Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-01/04-01/06**
Date: **3 December 2012**

THE APPEALS CHAMBER

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

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

PUBLIC REDACTED VERSION
Public Annexes 1 and 2 and public redacted Annex 3

Mr Thomas Lubanga's appellate brief against the 14 March 2012 *Judgment pursuant to Article 74 of the Statute*

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

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

Office of the Prosecutor
Ms Fatou Bensouda
Mr Fabricio Guariglia

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

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

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

Office of Public Counsel for Victims

Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

PART I: VIOLATIONS OF FAIR-TRIAL RULES

I – VIOLATION OF THE APPELLANT'S RIGHT TO BE INFORMED IN DETAIL OF THE NATURE, CAUSE AND CONTENT OF THE CHARGES AGAINST HIM

1. In its Judgment, the Chamber set aside the entirety of the testimonial and documentary evidence pertaining to all of the witnesses presented by the Prosecution as former child soldiers: Witnesses P-0007, P-0008, P-0010, P-0011, P-0157, P-0297, P-0298, P-0213 and P-0294.[1]

2. Despite excluding this evidence, the Chamber found that as a result of the implementation of the common plan to build an army, children under the age of 15 years were conscripted and enlisted into the FPLC between 1 September 2002 and 13 August 2003.

3. The Defence submits that by finding the Appellant guilty on the basis of the remaining evidence, the impugned decision breaches the Appellant's fundamental right under article 67(1)(a) to be informed in detail of the nature, cause and content of the charges against him.

4. Under the combined provisions of articles 61(3)(a) and 67(1)(a), rule 121(3) and regulation 52, the Prosecution is obligated, prior to the confirmation hearing, to state precisely in the Document Containing the Charges[2] the material facts in support of the charges in order to enable the suspect to prepare his defence.[3] Such a reading is consistent with previous rulings of the Court[4] and the international criminal tribunals.[5]

---

[1] Judgment, paras. 480 and 633.
[2] It must be read in conjunction with the Prosecution's list of evidence. ICC-01/04-01/06-803-tEN, para. 150; ICC-01/04-01/07-648 (*Katanga)*, para. 21(c).
[3] See ICC-01/05-01/08-424 (*Bemba)*, para. 208.
[4] See ICC-01/04-613 (*Mudacumura)*, paras. 6-7; ICC-01/04-01/10-465-Red (*Mbarushimana*), paras. 81-82; ICC-01/05-01/08-55 (*Bemba)*, para. 66.
[5] The international criminal tribunals' case law is consistent on this matter: the Prosecution has an obligation to state the material facts underpinning each of the charges in the indictment. An indictment which fails duly to set forth the specific material facts underpinning the charges against the accused must be amended in accordance with a specific procedure, failing which the relevant counts must be dismissed. ICTR, *The Prosecutor v. Ntakirutimana*, Appeals Chamber Judgment,

5. Relying on articles 61(3)(a) and 67(1)(a), rule 121(3) and regulation 52 of the Regulations, the Chambers of the ICC have confirmed on several occasions the importance at all stages of the proceedings of this fundamental principle, a violation of which may lead to the withdrawal of the charges concerned.[6] The Appeals Chamber of the ICC has stated, *inter alia*, how the phrase "material facts" is to be construed: "the term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged".[7]

6. The degree of specificity with which the Prosecution must present the material facts in support of its case depends on the nature of the case, in other words the Prosecution's characterisation of the alleged criminal conduct and the nexus between the accused and the crime.[8] Thus, where the Prosecution alleges that an accused personally committed the criminal acts alleged, it must provide in specific detail: (1) the identity of the victim, (2) the place and approximate date of the alleged criminal acts and (3) the means by which the acts were committed.[9]

7. It follows that, before deciding on the guilt of an accused person, a Chamber is bound to satisfy itself that the accused was in possession of sufficient specific

---

13 December 2004, para. 470; ICTY, *Prosecutor v. Kupreškić*, Appeal Judgment, 23 October 2001, paras. 88 and 114; ICTY, *Prosecutor v. Kvočka* et al, Appeal Judgment, 28 February 2005, para. 27; ICTR, *The Prosecutor v. Semanza,* Appeals Chamber Judgment, 20 May 2005, para. 85. See also ICTY, *Prosecutor v. Krnojelac, Decision on Defence Preliminary Motion Concerning the Form of the Indictment*, 24 February 1999, para. 12; ICTY, *Prosecutor v. Krnojelac*, *Decision on Preliminary Motion on Form of Amended Indictment*, 11 February 2000, paras. 17 and 18; and ICTY, *Prosecutor v. Brđanin and Talić*, *Decision on Objections by Momir Talić to the Form of the Amended Indictment*, 20 February 2001, para. 18; ICTY, *Prosecutor v. Naletilić and Martinović*, Appeal Judgment, 3 May 2006, para. 23. ICTR, *The Prosecutor v. Niyitegeka*, Appeals Chamber Judgment, 9 July 2004, para. 195; ICTY, *Prosecutor v. Kvočka* et al, Appeal Judgment, 28 February 2005, para. 28; ICTY, *Prosecutor v. Simić* et al, Trial Judgment, 17 October 2003, para. 120; ICTY, *Prosecutor v. Brđanin and Talić*, *Decision on Objections by Momir Talić to the Form of the Amended Indictment*, 20 February 2001, para. 52.

[6] See ICC-01/04-613 (*Mudacumura)*, paras. 4-5; ICC-01/05-01/08-424 (*Bemba)*, para. 208; ICC-01/04-01/06-2205, footnote 163; ICC-01/04-01/10-465-Red (*Mbarushimana)*, paras. 81-82.

[7] ICC-01/04-01/06-2205, footnote 163.

[8] ICTY, *Prosecutor v. Kvočka* et al, Appeal Judgment, 28 February 2005, para. 28; ICTY, *Prosecutor v. Kupreškić*, Appeal Judgment, 23 October 2001, para. 89; ICTY, *Prosecutor v Krnojelac, Decision on Defence Preliminary Motion Concerning the Form of the Indictment*, 24 February 1999, para. 12; ICC-01/04-01/10-465-Red, para. 112 (*Mbarushimana)*.

[9] ICTY, *Prosecutor v. Kupreškić*, Appeal Judgment, 23 October 2001, para. 89; ICTY, *Prosecutor v. Blaškić*, Appeal Judgment, 29 July 2004, para. 213.

details concerning the "material facts" set out by the Prosecution in support of the charges against him or her.

8. Otherwise, the Chamber must dismiss the charges against the accused.[10]

9. In the instant case, the Appeals Chamber will note that: (1) the Trial Chamber excluded from its Judgment the entirety of the evidence presented by the Prosecution, the Pre-Trial Chamber and the Trial Chamber as material facts in support of the charges against the Accused; and (2) the evidence underpinning the Chamber's findings does not attain the requisite threshold of specificity to support the finding that the Appellant was "sufficiently informed of the charges against him".

- *Exclusion of material facts in support of the charges*

10. Relying on the case law of the international criminal tribunals, the Prosecution acknowledged that, in the instant case, the Document Containing the Charges must contain, *inter alia*, information as to the identity of the victims, the place and the approximate date of the alleged offence and the means by which the offence was committed.[11]

11. These "material facts" were identified by the Prosecution at an early juncture as the information disclosed on the basis of "individual cases" in its Document Containing the Charges, as substantiated below:

- In response to a Defence complaint at the pre-trial stage regarding the vagueness of the Document Containing the Charges,[12] the Prosecution maintained that the document provided the Accused with precise

[10] ICC-01/05-01/08-424 (*Bemba*) para. 208: It is the duty of the Office of the Prosecutor alone to inform the accused; it is not the responsibility of the Chamber seized of the case to compensate any deficiencies in the Prosecution's case.
[11] ICC-01/04-01/06-748-Conf, para. 44.
[12] See hearing of 24 November 2006, T-44-ENG-ET, p. 64, lines 9 *et seq.* and "Document Containing the Charges", ICC-01/04-01/06-356.

information about the charges against him[13] by stating the identity of the victims, and the places and approximate dates of the crimes;[14] on this point, the Prosecution relied solely on the paragraphs concerning the "individual cases" of Witnesses P-0006, P-0007, P-0008, P-0009, P-0010 and P-0011.[15]

- The remainder of the Document Containing the Charges merely rehearses vague and general information which does not inform the Accused "in detail" of the charges against him.[16] The Prosecution justified this imprecision by indicating that the "necessary detailed information", that is, "the identities of the victims: The names of the victims and further identifying features [...], in particular the dates of birth of the children",[17] was provided in the "individual cases" part.[18] Furthermore, the Prosecution was of the view that the other general allegations about "children" were provided merely to complement the main information detailed in the "individual cases" part.[19]

---

[13] The Prosecution recalled: "The purpose of the Document Containing the Charges is to sufficiently inform Thomas LUBANGA DYILO of the charges against him in order to timely and adequately prepare his defence." ICC-01/04-01/06-748-Conf, para. 43.

[14] ICC-01/04-01/06-748-Conf, para. 45.

[15] The Prosecution submitted that it had provided sufficient details as to the identities of the victims of the crimes committed by Mr Lubanga at paragraphs 41, 45, 58, 64 and 77 of the Document Containing the Charges. As for the places and approximate dates of the crimes, the Prosecution referred exclusively to paragraphs 41 to 84 of the Document Containing the Charges, that is, the "individual cases" pertaining to Witnesses P-0006, P-0007, P-0008, P-0009, P-0010 and P-0011. ICC-01/04-01/06-748-Conf, para. 45.

