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TRIAL CHAMBER I

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

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

PUBLIC REDACTED VERSION

**Defence Response to "Prosecution's Reply to the '*Conclusions finales de la
Défense*'" of 1 August 2011**

Source: Defence Team for Mr Thomas Lubanga

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

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1. The Defence wishes to submit the following observations in response to the “Prosecution’s Reply to the ‘*Conclusions finales de la Défense*’”, filed on 1 August 2011 (hereinafter “Reply”).¹
2. First of all, the Defence notes that, in order to argue his case that crimes existed and that the Accused is responsible, the Prosecutor repeatedly relies on acts which occurred before September 2002, or even before 1 July 2002.
3. However, the International Criminal Court has no jurisdiction to try crimes committed prior to 1 July 2002, and this Chamber has no jurisdiction to try crimes committed outside the period covered by the charges, namely from the beginning of September 2002 to 13 August 2003.
4. It follows that the elements of the crimes charged and the modes of responsibility of the Accused can be contemplated only within the framework of acts committed between the beginning of September 2002 and 13 August 2003.

INDIVIDUAL CRIMINAL RESPONSIBILITY

I. EXISTENCE OF A “COMMON PLAN” (PARAS. 10-17)

1 – The Prosecutor has significantly modified his view of the “common plan”

5. The Prosecutor claims that the “common plan” to which the Accused allegedly contributed consisted of building an army, including through the enlistment and conscription of children under the age of fifteen years and using them to participate actively in hostilities.² He thereby claims that the

¹ ICC-01/04/01/06-2778-Conf.

² ICC-01/04-01/06-2778-Conf, para. 10.

crimes being charged were an integral part, as “criminal means”,³ of the “common plan” uniting the co-perpetrators.

6. In presenting his case thus, the Prosecutor is departing from his Closing Brief, where the crimes charged were presented as the consequence of the implementation of a “common plan” whose purpose was to “build an army of predominantly young persons; to create a political movement; using the political and military elements, to take control of Bunia and to assume authority in Ituri with the Accused at the helm and the co-perpetrators in key positions”.⁴ This formulation of the Prosecution accords with the view of the Pre-Trial Chamber that the crimes charged were not part of the co-perpetrators’ intended objectives but were their probable consequence.⁵
7. By claiming that the crimes charged were an integral part of the “common plan” alleged against the Accused, the Prosecutor is significantly amending the very nature of the case against the Accused and deviating from the framework set by the Pre-Trial Chamber in the *Decision on the confirmation of charges*.
8. The responsibility of the Accused can be considered in fact and in law only in relation to the charges brought against him as set out by Pre-Trial Chamber I in the *Decision on the confirmation of charges*. This is especially true for matters pertaining to the nature of the “common plan” which forms the basis of the theory of criminal co-perpetration.
9. Furthermore, in his Reply, the Prosecutor appears to revert to his initial view, stating that the Prosecution’s position is that the Accused “set in place

³ ICC-01/04-01/06-2778-Conf, paras. 10, 18 and 28.

⁴ ICC-01/04-01/06-2748-Conf, para. 74.

⁵ ICC-01/04-01/06-796-Conf-tEN, para. 377(ii): “although the agreement or common plan did not specifically target children under the age of fifteen years – it did target young recruits in general – in the normal course of events, its implementation entailed the objective risk that it would involve children under the age of fifteen years”.

circumstances that led to the recruitment of children under 15 in the ordinary course of events”.⁶

2 – The Prosecutor grossly misrepresents the case for the Defence

10. The Prosecutor repeatedly claims that the Defence stated that, in the prevailing circumstances, the need to constitute an armed force justified the enlistment and conscription of children under the age of fifteen years.⁷
11. Such a claim is a gross misrepresentation of the Defence’s observations in its Closing Submissions.
12. The Defence merely recalled that, in the prevailing circumstances, it was the duty of any political leader to secure the means of protecting civilian populations against massacres.⁸ At no point did the Defence claim that the crimes charged were justified by more important considerations or the prevailing context; on the contrary, the Defence submits that the Accused took all necessary and reasonable measures within his power to prevent the realization of the risk that children under the age of eighteen years and, more so, children under the age of fifteen years, would be enlisted in the FPLC or any other armed group.

3 – The Prosecutor’s portrayal of the evidence tendered is inaccurate or relies on unfounded interpretations

13. The Prosecutor seeks in vain to establish the involvement of the Accused in the operations conducted before September 2002 by dissident APC soldiers and Chief Kahwa. To this end, he misrepresents observations made by the Defence in its Closing Submissions and draws erroneous conclusions from certain evidentiary materials.

⁶ ICC-01/04-01/06-2778-Conf, para. 40.

⁷ ICC-01/04-01/06-2778-Conf, paras. 3, 28, 29 and 42.

⁸ ICC-01/04-01/06-2773-Conf-tENG, paras. 880 and 769-770.

14. [Para. 5] Referring to paragraph 379 of the Defence's Closing Submissions, the Prosecutor claims that the Defence had admitted that the UPC's political goals had been achieved through military action.⁹ This is incorrect. On the contrary, in that part of its Closing Submissions, the Defence emphasizes that Witness W-0041, who was called by the Prosecutor, admitted that the declaration of 11 August 2002 does not portray the facts faithfully. Contrary to the Prosecutor's submission,¹⁰ Witness W-0041 actually confirmed that the FRP, of which he portrays the Accused as President,¹¹ had no armed wing¹² and wished to "[TRANSLATION] capitalize on the situation" for its own gain.¹³
15. [Para. 15] The Prosecutor again attempts to build a case on certain public statements made by the UPC/RP or the Accused himself, suggesting that the UPC was involved in the takeover of Bunia in August 2002.¹⁴ As Witness D01-0019 clearly explained, these public statements for political purposes, which were all made after August 2002, do not reflect the actual facts of the events, but are instead a post facto attempt at political legitimization at regional and national level.¹⁵ On this point, the Prosecutor does not address the Defence's observations emphasizing that no document dated earlier than 9 August 2002 from the UPC, FRP or the Accused himself suggests that these organizations had the support of armed units.¹⁶ In general, there are no documents from before September 2002 to suggest such a situation.
16. [Para. 17] The July 2000 photograph of the Accused in civilian clothing alongside certain rebel APC soldiers,¹⁷ some of whom led the uprising of August 2002, in no way establishes that the Accused and these mutineers

⁹ ICC-01/04-01/06-2778-Conf, para. 5.

¹⁰ ICC-01/04-01/06-2778-Conf, para. 15.

¹¹ T-125-CONF-FRA-CT, p. 16, line 19.

¹² T-125-CONF-FRA-CT, p. 15, line 14.

¹³ T-126-CONF-FRA-CT, p. 16, lines 1-11.

¹⁴ ICC-01/04-01/06-2778-Conf, para. 15, footnote 16.

¹⁵ ICC-01/04-01/06-2773-Conf-tENG, paras. 786 and 793, footnote 1571.

¹⁶ ICC-01/04-01/06-2773-Conf-tENG, para. 780.

¹⁷ ICC-01/04-01/06-2773-Conf-tENG, para. 792.

“worked together”¹⁸ between those two dates. On this point, the Prosecutor does not reply to the Defence’s arguments, supported by evidence adduced at trial, that the leaders of the July 2000 mutiny were absent from Ituri for most of that period¹⁹ and that the Accused himself was outside of Ituri for the most part, and for a time imprisoned in Kinshasa, when they returned to Bunia.²⁰

17. [Paras. 13 and 14] Finally, contrary to the Prosecutor’s submission, Bosco Ntaganda and Kisembo Bahemuka were not members of the delegation which travelled to Kampala in May and June 2002.²¹ When examined on this matter, Witness W-0041, who wrongly described those two individuals as bodyguards of the Accused,²² stated that, unlike at the Kasese meeting in April 2002, the two were not members of the delegation headed by the Accused.²³
18. That those two APC soldiers were allegedly present in April 2002 at the meetings in Kasese in no way establishes that they acted on behalf of the UPC and that the party had an army; Witness D01-0019 clearly described the reasons for which certain APC commanders were in conflict with the Governor-Commander of Operations, Molondo Lompondo, who had rejected their assignments;²⁴ accordingly, they had excellent reasons of their own for

¹⁸ ICC-01/04-01/06-2778-Conf, para. 17.

¹⁹ ICC-01/04-01/06-2773-Conf-tENG, para. 781.

²⁰ ICC-01/04-01/06-2773-Conf-tENG, paras. 787-788.

