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Date: **4 February 2013**

THE APPEALS CHAMBER

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

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

Public Document

**Corrigendum of Observations on the appeals against the decisions pursuant to
 articles 74 and 76 of the Rome Statute**

Source: Legal Representatives of Victims, V01 team

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

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I. PROCEDURAL BACKGROUND

1. On 14 March 2012, the Trial Chamber handed down its *Judgment pursuant to Article 74 of the Statute*.¹
2. On 10 July 2012, the Trial Chamber handed down its *Decision on Sentence pursuant to Article 76 of the Statute*.²
3. On 3 October 2012, the Prosecution filed a notice of appeal against the decision on conviction³ and the Defence filed two notices of appeal against the conviction⁴ and sentencing⁵ decisions.
4. On 26 November 2012, the Defence submitted an application for leave to present additional evidence at the appeals stage.
5. On 3 December 2012, the Defence submitted documents in support of its appeal against the conviction⁶ and sentencing⁷ decisions, and the Prosecution submitted the document in support of its appeal against the sentencing decision.

¹ ICC-01/04-01/06-2842.

² ICC-01/04-01/06-2901.

³ "Prosecution's Notice of Appeal against Trial Chamber I's 'Decision on Sentence pursuant to Article 76 of the Statute'", ICC-01/04-01/06-2933 A4.

⁴ "Notice of Appeal lodged by the Defence for Mr Thomas Lubanga against Trial Chamber I's *Judgment pursuant to Article 74 of the Statute* of 14 March 2012", ICC-01/04-01/06-2934-tENG - A5.

⁵ "Notice of Appeal lodged by the Defence for Mr Thomas Lubanga against Trial Chamber I's *Decision on sentence pursuant to Article 76 of the Statute* of 10 July 2012" ICC-01/04-01/06-2935-tENG - A6.

⁶ "Mr Thomas Lubanga's appellate brief against Trial Chamber I's 10 July 2012 *Decision on Sentence pursuant to Article 76 of the Statute*", ICC-01/04-01/06-2949-tENG - A6.

⁷ "Mr Thomas Lubanga's appellate brief against Trial Chamber I's 10 July 2012 *Decision on Sentence pursuant to Article 76 of the Statute*", ICC-01/04-01/06-2949-tENG - A6.

6. On 4 December 2012, the Defence submitted the public version of an application to present additional evidence⁸ in the context of the two aforementioned appeals.
7. On 13 December 2012, the Appeals Chamber issued the *Decision on the participation of victims in the appeals against Trial Chamber I's conviction and sentencing decisions*, by which it invited those victims whose authorisation to participate in the case had not been withdrawn to submit their observations on the Defence and Prosecution filings⁹ no later than 4 February 2012.
8. The Legal Representatives of the V01 group of victims hereby present in one consolidated document their observations on the three appeals and the Defence application to submit evidence.

II. DEFENCE APPEAL AGAINST THE VERDICT OF GUILT

9. The victims have a clear interest in seeing the 14 March 2012 conviction upheld, since any reparations are contingent on that decision. They also have an interest in issues concerning the criteria and application of rules pertaining to the individual responsibility of the perpetrators of the crimes which they suffered.

PART ONE: VIOLATION OF FAIR-TRIAL RULES

I. THE RIGHT TO BE INFORMED OF THE CONTENT OF THE CHARGES

10. The Accused was informed of the nature, cause and content of the charges by the *Decision on the confirmation of charges*. The Defence criticises the fact that the Chamber dismissed a series of evidentiary materials tendered by the

⁸ "Requête de la Défense aux fins de présentation d'éléments de preuve supplémentaires dans le cadre des appels à l'encontre du "Jugement rendu en application de l'Article 74", ICC-01/04-01/06-2942-Red A5 A6 – public redacted version.

⁹ *Decision on the participation of victims in the appeals against Trial Chamber I's conviction and sentencing decisions*, ICC-01/04-01/06-2951 A4 A5 A6.

Prosecutor – at its own request – while deeming another set of materials to be pertinent.

11. The Defence cannot seriously maintain that it had no knowledge of the evidence on which the Chamber relied, which was presented in court and discussed *inter partes*.

I. ALLEGED BREACH OF THE PROSECUTION'S STATUTORY OBLIGATIONS

12. The Legal Representatives will defer to the Prosecution in response to this ground of appeal.
13. Nevertheless, should the Appeals Chamber find that the Prosecution did indeed breach its statutory obligations, this would not imply that the verdict of guilt should be quashed, unless the conviction were based primarily on evidence obtained by the Prosecution in breach of the Statute, which is clearly not the case.
14. Acquitting the Accused in order to remedy any errors which the Office of the Prosecutor might have made would breach the victims' rights to justice, which are enshrined in the Statute and in international law.¹⁰
15. The Defence criticises the Prosecution for having investigated superficially and/or negligently. In actual fact, this works in the Defence's favour. In the instant case, certain oversights in the Prosecution's use of intermediaries led the Chamber to dismiss a large part of Prosecution evidence, which must surely be to the Defence's benefit.

¹⁰ United Nations General Assembly, Resolution 60/147 of 16 December 2005, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, articles VII and VIII.

16. As to the disclosure issues, the Appeals Chamber has twice ruled that such problems were not to be considered as an abuse of process warranting a stay of proceedings.¹¹ Moreover, these problems were remedied.
17. Finally, the Defence erroneously contends that collaboration with the national authorities of the State Party which referred the situation to the Court renders the proceedings against the Accused unfair.¹² Since complementarity is a founding principle of the Rome Statute, there is nothing unlawful about any such collaboration in and of itself.

II. PREJUDICE TO THE INTEGRITY OF THE TRIAL

18. The Defence seemingly confuses the Office of the Prosecutor's duties with those of the Chamber. The integrity of the trial is not determined by the conduct of one of the parties to the case. The Defence does not explain its contention that the Chamber based its judgment on flawed evidence.
19. On the contrary, it must be noted that the Chamber's attitude towards the Office of the Prosecutor was highly critical and that it dismissed – rightly or wrongly – all of the evidentiary materials whose integrity was called into question by the Defence.
20. In any event, should the Appeals Chamber quash the judgment on the grounds of a breach of fair-trial principles, this should not lead it to acquit the Appellant, but to amend the decision or order a new trial before a different trial chamber in accordance with article 83 of the Statute.