[16] Information about the time: between 1 September 2002 and 13 August 2003 (paras. 6, 14, 19, 26, 27, 30 and 32); Information about the place: "district of Ituri" (paras. 6, 9, 12, 17, 19, 29 and 33); references to the training camps in "Centrale, Mandro, Rwampara, Irumu and Bule" (para. 34); Information about the identity of the victims: "children" (paras. 6-40). ICC-01/04-01/06-356 and ICC-01/04-01/06-1571, para. 6: Mr Lubanga allegedly recruited and conscripted children under the age of 15 years and used them to participate in hostilities in Ituri, between 1 September 2002 and 13 August 2003.

[17] ICC-01/04-01/06-748-Conf, para. 45(i).

[18] That is, paras. 41-87 of the Document Containing the Charges or paras. 41-101 of the amended version. ICC-01/04-01/06-748-Conf, para. 46(xi).

[19] The Prosecution stated that the general allegations made at paras. 30, 32, 37 and 40 (concerning "children") do not require the same level of precision, since the "necessary detailed information" is included in the "individual cases" part. ICC-01/04-01/06-748-Conf, para. 46(xi).

- The amended Document Containing the Charges filed on 2 December 2008[20] does not provide any additional information, save that the references to Witnesses P-0006 and P-0009[21] were replaced by references to Witnesses P-0157, P-0297, P-0298, P-0213 and P-0294.[22]

- Those witnesses were the only purported "victims" specifically identified by the Prosecution throughout the trial. At no other point in the proceedings did the Prosecution provide further details about dates and places pertaining to any other instances of enlistment, conscription or participation in hostilities of children in the FPLC during the material time.

- The Prosecution's List of Evidence, filed in August 2006, is of no assistance: (1) most of the evidence referred to was either not tendered into the record by the Office of the Prosecutor or was expressly excluded by the Chamber;[23] (2) much of the evidence is of little or no value;[24] and (3) the Prosecution referred to many items of evidence without stating how they are relevant or how they inform the Accused, contrary to the rules established in jurisprudence.[25]

- Finally, on 29 January 2007, the Pre-Trial Chamber confirmed the charges against Mr Lubanga[26] relying for the most part on witness statements presented as "individual cases"[27] without further details

[20] ICC-01/04-01/06-1571-Conf-Anx.
[21] The Prosecution withdrew P-0006 and P-0009 from its list of witnesses: ICC-01/04-01/06-1302-Conf.
[22] ICC-01/04-01/06-1571-Conf-Anx, paras. 41-98.
[23] ICC-01/04-01/06-356-Conf-Anx8. For example, newspaper articles, NGO reports, etc.
[24] For example: the vague allegations at paragraph 27 of the Document Containing the Charges could not be clarified by the content of 80 items of evidence with little or no probative value. ICC-01/04-01/06-356-Conf-Anx6, p. 25 *et seq.*
[25] ICC-01/04-01/10-465-Red, para. 112. For example, newspaper articles, NGO reports, etc. See ICC-01/04-01/06-2589 and ICC-01/04-01/06-2589-Anx-A, where the Chamber clearly finds that press articles "cannot usually be relied on to report with sufficient reliability the events they purport to address" (table entry 15); see also ICC-01/04-01/06-803-tEN, para. 106.
[26] ICC-01/04-01/06-803-tEN and ICC-01/04-01/06-796-Conf-tEN-Corr (confidential version).
[27] ICC-01/04-01/06-796-Conf, para. 251, footnotes 324, 325 and 326; paras. 265-266; para. 289 (P-0006, P-0007, P-0008, P-0009, P-0010 and P-0011).

which could assist the Defence in determining the material facts raised in support of the charges.

12. The Defence is not claiming that the Prosecution was under an obligation to provide the Appellant with the identities of all alleged victims of the crimes charged against him. However, it is inconceivable that the Accused could be found guilty without one sole victim being specifically identified.

13. In light of the above, there can be no doubt that the only specific material facts provided to Mr Lubanga concerned the purported victims P-0007, P-0008, P-0010, P-0011, P-0157, P-0297, P-0298, P-0213 and P-0294, who were presented as "individual cases" and **all** of whom were excluded by the Chamber at the end of the trial. From the outset of the case, the Chamber noted in relation to such evidence that it was the "primary evidence in the case which is said to support the charges the accused faces".[28]

- *Assessment of the prejudice suffered by the Appellant*

14. Should the Chamber find that the Accused's right enshrined in article 67(1)(a) was violated, it must assess and take into account the prejudice which the failure to disclose material facts[29] caused to the Defence, *inter alia* by assessing the importance of this information to the Accused's ability to prepare his defence. If the Prosecution's breach of its obligation to provide information "materially impaired" "the accused's ability to prepare his defence", the trial

[28] ICC-01/04-01/06-T-104-ENG-ET, p. 6 line 4 [emphasis added].

[29] ICTR, *The Prosecutor v. Ntakirutimana,* Appeals Chamber Judgment, 13 December 2004, para. 27; ICTY, *Prosecutor v. Kvočka* et al, Appeal Judgment, 28 February 2005, para. 34; ICTR, *The Prosecutor v. Muvunyi*, Appeals Chamber Judgment, 29 August 2008, para. 20; ICTR, *The Prosecutor v. Bagosora* et al, *Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I*, "*Decision on Motion for Exclusion of Evidence*", 18 September 2006, para. 30.

is rendered unfair.[30] In such circumstances, no finding of guilt against the accused may result from that charge.[31]

15. In the instant case, the Trial Chamber should reasonably have found that the Appellant's ability to prepare his defence was materially impaired by the fact that: (1) the "material evidence" underpinning the Prosecution's case was excluded too late and (2) the other evidence disclosed to the Appellant was insufficiently specific to allow him to mount an effective defence. The Chamber should have concluded on the basis of these findings that it could not find the Accused guilty.

16. In fact, the Appellant prepared his defence and focused his investigations on the nine witnesses (P-0007, P-0008, P-0010, P-0011, P-0157, P-0297, P-0298, P-0213 and P-0294) identified at an early stage by the Prosecution and the Pre-Trial Chamber as being representative of how children were enlisted, conscripted and used by the FPLC.[32] This information was provided in the "Amended Document Containing the Charges" and in the written statements of the witnesses to which that document referred.

17. The Defence also notified the Prosecution as early as January 2010 of its intention to demonstrate that the nine witnesses in question had made false statements before the Chamber. Nevertheless, the Prosecution took no steps to remedy the shortcomings of the Document Containing the Charges.

18. Furthermore, the other information disclosed by the Prosecution[33] is not specific enough to support a finding that the Appellant was notified in good

---

[30] ICTR, *The Prosecutor v. Ntagerura* et al, Appeals Chamber Judgment, 7 July 2006, paras. 28 *et seq.*; ICTR, *The Prosecutor v. Ntakirutimana,* Appeals Chamber Judgment, 13 December 2004, para. 58; ICTY, *Prosecutor v. Kupreskić* et al, Appeal Judgment, 23 October 2001, para. 122.

[31] ICTY, *Prosecutor v. Kvočka* et al, Appeal Judgment, 28 February 2005, para. 33; ICTY, *Prosecutor v. Naletilić and Martinović*, Appeals Judgment, 3 March 2006, para. 26; ICTR, *The Prosecutor v. Ntagerura* et al, Appeals Chamber Judgment, 7 July 2006, para. 28.

[32] Confirmed by the Chamber in its Judgment, para. 480.

[33] The Prosecution itself characterised the information as "[TRANSLATION] additional" to the material evidence.

time of the specific facts relied upon in support of the charges against him. This is confirmed by the Chamber's findings: the wording used by the Chamber is imprecise and does not mention any specific, verifiable examples of recruitment of soldiers under the age of 15 years into the ranks of the UPC during the material time.[34]

19. Lastly, the Defence is undoubtedly justified in raising this issue at the appeals stage. For one thing, given the fundamental nature of the Accused's rights under article 67 of the Statute, he must be able to raise the vagueness of the facts underpinning the charges against him at any stage of the proceedings.[35] For another, this issue was raised by the Defence before the Pre-Trial Chamber,[36] which rejected the Defence's argument on the matter, holding that the crimes charged and the mode of liability contemplated are clearly set out in the individual cases.[37] In any event, it was only when the Judgment was issued that the Appellant was able to understand fully the seriousness of the prejudice he had suffered by preparing his defence on the basis of specific facts disclosed by the Prosecution which were excluded only at the end of the trial.

20. In light of the foregoing, the Defence contends that the serious violation of the Appellant's fundamental right to be informed of the specific charges against

---

[34] The Chamber's formulation of the facts charged against the Appellant shows the same degree of imprecision as in certain formulations specifically deemed to be too imprecise by the chambers of the international criminal tribunals. For example: "April 1992 to August 1993", "[i]n the summer of 1992" and "prison guards"; "[f]rom 1 January to 31 July 1994", "in Karengera *commune*", "in other *communes* in Cyangugu *préfecture*" and "the orders". ICTY, *Prosecutor v. Krnojelac, Decision on Defence Preliminary Motion Concerning the Form of the Indictment*, 24 February 1999, paras. 42-49; ICTR, *The Prosecutor v. Ntagerura* et al, Appeals Chamber Judgment, 7 July 2006, paras. 4-46. Similarly, the Chamber indicates generally that "children" were enlisted or conscripted or participated in the hostilities; however, the exact identity and age of those "children" were not determined. Judgment, paras. 645-651, 653, 656, 664, 667, 668, etc.

[35] See, for example, ICTR, *The Prosecutor v. Niyitegeka*, Appeals Chamber Judgment, 9 July 2004, para. 200.

[36] Hearing of 24 November 2006, T-44-ENG-ET, p. 64, lines 9 *et seq.* Document Containing the Charges: ICC-01/04-01/06-356.