²¹ ICC-01/04-01/06-2778-Conf, para. 13; contrary to what the Prosecutor indicates, the period of May-June 2002 corresponds to the Kampala meetings, not the Kasese meetings (see ICC-01/04-01/06-2773-Conf-tENG, paras. 372 and 787).

²² Contrary to the Prosecutor’s statement, the Defence challenged the assertion that these two individuals were the Accused’s bodyguards (ICC-01/04-01/06-2773-Conf-tENG, para. 377); Witness W-0041 acknowledged that the only reason he labelled Kisembo a bodyguard was that he had seen him in the Accused’s entourage (T-126-CONF-FRA-CT, p. 5, lines 6-20); Witness D01-0019 confirmed that neither of the two individuals was a bodyguard of the Accused (T-340-FRA-CT, p. 42, line 14 to p. 43, line 1).

²³ T-125-CONF-FRA-CT, p. 5, line 25 and p. 6, line 1: the transcript of what the witness stated in French leaves no doubt that he is excluding these two individuals from the delegation which went to Uganda in May and June 2002; however, the English interpretation, being less accurate, may explain the Prosecutor’s error (T-125-CONF-ENG-CT, p. 5, lines 6-7).

²⁴ D01-0019 stated that these soldiers were discontented because they had suffered discriminatory treatment within the APC (T-344-CONF-FRA-ET, p. 9, line 27 to p. 10, line 1). The soldiers revolted

making their personal demands to the Ugandan authorities. Furthermore, on that date, they had only their own bodyguards and not a “military force”, as the Prosecutor alleges.

II. EXISTENCE OF AN “ESSENTIAL CONTRIBUTION” BY THE ACCUSED TO THE COMMISSION OF THE CRIMES CHARGED [PARAS. 18-38]

19. The Prosecutor states that, in his view, the Accused’s “essential contribution” to the commission of the crimes consisted solely of the control he exercised over the FPLC and his instructions to recruit and use children under the age of fifteen years.²⁵

1 – Existence of instructions from the Accused

20. This accusation is irrelevant and without factual basis.
21. Firstly, the proceedings against the Accused are based solely on article 25(3)(a), which pertains to a person who personally commits a crime “jointly with another...[person]”; the Accused is not being prosecuted on the basis of responsibility as a person issuing orders, which is specifically governed by article 25(3)(b), or for having committed the crimes “through another person”. Nor is he being prosecuted on the basis of articles 25(3)(b), (c) and (d), which govern other modes of criminal participation, including aiding, abetting or otherwise assisting in the commission of the crime. The responsibility of the Accused in this case cannot be contemplated in light of these modes of responsibility, which were not accepted by the Pre-Trial Chamber in its *Decision on the confirmation of charges*.

against their management within the APC in April and May 2002 (T-340-FRA-CT, p. 41, line 26 to p. 42, line 3).

²⁵ ICC-01/04-01/06-2778-Conf, para. 18.

22. [Para. 18] Secondly, there is no evidence to suggest that the Accused issued instructions for the recruitment of children under the age of fifteen years and their use in hostilities; more generally, there is no evidence to suggest that the Accused issued instructions for the enlistment and use of recruits. In this case, the only instructions issued by the Accused concerning military matters sought, on the contrary, to prohibit the recruitment of minors²⁶ and to demobilize minors who were within the armed groups present in Ituri.

2 – The Accused’s control over the FPLC

23. [Para. 19] The Prosecutor claims that “[i]t is sufficient [...] that the Accused was in control over the FPLC and had an instrumental role in the functioning of the military to demonstrate his essential contribution to the implementation of the common plan”.²⁷
24. On a number of occasions,²⁸ the Prosecutor confirms that, in order to demonstrate the Accused’s responsibility, he is relying not on his personal contribution to the commission of the crimes, but on his alleged status as a superior and the fact that he allegedly failed to take the necessary measures to end the enlistment of children under the age of fifteen years.²⁹ Hence it is clear that the Prosecutor is seeking the Accused’s conviction on the basis of responsibility by omission for acts committed by subordinates.
25. Such a contention is patently erroneous:

²⁶ When using the term “minor” in its Closing Submissions and this Response, the Defence is referring to persons under the age of eighteen years.

²⁷ ICC-01/04-01/06-2778-Conf, para. 19 [the French cites the unofficial translation].

²⁸ For example: ICC-01/04-01/06-2778-Conf, para. 26: responsibility for commander Jérôme Kakwavu’s troops.

²⁹ ICC-01/04-01/06-2778-Conf, para. 28.

– *The Prosecutor's case rests on flawed legal bases*

26. As the Defence showed in its Closing Submissions,³⁰ the status of a superior exercising effective control over civilian or military members of an organization is insufficient in and of itself to impute, pursuant to article 25(3)(a), criminal responsibility to a person with this status for crimes committed by members of his or her organization.
27. In the absence of personal participation in the crime (article 25(3)(a)) or orders issued (or other modes of criminal participation under article 25(3)(b), (c) and (d)), the responsibility of the superior on the basis of acts committed by subordinates can be established only pursuant to article 28; in the instant case, the Accused is not being tried on the basis of the responsibility provided for in article 28.
28. The Prosecutor's position that the Accused's responsibility can be established on the basis of his alleged "control" over the FPLC has no relevant legal basis.
29. Firstly, as previously stated in its Closing Submissions,³¹ the Defence submits that the complex theory based on the concept of "control over the organization", which was developed by Pre-Trial Chamber I in particular and embraced by the Prosecutor, is an excessively broad interpretation of the provisions of article 25(3)(a); such an interpretation does not flow from an analysis of the *travaux préparatoires*, but from legal opinions rooted in exclusively Germanic or Hispanic traditions, and does not appear to have been incorporated into legal systems based on the Anglo-Saxon or French tradition. The requirement that criminal law be foreseeable, and hence clear

³⁰ ICC-01/04-01/06-2773-Conf-tENG, paras. 58-62.

³¹ ICC-01/04-01/06-2773-Conf-tENG, para. 72.

and precise,³² demands that this interpretation be discounted, especially since the Accused originates from a legal tradition based on the French model, which is far removed from the traditions giving rise to such an interpretation.

30. Secondly, in any event, as Pre-Trial Chamber I stressed in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo*,³³ this theory of responsibility based on “control over the organization” in no way concerns the theory of the commission of a crime “jointly with another [...] person” (co-perpetration), but that of the commission of a crime committed “through another person”. Yet, unlike Mr Katanga and Mr Ngundjolo,³⁴ the Accused is being tried in this case only in his capacity as a co-perpetrator for having committed the crimes charged “jointly with another [...] person”;³⁵ it therefore follows that this theory is irrelevant in the instant case.

– *The Prosecutor’s portrayal of the evidence tendered is inaccurate or relies on unfounded interpretations*

31. In general, at no point does the Prosecutor state how the functions and activities alleged against the Accused were the *sine qua non* of the crimes charged. On the contrary, in the present case, the Accused’s initiatives consisted in impeding the commission of those crimes. Furthermore, in respect of the part purportedly played by the Accused, the Prosecutor’s portrayal of the evidence tendered is inaccurate or relies on unfounded interpretations.

³² See ICC-01/04-01/06-2773-Conf-tENG, para. 46, footnote 43.

³³ ICC-01/04-01/07-717, paras. 495-518, in particular, paras. 500-510.

³⁴ Pre-Trial Chamber II specifically stated that the two Accused were being tried for having “jointly committed through other persons, within the meaning of article 25(3)(a) of the Statute” [emphasis added] the crimes charged. ICC-01/04-01/07-717, paras. 575-580.

³⁵ See ICC-01/04-01/06-2773-Conf-tENG, para. 52, footnote 48 and para. 57, footnote 50.

32. [Para. 21] Contrary to the Prosecutor's assertion, Witness W-0016 (not W-0055) did not testify that all reports had to be submitted to the Accused, but merely alleged that the reports of the officers of the General Staff were transmitted to the Chief of Staff, Kisembo. W-0016 presumed that the Chief of Staff could, after consulting with the Deputy Chiefs of Staff, then prepare a report and submit a copy to the President and the Minister of Defence.³⁶
33. Nor does Witness W-0016's testimony support the Prosecutor's assertion that the Chief of Staff would usually propose General Staff officer candidates to the President. On the contrary, Witness W-0016 stated [REDACTED], but the witness stated that he did not know whether this name had been "[TRANSLATION] suggested to the superiors".³⁷
34. The Prosecutor relies on the fact that Witness W-0041 indicated that, in his view, meetings with the military had to be chaired by the Accused. In actual fact, this supposition on the part of the witness is completely unreliable: the witness emphasized that he had never attended this type of meeting, which were shrouded in great secrecy.³⁸ He therefore acknowledged that he was incapable of knowing whether the Accused participated in such meetings.
35. [Para. 22] A careful reading of the entry from the communications logbook cited by the Prosecutor reveals that he grossly misrepresents this document: it is clear that only the G2 sent the referenced message to all units; the handwritten addition, "No. 001" (not "No. 1"),³⁹ regardless of what it signifies, in no way refers to the President of the UPC/RP. Furthermore, the three

³⁶ T-189-CONF-FRA-CT, p. 62, lines 2-11.