¹¹ *Decision on the Defence Confidential Application Seeking a Permanent Stay Of the Proceedings*, ICC-01/04-01/06-2690-Red. See also the Trial Chamber's *Decision on intermediaries*, ICC-01/04-01/06-2434-Red2.

¹² "Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre du Jugement rendu en application de l'Article 74 du Statut" rendu le 14 mars 2012", para. 82, ICC-01/04-01/06-2948-Red.

PART TWO: CRIMES OF ENLISTMENT, CONSCRIPTION AND USE OF CHILDREN UNDER THE AGE OF 15 YEARS

I. PRESENCE OF CHILDREN UNDER THE AGE OF 15 YEARS IN THE FPLC

21. The Defence erroneously maintains that the Court could not find that children under the age of 15 years were present in an armed group without establishing the children's identity, date of birth, date and conditions of recruitment, military career, active combat and the date on which they left the armed group.¹³
22. Just as it is possible to find that a massacre, use of civilians as human shields, or inhuman treatment of prisoners did indeed take place without the victims of those crimes having been identified, so too is it possible to find that an armed group used child soldiers without those children having been identified.
23. No particular form of evidence is required under the Rome Statute for this or other crimes, in accordance with article 69(4).
24. *A priori*, there is no hierarchy distinguishing evidence provided by a victim's testimony and evidence provided by another person or via documents and images, and the notion of "primary evidence" is wholly irrelevant. On the contrary, it could be argued that testimony from individuals who are also victims provides fewer guarantees of objectivity than other forms of evidence.
25. Other decisions, both of the International Criminal Court and of other international courts, have clearly acknowledged that the crimes for which the Appellant has been convicted may be proved by a range of evidentiary materials, including the testimony of persons who estimated the age of the

¹³ "Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre du" Jugement rendu en application de l'Article 74 du Statut" rendu le 14 mars 2012", ICC-01/04-01/06-2948-Red 74, para. 128. ICC-01/04-01/06-2948-Red.

children they observed or interviewed, without a ruling on the exact age of the children in question.

26. In *Ngudjolo Chui*,¹⁴ Trial Chamber II provided the following grounds for its decision of 18 December 2012:

The Chamber notes that Witnesses P-2, P-12, P-30 and P-267 stated that child soldiers were in the ranks of the armed groups which came into existence in Ituri between 2002 and 2003, including in the Lendu and Ngiti communities. The final report of the Ituri Pacification Commission which met in Bunia from 4 to 14 April 2003 – signed by Mathieu Ngudjolo – also attests to the “[TRANSLATION] strong presence of children in the combatant forces”.

The Chamber further underscores that by signing the Agreement to end Hostilities on 18 March 2003 as Lendu representative of Djugu Territory, Mathieu Ngudjolo undertook “[TRANSLATION] to halt all recruitment and use of child soldiers in their armed forces”. It considers that attention must be drawn to the reference in the Agreement to a practice “[TRANSLATION] inconsistent with international law” and therefore not solely affecting those children under the age of 15 years.

For MONUC, which investigated the events which occurred in Ituri between January 2002 and December 2003, “there can be no doubt that all of the armed groups [...] systematically recruited [...] children – ranging from 7 to 17 years old – throughout the district of Ituri”. It even goes on to state that “at least 40 per cent of each militia force are children below the age of 18, with a significant minority below the age of 15”. MONUC further reported that the Lendu and Ngiti militias enlisted children to whom summary training was dispensed at training sites and the Zumbe area was regularly used to this end.

The Chamber notes that Witness P-268 claimed that on 24 February 2003, from his hideout in Bogoro, he saw scores of children, some bearing weapons such as machetes, spears and arrows, participate in the destruction of houses and the pillaging of property. The witness stated that they had come from Zumbe and Katonie, “[TRANSLATION] [f]rom the area where the Lendu were”, estimating them to be “[TRANSLATION] 10 to 15, 16 years of age”, the youngest of them aged between 8 and 10 years. The Chamber further notes that P-323 claimed to have seen during battle, in both the Lendu and Ngiti assailant groups, “*kadogos*”, that is young combatants, but did not specify their age. Finally, P-287 stated that those assailants she was forced to lead to the centre of Bogoro and who had purloined merchandise from a shop, included children under the age of 12

¹⁴ *Judgment pursuant to article 74 of the Statute*, Trial Chamber II, ICC-01/04-02/12-3-t-ENG, 18 December 2012, paras. 509 *et seq.*

years. The witness added that these attackers were taking the property which they had pillaged back to Zumbe hill. The Chamber finds the witnesses credible in respect of these various points of their testimony. Finally, it recalls its earlier finding that the Lendu assailants who took part in the 24 February 2003 attack on Bogoro had come from Bedu-Ezekere *groupement*.¹⁵ [Emphasis added]

27. Hence that Chamber also relied on several categories of evidence to determine the age of children within an armed group, including observation-based testimony, to reach the following finding:

In light of these various pieces of evidence, the Chamber considers it established that the presence of children in combatant groups in Ituri was, at the material time, a widespread phenomenon and that this was also the case in Djugu Territory, where the Bedu-Ezekere *groupement* is located. The Chamber further notes that children under the age of 15 years, including some bearing bladed weapons, from Bedu-Ezekere *groupement* were present at the 24 February 2003 attack on Bogoro.¹⁶ [Emphasis added].