[37] ICC-01/04-01/06-796-Conf-tEN-Corr, paras. 150-151. The Pre-Trial Chamber refers to paragraphs 20-24 of the Document Containing the Charges.

him impaired his ability to prepare his defence and thus rendered the trial unfair. Hence, the exclusion of the material facts should necessarily have entailed a dismissal of the charges against Mr Lubanga.[38]

II – THE PROSECUTION'S VIOLATION OF ITS STATUTORY OBLIGATIONS

21. The Chamber stated in its Judgment that it was unpersuaded that the Prosecution had violated its obligations, considering that the Chamber itself "took measures [...] to mitigate any prejudice to the defence" and "kept these obligations on the part of the prosecution permanently under review".[39]

22. The Appeals Chamber will note that the impugned decision is tainted by numerous factual and legal flaws in the Chamber's findings on the following matters:

1. The Prosecution's serious breaches of its statutory obligations

1.1 Obligation to investigate exonerating circumstances

23. Under article 54(1), the Prosecutor is obliged to investigate incriminating and exonerating circumstances in order to establish the truth. This stipulation has been upheld in previous Court rulings.[40] The Prosecution therefore has a duty actively to seek exonerating evidence and to ascertain the reliability and credibility of the evidence which it intends to submit in support of the charges confirmed against an accused. In any event, even absent such an obligation to investigate exonerating circumstances, the most basic rules of justice oblige the Prosecution to ascertain the integrity of its evidence before presenting it to the Court.

---

[38] The Chamber summarises the Defence's observations on this point; see Judgment, paras. 178-179. However, the Chamber does not detail the grounds for its decision to assess other evidence tendered by the Prosecution in spite of the exclusion of the main evidence.

[39] Judgment, para. 120.

[40] ICC-01/05-01/08-55 (*Bemba)*, para. 26; ICC-01/09-02/11-382-Red (*Muthaura, Kenyatta and Ali)*, *Dissenting Opinion of Judge Hans-Peter Kaul*, paras. 50-51.

24. The impugned decision finds that the Prosecution was particularly negligent in exercising its duty to investigate, *inter alia*, by failing to verify and scrutinise its own evidence before tendering it.[41]

25. The Chamber noted that the Prosecution's failure to oversee its intermediaries and to verify the incriminating evidence led it to present wholly unreliable testimonies before the Chamber, possibly resulting from fraudulent acts on the part of its intermediaries.[42]

26. The Chamber emphasised, *inter alia*, that in respect of the witnesses presented as former child soldiers, the Prosecution neglected to consult civil registry or Independent Electoral Commission records,[43] to verify those witnesses' schooling[44] and to attempt to contact members of their family[45] or community[46] to verify the information provided by the witnesses. The Chamber also noted that the Office of the Prosecutor failed to take the necessary measures to establish the children's age using objective evidence.[47]

27. The Chamber thus held that the Prosecution's failure to verify the histories of the purported child soldiers significantly undermined the value of some of the evidence called by the Prosecution.[48] It further held that "[t]he prosecution's

---

[41] Judgment, para. 482.
[42] The Chamber notes that the lack of proper oversight of the work of the intermediaries meant that they were potentially able to take advantage of the witnesses they contacted. Judgment, paras. 482-483.
[43] The Prosecution did not research the IEC database since it took for granted that children were not included on electoral rolls: See: ICC-01/04-01/06-Rule68Deposition-Red2-ENG, 18 November 2010, p. 21, lines 15-19; and Judgment, para. 175.
[44] As noted by the Chamber, the investigators did not attempt to obtain the school records of the alleged child soldiers in order to verify their age or enrolment (See Judgment, paras. 161, 173 and 174); P-0582 did not attempt to go to the schools where the relevant individuals stated that they were enrolled (See Judgment, para. 174).
[45] Judgment, para. 160. It is also noted that the investigators did not contact the families to arrange interviews with those children (Judgment, para. 172).
[46] Judgment, para. 173.
[47] Judgment, paras. 170-171.
[48] Judgment, para. 175.

negligence in failing to verify and scrutinise this material sufficiently before it was introduced led to significant expenditure on the part of the Court".[49]

1.1.1 Factual errors in the assessment of the gravity of the Prosecution's failings in its investigations

28. The Chamber committed a serious error of judgement by holding that it could not conclude on the basis of the factual evidence it took into account that the Prosecution had committed a serious violation of its obligation to investigate both incriminating and exonerating circumstances.

29. Firstly, the Chamber erred in fact by restricting its assessment of the seriousness of the Prosecution's failings in its investigation of exonerating circumstances only to those witnesses who claimed to be former child soldiers.[50] The Chamber omitted to assess the consequences of the Prosecution's failings in its investigations across the entirety of the evidence it called.

30. Yet, an analysis of the proceedings shows that the Prosecution treated the entirety of its evidence with the same negligence, as illustrated by the following examples:

- The Prosecution submitted to the Chamber video footage of individuals whom it presented, by way of established fact, as being UPC/FPLC soldiers under the age of 15 years.[51] That footage was accepted by the Chamber as evidence of the presence of children under the age of 15 years in the UPC armed forces and in Mr Lubanga's guard.[52] At the end of the trial, the Defence was able to locate two of those individuals[53]

[49] Judgment, para. 482.
[50] Judgment, para. 482.
[51] For example, ICC-01/04-01/06-2748-Conf, paras. 164-165 and T-356-FRA-ET, p. 33, lines 25-27; p. 34, line 26, to p. 35, line 1; p. 36, lines 3-5 and 18-27.
[52] EVD-OTP-00574, timestamp 01:49:02: Judgment, paras. 713, 859, 915 and 1254. Excerpt EVD-OTP-00571, timestamp 02:47:16: Judgment, paras. 713, 860, 915 and 1251.
[53] The individuals appearing in: EVD-OTP-00574, timestamp 01:49:02, and EVD-OTP-00571, timestamp 02:47:16.

and to obtain information showing that they were in fact over the age of 15 years at the material time.[54] In addition to demonstrating those individuals' real age, the Defence's investigations established that the Prosecution did not investigate those individuals rigorously. There can be no doubt that the Prosecution's failure to investigate this evidence, which was held against the Appellant[55] by the Chamber, clearly caused him irreparable prejudice.

- The Prosecution presented P-0089 and P-0555 as former FPLC soldiers. At the end of the trial, the Defence moved the Chamber to find that the Office of the Prosecutor clearly failed to verify the content and mendaciousness of their statements.[56] The fact that those witnesses, who were not presented by Intermediaries P-0143, P-0316 and P-0321,[57] also gave mendacious or inaccurate testimonies confirms that the problems with the Prosecution's investigations pervade a great deal more than the evidence pertaining to P-0316, P-0321 and P-0143. The Chamber made no finding in respect of this argument from the Defence.

31. In its Judgment, the Chamber found that Witness P-0015, who was presented by the Office of the Prosecutor as a former FPLC soldier of adult age, had not undergone the requisite verifications prior to his testimony.[58] Likewise, the case of Witnesses D-0016 and P-0038 illustrates the fact that the Prosecution

---

[54] See *Infra*, paras. 158-171.

[55] EVD-OTP-00574, timestamp 01:49:02: mentioned four times in the Judgment, at paras. 713, 859, 915 and 1254. Excerpt EVD-OTP-00571, timestamp 02:47:16, mentioned four times in the Judgment, at paras. 713, 860, 915 and 1251.

[56] Even cursory investigations with their family members and the schools which they claimed to have attended would have shown the Office of the Prosecutor that their statements are replete with numerous inaccuracies and implausibilities. P-0089: ICC-01/04-01/06-2657-Conf-tENG, paras. 253 *et seq.* and ICC-01/04-01/06-2773-Conf-tENG, paras. 516-522. P-0555: ICC-01/04-01/06-2657-Conf-tENG, paras. 256-259.

[57] See ICC-01/04-01/06-2657, paras. 248-262. ICC-01/04-01/06-2773-Conf-tENG, paras. 3 and 1-18, where the Defence requested the Chamber to consider, *mutatis mutandis*, the body of facts and arguments set out in its application for a stay of the proceedings.

[58] Judgment, para. 327.

should have verified the statements of all its witnesses before presenting them to the Chamber as credible and reliable evidence.[59] In this respect, the Chamber erroneously concluded that Intermediary P-0316 encouraged witnesses to lie about their involvement as child soldiers within the UPC;[60] D-0016, who was an adult at the material time, was instead encouraged by P-0316 to lie about the fact that he had seen child soldiers within the FPLC.[61]

32. The evidence set out above shows that the Prosecution failed to conduct a proper and exhaustive investigation of all of the videos, testimonies and other evidence.

33. Secondly, although the Chamber noted the significant expenditure occasioned by the Prosecution's dereliction of its obligation, it failed to consider the existence of serious prejudice to the Defence. Not only did the Defence devote the majority of its time and resources allocated for investigations to verifying and challenging what the Chamber itself considered to be the "material evidence" in the case – that is, the evidence pertaining to the nine witnesses presented as child soldiers – but it was also deprived of the means of properly cross-examining all of the witnesses presented by the Prosecution. This led to serious inequality between the parties.

34. Lastly, once the Chamber had noted the Prosecution's failure to verify the vast majority of the evidence it presented, it should automatically have found that the prejudice caused by admitting such evidence into the record greatly exceeded its probative value.[62]

[59] D-0016: Judgment, paras. 350 *et seq.* and D-0038: Judgment, paras. 340 *et seq.*
[60] Judgment, paras. 373 and 483.
[61] T-256-CONF-FRA-CT, p. 21, lines 12-16, and T-257-CONF-FRA-CT, p. 3, lines 21-23.
[62] ICC-01/04-01/06-1398-Conf, para. 24; ICC-01/04-01/06-803-tEN para. 100; see article 64(9) and rule 63; see also: ICTY, *Prosecutor v. Tihomir Blaškić*, *Decision on the standing objection of the Defence to the admission of hearsay with no inquiry as to its reliability*, 21 January 1998, para. 14.