³⁷ "[TRANSLATION] It wasn't really necessary for me to know that because [REDACTED] if he can... suggesting that to the superiors – that's not my problem, [REDACTED]". (T-189-CONF-FRA-CT, p. 60, lines 13-16).

³⁸ T-126-CONF-FRA-CT, p. 66, line 18 to p. 67, line 16.

³⁹ EVD-OTP-00409, p. 0198.

messages on that page are a perfect illustration of the fact that the orders were issued directly by the Chief of General Staff on his own behalf.⁴⁰ Lastly, regardless of the credibility or otherwise of the testimonies cited by the Prosecutor, the fact that the Accused maintained relations with the military leaders clearly does not prove that he exercised “effective control” over them.

36. [Para. 23] Although, as the Prosecutor states, Witness W-0055 stated that a military operation was planned at the Accused’s residence, at no point did that witness say that the Accused himself personally participated in that planning. Furthermore, that witness’s testimony is unequivocal on the fact that the Accused intervened only to authorize the provision of the necessary logistical and financial resources.⁴¹
37. [Paras. 24-25] Contrary to the Prosecutor’s allegation of misrepresentation, Witness W-0055 stated without any ambiguity: “[REDACTED]”.⁴² He confirmed: “[TRANSLATION] I never saw the President taking part in a meeting of all of the commanders”⁴³ and added “[TRANSLATION] I did not witness any meetings which Mr Lubanga convened with the commanders”.⁴⁴ The witness described only informal meetings,⁴⁵ and only two of those,⁴⁶ one of which involved [REDACTED].⁴⁷
38. [Para. 26] The Prosecutor does not dispute the fact that the troops led by commander Jérôme Kakwavu joined forces with the FPLC only after August

⁴⁰ EVD-OTP-00409, p. 0198 (French translation EVD-OTP-00622, p. 1092): “[TRANSLATION] You must go after this OPS in Kpandroma because I have given everything required (-) but I haven’t received an answer yet [...] In the coming days I want you to stop [...]”. [Emphasis added]

⁴¹ See ICC-01/04-01/06-2773-Conf-tENG, para. 486, and footnote 1060.

⁴² T-175-CONF-FRA-CT, p. 41, lines 18-19.

⁴³ T-175-CONF-FRA-CT, p. 41, lines 14-15.

⁴⁴ T-175-CONF-FRA-CT, p. 42, lines 3-5.

⁴⁵ T-175-CONF-FRA-CT, p. 41, line 25 to p. 42, line 1: “[REDACTED].”

⁴⁶ T-175-CONF-FRA-CT, p. 43, lines 18-22.

⁴⁷ T-175-CONF-FRA-CT, p. 42, lines 13-15 and p. 43, lines 10-13.

2002 and defected several days before 6 March 2003. Accordingly, contrary to the Prosecutor's submission, it goes without saying that the Accused cannot in any way be considered responsible for the recruitment of those troops. It is important to note that the majority of Witness W-0055's statements as to the age of the soldiers concern Jérôme Kakwavu's troops.

39. [Para. 29] The Prosecutor contends that the process of recruitment and mobilization of young people was undertaken by the "wise men" of the villages. Whether this theory is true or false, the Prosecutor thereby acknowledges that this process was out of the Accused's control. Indeed, as the Defence demonstrated in its Closing Submissions,⁴⁸ there is no evidence to suggest that the Accused exercised control over these "wise men" or "elders" or that he issued any instructions to them.
40. [Para. 30] Contrary to the Prosecutor's allegation of misrepresentation, Witness W-0055 acknowledged under cross-examination his complete lack of knowledge as to the training which the UPC/RP recruiters allegedly received; he states on two occasions: "[TRANSLATION] I do not know how the *cadres* were trained";⁴⁹ "[TRANSLATION] I do not know how they were trained, I'm saying that these were things that [REDACTED] told me".⁵⁰ He thereby rectified as clearly as possible the inaccurate statements he made on this subject under examination by the Prosecutor.
41. [Para. 32] Contrary to the Prosecutor's claim, at no point does the "G5 6 November 2002 monthly report" suggest that forcible enlistments took place in the villages. The villagers' wish to recover a quarter of the enlisted recruits

⁴⁸ ICC-01/04-01/06-2773-Conf-tENG, paras. 500-506 and 835.

⁴⁹ T-177-CONF-FRA-CT, p. 49, lines 13-14.

⁵⁰ T-177-CONF-FRA-CT, p. 50, lines 6-7.

merely conveys their concern to be able to confront attacks autonomously.⁵¹ Contrary to the interpretation advanced by the Prosecutor, this document instead demonstrates the voluntary nature of the enlistments: referring to the civilian population, the report states: “[TRANSLATION] it allegedly said that it would no longer send any children because it is in a completely unsafe position”. This wording underscores the fact that the decision on whether or not to enlist was left to the civilians concerned, of their own free will. Finally, as has already been noted,⁵² it is important to note that this report, which makes reference to serious complaints from the civilian population about FPLC soldiers,⁵³ makes no mention of protests against forcible enlistments.

42. [Para. 33] Contrary to the Prosecutor’s contention, nothing suggests that the report was sent to the Accused. The English version of the sentence quoted by the Prosecutor is not sufficiently accurate: the original version states “... *Demandez aux N°01...*”; the use of the plural in this sentence suggests that there were several “No. 01s”, which appears to rule out any reference to the Accused; in any event, even if that were the case, this sentence would confirm that the soldiers only contemplated approaching the President for matters concerning “civil servants” and not military affairs. Conversely, the report, which was addressed to the Chief of General Staff, demonstrates that the Chief of General Staff was vested with powers which far exceeded military matters: hence he is requested to contact international organizations or the Governor of the province.⁵⁴ In any event, this sentence in no way suggests that the report was sent to the Accused. Finally, contrary to what the Prosecutor

⁵¹ This entry confirms the existence of self-defence groups in villages during that period.

⁵² ICC-01/04-01/06-2773-Conf-tENG, para. 887.

⁵³ EVD-OTP-00457, pp. 0138-0140.

⁵⁴ EVD-OTP-00457, p. 0142.

submits, the Accused is not “saluted” at the end of the report: the G5 praises the speech made by the President⁵⁵ at the Bunia stadium.⁵⁶

43. [Para. 34] Contrary to the Prosecutor’s claim, Witness W-0055 never stated that the G5 had met with the Accused and the Chief of Staff in relation to the matter of recruitment; Witness W-0055 merely acknowledged that the G5’s activities allowed him to meet with “[TRANSLATION] the chiefs of staff or President Thomas Lubanga” to discuss this matter;⁵⁷ at no point did he state that such a meeting actually took place with the Accused.
44. [Para. 37] As regards the Prosecutor’s allegations concerning the presence of children under the age of fifteen years amongst the President’s guards, the Defence refers to its observations in its Closing Submissions, and in particular to its analysis of the testimony of Witness W-0016.⁵⁸ In respect of that witness, it should be recalled that he spoke in French and hence only his exact words should be considered, taking care to verify the accuracy of the translation into English; in this respect, the wording “*il y en a pas quatre* [there are not four]”, which signifies a number less than four was incorrectly translated as “no more than four”, which has a different meaning.⁵⁹

III. *MENS REA* [PARAS. 39-55]

45. [Para. 39] Contrary to the Prosecutor’s suggestion, under the Elements of Crimes, it must be shown that the Accused “knew, or should have known” that certain recruits were under the age of fifteen years. In the instant case, no

⁵⁵ Who is not referred to as “No. 1” but by the title “[TRANSLATION] His Excellency, the President of the movement”.

⁵⁶ The expression “*coup de chapeau*” [“hats off”], which is typically French, may have misled the Prosecutor.

⁵⁷ T-175-CONF-FRA-CT, p. 78, lines 14-16.

⁵⁸ ICC-01/04-01/06-2773-Conf-tENG, paras. 405-425.