28. The Special Court for Sierra Leone took a similar approach in various cases:

While the Chamber heard testimony from child fighters who were able to identify their ages at the times of relevant events, we note that several such witnesses estimated the age of other child fighters based on comparisons between their own size and that of the other children. The Chamber also heard evidence from many other witnesses who observed children who appeared to be under the age of 15 engaged in various war-related activities. The Chamber is cognisant that these estimations of age were generally made on the basis of a child's appearance or height, rather than on objective proof of age. Given the inherent uncertainties in such estimations, the Chamber has exercised caution in determining the ages of children associated with the rebel factions in its findings. We nonetheless note that during the DDR process it was established through the use of verification of age methods such as the physical inspection of teeth that many of the children who had fought with the RUF and AFRC forces were under 15 at that time, which was towards the end of the Indictment period.¹⁷

29. Consequently, the question is not whether the Chamber could rely on evidentiary materials other than victims' testimony, but whether such materials could establish the material truth of the crime beyond reasonable doubt.

¹⁵ *Ibid.*, para. 512.

¹⁶ *Ibid.*, para. 516.

¹⁷ *The Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Case No. SCSL-04-15-T, Judgment, 2 March 2009, <http://www.sc-sl.org/LinkClick.aspx?fileticket=D5HojR8FZS4%3d&tabid=215>, paras. 1626-1628.

30. In the instant case, the Chamber took into consideration the statements of individuals who were members of the armed group in question, neutral Congolese and international observers (such as Witness P-0046) and documents and video footage, while systematically excluding any evidence likely to raise doubts.
31. Given that a large number of witnesses stated that they had seen children who were obviously under the age of 15 years, that video footage shows a number of individuals with the physical appearance of young children under the age of 15 years – a fact unchallenged by the Defence – and that the Appellant himself acknowledged the presence of minors under the age of 15 years (by ordering their demobilisation), the Chamber could legitimately find that such children were present in the militia, even if it were later established that some of the children observed who appeared younger than 15 were in actual fact older.
32. The Chamber did not reverse the burden of proof and at no point placed the onus on the Accused to demonstrate the real age of all individuals appearing in the multiple video clips which were shown. At most, it considered that there was no reasonable doubt that those individuals included children under the age of 15 years, given that a large number of the persons appearing in the video footage had the physical appearance of young children.
33. Furthermore, the Chamber did not err by stating that it had independently assessed the age of the children identified in the video footage, to the extent that it was possible to draw a safe conclusion based on their appearance.
34. In order to reach a finding that a crime within the meaning of article 8(2)(e)(vii) has been committed, it is not necessary to determine the victims' age precisely, only that they were children under the age of 15 years.

35. There are quite clearly some images where it is possible to say for certain that one or more children are under the age of 15 years, whereas there may be some doubt with other images.
36. Estimating a child's age on the basis of his or her physical appearance is not necessarily less reliable than a statement by the child or a close relative. It is not any less reliable than a voting card, since many young people in the DRC applied for a voting card stating that they were older in order to have some form of proof of identity and the attendant benefits.¹⁸
37. However, it is not just one child whose age is being estimated, but a large number of children appearing in video footage (several hundred individuals, according to the Defence!¹⁹). In order to determine whether the Chamber committed a factual error by finding that a number of children obviously under the age of 15 years appeared on certain videos, the Appeals Chamber would have to view the entire footage in question, which is not normally within its remit.
38. Furthermore, if the Chamber were to have erred on the subject of one individual – which has not been demonstrated – that would not then imply that it committed a factual error by ruling on the age of a large number of individuals appearing in the footage viewed.

¹⁸ On the reliability of voting cards, see *inter alia* ICC-01/04-01/06-2501-Red 05-07-2010.

¹⁹ “*Mémoire de la Défense de M. Thomas Lubanga relatif à l’appel à l’encontre du ‘Jugement rendu en application de l’Article 74 du Statut’ rendu le 14 mars 2012*”, ICC-01/04-01/06-2948-Red, para. 153.

II. CONSCRIPTION OF CHILDREN UNDER THE AGE OF 15 YEARS

39. The Defence contends that the Chamber committed an error of law by considering that the crimes of conscription and enlistment could be treated together as “dual conduct belonging to a same offence”.²⁰
40. The Legal Representatives take the opposite view that the Chamber was perfectly entitled to combine not only the enlistment and conscription of children under the age of 15 years, but also the use of such children in hostilities. Notwithstanding the use of the wording “separate offences” in a recital of the judgment,²¹ these three concepts do not cover three different crimes, but three forms of the same crime defined by article 8(2)(e)(vii) of the Statute.
41. The fact that three terms are used to define one crime does not signify that the drafters of the Statute intended for them to be separate offences.²² Article 8(2) of the Statute provides a long list of offences which are defined as war crimes. For a large number of them, several possible forms are given: “torture *or* inhuman treatment”, “causing great suffering *or* serious injury [...]”, “unlawful deportation *or* transfer *or* unlawful confinement”, “killing *or* wounding treacherously”, and so on. However, each form does not constitute a different crime.
42. In the Elements of Crimes, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and “any other form of sexual violence” are treated as separate offences, each with a specific definition; whereas

²⁰ “Mémoire de la Défense de M. Thomas Lubanga relatif à l’appel à l’encontre du ‘Jugement rendu en application de l’Article 74 du Statut’ rendu le 14 mars 2012”, ICC-01/04-01/06-2948-Red, para. 231.

²¹ Verdict, para. 609: “Bearing in mind the use of the word ‘or’ in Article 8(2)(e)(vii), in the Chamber’s view the three alternatives (*viz.* conscription, enlistment and use) are separate offences.”

²² “Mémoire de la Défense de M. Thomas Lubanga relatif à l’appel à l’encontre du ‘Jugement rendu en application de l’Article 74 du Statut’ rendu le 14 mars 2012”, ICC-01/04-01/06-2948-Red, para. 231.