1.1.2 Factual error in assessing the measures taken by the Chamber to prevent any prejudice to the Defence or to remedy the failure to investigate exonerating circumstances

35. The Chamber committed a factual error by holding that it "took measures [...] to mitigate any prejudice to the defence whenever these concerns were expressed" and that it "kept these obligations on the part of the prosecution permanently under review".

36. The Chamber did not specify in its Judgment the measures implemented to remedy the prejudice suffered by the Defence as a result of the Prosecution's breach of its investigation obligations.[63]

37. Although the Trial Chamber excluded certain evidentiary materials, the Appeals Chamber will find that their exclusion at a late stage[64] cannot remedy the Prosecution's extensive failings which affect all of the evidence it presented. The Chamber conducted no assessment of the prejudice caused to the Defence in respect of the remaining evidence.[65]

38. Furthermore, the Trial Chamber has no means of "[keeping] these obligations on the part of the prosecution permanently under review", no means of assessing the thoroughness of the Prosecution's investigations, nor the means or resources to conduct its own investigations.

39. It follows that no trier of fact could reasonably hold that the aforementioned evidence is insufficient to demonstrate the seriousness of the Prosecution's

---

[63] In this respect, the Defence refers the Court to the statements of Judge Blattman in his *Separate and Dissenting Opinion*, ICC-01/04-01/06-1191, para. 14: "I do not consider a general assurance by the Majority that the Trial Chamber will ensure fairness to be a judicial safeguard against unfairness, nor does it provide legal certainty to the parties. As such, I am not convinced of this as a valid argument."

[64] The Defence has previously raised the issue of the prejudice it suffered as a result of the Prosecution's failings in its investigation obligations in the "Defence Application Seeking a Permanent Stay of the Proceedings". The Chamber dismissed the application without assessing the merits of the arguments presented. ICC-01/04-01/06-2657-tENG and ICC-01/04-01/06-2690.

[65] Except for the testimonies of Witnesses P-0007, P-0008, P-0010, P-0011, P-0157, P-213, P-294, P-0297, P-0298 and P-0299.

violation of its statutory obligation and the Chamber's inability to prevent or remedy any prejudice caused to the Appellant.

1.2 The Prosecution's obligation to disclose all exculpatory evidence and evidence affecting the credibility of the incriminating evidence

40. Under article 67(2), the Prosecutor has an obligation to disclose to the accused "all of the evidence in [his or her] possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence". Previous Court rulings have established that the accused's right to receive disclosure of potentially exculpatory evidence is absolute and constitutes a major prerequisite for a fair trial.[66]

41. The Court has also ruled that the Office of the Prosecutor has an obligation to disclose to the Defence, as soon as is practicable and throughout the trial period, any rule 77 evidence, that is, any and all evidence material to the preparation of the defence,[67] be it internal communications within the Office of the Prosecutor, investigator's notes, or any other type of documents.[68] The Prosecutor must expeditiously fulfil his disclosure obligations throughout the trial.[69]

42. The ECHR and the Appeals Chambers of the ICTY and ICTR have recalled these principles and their scope in this respect.[70] The Appeals Chamber underscored the "fundamental importance" of the obligation, and stated that "[t]he disclosure of exculpatory material is fundamental to the fairness of

[66] ICC-01/04-01/06-1401, para. 77; ICC-01/04-01/06-1486, para. 42; ICC-01/04-01/06-1311-Anx1, para. 94; ICC-01/09-01/11-44 (*Ruto* et al) para. 24; ICC-01/04-01/07-621 para. 3 *(Katanga and Ngudjolo Chui)*.
[67] ICC-01/04-01/06-1433, paras. 2, 77, 79 and 81; ICC-01/09-01/11-44 (*Ruto* et al), para. 24.
[68] T-334-CONF-FRA-ET, p. 73, lines 8-19.
[69] ICC-01/04-01/06-2624, para. 20; ICC-01/09-01/11-44 (*Ruto* et al*)*, para. 24.
[70] See, for example, ECHR, *V. v. Finland*, Judgment, 24 July 2007, para. 74; ECHR, *Jasper v. United Kingdom,* Judgment, 16 February 2000; ICTY, *Prosecutor v. Krstić*, Judgment, 19 April 2004, para. 180; ICTY, *Prosecutor v. Orić*, *Decision on ongoing complaints about prosecutorial non-compliance with Rule 68 of the Rules*, 13 December 2005, para. 20; ICTY, *Prosecutor v. Furundžija*, Decision, 16 July 1998, para. 17; etc.

proceedings before the Tribunal".[71] Disclosure of potentially exculpatory evidence and rule 77 evidence is a fundamental right of the accused,[72] and is not a matter of mere courtesy, as the Office of the Prosecutor has claimed.[73]

43. The Defence has constantly had to contend with unjustifiably late disclosures, and brought a great many such problems to the Chamber's attention.[74] The Chamber itself has already noted on numerous occasions the Office of the Prosecutor's failings in its disclosure obligations.[75]

44. In light of the foregoing, the only reasonable finding of the Chamber should have been that the Office of the Prosecutor's dereliction of its disclosure obligations relates to material evidence and hence is seriously prejudicial to the fundamental rights of the Appellant. The Chamber committed the following errors of fact and law in relation to the effects of the Prosecution's dereliction of its disclosure obligations on the Appellant's rights:

1.2.1 Factual errors

45. The Chamber erred in fact when it held that it had "addressed any potential prejudice to the accused arising from [...] late disclosure".[76]

1.2.1.1 Limits of the Chamber's power in disclosure matters

46. Despite having issued orders on disclosure in the instant case, the Chamber's power to intervene is limited to issuing orders when a problem is brought to its attention by the Defence or the Office of the Prosecutor. The Defence, for its

---

[71] ICTY, *Prosecutor v. Krstić*, Judgment, 19 April 2004, para. 180 [emphasis added]; ICTY, *Prosecutor v. Kordić and Čerkez*, *Decision on Motion by Dario Kordić for Access to Unredacted portions of October 2002 Interviews with Witness "AT"*, 23 May 2003, para. 24.
[72] ICC-01/04-01/06-2585, para. 19.
[73] E-mail from the Prosecutor on 25 October 2012. (The Defence has sought to file this evidence at the appeals stage: ICC-01/04-01/06-2942, Anx8; DRC-D01-0003-5985, p. DRC-D01-0003-5987).
[74] See, in this respect, the Defence's e-mails and annex sent to the Chamber on 5 February 2010 at 16:27 and 09 March 2010 at 15:57 (confidential annex 3), and ICC-01/04-01/06-2657-Conf-tENG, paras. 268-285.
[75] T-99-FRA-ET, p. 4, lines 9-25, T-104-FRA-ET, p. 12, lines 2-16, and T-239-CONF-FRA-CT2, p. 6, lines 2-18.
[76] Judgment, para. 121.

part, may raise such a problem only if it becomes aware that the Office of the Prosecutor has in its possession potentially exculpatory evidence or evidence material to the preparation of its defence.

47. Two examples clearly illustrate the limits of the Chamber's power to remedy the Prosecution's shortcomings in the area of disclosure: the late disclosure of evidence likely to affect the credibility of P-0031, and its failure to disclose the list of FPLC soldiers dated 9 December 2004.

- *Evidence likely to affect the credibility of P-0031*

48. P-0031 testified before the Court from 24 June to 3 July 2009. His status as an intermediary was not revealed to the Defence until the last day of his appearance as a witness, after the information was disclosed by the witness himself in court that day.[77]

49. On 1 November 2010, that is, nearly a year and a half after his testimony, the Office of the Prosecutor disclosed to the Defence a memorandum dated 23 February 2006 pertaining to Intermediaries P-0143 and P-0316.[78] This document illustrated incidentally that P-0031's behaviour at that time had led the Office of the Prosecutor to entertain doubts regarding his reliability.[79] Thus, the information was communicated to the Defence purely by accident, and not because the Prosecution considered that it was under an obligation to disclose it to the Defence.

50. When invited by the Chamber to explain the reason why this information was disclosed at such a late stage, the Prosecutor clearly indicated that he did not consider himself under an obligation to disclose evidence which would diminish the credibility of a witness if as a result of the totality of evidence in

[77] E-mail from the Office of the Prosecutor which the Defence received on 2 July 2009 at 18:55, transmitting such an amendment to its list of intermediaries, which was initially disclosed on 6 March 2009.
[78] Disclosure package 183 of 1 November 2010.
[79] EVD-OTP-00641, p. 3.

his possession he considered the witness credible.[80] The Office of the Prosecutor thereby arrogated to itself the right to deprive the Defence of the opportunity to examine certain exculpatory evidence if, when considered in light of other evidence, it did not appear to the Prosecution that the exculpatory material would affect the credibility of its evidence.