⁵⁹ French version: T-189-CONF-FRA-CT, p. 35, line 11; English version, T-189-CONF-ENG-CT, p. 36, line 2.

such evidence has been brought. The wording used in the Elements of Crimes indicates that such knowledge of the crimes on the part of the Accused must be certain knowledge.

46. [Paras. 40 to 42] Contrary to the Prosecutor's claim, the Accused's visit to the Rwampara training camp and the speech he gave to the recruits in no way constitutes an "essential contribution" to the recruitment operations: regardless of their age, the enlistment of these recruits had already taken place, and nothing implies that the recruitment and training operations would have ground to a halt if this visit had not taken place. Evidently, this visit and the Accused's speech on that occasion had no influence whatsoever on the recruitment operations conducted by the military leaders. Nonetheless, it is true to say that this visit strengthened the Accused's conviction that a determined effort should be made to continue with measures to demobilize minors under the age of eighteen years.
47. Furthermore, his speech to the recruits can in no way be considered to be unreserved approval of the conduct of the military leaders. At no point did the Accused direct any thanks or praise to the military leaders present. There is no evidence to suggest that the Accused approved the conduct of the military leaders with regard to recruitment and training. On the contrary, evidence has been brought to show that the Accused continually issued them with extremely strict instructions ordering them to ensure that no minors under the age of eighteen years were enlisted into the armed forces.
48. Finally, as shown above, no evidence has been brought to show that the recruits present at this visit included children under the age of fifteen years. On the contrary, Witness W-0055 stated that most of the recruits at the

Rwampara camp were old enough to be soldiers,⁶⁰ and it was shown that the only recruit present who was identified by the Prosecutor, Witness W-0010, was over the age of sixteen years on that date. Hence there is even less basis for the claim that the Accused was personally aware of the presence of children under the age of fifteen years amongst those recruits.

49. [Para. 45] The Prosecutor implies that Witness D01-0011 must necessarily have known the applicable procedures for verifying the age of FPLC recruits, which is why, he contends, the witness was called by the Defence. These claims are unfounded. Firstly, Witness D01-0011 is not in a position to testify to the existence of applicable procedures for verifying the age of recruits,⁶¹ and secondly, the witness was not called to testify by the Defence for that reason.⁶²
50. [Paras. 46-47] The Prosecutor claims that the Defence misrepresents the testimony of Witness W-0046 by stating that she confirmed that only the UPC/RP took measures to demobilize child soldiers. The Defence maintains that this is indeed what the witness stated, speaking in French during her testimony before the Pre-Trial Chamber. In response to the question put in French by the Presiding Judge: “[TRANSLATION] Were you aware of other groups or militias having taken similar measures?” Witness W-0046 stated “[TRANSLATION] No”.⁶³ The exact words spoken by the Presiding Judge and the witness in their mother tongue leave no doubt as to the meaning of this answer. Beyond the differing interpretations of W-0046’s testimony, one thing is certain: there is no evidence to suggest that other armed groups in eastern Congo launched measures to demobilize minors during that period.

⁶⁰ T-175-CONF-FRA-CT, p. 75, lines 10-16: at no point did the witness state the age of these *kadogos*.

⁶¹ See ICC-01/04-01/06-2773-Conf-tENG, paras. 740 and 877.

⁶² Not only did the Defence not put any questions to the witness on this matter, but the summary of the main topics to be addressed during the appearance of Witness D01-0011, which was disclosed on 3 September 2009, also made no mention of the matter.

⁶³ EVD-OTP-00494, T-39-FRA, p. 96, lines 1-6.

51. [Para. 46] The Prosecutor claims that W-0046's testimony confirms the "important efforts" deployed by the international community for the demobilization of children at the time of the issuance of the decree of 1 June 2003. On the contrary, the testimony of W-0046 confirms that the assistance available at that time for demobilization was practically non-existent.⁶⁴
52. [Para. 48] Contrary to the Prosecutor's claim, the Defence responded specifically to his allegations of complaints from international organizations based on the testimonies of Witnesses W-0046⁶⁵ and W-0031.⁶⁶
53. [Para. 49] The Prosecutor submits that, like the public statements by UPC/RP leaders on their organization's purported involvement in the takeover of Bunia which were made for propaganda purposes, internal UPC/RP documents on demobilization were drafted for the sole purpose of responding to pressure from the international community.
54. That analysis calls for the following observations:
- In advancing that argument, the Prosecutor appears to concede that the public statements upon which he relies in support of his demonstration that an alleged "common plan" existed prior to September 2002 are in fact acts of propaganda lacking any reliability;

⁶⁴ Lateness in setting up centres to receive demobilised children: T-205-CONF-FRA-ET, p. 55, line 24 to p. 56, line 1; Funding was not obtained by Caritas until July 2003 to support demobilised children: EVD-OTP-00495, T-40-CONF-FR-ET, p. 9, lines 4-6; No measures were taken because of the fighting in Bunia in the period after 6 March 2003: EVD-OTP-00494, T-39-FR-ET, p. 54, lines 4-8; Before mid-2003, the activities of Save the Children did not extend to the demobilisation of children. In mid-2003, Save the Children created only one transit centre in Bunia: T-205-CONF-FRA-ET, p. 54, lines 3-12 and p. 66, lines 13-23.

⁶⁵ See, for example, ICC-01/04-01/06-2773-Conf-tENG, para. 647. See also the observations at *idem*, paras. 899-900.

⁶⁶ See, for example, ICC-01/04-01/06-2773-Conf-tENG, paras. 618-637 concerning the credibility of the witness and the reliability of the information he provided. *Idem*, paras. 899-900.

- The Prosecutor ignores the fundamental difference in nature between the two categories of documents: whilst the first set of documents – political statements intended for propaganda purposes – are all public or intended for public use, the second set, relating to demobilization, are all internal documents, most of which remained confidential prior to their use in the trial; although the content of two of them was broadcast publicly by Radio Candip,⁶⁷ none of them, however, were shown physically to anyone outside the UPC/RP or FPLC; it follows that the argument that false documents were fabricated for propaganda purposes is totally unfounded.
55. [Para. 51] Contrary to the Prosecutor's assertion, the prohibition on the enlistment of minors and the demobilization measures initiated by the Accused are not contradicted by the latter's visit to Rwampara training centre.
56. Firstly, as Witness W-0055 pointed out, most of the recruits present at this training centre were old enough to be soldiers, and very few of them could be described as *kadogos*.⁶⁸ The Accused's speech during his visit was, therefore, directed essentially at recruits old enough to be soldiers. It cannot, therefore, be interpreted in any way as an encouragement to enlist or use children under the age of fifteen years.
57. Secondly, Witness W-0046, who was responsible for child protection at MONUC, explained at length the particularly complex nature of the implementation of demobilization measures, going so far as to criticise the UPC/RP for its precipitate implementation of demobilization measures, which

⁶⁷ D01-0019: on the order of October 2002: T-341-FRA-ET, p. 6, line 26 to p. 7, line 7; on the decree of 1 June 2003, see D01-0011: T-347-CONF-FRA-ET, p. 15, lines 12-21. This broadcast, in Swahili, Lingala and French, was intended solely to keep the local population informed of the activities of the UPC/RP executive. D01-0011: T-347-FRA-ET, p. 23, lines 3-17 and D01-0019: T-341-FRA-ET, p. 7, line 14 to p. 8, line 7 and T-345-FRA-ET, p. 59, line 25 to p. 60, line 6.

⁶⁸ T-175-CONF-FRA-CT, p. 75, lines 10-16: at no time does the witness specify the age of these *kadogos*.

did not allow children to be reintegrated effectively into their families.⁶⁹ Evidently, the Accused could not, during that visit, publicly reprimand the military commanders in front of their troops and suddenly send recruits who appeared to be under the age of eighteen years back to their families.

58. [Paras. 52 and 53] Contrary to the Prosecutor's assertion, the testimonies of Witnesses W-0031 and W-0024 confirm that demobilization measures were implemented. Although these witnesses were manifestly biased in their attempt to minimise the significance and scope of these measures, they do nevertheless accept the existence of such measures.⁷⁰
59. [Para. 54] Regarding the Prosecutor's allegations in paragraph 54, the Defence refers to paragraphs 657, 660 and 943 to 948 (implementation of the 1 June 2003 decree) and paragraphs 653 to 656 (30 May 2003 meeting) of its Closing Submissions.
60. [Para. 55] Regarding the *kadogo* unit, the Defence refers to its analysis of W-0017's testimony at paragraphs 442 to 448 of its Closing Submissions.⁷¹

THE "COMMISSION OF THE CRIMES"

61. [Paras. 58 to 60] Regarding W-0016, the Defence refers the Chamber to paragraphs 405 to 425 of its Closing Submissions. Furthermore, contrary to the Prosecutor's assertion in paragraph 59 of his Reply, Witness W-0016 did not belong to the UPC/FPLC for a period of one year. In his testimony, W-0016

⁶⁹ EVD-OTP-00494, T-39-FR-ET, p. 88, lines 15-19. See also: *Idem*, p. 88, line 11 to p. 89, line 3; EVD-OTP-00493, T-38-FR-ET, p. 26, lines 10-13.