“conscripting, enlisting or using children” is treated as one and the same offence, covered only by article 8(2)(b)(xxvi) and 8(2)(e)(vii)

43. Enlistment and conscription of children under the age of 15 years are therefore two types of conduct constituting the same offence. While there are indeed differences between the various forms of the offence, which may even indicate varying degrees of gravity, this should have no impact on the discussion of guilt, only on the sentencing, where the forms and circumstances of the crime have full relevance.
44. The Defence is also wrong to assert that the distinction between enlistment and conscription depends on the volition of the children recruited and not on the conduct of the perpetrator of the crime. While the term “enlistment” may indeed refer to recruitment of volunteers whereas “conscription” implies a form of mandatory recruitment,²³ the Chamber rightly considered that children under the age of 15 years cannot be considered to possess the volitional element since they are incapable of providing valid *de facto* or *de jure* consent.
45. In reality, it is the element of force or threat on the part of the perpetrator which distinguishes the two prohibited forms of recruitment of children, not a child’s “consent”. If an armed group decides to enlist only volunteers, it may be the case that a child claiming to be a “volunteer” is in actual fact acting on the instructions of a parent. That does not make the recruitment “conscription”. Similarly, a leader of an armed group who compels families to enrol their children into the militia cannot claim that recruitment is “voluntary” if a child does not oppose it, either out of ignorance or necessity.

²³ See SCSL, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Case No. SCSL-04-15-T, Judgment, 2 March 2009, <http://www.sc-sl.org/LinkClick.aspx?fileticket=D5HojR8FZS4%3d&tabid=215>: The SCSL defines conscription as “compulsory enlistment of persons into military service”.

46. While in the enacting part of its judgment, the Chamber found the Appellant guilty of conscription AND enlistment of children under the age of 15 years, it could equally have found him guilty of conscription OR enlistment, in particular if it had found that the recruitment of children had been established, but not the manner in which they were recruited (i.e. voluntarily or forcibly).
47. By convicting the Accused under the three forms of the crime set forth at article 8(2)(e)(vii), the Chamber rightly considered that the crime had been committed under those three forms and that the Appellant was responsible. However, should the Appeals Chamber hold that only one or two forms of the crime have been established beyond reasonable doubt, it could amend the verdict accordingly.

III. PARTICIPATION OF CHILDREN UNDER THE AGE OF 15 YEARS IN HOSTILITIES

48. The Defence criticises the Chamber for holding that active participation in hostilities is established where “the support provided by the child to the combatants exposed him or her to real danger as a potential target” whereas the concept of risk has no basis in the international law of armed conflicts.
49. Such criticism contradicts the link drawn by the Defence itself between the prohibition on using children in hostilities and the protection to which they are entitled under article 3 common to the four Geneva Conventions. Indeed, it may be argued that the use of children under the age of 15 years to participate in hostilities transforms them from “protected persons” to the equivalent of combatants, which makes them a military target just as integrating them into a military organisation does.
50. The drafters of the Statute preferred the term “participate actively” to “participate directly” in order to include forms of indirect participation in

hostilities, precisely because of the increasingly frequent use of civilians in supporting roles: “With children, it was considered that a phrase should be used that could be capable of wider interpretation”²⁴ [emphasis added].

51. During the work of the Preparatory Committee at the Rome Conference, the following footnote was inserted in the report as guidance on how the article in question should be construed:

The words “using” and “participate” have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries on an airbase or the use of domestic staff in an officer’s married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.²⁵

52. Contrary to the Defence’s claim,²⁶ the text does not exclude from the purview of the article activities such as domestic chores carried out not in a civilian context, as in a private household for an officer’s wife, but in a military camp and to provide direct help to a commander.

53. Hence the Chamber was correct to hold that:

The use of the expression “to participate actively in hostilities”, as opposed to the expression “direct participation” (as found in Additional Protocol I to the Geneva Conventions) was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence of using children under the age of 15 actively to participate in hostilities. It is noted in this regard that Article 4(3)(c) of Additional Protocol II does not include the word “direct”.²⁷

54. The prohibition on using children in a role in which they become participants in hostilities is certainly not contingent on their being recruited as members of

²⁴ Garraway, Charles, *Using, conscripting or Enlisting Children*, in *The International Criminal Court*. Ed. Roy Lee. Transnational Publishers 2000, p. 206.

²⁵ Charles Garraway, *op. cit.*, p. 206, footnote 161.

²⁶ “*Mémoire de la Défense de M. Thomas Lubanga relatif à l’appel à l’encontre du ‘Jugement rendu en application de l’Article 74 du Statut’ rendu le 14 mars 2012*”, ICC-01/04-01/06-2948-Red, para. 261.

²⁷ ICC-01/04-01/06-2842 14-03-2012 1/624 SL T, para. 627.

an armed group, but also applies to any one-time use of children as long as it is an activity which strips the child of his or her status as a protected person under the Geneva Conventions.

55. The Defence argues that by drawing on the concept of “risk” (as a potential military target), the Chamber’s analysis somewhat conflates the crimes of enlistment, conscription and use of child soldiers, “thereby divesting the three concepts of their substance”.
56. On the contrary, viewing these three concepts as different crimes is what obscures their common substance, which is to deny children – who would normally be afforded more protection than civilians in general – the protection reserved for non-combatants under humanitarian law, only to transform them effectively into a potential military target.²⁸
57. However, it is true that in the case of a child participating in military activities as a member of an armed group, the line between the two concepts of the crime becomes blurred. Using children to participate in combat may be a more serious form of the crime than using them in functions which expose them to less direct risk to their lives – for instance, as bodyguard – but does not change the nature of the crime.
58. The Defence’s argument that only children on the battlefield may be protected runs counter to all the instruments pertaining to the issue. A soldier who is on patrol or guard duty or is simply present in a military camp is equally a military target.

²⁸ See article 4-3 of Additional Protocol II. It is worth noting that article 4-3(d) provides that “the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured”.