51. This view is clearly erroneous and has far-reaching consequences for the fairness of the proceedings. Whilst the Office of the Prosecutor may form a positive opinion about the credibility of its witnesses, this does not absolve it from its duty to disclose to the Defence any and all evidence which might call their credibility into question. The Chamber has already had occasion to state clearly its position on this point. It held that whilst the subjective conclusions of members of the Office of the Prosecutor need not be disclosed, the objective material that led to such conclusions must be disclosed to the Defence if it is potentially exculpatory within the meaning of article 67(2).[81]

52. Such an erroneous view of the Prosecution at such an advanced stage in the proceedings arouses legitimate suspicion that the Office of the Prosecutor deliberately omitted to disclose significant exculpatory evidence to the Appellant. The Chamber itself voiced concern on this matter at the hearing of 5 November 2010, stating that if that position had been taken in relation to that specific document, it could be assumed that "it has or may have been made in relation to other similar documents".[82]

- *Non-disclosure of the list of FPLC soldiers dated 9 December 2004*

53. In the course of preparing this brief, the Defence realised that it was unable to identify one of the documents used by the Office of the Prosecutor

[80] T-326-FRA-ET, pp. 1-10; ICC-01/04-01/06-2625-Conf, paras. 26-27.
[81] ICC-01/04-01/06-2656-Conf, para. 16: The Chamber illustrates its statement by indicating that when the credibility of a prosecution witness may be called into question by certain information in the Prosecution's possession, the Prosecution must disclose it to the Defence.
[82] T-326-ENG-ET, p. 3, lines 16-17; ICC-01/04-01/06-2585, para. 19.

investigators in their telephone conversation with P-0089 on 18 March 2010.[83] The Defence therefore requested the Prosecution to provide it with the document reference or, if possible, a copy of the document.[84]

54. On 25 October 2012, the Prosecutor responded to the Defence that it was a list prepared in 2004 and therefore "outside the temporal scope of the charges at trial", but that he agreed to disclose the document as a matter of "courtesy".[85]

55. On 29 October 2012, the Prosecutor disclosed the document, entitled "*Liste Nommiative de F.P..L.C.* [sic]",[86] to the Defence.

56. The fact that the Prosecution considered that in principle this list did not need to be disclosed because it was drafted outside the material time is unequivocal proof of the Prosecution's misconception of its disclosure obligations.

57. The Prosecution has had this list in its possession since 10 February 2006.[87] However, it was not disclosed to the Defence until 29 October 2012 – more than six years later – and then only because the Defence specifically requested it.

58. Even *prima facie*, this document is of paramount importance in the instant case. It is the only apparently exhaustive list of FPLC soldiers in the record of the case. It was signed by Bosco Ntaganda, who was the FPLC Chief of Staff in December 2004[88] and is portrayed by the Prosecution as one of Mr Thomas Lubanga's co-perpetrators in this case.[89] Furthermore, the document's exculpatory value cannot seriously be contested.

---

[83] EVD-D01-00985, lines 166-220.
[84] Defence e-mail of 18 October 2012. The Defence has sought to file this evidence at the appeals stage: ICC-01/04-01/06-2942, Anx8.
[85] Prosecution e-mail of 25 October 2012. The Defence has sought to file this evidence at the appeals stage: ICC-01/04-01/06-2942, Anx8.
[86] DRC-OTP-0141-0009. The Defence has sought to file this evidence at the appeals stage: ICC-01/04-01/06-2942, Anx7.
[87] See the metadata of DRC-OTP-0141-0010.
[88] DRC-OTP-0141-0010, page DRC-OTP-0141-0147.
[89] ICC-01/04-01/06-2748-Conf, para. 3

59. In fact, the list can be used *inter alia* to verify whether individuals were members of the FPLC, at least until 9 December 2004.

60. Therefore, the list may be used to refute the testimony of Prosecution witnesses who claimed to have belonged to the FPLC at least until 9 December 2004, but whose name does not appear on the list. This applies *inter alia* to P-0038, who claimed to have belonged to the FPLC until 2005.[90] However, the Prosecution's failure to disclose the list deprived the Defence of an opportunity to use it in its cross-examination of P-0038. The Chamber nevertheless relied on P-0038's testimony on a great many occasions in its Judgment,[91] despite the Defence's robust challenge to the credibility of this witness,[92] who was introduced to the Office of the Prosecutor by P-0316.

61. Furthermore, the list corroborates the testimony of certain Defence witnesses, since it confirms that they belonged to the FPLC in December 2004.[93] The Defence was also denied an opportunity to examine D-0037 as to the exact circumstances surrounding the preparation of the list, since he had acted as the signatory's personal secretary.[94] The list would also have been of prime importance in the Defence's investigations, *inter alia* by helping in its search for former FPLC soldiers.

62. Not only was it obvious that this document should have been disclosed automatically and without delay in accordance with the Prosecution's statutory obligations, but the Defence also made many disclosure requests which should have prompted the Prosecution to disclose said document. The Defence requested the Prosecution to disclose, *inter alia*, all of the documents

---

[90] Judgment, para. 688.
[91] *Inter alia,* Judgment, paras. 637, 648, 688-693, 801-803, 812-814 and 821-824, 845, 851-853, 881, 894-895, 912-913, 915, 1074-1076, 1111, etc.
[92] *Inter alia,* ICC-01/04-01/06-2773-tENG, paras. 450-475.
[93] *Inter alia,* Witnesses D-0037 (whose name appears on page DRC-OTP-0141-0009, line 7, of the list) and D-0006 (whose name appears on page DRC-OTP-0141-0110, line 24, of the list).
[94] T-349-FRA-ET, p. 7, lines 25-27; p. 8, lines 8-12.

originating from the UPC/RP,[95] as well as documents which make reference to Defence witnesses.[96]

63. Furthermore, it cannot reasonably be maintained that the Prosecution has no obligation to disclose exculpatory documents or documents which are material to the preparation of the defence simply because they bear a date falling outside the material time. The Prosecution itself tendered many evidentiary materials which were prepared outside the material time or which pertain to events which occurred outside that time, including in 2004.[97] The Chamber also relied on evidence from outside the material time in order to reach its verdict on Mr Thomas Lubanga's criminal responsibility.[98]

64. The Prosecution's failure to disclose the list in good time is incontrovertible evidence of the limitations of the Chamber's power to remedy such failings. The Chamber cannot order the Prosecution to comply with its obligation to disclose a given document unless the Prosecution reveals the existence of that document.

65. Hence the Prosecution has without a doubt misconstrued its disclosure obligations. It is therefore impossible at this late stage in the proceedings to determine whether it possesses other similar evidence which has never been disclosed and whose existence has never been brought to the attention of the Chamber or the Defence.

1.2.1.2 Effects of non-disclosure on the Appellant's right enshrined in article 67(1)(c)

66. The Chamber erred by failing to take into account the effects of the Prosecution's repeated failure to disclose materials on the Accused's fundamental right to be tried without undue delay.

---

[95] Defence e-mail dated 26 April 2010.
[96] *Inter alia*, Defence e-mail dated 27 August 2009.
[97] See, *inter alia*, video EVD-OTP-00474 dated 21 July 2004, referred to by the Prosecution in its closing submissions: ICC-01/04-01/06-2748-Conf, para. 391, footnote 1116, and para. 429, footnote 1256.
[98] See, *inter alia*, Judgment, para. 774.

67. In the instant case, a significant volume of article 67(2) or rule 77 evidence was disclosed to the Defence at a late stage in the proceedings, after the Prosecution had rested its case.[99] This applies to the aforementioned examples. These late disclosures would have required additional investigations, and would likely have resulted in many witnesses being recalled before the Chamber. For example, it would have been necessary to examine the following witnesses:

- P-0012, P-0014, P-0017, P-0055 and P-0116 as to the identity of the individual who introduced them to the Office of the Prosecutor – information which the Prosecution is yet to disclose to the Defence;[100]
- P-0030 as to his links with P-0143;[101]
- P-0017 as to his links with P-0015, who admitted to having lied to the Office of the Prosecutor investigators;[102]
- P-0031 as to his contacts with Intermediaries P-0321 and P-0143,[103] etc.

68. Given the significant delays in the case, any such request on the part of the Defence would only have aggravated the prejudice which the Appellant had already suffered owing to the violation of his right to be tried within a reasonable period of time.

1.2.2 Legal errors

69. The Chamber erred in law when it held that the late disclosure of potentially exculpatory evidence did not violate the Appellant's rights because it was

[99] T-209-CONF-FRA-ET, 14 July 2009.
[100] EVD-D01-01039, p. 1: The Office of the Prosecutor's table of contacts between intermediaries and witnesses states that "the Prosecution continues to review its records".
[101] P-0030 stated that P-0143 is his friend and that he had received evidence from him. EVD-D01-01037, p. 5788, eighth line.
[102] The Prosecution stated that it was unable to say who introduced it to Witness P-0017. However, Witness P-0015 stated that he had introduced P-0017 to the Prosecution. T-265-CONF-Red-FRA-CT2, p. 38, lines 3-14.
[103] Judgment, para. 474.

contradicted by other evidence in the record.[104] The Chamber does not address the Defence's complaint about the significant prejudice to the Defence arising from the late disclosure of a witness statement which was clearly exculpatory, as demonstrated below.

70. On 20 October 2010, notes pertaining to an interview on 13 September 2006 by the Office of the Prosecutor with a person identified as [REDACTED] were disclosed to the Defence.[105] This individual presented himself to the Office of the Prosecutor investigators as having been Mr Thomas Lubanga's bodyguard throughout the material time.[106] He stated, amongst other things, that he had never seen any child soldiers under the age of 15 years in the UPC,[107] still less in the presidential guard, and added that Mr Thomas Lubanga was opposed to the recruitment of child soldiers.[108]

71. No explanation was advanced as to why this quite obviously exculpatory witness statement was not disclosed until more than four years after it was taken by the Office of the Prosecutor. This unjustified delay deprived the Defence of an opportunity to investigate evidence which was vital to the Appellant's defence and to examine witnesses effectively during their testimony before the Court.[109]

72. Although the Defence was unable to secure this individual's appearance as a witness as a result of the undue delay in the disclosure of his statement, the Chamber found in any event that this written statement lacked credibility "given it is contradicted by a wealth of evidence that has been accepted by the Chamber".[110]

---

[104] Judgment, para. 1261.
[105] EVD-D01-00773.
[106] EVD-D01-00773, para. 30.
[107] EVD-D01-00773, para. 67.
[108] EVD-D01-00773, para. 68.
[109] See, in this respect, ICC-01/04-01/06-2657-Conf-tENG, paras. 279-281, and ICC-01/04-01/06-2773-Conf-tENG, para. 848.
[110] Judgment, para. 1261.