⁷⁰ See ICC-01/04-01/06-2773-Conf-tENG, paras. 636-637 and 905.

⁷¹ ICC-01/04-01/06-2773-Conf-tENG, paras. 442-448.

stated rather that he joined the UPC in August 2002 and that he left in late November or early December 2002,⁷² a total of around three months.

62. [Paras. 61 and 62] Regarding Witness W-0041, the Defence refers to paragraphs 369 to 404 of its Closing Submissions. The Defence adds that the Prosecutor relies on the English transcript of W-0041's examination to maintain that the practice of systematic recruitment was common in the UPC army after 2 September 2002.⁷³ Yet, on this point, the English version of the transcripts is erroneous.⁷⁴ In French, the language in which W-0041 spoke, the witness stated rather the opposite.⁷⁵

Q. During the time that the UPC was controlling Bunia, was there an obligation to give boys?

WITNESS WWWW-0041:

[TRANSLATION] A. Actually, I couldn't really say whether there was systematic recruitment, but there was training. I couldn't really say that there was... there was someone requesting an obligation for a certain type of recruitment; no.

Q. I'm sorry, sir, there may have been a problem with the translation, but I just wanted to understand. Did you say there had been systematic recruitment?

[TRANSLATION] A. No. I said this: I don't know, at the time of there must... there was no systematic recruitment of a usual kind at the time by the UPC itself. Maybe it was done elsewhere, but in any case, there wasn't any on a systematic basis, at that time, from 2 September.

63. [Paras. 63 and 65] Regarding Witness W-0017, the Defence refers to paragraphs 426 to 449 of its Closing Submissions.
64. [Para. 64] Regarding W-0055, the Defence refers to paragraphs 476 to 515 of its Closing Submissions. It adds that W-0055 did not maintain that he "interacted with adults and children", but rather that there were no children in

⁷² T-189-CONF-FRA-CT, p. 3, line 6 to p. 4, line 8.

⁷³ ICC-01/04-01/06-2778-Conf, para. 62.

⁷⁴ A note to this effect was included by the translator of document ICC-01/04-01/06-2778-Conf in paragraph 62 of the unofficial French version.

⁷⁵ T-125-CONF-FRA-CT, p. 68, lines 10-24.

[REDACTED], and that he only had two *kadogos* in his bodyguard.⁷⁶ W-0055 estimated the age of one of these two *kadogos* to be sixteen years,⁷⁷ and gave no indication of the age of the second. The Prosecutor alleges further that W-0055 confirmed that the *kadogos* who were able to carry a weapon included children under the age of fifteen years. It must be emphasised, however, that the Prosecutor did not put the question openly to the witness, but read him an excerpt from his written statement, in which the Office of the Prosecutor's investigators themselves put highly leading questions,⁷⁸ thus affecting the probative value of the witness's reply.

65. [Para. 66] Regarding W-0024, the Defence refers to paragraphs 581 to 592 of its Closing Submissions.
66. [Paras. 67 to 70] Regarding W-0046, the Defence refers to paragraphs 638 to 663 of its Closing Submissions. It adds that the fact that W-0046 "spoke with more than 1000 victims and interviewed more than 400 people" during her March 2003 mission [para. 69], over a period of only two weeks⁷⁹ is but further proof that the information provided by those individuals was not verified.
67. [Para. 71] In the first sentence of this paragraph, the Prosecutor attributes to W-0116 statements which pertain rather to the testimonies of W-0031 (footnote 132) and W-0046 (footnote 133). Furthermore, contrary to the Prosecutor's assertions, W-0116 did not testify that he found it easy to determine a child's age from the child's size, but rather that he was not able to determine the age of an individual simply from a photograph, without interviewing the

⁷⁶ T-176-CONF-FRA-CT, p. 50, line 23 to p. 51, line 9.

⁷⁷ T-178-CONF-FRA-CT, p. 45, line 9 to p. 46, line 6.

⁷⁸ T-178-CONF-FRA-CT, p. 65, line 24 to p. 66, line 13.

⁷⁹ EVD-OTP-00479, T-37-FRA-ET, p. 46, line 22 to p. 48, line 21.

individual.⁸⁰ Regarding W-0116, the Defence further refers the Chamber to paragraphs 593 to 617 of its Closing Submissions.

68. [Para. 72] Regarding W-0031, the Defence refers to paragraphs 618 to 637 of its Closing Submissions.
69. [Para. 73] The Prosecutor was informed of the latest correction to the translation of D01-0004's testimony,⁸¹ to which he submitted no objections. The fact that he continues nevertheless to maintain that D01-0004 testified that "children aged 12 and 14 years" belonged to the UPC is misleading to the Chamber. The Defence further refers to paragraphs 753 to 755 of its Closing Submissions on this point.
70. [Para. 75] The Defence refers to its Closing Submissions, and more specifically to paragraphs 148 to 167 (regarding W-0010), 533 to 536 (regarding W-0030) and 703 to 707 (regarding the video images).
71. [Paras. 76 to 80] The Defence refers the Chamber to its Closing Submissions at paragraphs 708 to 716 (regarding the NGO documents), 725 (regarding the UN documents), 618 to 637 (regarding W-0031) and 638 to 663 (regarding W-0046).
72. [Para. 77] Furthermore, the Prosecutor misrepresents the Defence's position regarding these documents. The Defence does not maintain that the mere fact that the documents may have been created for use in a context other than criminal proceedings means that they are wholly unreliable. It maintains rather that it was amply demonstrated in the present case that the information recorded in the NGO and UN documents was not verified at all, since the objective of those organisations was not to ascertain the veracity of the

⁸⁰ T-208-CONF-FRA-ET, p. 60, line 15 to p. 61, line 3.

⁸¹ T-243-CONF-FRA-CT4, p. 24, line 14.

children's testimony but to find a solution to their problems.⁸² It is this lack of verification which precludes the attachment to these documents of any reliability whatsoever within the context of criminal proceedings.

73. The Prosecutor seeks further to minimise the evidence, compelling though it is, of the interest which certain individuals might have had in presenting themselves falsely to NGOs and the United Nations as former child soldiers with the aim of receiving material or financial assistance [para. 79].
74. W-0031 stated, *inter alia*, to the Office of the Prosecutor's investigators that there were "[TRANSLATION] cases of children giving different names to the different social workers with the intention of obtaining material benefits from the CTO [*centre de transit et d'orientation* (transit and orientation centre)], such as shelter, food and clothing".⁸³ D01-0023 testified precisely and in detail that a large number of civilians presented themselves falsely as former soldiers to demobilization organisations active in Ituri in order to obtain certain benefits.⁸⁴ W-0089 not only acknowledged the existence of this practice,⁸⁵ but also admitted that he himself had lied to CONADER about his age in order to benefit from its assistance.⁸⁶ As acknowledged by Intermediary W-0321, demobilization NGOs falsely presented street children as former child soldiers.⁸⁷ The funding of some NGOs, [REDACTED], varied according to the number of children received by their centre,⁸⁸ such that they had a financial interest in artificially inflating their statistics.

⁸² See ICC-01-04-01/06-2773-Conf-tENG, paras. 630 to 633 and 709 to 716 (on the documents relating to W-0031), paras. 638 to 678 and 725 (on the documents relating to W-0046 and W-0360).

⁸³ T-202-CONF-FRA-ET, p. 40, lines 8-15.

⁸⁴ See ICC-01/04-01/06-2773-Conf-tENG, paras. 516 to 522.

⁸⁵ EVD-D01-00986, p. 0308, lines 142-143; see ICC-01-04-01/06-2773-Conf-tENG, para. 521.

⁸⁶ T-196-CONF-FRA-ET, p. 63, lines 21-24; ICC-01-04-01/06-2773-Conf-tENG, para. 522.

⁸⁷ T-320-CONF-FRA-ET, p. 24, line 27 to p. 25, line 4.

⁸⁸ T-202-CONF-FRA-ET, p. 38, lines 14-22.