PART THREE: INDIVIDUAL CRIMINAL RESPONSIBILITY

I. OBJECTIVE CONDITIONS

59. The Defence addresses the material and mental elements of the crime separately, but wrongly suggests that the Chamber derived the objective requirements (*actus reus*) solely from the perpetrator's intent (*mens rea*). Indeed, the quotation from paragraph 985 of the judgment is taken out of context.
60. The Chamber did indeed hold that the "common plan" of the co-perpetrators must itself include an element of criminality, while referring to elements set out in relation to the mental element.
61. The Trial Chamber's test at paragraph 984 – "it is necessary, as a minimum, for the prosecution to establish the common plan included a critical element of criminality, namely that, its implementation embodied a sufficient risk that, if events follow the ordinary course, a crime will be committed" – pertains to an assessment of the common plan, i.e. the *actus reus*, and hence is unrelated to the mental element under article 30. The existence of such risk is in fact an objective element, which is not predicated on the perpetrator's knowledge.
62. The Chamber rightly notes that in the temporal and geographical circumstances, the common plan to recruit militia members embodied *sufficient risk that if events follow the ordinary course* children under the age of 15 years would be recruited.
63. The Defence also challenges the material element of the crime consisting of the perpetrator making an "essential contribution" to the joint enterprise, in particular by exercising control over the crime, and argues that article 25(3)(a) always requires personal and direct participation in the crime.

64. It views Presiding Judge Fulford's separate opinion as providing proof of an error of law on the part of the Chamber. However, his separate opinion is a concurring opinion.

65. Admittedly, Judge Fulford takes the view that it is not necessary to prove the "essential" nature of the contribution to the crime, that the "control" test is too strict for the prosecution and that the Statute only requires the establishment of a causal link between the crime and the accused's contribution:

16. To summarise, a plain text reading of Article 25(3)(a) establishes the following elements for co-perpetration:

- a. The involvement of at least two individuals.
- b. Coordination between those who commit the offence, which may take the form of an agreement, common plan or joint understanding, express or implied, to commit a crime or to undertake action that, in the ordinary course of events, will lead to the commission of the crime.
- c. A contribution to the crime, which may be direct or indirect, provided either way there is a causal link between the individual's contribution and the crime.²⁹

66. Nevertheless, Judge Fulford concurs with the (more restrictive) position of the Majority by considering that:

Abandoning the control of the crime theory for the purposes of the Article 74 Decision would significantly modify the law governing the charges, at a stage when the evidence is closed and the parties have made their submissions. The alternative approach which I have described above arguably involves applying a "lesser" test [emphasis added]. If at this stage in the proceedings (and without prior notice) the Chamber ruled that the prosecution only has to establish a contribution – as opposed to an "essential" contribution – the trial would be rendered unfair, in violation of Article 64(2) of the Statute. The accused is likely to have made a number of tactical decisions that, at least in part, have been informed by the legal requirements for a conviction. I am therefore in agreement with my colleagues that the tests described in paragraphs 1013 and 1018 of the Judgment are to be applied, notwithstanding my overall reservations as to the "control of the crime" theory.³⁰

67. In her concurring opinion to the judgment in *Ngudjolo Chui*, Judge Van den Wyngaert is even more to the point:

I see no legal basis for the "essential contribution" requirement. I therefore reject the idea that it suffices for joint perpetration under Article 25(3)(a) that an

²⁹ *Separate Opinion of Judge Adrian Fulford*, ICC-01/04-01/06-2842 14-03-2012 603/624 SL T, para. 16.

³⁰ *Ibidem*, para. 21.

accused only makes a contribution to a broadly defined common plan and not to the crime.³¹

68. The Defence also errs when it states that command responsibility is “exclusively” provided for in article 25(3)(b) and article 28, and that article 25(5)(a) cannot ever refer to superiors.
69. Article 25(3)(a) pertains to the responsibility of a person who commits a crime “as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible”. And it is precisely superiors who are capable of committing a crime through another person.
70. Responsibility of a superior under article 25 must be distinguished from responsibility under article 28, which pertains to the specific command responsibility of military leaders or civilians for the actions of others deriving from their failure to prevent or prosecute the crimes committed by their subordinates. This responsibility exists only if the superior exercised “effective control” over the direct perpetrators. Article 25, however, pertains to conduct which in and of itself constitutes a crime. Paragraph 3(a) concerns the principals, including those acting through their subordinates, while paragraphs (b) to (d) set forth the accessory forms of contribution to the crime.³²
71. Consequently, the Defence is wrong to argue that the Appellant’s position and his knowledge of the crimes prosecuted are “irrelevant” to an assessment of his responsibility on the basis of article 25(3)(a) and that the Chamber in fact held the Appellant responsible on the basis of facts exclusively governed by article 25(3)(b) or article 28.

³¹ Separate opinion of Judge Christine Van den Wijngaert, ICC-01/04-02/12-4 18-12-2012 6/34 SL T para. 6.

³² Van Sliedregt, Elies, *The curious case of international criminal liability*. Journal of International Criminal Justice, Vol. 10, 1172-1188, para. 15.
<http://dare.ubvu.vu.nl/bitstream/handle/1871/39246/CuriousCaseofICR.SSRN.pdf?sequence=1>.

72. As for the Chamber's alleged misappraisals when examining the Appellant's responsibility, it must be noted that the Chamber rightly relied on, *inter alia*, the Appellant's visits to recruitment and training camps where, in the presence of a large number of young children (who were obviously under the age of 15 years), he gave speeches to encourage both the child recruits and their leaders.
73. Taken out of context, such speeches could certainly, in and of themselves, constitute a form of inducement to commit a crime within the meaning of article 25(3)(b), equivalent to a form of complicity. However, in this case, it was encouragement, not from a third party, but from a military leader to his subordinates who execute orders received from the hierarchy. The Chamber legitimately considered these speeches to be evidence of the Accused's personal involvement in the joint enterprise which led to the enlistment, conscription or use of children in hostilities, and hence constituted an essential contribution to the crime.

II. MENTAL ELEMENTS (MENS REA)

74. The Defence criticises the fact that the Chamber used as a mental element "awareness that a consequence will occur in the ordinary course of events", which it equates to "*dolus eventualis*". Yet this is the exact terminology used by the drafters in article 30 of the Statute.
75. In actual fact, the Chamber applied a test which was excessively favourable towards the Appellant. The general test of article 30, "intent and knowledge", may apply to the recruitment of children under the age of 15 years into an armed group, but not to an assessment of their age.
76. This crime is defined by the Elements of Crimes as the enlistment of persons for whom "the perpetrator knew, or should have known, that such person or persons were under the age of 15 years".