73. Yet, the Accused has an absolute entitlement to receive all potentially exculpatory evidence, even if the value of certain evidence may seem to be undermined by other evidence,[111] as the Chamber itself stated on 8 April 2008.[112] It would be particularly unfair if, at the deliberation stage, a chamber were to assess the credibility of the written statement of a witness who was not called to testify on the basis of a firm opinion it had formed on the guilt of the accused. Furthermore, it is established that a chamber cannot dismiss an item of evidence simply because it is contradicted by other evidence in the record of the case.[113]

74. Moreover, many aspects of this witness's statements were corroborated by other evidence in the record,[114] including by certain Prosecution witnesses.[115]

75. In light of the foregoing, the only reasonable conclusion which the Chamber could have reached was that the Office of the Prosecutor's failings in its disclosure obligations are pervasive and hence seriously prejudicial to the fundamental rights of the Appellant.

1.3 The Prosecutor's duty of independence

76. The Prosecutor has an obligation to act independently and must ensure that the Office of the Prosecutor and its members maintain their full independence and do not seek or act on instructions from any external source.[116] This

[111] ICC-01/09-01/11-44 (*Ruto* et al) para. 24.
[112] ICC-01/04-01/06-1311-Anx1, para. 94.
[113] ICTR, *The Prosecutor v. Muvunyi*, Judgment, 29 August 2008, para. 147.
[114] On the absence of children under the age of 15 years in Thomas Lubanga's guard: D-0011: T-347-FRA-ET, p. 24, line 22, to p. 25, line 2; D-0019: T-341-FRA-ET, p. 11, line 23, to p. 12, line 4; D-0037: T-349-FRA-ET, p. 52, lines 3-7.
[115] *Inter alia*: P-0012: T-168-CONF-FRA-CT, p. 28, lines 7-24. Corroborates this witness's statements on the fact that Mr Tibasima, not Thomas Lubanga, was responsible for sending individuals to Uganda for military training in the year 2000. See Judgment, paras. 1028 *et seq.*
[116] See article 42(1) of the Statute and regulation 13 of the Regulations of the Office of the Prosecutor (ICC-BD/05-01-09).

stipulation is confirmed by the *travaux préparatoires* to the drafting of the Statute.[117]

77. In its Judgment, the Chamber noted that:

- The Prosecution was aware from the outset of its collaboration with P-0316 that he had held a position of responsibility in the ANR (Congolese intelligence services)[118] and that he used other ANR agents to assist him in his work for the Prosecution;[119]

- The investigators met activists, including militant activists, who wanted to provide information, and this led them to identify the first intermediaries.[120]

78. The Chamber underscored its particular concern that the Prosecution used as an intermediary an individual with such close ties to the government that had originally referred the situation in the Democratic Republic of the Congo (DRC) to the Court. Given the likelihood of political tension, or even animosity, between the Appellant and the government, it was wholly undesirable for witnesses to be identified, introduced and handled by one or more individuals who, on account of their work or position, may have partially or wholly lacked the necessary qualities of independence and impartiality.[121]

79. The Chamber noted that if the Prosecution uses the services of such individuals, it must verify and scrutinise any information and intelligence

[117] International Law Commission, A/CN.4/464/Add.1, 22 February 1995, paras. 52 and 67; Preparatory Committee on the Establishment of an International Criminal Court, A/AC.249/1998/L.13, 4 February 1998, article 36, para. 1.
[118] Judgment, para. 366.
[119] Judgment, para. 266.
[120] Judgment, paras. 143-147.
[121] Judgment, para. 368.

they provide, in order to avoid any manipulation or distortion of the evidence.[122]

80. However, an analysis of the proceedings shows that the Prosecution did not conduct any verifications of the evidence it tendered (see *supra*, paragraphs 23 to 39).

81. The Defence contends that the Chamber committed a serious error of fact by failing to draw any conclusions from the fact that the Prosecution assigned essential investigation missions to intermediaries who had an obvious interest in the Appellant's conviction, without thoroughly verifying the evidence those intermediaries provided.

82. Firstly, the Chamber could not reasonably conclude that the essential, direct part played by the Congolese State in the Office of the Prosecutor's investigations was not such as to make the proceedings against the Appellant unfair.

83. In addition to the evidence noted by the Chamber in its Judgment, several other evidentiary materials reveal the extent of the involvement of the ANR and the Congolese authorities in the Office of the Prosecutor's investigations. For example:

- The Prosecutor was aware from the outset that P-0316 held a position of responsibility in the ANR[123] and that he employed at least three other ANR agents to assist him in the tasks assigned to him by the Office of the Prosecutor.[124] Similarly, P-0038 0038 acknowledged that he was in

[122] Judgment, para. 368.
[123] T-334-CONF-FRA-ET p. 16, lines 23-25. T-327-CONF-FRA-ET, p. 11, lines 12-24; p. 12, lines 15-21, and p. 13, line 16, to p. 14, line 10; EVD-OTP-00598; EVD-OTP-00597 and EVD-OTP-00598.
[124] Intermediary P-0183, [REDACTED] and [REDACTED]: T-331-CONF-FRA-ET, p. 79, lines 9-12 and p. 82, lines 14-24; T-333-CONF-FRA-ET p. 15, lines 7-13, and p. 25, lines 12-14. See also Bernard Lavigne: Rule68Deposition-CONF-FRA-ET, 17 November 2010, p. 66, lines 9-28, and documents EVD-D01-00371; DRC-OTP-0234-0221 and EVD-D01-00371.

contact on many occasions with P-0316 and his two colleagues, P-0183 and [REDACTED], who were ANR agents.[125]

- P-0316 stated that he had direct links with the highest authorities of the Congolese government and that he remained loyal to his government throughout his time as an intermediary for the Office of the Prosecutor.[126]

- The Prosecution used the services of the Congolese authorities in its investigations; D-0036 was officially summoned to a meeting with the Office of the Prosecutor of the ICC by the Prosecutor of the Bunia Public Prosecutor's Office.[127]

84. Furthermore, the incident concerning Witness P-0297 which occurred after the evidence had closed is further proof of the fraudulent intervention of the Congolese authorities in the Court's investigations.

85. P-0297 was excluded from the Court's witness protection programme [REDACTED] and [REDACTED]. P-0297 was [REDACTED], but [REDACTED] affiliated with Joseph Kabila.[128]

86. [REDACTED]. [REDACTED],[129] [REDACTED].

87. Therefore, for the entire duration of his participation in the Court's protection programme,[130] as well as during his testimony before the Court, P-0297 was [REDACTED] at the service of President Kabila.

---

[125] T-337-CONF-FRA-ET, p. 13, line 20, to p. 14, line 18, and p. 15, lines 21-23.
[126] Judgment, para. 367 and T-336-CONF-FRA-ET, p. 67, lines 19-20; T-327-CONF-FRA-ET, p. 13, lines 25-28 and p. 18, line 3 to p. 20, line 8. T-332-CONF-FRA-ET, p. 52, lines 14-19.
[127] EVD-D01-01100; T-350-CONF-FRA-CT3, p. 57, line 24 to p. 58, line 22.
[128] The Defence has sought to file this evidence at the appeals stage: ICC-01/04-01/06-2942, Anx5-tENG.
[129] [REDACTED]. The Defence has sought to file this evidence at the appeals stage: ICC-01/04-01/06-2942, Anx6-tENG.
[130] P-0297 was placed in the Court's protection programme in January 2008 (EVD-D01-00335).

88. This interference by the Congolese authorities was further exacerbated by the fact that as part of a concerted operation led by a Congolese political figure with close links to the nation's authorities ("Victim" a/0270/07), participating victims usurped the identity of third persons and, in turn, perjured themselves before the Chamber.[131]

89. Secondly, no trier of fact could reasonably find that the essential, direct part played by militant organisations in the Office of the Prosecutor's investigations would not render the proceedings against the Accused unfair.

90. In fact, the Office of the Prosecutor assigned investigation missions to members of militant organisations involved in assisting victims and representing them before the Court, such as P-0143,[132] P-0031 and P-0321.[133] It is self-evidence that such a mandate could not guarantee the impartiality expected of the Prosecution in the conduct of its investigations, since such individuals had an interest in securing the Appellant's conviction.

91. Thirdly, the Chamber erred by holding that it had remedied all violations of the Appellant's rights.[134] Despite expressing concerns that "the prosecution used an individual as an intermediary with such close ties to the government that had originally referred the situation in the DRC to the Court",[135] the Chamber provided absolutely no remedy for the patent lack of independence of the Office of the Prosecutor. On the contrary, it even accepted the testimony of P-0038, who was introduced to the Office of the Prosecutor by P-0316.

---

[131] Judgment, para. 502. See: ICC-01/04-01/06-2773-Conf-tENG, para. 226.
[132] P-0143 leads an NGO called [REDACTED], specialising in [REDACTED] (EVD-D01-01046 and EVD-D01-01047). He also submitted applications for participation before the ICC on behalf of Victims a/0046/06 to a/0052/06. The Chamber withdrew the right to participate from four of those victims. Judgment, para. 484.
[133] "Before and during the time he worked for the OTP, P-0321 (along with P-0031) acted as an intermediary for a particular organisation, which helped victims to participate in these proceedings. Judgment, para. 446.
[134] Judgment, para. 123.
[135] Judgment, para. 368.