75. [Paras. 81 and 82] For the reasons set out in paragraphs 717 to 724 of its Closing Submissions, the Defence formally challenges the Prosecutor's position on the use of the term "children" in the context of the G5's report of 6 November 2002.⁸⁹ The Defence adds that, were the Prosecutor of the opinion that the intention of the author of that report was to deal with the enlistment of minors into the army, he could have requested that the author appear as a witness, which he did not.
76. The Defence adds, for the reasons set out in paragraphs 10 to 12, that the Prosecutor seriously misrepresents the Defence's position at paragraph 81 and footnote 159 of his Reply. Thus, although the Defence did state that its position was that it was the duty of all political leaders at the time to take steps to protect the civilian populations from massacres, it never stated, contrary to the Prosecutor's assertions [footnote 159], that it would have been a serious neglect of duty if the Accused had imposed restrictions on the enlistment or conscription of children. The Prosecutor's repeated misrepresentation of the Defence's position can only be construed as a deliberate attempt to mislead the Chamber.
77. [Para. 83] Regarding the 12 February 2003 letter from the National Secretary for Education of the UPC/RP, the Defence refers to paragraphs 726 to 731 of its Closing Submissions.

THE "FLAWS IN THE DEFENCE ANALYSIS OF WITNESS TESTIMONY"

I. THE CREDIBILITY AND RELIABILITY OF THE WITNESSES PRESENTED AS FORMER CHILD SOLDIERS [PARAS. 84-110]

⁸⁹ EVD-OTP-00457.

78. [Para. 89] Contrary to the Prosecutor's claim, the Defence considers that the evidence referred to at paragraph 89 has been admitted into the record of the present case, and may, accordingly, be considered by the Chamber:

- Applications for reparations filed by witnesses called to testify: These are official Court forms contained in the case record. They were notified officially by the Registry of the Court in an annex to a filing recorded in the standard manner (ICC-01/04-01/06-2270);
- Applications for victim participation filed by witnesses called to testify: These are official Court forms contained in the case record: they were notified officially by the Registry of the Court in an annex to a filing recorded in the standard manner;
- Prior witness statements: Contrary to the Prosecutor's claims, the excerpts from prior witness statements used by the Defence in its Closing Submissions were put to the witnesses during their testimony. For example:
 - a. W-0007: the excerpt from the witness's written statement relating to his date of birth was used by the Prosecutor during the examination of the witness.⁹⁰ Although the Prosecutor did not expressly mention the date of [REDACTED] 1991, the witness's reply leaves no doubt that this was the date he was referring to;
 - b. W-0213: the Defence does not refer to paragraphs from the witness's prior statements, but to excerpts of transcripts of certain hearings at which quotations from written statements were put to the witness;⁹¹

⁹⁰ See ICC-01/04-01/06-2773-Conf-tENG, footnote 125 (quoting: T-148-CONF-FRA-CT, p. 33, line 24 to p. 34, line 4).

⁹¹ See, for example, ICC-01/04-01/06-2773-Conf-tENG, footnote 457 (quoting: T-133-CONF-FRA-CT, p. 74, lines 2-12, p. 78, lines 10-16 and p. 79, lines 3-9).

- c. W-0297: at paragraph 310 of its Closing Submissions, the Defence refers to the transcripts of certain hearings at which excerpts from his prior statements were put to Witness W-0297;⁹²
- d. W-0298: at paragraph 349 of its Closing Submissions, the Defence refers to the transcripts of W-0298's testimony during which excerpts of his written testimony were put to the witness.⁹³

- Correspondence: The information contained in this correspondence is registered in the record of the present case: it was provided at the express request of the Chamber and was discussed orally during hearings before Trial Chamber I.⁹⁴ The information contained therein may, accordingly, be submitted for the Chamber's consideration.

79. [Para. 90] Contrary to the Prosecutor's claim, it has been demonstrated, *inter alia*, that:

- It was impossible to reach Mandro training centre by vehicle as indicated by Witness W-0016: "[TRANSLATION] For a start, vehicles couldn't reach the place where we were (...) "⁹⁵ "[b]ecause there was no road; there were only footpaths, vehicles couldn't get through".⁹⁶ Contrary to the Prosecutor's claim, the witness, who gave his testimony

⁹² In paragraph 301, indent 1, of ICC-01/04-01/06-2773-Conf-tENG, the Defence refers in error to a paragraph of a statement (EVD-OTP-00563, para. 8) which was not put to the witness during the course of his testimony.

⁹³ During his cross-examination, the Defence put, paragraph 77 of his statement of January 2008 to Witness W-0298: T-124-CONF-FRA-CT, p. 29, line 21 to p. 30, line 2.

⁹⁴ 1) Regarding the fact that Witness W-0297 requested money in order to pay a dowry (ICC-01/04-01/06-2773-Conf-tENG, paras. 317-318, footnotes 717 and 719-721): see T-294-FRA-CT, p. 26, line 24 to p. 27, line 23 and T-293-CONF-FRA-CT, p. 1, line 18 to p. 4, line 5. The Defence notes that the Presiding Judge stated on this matter that "[i]t seems to us that that could be interpreted properly as expressing a somewhat unusual financial interest in giving evidence before this court." (T-294-ENG-CT, p. 28, lines 3-5); 2) Concerning the fact that W-0157 claimed falsely not to know how to read (ICC-01/04-01/06-2773-Conf-tENG, para. 196, footnote 382): see, for example, T-187-CONF-FRA-CT, p. 23, lines 2-3.

⁹⁵ T-190-CONF-FRA-CT, p. 51, lines 1-2.

⁹⁶ T-191-CONF-FRA-CT, p. 6, lines 13-14 and p. 7, lines 6-11.

in French, stated that it was “[TRANSLATION] because the ground was really uneven that vehicles, even 4x4s, ... couldn’t get through.”⁹⁷

- Commander Pepe died in 2001 in Beni, and was never in the FPLC.⁹⁸ Commander Claude was killed in an exchange of fire in April 2002;⁹⁹
- There is no evidence to substantiate the Prosecutor’s assertion that W-0010 and D01-0006 [REDACTED] in 2005, at the time when D01-0005 and W-0010 [REDACTED] in [REDACTED]. On the contrary, the testimonies of D01-0005 and D01-0006 confirmed that they were [REDACTED];¹⁰⁰
- W-0294 stated clearly that he did not see his brother whilst he was in the UPC army: “[TRANSLATION] because our paths never crossed in the army”;¹⁰¹
- The Prosecutor has not shown that the Accused participated in more than one meeting in Bunia stadium between January and March 2003.¹⁰² The only evidence the Prosecutor provided in support of Witness W-0008’s assertion concerning the arrival of Thomas Lubanga at Bunia stadium is a video containing images of an open-topped vehicle in Iga Barrière. Accordingly, these images bear no relation to a meeting in Bunia stadium and can not in any way corroborate W-0008’s testimony.

⁹⁷ T-191-CONF-FRA-CT, p. 35, lines 22-24. (Emphasis added)

⁹⁸ Witness D01-0006 confirmed that commander Pepe died before D01-0006 joined the UPC. The witness also stated that commander Pepe was in the APC at the time of his death. (T-254-CONF-FRA-CT, p. 61, lines 6-7 and p. 63, lines 14-18). Corroborated by: D01-0037: T-349-FRA-ET, p. 17, lines 1-4; D01-0007: T-348-FRA-ET, p. 23, lines 12-15.

⁹⁹ The Prosecutor’s own witnesses provided this information in evidence. See, *inter alia*, W-0299: T-120-CONF-FRA-CT, p. 16, lines 19-25.

¹⁰⁰ See, for example, D01-0006: T-254-CONF-FRA-CT, p. 58, lines 10-11; D01-0005: T-261-CONF-FRA-CT, p. 21, lines 12-19. Concerning 2005, see EVD-D01-00742, p. 0379, lines 127-143.

¹⁰¹ T-151-CONF-FRA-CT, p. 73, lines 13-14.

¹⁰² The Prosecutor himself tendered into evidence the video showing Mr Lubanga’s arrival at Bunia stadium, which confirms that Mr Lubanga actually arrived there in a closed-topped vehicle (EVD-OTP-00571, 02:22:37 to 02:23:11; W-0030: T-128-CONF-FRA-CT, p. 50, lines 14-18) directly contradicting W-0008’s testimony.