77. The Elements of Crimes define the elements of the offences (*actus reus*).³³

However, during the *travaux préparatoires*, the drafters also studied the mental element of what was to be understood by “child under the age of 15 years”:

There were, however, differing views as to the extent of knowledge of the age of the child required by the perpetrator. Some States considered that there should be no knowledge at all. Thus the burden would be on someone who conscripted or enlisted to satisfy himself as to the age of those who came to him. However, others thought that this would, in effect, contravene article 67(1)(i) of the Statute, which provides that no reversal of the burden of proof or onus or rebuttal can be imposed upon the accused. Despite this, there was a considerable body of opinion that a strict application of article 30, requiring that the perpetrator had knowledge of the age of the person conscripted or enlisted, would impose too high a burden on the prosecution. This view was accepted even by those who considered that any deviation from the terms of article 30 was outside the terms of the Statute and, indeed, the authority of the Preparatory Commission. The compromise was to require that the accused ‘know or should have known that such person or persons were under the age of 15 years’. Those with reservations as to the vires of this provision were reassured by article 9(3) of the Statute providing that elements ‘shall be consistent’ with the Statute. Any inconsistent element would be struck down by the judges. However, all delegations considered that it was important to signify to the judges what the international community considered that the appropriate test was in these particular circumstances, in order to ensure the protection of children.³⁴

78. In practice, the definition implies that if a perpetrator is faced with individuals who do not have proof of age but from their height, physical development and appearance seem to be under the age of 15 years, he or she must refrain from recruiting them.

79. This definition from the Elements of Crimes is not an exception to the general rule of article 30, since the rule remains applicable to recruitments as such. However, article 30 itself states that this general rule applies, “unless otherwise provided”.

³³ Article 9 of the Statute: “Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8 [...]”. See also Kelt, M., and Von Weibel, H., *General principles of criminal law and the elements of crimes*, in “The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence”. Ed. Rou Lee, Transnational Publishers Inc., p. 19.

³⁴ Charles Garraway, *Article 8(2)(b)(xxvi) – Using, conscripting or enlisting children. Ibidem*, p. 207.

80. The general introduction to the Elements of Crimes states in this respect:

As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies. Exceptions to the article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below.

81. The inapplicability of the “intent and knowledge” element to the age of the children covered by article 8(2)(e)(vii) results from the specific nature of that crime, which requires compliance with rules protecting young children in the law of armed conflict,³⁵ rules which form part of *ius cogens*.

82. In a country where minors have no identity documents and civil status records are no longer reliable as a result of the conflict situation, a child’s date of birth and therefore age is almost always uncertain. The article 8(2)(e)(vii) prohibition would be meaningless if it were to be accepted that ignorance of a child’s exact date of birth allows that child to be recruited, even if he or she bears all the physical characteristics of a child under the age of 15 years.

83. The purpose of the prohibition, i.e. to protect children under the age of 15 years, can certainly not be fulfilled if recruitment were to be permitted as long as a child is unable to prove his or her exact age. In this respect, responsibility for verifying age must lie with the recruiter, not the child.

³⁵ *Inter alia*, the rule of Protocol II, article 2(3)(c) “3: Children shall be provided with the care and aid they require, and in particular: [...] (c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.” The Special Court for Sierra Leone confirmed this nexus: “Recognising that the prohibition against enlistment of child soldiers has its foundation in Article 4(3)(c) of Additional Protocol II, the Chamber holds that the definition of armed conflict under Additional Protocol II should be applied as outlined above.” Judgment cited at footnote 8, p. 194.

84. This principle of protection is reflected in both international and national case law.

85. For example, the SCSL held that:

[...] the perpetrators of these acts knew or had reason to know [emphasis added] that the persons abducted and forced to undergo military training were under the age of 15 years at the time. We recall that children as young as eight and nine were abducted. We are therefore satisfied that many children abducted were sufficiently young that the perpetrators knew from their physical appearance that they were under the age of 15.

[...]

The Chamber is of the opinion that the perpetrators are stopped from pleading lack of knowledge, having regard to these factors. The Chamber accordingly finds that where doubt may have existed as to whether a person abducted or trained was under the age of 15, it was incumbent on the perpetrators to ascertain the person's age. The Chamber therefore finds that the perpetrators of these abductions and training knew or had reason to know that persons subjected to these practices were under the age of 15.³⁶

86. While a protective approach in this matter is especially warranted in the context of humanitarian law, it is also embodied in national laws and/or case law pertaining to certain ordinary crimes. For example, article 187(4) of the Swiss Criminal Code explicitly criminalises negligent conduct in a domain where criminal law protects minors under a certain age:

[TRANSLATION] The perpetrator must exercise great caution when the victim's apparent age is close to the age limit for protection; only in cases where precise facts led him to accept that the person was over the age of 16 will he avoid punishment.³⁷

87. The courts are generally very hesitant to accept ignorance of a child's real age as a defence in the context of rape or indecent assault of a child below a certain age, especially if the child's appearance is clearly that of a child below a certain

³⁶ *Ibid.*, paras. 1702-1705.

³⁷ Favre, C., Pellet, M., and Stoudmann, P., *Code Pénal annoté*, Ed. Bis et ter, Lausanne, 1997, p. 383.

age, sometimes even when the perpetrator claims to have been misled by the victim's appearance, especially in American case law.³⁸

88. The Defence is therefore undoubtedly wrong to assert that the Chamber ought to have found that there was "reasonable doubt" on the part of the Appellant concerning the presence of minors under the age of 15 years in his troops, owing to the "extreme uncertainty of an evaluation of age based on the physical appearance of individuals".