1.4 Duty of fairness and impartiality

92. Article 67(1) safeguards the right of all accused persons to a fair and impartial trial. The Prosecutor has an obligation fully to respect the fundamental rights of the Accused pursuant to article 54(1)(c).[136] This is confirmed by previous rulings of the Court[137] and the STL,[138] and supported by the *travaux préparatoires* for the drafting of the Statute of the Court.[139]

93. As the ICTY emphasised, the Prosecutor's role is not primarily to secure the accused's conviction, but to "assist the Chamber to discover the truth in a judicial setting".[140] This opinion was echoed by the STL[141] and is consistent with the Prosecution's own portrayal of its functions before the Court.[142]

94. This position is also consistent with the UN Guidelines on the Role of Prosecutors.[143]

95. The ICTY and ICTR Appeals Chamber have also recalled the importance of the Prosecution's compliance with its fundamental obligations.[144]

96. The Chamber committed a manifest error in failing to address in its Judgment the Defence's submissions[145] on the Prosecution's serious breaches of its statutory obligations.

---

[136] The Prosecutor's duty of impartiality is set forth in particular at article 42(7) of the Statute.
[137] ICC-01/04-01/06-2433, paras. 38 and 40, ICC-01/09-02/11-382-Red, *Dissenting Opinion by Judge Hans-Peter Kaul*, para. 50(3).
[138] STL, *Order regarding the detention of persons detained in Lebanon in connection with the case of the attack against prime minister Rafiq Hariri and others*, 29 April 2009, para. 25.
[139] On the right to a fair trial, see the works of the International Law Commission, A/CN.4/464/Add.1, 22 February 1995, paras. 136 and 156. On the duty of impartiality, see Preparatory Committee on the Establishment of an International Criminal Court, A/AC.249/1998/L.13, 4 February 1998, article 36(3) and 36(5).
[140] ICTY, *Prosecutor v. Kupreškić*, *Decision on communication between the parties and their witnesses*, 21 September 1998, p. 3, para. (ii).
[141] STL, *Order regarding the detention of persons detained in Lebanon in connection with the case of the attack against prime minister Rafiq Hariri and others*, 29 April 2009, para. 25.
[142] ICC-02/04-85, para. 32.
[143] Guidelines on the Role of Prosecutors, adopted by the eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, article 13(a).
[144] ICTY, *Prosecutor v. Delalić* et al, Judgment, 20 February 2001, para. 604; ICTR, *The Prosecutor v. Barayagwiza*, Decision, 3 November 1999, paras. 91-92.

97. In the instant case, the Defence contends that on numerous occasions, the Prosecution breached its fundamental obligations to respect fairness and impartiality: (1) it failed to report that items of evidence which it had submitted to the Chamber were mendacious or inaccurate[146] and (2) throughout the proceedings, the Prosecution displayed a bias in relation to the Accused which is inconsistent with its duties.[147]

1.4.1 Failure to report that evidence submitted to the Chamber was mendacious or inaccurate

98. Over and above its disclosure obligation under article 67(2), the Prosecution is duty-bound to inform the Chamber and participants if evidence tendered at trial on its motion is false as soon as it becomes aware of the fact. Although this obligation is not stated explicitly in the instruments governing proceedings before the ICC, it is indisputably part of the internationally recognised principles of professional ethics applicable to prosecutors.[148] Any breach of this obligation is universally regarded as being contrary to the most elementary requirements of justice.

99. In the instant case, the Prosecution should have in all impartiality[149] informed the Chamber in good time that:

- Information in its possession confirmed that P-0316 was aware of the fact that P-0183 was alive,[150] contrary to Intermediary P-0316's

---

[145] ICC-01/04-01/06-2773-Conf-tENG, paras. 1-18, where the Defence requests the Chamber to consider, *mutatis mutandis*, the body of facts and arguments set out in its application for a stay of the proceedings (ICC-01/04-01/06-2657-tENG).
[146] ICC-01/04-01/06-2657-tENG, paras. 282-285; ICC-01/04-01/06-2773-tENG, paras. 1-18.
[147] ICC-01/04-01/06-2657-tENG, paras. 286-289; ICC-01/04-01/06-2773-tENG, paras. 1-18.
[148] Standards Of Professional Conduct: Prosecution Counsel, Prosecutor's Regulation No. 2 (1999), rule 2(e); Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, adopted on 23 April 1999, point 4.2(d); See also: Draft Code of Professional Conduct for Prosecutors of the International Criminal Court, article 7(5) and 7(6) (not yet adopted).
[149] See, for example, articles 24-25 of the Code of Professional Conduct. It would be inconceivable if the Prosecutor of the ICC did not have equivalent obligations towards the Chamber and the parties to those which the Code of Professional Conduct imposes on other counsel intervening before the Court (article 1).
[150] EDV-D01-01042, No. 157.

testimony.[151] After implying that P-0183's death might be debatable, the Prosecutor was compelled to concede that there was a solid factual basis for the Defence's questions.[152]

- Contrary to P-0316's testimony,[153] he did in fact introduce a number of witnesses to the Office of the Prosecutor.[154] Yet the Office of the Prosecutor never informed the Chamber that it was in a position to contradict this incorrect statement by P-0316.

- In *Katanga/Ngudjolo*, the Office of the Prosecutor declined to call P-0157 to testify as a former child soldier.[155] However, in the instant case, the Prosecution maintained that this witness was in fact a former child soldier of the UPC/FPLC who was under the age of 15 years at the time of his enlistment. Moreover, the Chamber disregarded his testimony, stating that it was notable for its lack of detail as regards certain significant events.[156]

- When it became aware that Witnesses P-0007 and P-0008 had lied about their family relationship, the Prosecution failed to inform the Chamber promptly on its own initiative.[157] The Prosecution became aware of the situation through interviews with their parents (P-0496 and P-0497) in early November 2009. It was not until the eve of the testimony of Defence Witness D-0012, who was called in February 2010 to contradict the testimonies of P-0007 and P-0008, that the

[151] T-331-CONF-FRA-ET, p. 78, line 23, to p. 85, line 23.
[152] T-332-CONF-FRA-ET, p. 4, line 12 to p. 7, line 13.
[153] P-0316 claimed that he merely contacted witnesses who were already known to the Office of the Prosecutor. T-331-CONF-FRA-ET, p. 39, lines 19-23.
[154] DRC-D01-0003-5847.
[155] The Defence refers the Chamber to this point in its filing ICC-01/04-01/06-2416-Conf, and the Prosecutor's filing ICC-01/04-01/06-2393.
[156] Judgment, para. 473.
[157] The Defence refers the Court to its submissions: ICC-01/04-01/06-2688-Conf, para. 16.

Prosecution conceded, when prompted by the Defence, that the witnesses had lied before the Chamber on this point.[158]

100. The examples above show that the Prosecution did not consider it essential to present incriminating evidence to the Chamber fairly and impartially.

1.4.2 The Prosecution's manifest bias in its public statements

101. Furthermore, throughout the proceedings the Prosecution has displayed a bias in relation to the Appellant which is incompatible with its functions. The following examples demonstrate that the Prosecution and its representatives transmitted grossly erroneous or blatantly exaggerated information about the Appellant to the public and made incorrect statements about the status of the proceedings:

- The interview given by Ms Le Fraper du Hellen – still available on the internet at the time of writing – was never refuted or rectified by the Office of the Prosecutor, despite being severely criticised by the Chamber.[159] Thus it continues to cause prejudice to Mr Lubanga.

- The Prosecutor's statements at a press conference on 15 March 2012, the day after the judgment was handed down, presented the Chamber's findings erroneously. On that occasion, the Prosecutor paid tribute to the "child soldiers" who testified in the case, failing to mention that their testimonies had been dismissed by the Chamber. He further stated that the Chamber had confirmed that his investigations were "very good", whereas in actual fact that Chamber had been highly critical of his methods of investigation.

102. Such violations compound the others mentioned above and as a whole are of such gravity as to render the trial unfair.

---

[158] T-247-CONF-FRA-RT, p. 37, line 14, to p. 38, line 6.
[159] ICC-01/04-01/06-2433.

2. The gravity of the Prosecution's failings in its statutory obligations affects the reliability of all of its evidence at trial

- *The Chamber erred in law by holding that each of the Prosecution's failings should be assessed individually*

103. In its Judgment, the Chamber failed to assess the combined effect of all of the Prosecution's failings on the integrity of the proceedings and the fairness of the trial. Had it done so, it would have necessarily have held that, in the face of such violations, the only decision which would safeguard the integrity of the proceedings would be to acquit the Appellant.

- *The Chamber erred in fact by holding that the Prosecution's failings affected only evidence pertaining to alleged child soldiers*

104. The rights of the Defence, both during the examination of Prosecution witnesses and in relation to the presentation of exculpatory evidence, can be effectively and efficiently exercised only if all the available evidence has been actively sought by the Prosecutor and then disclosed to the Defence in good time and with full respect for the Appellant's rights. Otherwise, judicial proceedings cannot enable the facts to be established with sufficient certainty to support a guilty verdict.

105. However, the evidence shows that the Prosecution's failure to verify statements of individuals whom it called to give evidence is pervasive and not restricted to those witnesses who were presented as former child soldiers.[160]

106. Accordingly, the Chamber erred by attaching sufficient weight to certain evidentiary materials – which, like the evidence pertaining to the child-soldier witnesses, was not verified by the Prosecution – in order to reach its guilty verdict.

107. In view of this persistent, inappropriate conduct by the Prosecution, the Appeals Chamber will note that it has no means of satisfying itself that: (1) the

[160] See *supra*, paras. 23-39.

