addressing myself on the same issue to the south defence forces that were

11 active in the environment and to the prominent figures, and this is shown before this

12 Court.

13 On the 1 June 2003, I took a decree for demobilisation, Article 1 of which provides that,

14 "All the individuals under 18 years of age from this day are demobilised from the

15 Patriotic Forces for the Liberation of Congo," end of quote.

16 The report of our collaboration with the NGO Caritas for the implementation of this

17 decree was also confirmed before this Court. That, Mr President, your Honours, that

18 is the reality of my acts. I acted publicly by decree to give a major impetus to my

19 decision, but also firmly and constantly worked within the confines of the

20 administration. How absurd would it have been if on one hand I carried out this

21 work and on the other I abducted, enlisted and sent children into combat as has been

22 found against me?

23 Misleading images have been retained against me, against me. Implausible

24 testimony has been held against me, implausible and biased testimony delivered six

25 years after the events, and at the same time eyes have been deliberately closed to

1 unequivocal documentation. There has been a deliberate refusal to see what is clear
2 before our eyes, what is palpable and incontestable.

3 Your Honour, to convict me it has been necessary to close one's eyes to a whole
4 portion of the reality of facts. So I say it once again one last time, yes, I banned
5 enlisting of minors. Yes, I acted for their demobilisation. Yes, everybody knows in
6 Bunia and throughout Ituri and I will never accept people talking about a
7 masquerade in that regard, and of all the leaders at that time I was the first to have
8 done so in the chaos of Ituri. The Prosecutor's witness, a representative of MONUC,
9 the one referred to by the representative of victims a moment ago, he confirmed this
10 before the Pre-Trial Chamber.

11 Whatever I am judged I will accept it, but may your justice not be blind or one-eyed.

12 Your Honour, your Honours, in life there are moments where a man must act. He
13 must act imperatively out of dignity, out of duty and for human dignity. In 2002,
14 tragic events brought me to taking responsibilities. It would have been inhuman to
15 look at human lives being savagely torn asunder and scorned without doing
16 anything.

17 I chose to act in the middle of the greatest danger. I did so with sincerity and
18 dedication. I acted for these children, these women, these elderly persons from Ituri.
19 They and I did not have any other recourse and I have not ceased from reminding my
20 collaborators: Do well what we have to do. Do it in the full respect for others. Do
21 it for the good, for the interest of all.

22 And we've acted, I chose to act and I don't fear today having to reply for my actions.
23 I would have been inconsolable if I had chosen inaction, because those who
24 experienced the tragedy of Ituri can imagine the consequence thereof.

25 Your Honour, your Honours, this conflict born in 1999 generated huge amounts of

1 victims. I've seen them. I've known them. I heard their suffering. I would have
2 wanted to assuage their pain. I still regret that the actions that I carried out were not
3 able to put an end to this terrible conflict which ravaged our country.

4 I don't claim that I never made a mistake, but those who saw me act know that never,
5 at no moment, nor in any way, did I tolerate that children under the age of 15 be
6 recruited as soldiers.

7 Did I do my duty? I think so. That is it, the source itself of my energy, of my hope
8 during these nine years of detention. I leave it to you to decide. Thank you.

9 PRESIDING JUDGE KOURULA: Thank you very much, Mr Lubanga. The Appeals
10 Chamber assures that it will take into -- we will take into consideration the matters you have
11 personally raised this afternoon. What is possibly regarded inappropriate will not be
12 considered by the Chamber, but we pay due attention to your personal views and the Appeals
13 Chamber is working hard towards the resolution of the issues on appeal in this case. The
14 parties and participants will be informed, hopefully not too distant future, when the judgment
15 will be delivered.

16 The Appeals Chamber thanks the parties and participants for their assistance with
17 respect to this appeal -- appeals hearing of both yesterday and today.

18 Indeed I would like to one more time to thank all present and in particular the court
19 officer, courtroom usher, interpreters, court reporters, stenographers and security
20 officers.

21 Oh, sorry. Prosecutor?

22 MR GUARIGLIA: No, I am the one that has to apologise, your Honour, for interrupting this.
23 We just have to make one correction for the record and we think that it is probably important
24 to read now before the hearing is over.

25 PRESIDING JUDGE KOURULA: Very briefly.

1 MR GUARIGLIA: Would that be amenable for the Chamber?

2 PRESIDING JUDGE KOURULA: Very briefly.

3 MR SACHDEVA: I'm grateful, Mr President. It's in relation to your Honours'

4 question about the FPLC document. We had stated that this was 54(3)(e), when in

5 fact after we checked the records - and I apologise for that - the document was

6 received by us from the DRC authorities and there were no conditions of receipt.

7 That's the correction we would like to make on the record, may it please the Court.

8 PRESIDING JUDGE KOURULA: Thank you very much. No wonder the Defence was

9 surprised.

10 Again, I was with interpreters at the time, court reporters, stenographers and security

11 officers. This concludes the hearing of the Appeals Chamber and hereby the hearing

12 is adjourned.

13 THE COURT USHER: All rise.

14 (The hearing ends in open session at 3.19 p.m.)