III. PROSECUTION APPEAL AGAINST THE SENTENCE

89. The victims have an interest in expressing their views and concerns on the appeals against the sentence, in view of the fact that, in accordance with rule 145(1)(c) and 145(2)(b)(iii), the sentence must also take into consideration the harm caused to victims, their particular defencelessness or their number.
90. In its third ground of appeal, the Prosecution rightly submits that the test applied by the Chamber to dismiss certain aggravating circumstances has no legal basis. In fact, in its consideration of the aggravating circumstances linked to the consequences of the act, the Chamber required proof of the convicted person's criminal responsibility for those consequences, as if they were specific charges:

69. However, that said, it remains necessary for the Chamber to be satisfied beyond reasonable doubt that: (i) child soldiers under 15 were subjected to

³⁸ See Loewy, A. H., *Criminal Law*, 2nd ed., West Publishing Co., St. Paul, MN, 1987, pp. 63 *et seq.*: "Statutory rape is generally a strict liability offence. [...] Thus, even an honest and reasonable mistake as to the age or mental capacity will not serve to exculpate the defendant". See *S. v. Superior Court of Pima County*, 104 Ariz. 440, 454 P. 2d 982 (1969). W.R. LaFave and A.W. Scott, Jr, *Criminal Law*, Hornbook, Pocket Part, 1995, p. 29, mentions that the majority of States "imposes strict liability for sexual acts underage complaints", thus making a conviction possible "even when the defendant's judgment as to the age of the complainant is warrant by her appearance, her sexual sophistication, her verbal misrepresentations, and the defendant's careful attempts to ascertain her true age".

sexual violence; and (ii) this can be attributed to Mr Lubanga in a manner that reflects his culpability, pursuant to Rule 145(1)(a) of the Rules.³⁹

91. By applying this test and relying on rule 145(1)(a), the Chamber erred in law, since paragraph (1)(a) of this rule concerns not the consequences of the crime but the degree of culpability. According to this provision, the sentence will therefore be of greater or lesser severity depending on whether the convicted person was one of the principals or a less important co-perpetrator (a follower).
92. For example, the ICTR ordered the maximum sentence for the former Prime Minister of Rwanda, despite his cooperation with the court and his guilty plea, owing to his position within the State apparatus, and held that this position entrusted him with the duty and authority to protect the population and that he abused this trust.⁴⁰
93. However, the “circumstances of the crime”, such as the harm caused to the victims and their families, are objective circumstances which are linked not to the perpetrator of the crime, but to the victims.
94. The Chamber stated that it had

considered the gravity of these crimes in the circumstances of this case, with regard, *inter alia*, to the extent of the damage caused, and in particular “the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent [...]”.⁴¹
95. This suggests that the Chamber took into account the extent of the damage and the harm caused to the victims when considering the “gravity of the crime”.

³⁹ *Decision on Sentence pursuant to Article 76 of the Statute*, ICC-01/04-01/06-2901 10-07-2012 1/52 RH T, para. 69.

⁴⁰ ICTR, *The Prosecutor v. Kambanda*, 4 September 1998, paras. 41-62.

⁴¹ *Decision on Sentence pursuant to Article 76 of the Statute*, ICC-01/04-01/06-2901 10-07-2012 1/52 RH T, para. 44.

However, such was not the case, as Judge Odio Benito noted in her dissenting opinion:

Despite this affirmation, it subsequently disregards this fundamental factor which shall be considered by the Chamber pursuant to Rule 145(l)(c) of the Rules. The Majority of the Chamber considers as relevant factors only: a) the large-scale and widespread nature of the crimes committed; b) the degree of participation and intent of the convicted person; and c) the individual circumstances of the convicted person.⁴²

96. Contrary to other factors determining the “gravity of the crime”, such as the number of minors recruited into the UPC,⁴³ the harm caused to the victims was addressed only as part of the consideration of potential aggravating circumstances, only to be dismissed by the Chamber.
97. The victims are of the view that the Chamber should have taken account of their suffering, either in determining the gravity of the crime or as an aggravating circumstance. Handing down a sentence for the presence of children under the age of 15 years in an armed group without taking account of the conditions of their presence, in particular conditions tantamount to inhuman or degrading treatment and/or sexual violence suffered by young victims, does not equate to proper justice.
98. Judge Odio Benito rightly recalled that:

Pursuant to Rule 145(l)(c) of the Rules, the Chamber has the authority and the obligation to consider the damaging effects that the recruitment, particularly the harsh treatment and sexual violence had upon very young children, as an exacerbating factor in the determination of the sentence.
99. To obscure the circumstances of the victims’ suffering, the Majority applied a test which was unnecessarily strict, linked to the Appellant’s *mens rea*, which is not supported by the Court’s instruments.

⁴² Separate opinion of Judge Odio Benito, *Decision on Sentence pursuant to Article 76 of the Statute*, ICC-01/04-01/06-2901, para. 5.

100. Aggravating circumstances may be subjective elements, such as the motive (rule 145(2)(b)(v)), or objective elements, whether they are linked to the convicted person, such as prior convictions or official capacity (145(2)(b)(i) and (ii)), or to the consequences of the crime (defencelessness or number of victims, rule 145(2)(iii) and (iv)).
101. By definition, the perpetrator of a crime cannot foresee all of the consequences of his or her actions, and the consequences are not dependent on the perpetrator's conduct alone. For example, the perpetrator of an attack on a civilian target cannot foresee the number of dead or injured or the extent of economic loss which the attack will cause. However, that does not mean that these circumstances cannot be taken into account by the bench, especially if they are particularly serious.
102. The fact that a military leader who orders or supports war crimes shows no concern for the consequences of his or her conduct and/or does not even think about them does not imply that the Court should disregard them.
103. None of the Court's instruments makes the consideration of aggravating circumstances pertaining to the consequences of the crime contingent on the rules on individual criminal responsibility. On the contrary, both article 78 and rule 145 allow the Chamber broad discretion in taking account of mitigating and aggravating circumstances, examples of which are provided in a non-exhaustive list.
104. While the International Criminal Court need not necessarily follow the case law of the ad hoc tribunals, it is worth noting that the tribunals generally held that

⁴³ ICC-01/04-01/06-2901, para. 50: "The Chamber, in passing sentence, has reflected its determination that the involvement of children was widespread."

the determination of what constitutes aggravating or mitigating circumstances⁴⁴ and the weight to be attached to them should be left to the trial chamber's discretion.⁴⁵

105. Furthermore, it would be difficult for the Court to apply the rules on criminal responsibility to aggravating circumstances, since such circumstances do not necessarily constitute crimes within the Court's jurisdiction, as is the case for a series of circumstances set forth in rule 145(2)(b) (such as abuse of power or official capacity, or discriminatory conduct).