80. [Para. 91] Contrary to the Prosecutor's suggestion, the Defence position on the credibility of Witness W-0011 and the reliability of his statements is not only founded in the considerable inconsistencies and contradictions in his testimony, but also in the witness's behaviour at his meeting with the investigators in 2005, and his testimony before the Chamber.¹⁰³
81. [Para. 93] Contrary to the Office of the Prosecutor's claim, Expert CHM-0004's evidence corroborates the Defence submissions on the false statements as regards their identities and those of their family members given by those witnesses presenting themselves as former child soldiers. Expert witness CHM-0004 stated:
- with particular reference to school certificates and a marriage certificate, that an individual's "[TRANSLATION] usual" names are those which are "[TRANSLATION] recognised in all the documentation"¹⁰⁴ and are those by which an individual is known;¹⁰⁵
 - that a person "[TRANSLATION] cannot easily change names once these names have been registered in the State records".¹⁰⁶ Even where a person changes name, only the name given by his or her parents is official;¹⁰⁷
 - that an individual may be known by different names which nevertheless consist solely of the names which were given to him or her at birth;¹⁰⁸ that individual cannot add further names to the name given by his or her parents;¹⁰⁹

¹⁰³ The Defence refers to its submissions at ICC-01/04-01/06-2773-Conf-tENG, paras. 170-192.

¹⁰⁴ T-223-FRA-ET, p. 84, line 8.

¹⁰⁵ T-224-FRA-ET, p. 3, lines 2-13 and T-223-FRA-ET, p. 83, line 22 to p. 85, line 11.

¹⁰⁶ T-224-FRA-ET, p. 3, lines 7-8.

¹⁰⁷ T-224-FRA-ET, p. 3, lines 9-11.

¹⁰⁸ T-224-FRA-ET, p. 3, lines 16-24.

¹⁰⁹ T-224-FRA-ET, p. 3, line 14 to p. 4, line 3.

- A person’s nicknames or names denoting respect, are, in most cases, not entered on official cards;¹¹⁰
- An individual who was born in peacetime and attended school is in a position to know to his or her date of birth.¹¹¹

82. In any event, it is manifest that the majority of witnesses presented as former child soldiers lied about their identity, by providing names that they have never borne, for the purpose of concealing the truth.
83. [Para. 94] Disregarding the numerous mendacious statements made by Witnesses W-0007 and W-0008, and all the contradictions and inconsistencies in their evidence, the Prosecutor argues that Witnesses W-0007 and W-0008’s statements about their family relationship do not affect their testimony as a whole.
84. Yet, the fact that Witnesses W-0007 and W-0008 lied on the subject necessarily affects their credibility. Not only did the witnesses lie that they were cousins, but they also had to adapt their evidence accordingly in key respects, namely their identities, those of their parents, brothers and sisters, and the contact that the witnesses had with them.
85. [Para. 95] Contrary to the Prosecutor’s assertion, it is not apparent from document EVD-D01-00082 that Witness W-0010’s interview was conducted by someone from the NGO [REDACTED].¹¹² Moreover, Witness W-0046, a MONUC employee and author of the document, explained that “[TRANSLATION] This document brings together the interviews that I carried out with the children and interviews carried out by other colleagues from child protection who came to assist me in Ituri at various moments in time.”¹¹³ She further stated that that extract consisted of her “[TRANSLATION] written notes of the

¹¹⁰ T-223-FRA-ET, p. 86, lines 6-9 and p. 89, line 19 to p. 90, line 3.

¹¹¹ T-224-FRA-ET, p. 21, line 18 to p. 22, line 1.

¹¹² It is merely stated that W-0010 was identified by that NGO.

¹¹³ T-208-CONF-FRA-ET, p. 37, lines 5-7.

interview”.¹¹⁴ Witness D01-0005’s statements in that regard are consistent with Witness W-0046’s explanations regarding the notes of the interviews she carried out as a MONUC employee and the interviews conducted by some of her colleagues.

86. [Para. 96] W-0031 and D01-0025’s answers regarding the armed groups to which Witness W-0157 allegedly belonged, when analysed in the general context of their evidence, confirm that they do not consider W-0157 to have been a soldier in the FNI/FRPI group. When questioned about Witness W-0157, Witness W-0031 stated: “[TRANSLATION] I remember that name. But, he was a child who belonged to the FNI; [REDACTED], he belonged to the FNI”¹¹⁵ [emphasis added]. When questioned about the military group to which Witness W-0157 had belonged, Witness D01-0025 only mentioned the FRPI.¹¹⁶
87. [Para. 97] Contrary to the Prosecutor’s assertion, Witness W-0294’s mother contradicted her son’s evidence by stating that “[TRANSLATION] when he reached school age, his father enrolled him in a school.”¹¹⁷ [emphasis added] Furthermore, at no point did she mention that her son was enrolled in the 2nd year of primary school at the age of four years; she also said that she did not know whether or not he had been enrolled in nursery school.¹¹⁸
88. [Para. 98] As regards photograph EVD-OTP-00390, the Defence refers to its submissions.¹¹⁹
89. As regards EVD-OTP-00390, the Defence was informed of the actual circumstances in which Witness [REDACTED] took that photograph during an interview with members of the Defence team after W-0294 had appeared before the Chamber.

¹¹⁴ T-208-CONF-FRA-ET, p. 49, line 9.

¹¹⁵ T-202-CONF-FRA-ET, p. 77, lines 13-14.

¹¹⁶ T-259-CONF-FRA-ET, p. 18, lines 22-25.

¹¹⁷ T-153-CONF-FRA-CT, .35, lines 24-25.

¹¹⁸ T-153-CONF-FRA-CT, p. 36, lines 12-14.

¹¹⁹ ICC-01/04-01/06-2773-Conf-tENG, para. 276.

90. [Para. 99] An error has crept into paragraph 279 of the Defence submissions, which should have read as follows: Witness W-0293 confirms that she herself had lived in [REDACTED] and that she fled with her family to [REDACTED].¹²⁰
91. [Para. 100] Contrary to the Prosecutor's assertion, it is apparent from W-0297's evidence that it was he who made contact with Witnesses [REDACTED] and [REDACTED]:¹²¹ as Witness [REDACTED] refused to speak to him,¹²² Witness W-0297 contacted a neighbour to obtain Witness [REDACTED]'s contact details.¹²³ Although Witness W-0297 stated that he wanted to meet Witnesses [REDACTED] and [REDACTED] because they were members of his family; Witness W-0297's evidence demonstrates that he was particularly interested in the content of their evidence.¹²⁴
92. W-0297 telephoned [REDACTED] to say to him: "[TRANSLATION] Please, [REDACTED], if you come to the Netherlands – because I have been told that you are going to the Netherlands, do not say that I was not a soldier. You have to say that I was a soldier. Because if I say the opposite to what he said, he will be jailed.' He said: 'Before going to say anything at all, when I come to that country, we will have to get together, to meet, him and me, beforehand.'"¹²⁵
93. [Para. 102] The Prosecutor relies on material which has not been admitted into evidence in an attempt to show that the explanations given by Witnesses W-0007, W-0008 and W-0010 about their voting cards are consistent with the evidence tendered.¹²⁶

¹²⁰ T-153-CONF-FRA-CT, p. 40, line 3 to p. 41, line 1.

¹²¹ T-291-CONF-FRA-ET, p. 41, lines 10-25.

¹²² T-291-CONF-FRA-ET, p. 41, lines 21-22.

¹²³ T-291-CONF-FRA-ET, p. 42, line 13.

¹²⁴ See for example ICC-01/04-01/06-2773-Conf-tENG, para. 321.

¹²⁵ [REDACTED].

¹²⁶ None of the material mentioned has been admitted into evidence, that is to say: ICC-01/04-01/07-T-151-ENG, p. 24, lines 3-8 (transcripts of a hearing in another case); ICC-01/04-01/06-2501, paras. 16-21 (all of the documents which are referred to in these paragraphs); ICC-01/04-01/06-2666, para. 5 (no evidence is mentioned therein).