106. Even the Prosecution's proposed test, whereby the consequences must not only be "directly related to the crimes" but also "foreseeable", has no basis in the Court instruments. The victims fail to see why the indirect consequences of the crime or those which the perpetrator did not necessarily foresee cannot be taken into account.

107. As for proof of these circumstances, the victims refer the bench to Judge Odio Benito's arguments in her dissenting opinion (paragraphs 9 *et seq.*) and to the document in support of the Prosecution's appeal (paragraphs 83 *et seq.*).

III. DEFENCE APPEAL AGAINST THE SENTENCE

108. The Chamber did not err in law by relying on factors of gravity which do not themselves constitute crimes. On the contrary, as is the case for determining mitigating or aggravating circumstances, the elements to be taken into account in assessing the gravity of the crimes are generally not crimes within the jurisdiction of the Court.⁴⁶

⁴⁴ ICTR-96-13-A, *Musema*, judgment of 16 November 2001, para. 395.

⁴⁵ ICTR-97-23-S *Kambanda*, judgment of 4 September 1998, para. 124, IT-96-21-A, *Čelebići*, judgment of 20 February 2001, para. 775; *Musema* judgment (see footnote 45), para. 396.

⁴⁶ ICC-01/04-01/06-2901, para. 94.

109. The Defence is also wrong to claim that the Chamber held that the crimes charged were widespread. On the contrary, the Chamber (erroneously, in our view) dismissed this position of the Prosecution and the Legal Representatives of Victims in reaching the following finding:

The Chamber has not reached conclusions to the criminal standard, namely beyond reasonable doubt, as to the precise number, or proportion, of the recruits who were under 15 years. The Chamber, in passing sentence, has reflected its determination that the involvement of children was widespread.⁴⁷

110. As to the time spent by the Appellant in detention in the DRC, the Legal Representatives draw the Appeals Chamber's attention to the fact that the Appellant was not prosecuted in the DRC for the crime suffered by their clients and which is the subject of the charges against him before the International Criminal Court.

111. Furthermore, this crime does not feature in the Congolese Military Criminal Code, which punishes both war crimes on the basis of a definition which is actually rooted in general criminal law,⁴⁸ and military activity directed against the country,⁴⁹ but which has not incorporated the Rome Statute crimes *ipso facto*.

112. Moreover, the fact that the accused was not prosecuted in the DRC for the crimes tried by the Court meant that the Pre-Trial Chamber was able to rule on

⁴⁷ *Ibidem*, para. 50.

⁴⁸ Article 173 of the Military Criminal Code: "[TRANSLATION] War crimes shall be understood to be any offences against the laws of the Republic committed during war which are not justified by the laws and customs of war".

⁴⁹ Article 174 of the Military Criminal Code: "[TRANSLATION] persons who, at the time of the perpetration of the crime, were in the service of or of an ally of the enemy in any capacity whatsoever, including as a civil servant of the administration or judiciary, non-combatant soldiers, officials or employees of an administration or members of any organisation or any individuals tasked by them with any mission, and who are guilty of crimes committed since the opening of hostilities in the territory of the Republic or in any theatre of war, either against a national, a foreigner or a refugee on the territory of the Republic, either to the detriment of the goods of any of the aforementioned natural persons and any national legal person, where such offences, even if perpetrated at the time of or under the pretext of a state of war, are not justified by the laws and customs of war, shall be

its jurisdiction and the admissibility of the case, in accordance with articles 17 and 19 of the Statute.⁵⁰

113. The Chamber was therefore under no obligation to take into account any complaints against the Congolese military judicial authorities. The International Criminal Court cannot rule on or assess the positive law of States Parties to the Statute beyond the scope of article 20 of the Rome Statute whose conclusions are not relevant to the case at bar.

IV. DEFENCE APPLICATION TO TENDER ADDITIONAL EVIDENCE ON APPEAL

114. In its application of 4 December 2012, the Defence requested leave to present fresh evidence at appeal.⁵¹

115. The Legal Representatives defer to the Appeals Chamber's determination in relation to the evidence tendered at the sentencing hearing of 13 June 2012, and the potential testimony of D-0041, although they are of the opinion that the exact age of these witnesses is problematic and of very limited relevance, for the reasons set forth above.

116. The Legal Representatives consider that tendering a list of FPLC names as at 11 December 2004, well after the period covered by the charges, is irrelevant and thus unhelpful in determining which individuals belonged to said armed group at the material time.

117. As for the evidence pertaining to Witness P-0297, his statements were not relied on by the Chamber, which held:

prosecuted before the military courts in accordance with the provisions in force and with the present code.

⁵⁰ ICC-01/04-01/06-512, 23 October 2006.

⁵¹ ICC-01/04-01/06-2942-Red, 4 December 2012.

429. The Chamber recognises that this witness may have been confronted with difficult circumstances, but in light of the matters set out above, his account, overall, is unreliable. Notwithstanding the allegation made by P-0297 against some of the other witnesses in the case, it is likely that P-0321 persuaded or encouraged him to give false evidence. The Chamber is unable to rely on his account.⁵²

118. Accordingly, the Legal Representatives fail to see how additional evidence on any subsequent activities of this witness would lead to the judgment being quashed. Hence, such evidence should be deemed inadmissible.

Consequently, the Legal Representatives respectfully request the Appeals Chamber:

To take into consideration the views and concerns set out above.

The Legal Representatives of the V01 team of victims

[signed]

Luc Walleyen

[signed]

Franck Mulenda

Dated this 4 February 2013

At Brussels, Belgium, and Kinshasa, Democratic Republic of the Congo

⁵² ICC-01/04-01/06-2842, para. 429.