94. [Para. 104] Contrary to what the Prosecutor implies, at no time has the Defence argued that the sole fact that a witness reviewed his or her statement when giving evidence shows that the witness lied to the Chamber. As explained in its Closing Submissions, the Defence instead takes the view that the Chamber must take account of these factors when assessing such a witness's credibility and the reliability of his or her evidence.¹²⁷
95. [Para. 105] Contrary to the Prosecutor's assertion, the Defence never claimed that only at age six is it possible to start the first year of primary school. Rather, the Defence argued that D01-0029's evidence demonstrated that the minimum age for starting the 1st year of primary school is six years.¹²⁸ The Prosecutor's assertion that "the Defence conveniently ignores that the information in this register does not accord with their continued insistence that it was only possible to start school at age 6" could mislead the Chamber. In fact, the register shows, in accordance with D01-0029's evidence, that Witness W-0213 was thirteen years old in the 4th year of primary school, which in no way contradicts the fact that in the DRC the minimum age for starting the 1st year is six years.
96. [Para. 106] Although Witness W-0294 did not verify the content of EVD-D01-00319 (Screening note), it consists of notes taken by W-0581, who was acting on behalf of the Prosecutor, at a meeting with Witness W-294.¹²⁹ Of further interest is the fact that the information provided by Witness W-0294 to the

¹²⁷ After reviewing his deposition during an adjournment, Witness W-0213 made drastic changes to his statements about his second abduction; the fact that Witness W-0294 asked to review his statement corroborates the fact that he did not tell the truth when interviewed by the Office of the Prosecutor and when giving evidence before the Chamber, as demonstrated by the documentary evidence and the numerous inconsistencies, implausibilities and contradictions which surfaced during his cross-examination.

¹²⁸ ICC-01/04-01/06-2773-Conf-tENG, paras. 184, 268 and footnote 353; D01-0029: T-293-CONF-FRA-CT, p. 11, lines 4-7.

¹²⁹ T-301-CONF-FRA-CT, p. 53, lines 1-10; T-313-CONF-FRA-ET, p. 17, line 27 to p. 18, line 3.

Office of the Prosecutor in 2007 is generally different to that which he gave in evidence to the Chamber.¹³⁰

97. [Para. 107] Contrary to the Prosecutor's assertion, the Defence did not maintain that Witness W-0297's fear is not convincing, but rather that his explanations in that regard are not credible. Moreover, contrary to what the Prosecutor implies, in no way does the situation invoked in relation to Witness D01-0032 resemble that of Witness W-0297:

- Witness D01-0032 never claimed to be afraid of the Defence team's resource person;
- The circumstances in which the resource person approached Witness D01-0032 differ from those in which Defence counsel met Witness W-0297: Witness W-0297 was informed by VWU prior to the official meeting with Defence counsel of the meeting's objectives and the role of Defence counsel and, in those circumstances, consented to answering Defence counsel's questions.

II. THE CREDIBILITY AND RELIABILITY OF OTHER PROSECUTION WITNESSES (PARAS. 111-123)

98. [Para. 112] As regards the assessment of Witness W-0055's evidence, the Defence refers to paragraphs 476 to 481 of its submissions, which are not, as the Prosecutor implies, confined to the time period which the Witness spent in the FPLC.

99. [Para. 114] Contrary to the Prosecutor's assertion, the Defence clearly put it to Witness W-0038 that Intermediary W-0316 encouraged him to lie to the Office of the Prosecutor and the Chamber.¹³¹

¹³⁰ The Defence refers to its Closing Submissions, ICC-01/04-01/06-2773-Conf-tENG, para. 273.

¹³¹ T-337-CONF-FRA-ET, p. 47, line 5 to p. 50, line 18.

100. There is evidence to show that Intermediary W-0316 encouraged Witnesses W-0015 and D01-0016 to give false evidence aimed at securing the Accused's conviction.¹³² Intermediary W-0316's behaviour,¹³³ Witness W-0038's statements,¹³⁴ and the contradictions between the statements of Intermediary W-0316 and Witness W-0038¹³⁵ amply demonstrate that Witness W-0038, just like Witnesses W-0015 and D01-0016, was encouraged by Intermediary W-0316 and his assistants to give false statements to the Office of the Prosecutor and the Trial Chamber.
101. [Para. 116] The Defence never stated that Witness W-0299 had been the Accused's bodyguard up until August 2003. On the contrary, the Defence underscores at paragraphs 524 and 526 of its Closing Submissions that the Witness clearly stated that he stopped acting as the Accused's bodyguard when the Accused left Kinshasa for Mandro in August 2002.¹³⁶
102. [Para. 118] The Defence notes that the Prosecutor's Reply concerning the credibility of Witness W-0116 and the reliability of the information he provided in his evidence is confined to just one of the numerous points raised by the Defence at paragraphs 612 to 617 of its Closing Submissions.
103. [Paras. 119 to 121] As regards Witness W-0031, the Defence refers to its Closing Submissions and its Application Seeking a Permanent Stay of the Proceedings.¹³⁷
104. [Paras. 122-123] As regards Witness W-0046, the Defence refers to its Closing Submissions.¹³⁸

¹³² ICC-01/04-01/06-2657-Conf-tENG, paras. 29-74.

¹³³ ICC-01/04-01/06-2657-Conf-tENG, paras. 29-74.

¹³⁴ ICC-01/04-01/06-2773-Conf-tENG, paras. 450-475; ICC-01/04-01/06-2657-Conf-tENG, paras. 64-68.

¹³⁵ ICC-01/04-01/06-2773-Conf-tENG, paras. 450-453; ICC-01/04-01/06-2657-Conf-tENG, para. 64.

¹³⁶ T-122-CONF-FRA-CT, p. 48, line 18 to p. 49, line 11. The Defence refers to its submissions ICC-01/04-01/06-2773-Conf-tENG, paras. 523-527.

¹³⁷ ICC-01/04-01/06-2773-Conf-tENG, paras. 618-637; ICC-01/04-01/06-2657-Conf-tENG, paras. 184-199.

“ON THE EXISTENCE AND NATURE OF THE ARMED CONFLICT” [PARAS. 124-126]

105. [Paras. 124 to 126] It has not been demonstrated that the FNI, the FRPI, PUSIC or the FAPC were organised armed groups within the meaning of IHL. The Prosecutor has not shown that these organisations had at their disposal an organised army which, under responsible command, exercised such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the provisions of IHL.¹³⁹
106. To substantiate his contentions, the Prosecutor essentially relies on United Nations documents¹⁴⁰ and reports prepared by W-0360.¹⁴¹ Yet, W-0360 himself highlighted the limited reliability of the information at his and MONUC’s disposal as regards the factual details of the events which took place in Ituri in 2002-2003.¹⁴² Furthermore, the evidence mentioned by the Prosecutor provides no information as to the level of organisation of these groups, the existence of any command or their capacity to carry out sustained and concerted military operations.
107. References in reports to these groups as armed groups, and their participation in the Ituri Pacification Commission, do not absolve the Prosecutor from discharging his burden of adducing evidence to substantiate his allegations. This matter is for the Bench, and not third parties, to adjudge.
108. Furthermore, it has not been demonstrated that clashes between organised armed groups took place after May 2003. The sporadic attacks by civilians in villages after 30 May 2003, which the reports attributed to one of these groups

¹³⁸ ICC-01/04-01/06-2773-Conf-tENG, paras. 638-663.

¹³⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, article 1, subparagraph 1.

¹⁴⁰ See EVD-OTP-00623, EVD-OTP-00625 and EVD-OTP-00737.

¹⁴¹ EVD-OTP-00403 and EVD-OTP-00405.

¹⁴² T-157-CONF-FRA-CT, p. 12, line 4 to p. 20, line 25; see also ICC-01/04-01/06-2773-Conf-tENG, para. 725.

or another, did not constitute combat between organised armed groups, and cannot be considered as an armed conflict within the meaning of IHL.¹⁴³ Accordingly the date of 30 May 2003 does not correspond to a “[r]eduction in hostilities”,¹⁴⁴ but rather a cessation of hostilities.

109. The Defence refers the Chamber to paragraphs 694 to 699 of its Closing Submissions on this matter.

THE INVOLVEMENT OF THE CONGOLESE AUTHORITIES

110. The Defence refers to the arguments put forward in the first part of its Closing Submissions.
111. To these submissions, the Defence wishes to add that the fraudulent involvement of the Congolese political authorities in the proceedings is further confirmed by the information and documents disclosed and transmitted by the Registry in its 28 July 2011 report.¹⁴⁵ Indeed, the information and documents indicate that Witness W-0297 is personally involved in an association which is acting on behalf of President Kabila.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I:

TO ACQUIT Mr Thomas Lubanga of all charges; and
TO ORDER his immediate release.

[signed]
Ms Catherine Mabille, Counsel

Dated this 15 August 2011

At The Hague, The Netherlands

¹⁴³ Protocol II, article 1, subparagraph 2.

¹⁴⁴ ICC-01/04-01/06-2778-Conf, para. 125.

¹⁴⁵ ICC-01/04-01/06-2777-Conf. See also the documents transmitted by e-mail by the Victims and Witnesses Unit on 10 August 2011.