Prosecution conducted all the necessary verifications to ensure that the evidence presented to the Chamber was not mendacious or fraudulent; (2) the Prosecution fulfilled its disclosure obligations; (3) the Prosecution's independence was not compromised; and (4) the Prosecution reported the inaccuracy or mendaciousness of certain evidentiary materials which it could have tendered to incriminate the Appellant.

108. It follows that the only finding which the Appeals Chamber can reach in view of the situation is that the Prosecution's evidence failed to prove the Appellant's guilt "beyond reasonable doubt".

3. Unfairness of the trial towards the Appellant

109. These patent errors are such that they cast doubt on the impugned decision, since no finding of guilt can be reached at the outcome of judicial proceedings whose unfairness has been established and which have failed to remedy all the prejudice caused to the Appellant.

III – PREJUDICE TO THE INTEGRITY OF THE TRIAL

110. The Chamber had occasion to note at various junctures throughout the trial that the Office of the Prosecutor's methods of conducting investigations cast serious doubt on the integrity of the trial.[161]

111. In passing judgment, it clearly found that there were grounds to believe that persons acting on behalf of the Office of the Prosecutor participated in the preparation of false witness statements aiming to secure the Appellant's conviction and that a large number of witnesses deliberately gave false testimony before the Chamber.[162]

112. Thus, the Chamber considered that the Prosecution should not have delegated its investigation responsibilities to intermediaries, and the Prosecution's

[161] ICC-01/04-01/06-2517-Conf, para. 31; ICC-01/04-01/06-2434-Conf, paras. 138 and 140.
[162] Judgment, para. 483.

negligence in failing to verify and scrutinise this material sufficiently before it was tendered into evidence led to significant expenditure on the part of the Court. Lastly, it emphasises that an additional consequence of the lack of proper oversight of the intermediaries was that they were potentially able to take advantage of the witnesses they contacted.[163]

113. However, despite these findings, and contrary to its previous announcement,[164] the Chamber did not make any finding on the Prosecution's responsibility in the presentation of this false evidence and the impact thereof on the integrity of the proceedings.

114. Firstly, the Defence submits that the Trial Chamber failed to take account of the fact that the gravity of the situation was exacerbated by the Prosecution's conduct. Despite having sufficient information alerting it to the gravity of these acts, at no point did the Prosecution take the necessary and reasonable measures to investigate them in a timely manner, to take disciplinary action against the perpetrators, and to inform the Court. On the contrary, the Prosecution stubbornly did its utmost, against all the evidence, to challenge the fact that this evidence tampering took place and refused to remedy it.

115. The Prosecution is thus responsible – both as a result of the actions of those individuals acting on its instructions and under its control, and of its own improper failure to take action – for extremely serious offences against the judicial process of searching for the truth, thereby making it impossible for the triers of fact to establish the necessary factual basis in order to rule on the merits of the charges against the Appellant.

116. These offences severely contaminate the very essence of the judicial process. They breach not only the fundamental rights of the Appellant, but also the right of the international community as a whole, and in particular the

[163] Judgment, para. 482.
[164] ICC-01/04-01/06-2690-Conf, para. 198.

populations directly affected, to see the judicial apparatus establish the full and accurate substance of the facts and determine those responsible.

117. Whatever the extent of the evidence affected by the Prosecution's conduct which was criticised by the Chamber, the exceptional gravity of such a situation amounts to an abuse of process of such a nature as to warrant the Appellant's acquittal.

118. Secondly, the Defence submits that none of the evidence presented by the Prosecution is sufficient to establish the Appellant's guilt. On the contrary, it has been shown that the charges brought against him are essentially the result of evidence tampering, suggesting the fraudulent involvement of authorities or organisations outside of the Court.

119. The inevitable consequence of the proven fraudulent acts, their organised and repeated nature, the positions held by those who perpetrated them, and the large volume of witness evidence directly affected is that serious doubt has been cast on the truthfulness of all of the Prosecution's witnesses who gave evidence at trial.

120. This subornation, of which evidence has been advanced, affects the credibility not only of the statements of those witnesses identified as having been subjected to such influence, but also of all of the evidence presented by the Prosecution in support of its charges.

121. Moreover, the Office of the Prosecutor's serious breaches of its obligation to investigate both incriminating and exonerating circumstances demonstrated above necessarily taint the entirety of the evidence brought at trial, since the consequence of such breaches has been to deprive the Defence of the means to challenge the credibility of that evidence.

122. Accordingly, the Chamber erred by failing to find that it was impossible for it to attach sufficient weight, "beyond reasonable doubt", to any of the evidence whatsoever which was presented by the Prosecution.

123. Over and beyond the conviction of the triers of fact, the damage to the integrity of the judicial process has projected an indelible image of the trial which is sits ill with the fundamental principles of justice. There is no longer any hope of complying with the adage "not only must justice be done; it must also be seen to be done" other than by acquitting the Appellant.

PART II: GROUNDS PERTAINING TO THE CRIMES OF ENLISTMENT, CONSCRIPTION AND USE OF CHILD SOLDIERS UNDER THE AGE OF 15 YEARS

I – FAILURE TO ESTABLISH THE PRESENCE OF CHILD SOLDIERS UNDER THE AGE OF 15 YEARS IN THE FPLC

1. The exclusion of the core evidence in its entirety should have entailed the acquittal of the Appellant

124. The Chamber committed a grave factual error by failing to make the logical findings from the exclusion of the evidence concerning all of the individuals presented as former FPLC child soldiers under the age of 15 years.

125. Firstly, the exclusion of the entire body of evidence concerning the "*cas individuels* [individual case histories]" should have entailed the Appellant's acquittal.

126. The testimony of individuals presented as former child soldiers should have constituted the core evidence in the case.[165] As previously stated, the Prosecutor made clear from the very outset of the case that the individual case histories of these purported child soldiers contained information essential to sustaining the charges levied against the Appellant.[166] The Chamber further confirmed, as trial commenced, that the testimony of individuals presented as

[165] S*upra*, paras. 10-13.
[166] *Supra*, para. 11.

former child soldiers constituted the "primary" evidence on which the charges rested.[167]

127. Eleven witnesses in total (nine for the prosecution and two victims who had applied to give evidence) were called as former child soldiers. The Chamber dismissed this testimonial evidence in its entirety.[168]

128. As a result of the Chamber's exclusion of such testimony, there remains no specific and verifiable example of recruitment of soldiers under the age of 15 years into UPC ranks during the material time to establish:

- the identity of a single putative child soldier;
- the date of birth of any such child;
- the date and conditions of any such child's recruitment;
- any such child's military experience and the combat in which he or she took part;
- the date whereon such a child left the armed group.

129. To convict the Accused, the Chamber must be satisfied of his guilt beyond reasonable doubt.[169] The Defence submits that absent such core evidence of the constituent elements of the crime, the Chamber could not reasonably find the Appellant guilty beyond reasonable doubt.

130. Secondly, the remaining evidence is insufficiently specific for a finding "beyond reasonable doubt".

131. The Chamber committed a manifest error by founding the conviction on certain witnesses' statements regarding the age of individuals with regard to

[167] T-104-ENG-ET, p. 5, line 23 to p. 6, line 4.
[168] Judgment, paras. 247, 268, 288, 473, 406, 415, 429, 441 and 502.
[169] Article 66(3). See ICTY, *Prosecutor v. Delalić et al.*, Judgement, 16/11/1998, para. 601; *Prosecutor v. Stakić*, Judgement, 22 March 2006, para. 219; ICTR, *Prosecutor v. Ntagerura et al.*, Judgement, paras. 174-175.

whom the Defence was precluded from conducting any investigation and the Prosecutor undertook no verification.

132. The Chamber's finding is antithetical to its oral decision of 7 July 2009, whereby in connection with P-0046's testimony it refused the introduction of the document entitled "*Histoires individuelles*",[170] which is a collation of the notes of P-0046's interviews with 34 individuals who had presented themselves as former child soldiers. In light of the expunction *vis-à-vis* the Appellant of all identifying information pertaining to the individuals interviewed, the Chamber rightly determined that the document was inadmissible as evidence insofar as it would prejudice the Defence since "the Defence are unable […] to investigate the circumstances or the accuracy of any of the individual case histories".[171]

133. The failure of the witnesses themselves to verify certain evidence further impelled the Chamber to rule that it could not rely on that material to determine the presence of children under the age of 15 years. This was particularly the case for register EVD-OTP-00739 and list EVD-OTP-00474, which the Chamber found lacked information concerning the armed group or groups of which the children were members.[172]

134. The Chamber further found that it could not rely on a register (EVD-OTP-00476) from P-0031 [REDACTED] to establish the presence of child soldiers under the age of 15 years in the FPLC – notwithstanding that the document stated the children's dates of birth and the armed group with which they were associated – on account of the potential unreliability and apparent insufficient verification of the information contained therein.[173]

[170] T-205-CONF-FRA-ET, p. 1, line 24 to p. 3, line 21.
[171] T-205-CONF-ENG-ET, p. 3, lines 1 *et seq*. The document is referred to as Annex 8.
[172] Judgment, para. 739.
[173] Judgment, para. 740.

135. Given that none of the witnesses called in the instant case to assess the age of the FPLC soldiers revealed the identity of a single individual concerned, the Defence was wholly unable to verify their age, let alone the genuineness of their FPLC membership.

136. Whilst, the Chamber stated that it had exercised "caution" in appraising that evidence,[174] it should not have relied on unverified or unverifiable assessments in determining the age of the individuals concerned, particularly in the context of the present case, where all of the material verified by the Defence was removed from the evidence as unreliable.

137. The tendering of evidence or witness statements which are unverified by the Prosecutor, and whose imprecision precludes any investigation by the Defence, rules out any finding "beyond reasonable doubt" as to the age of the individuals concerned.

2. Misjudgment of other evidence in the record

138. The exclusion of the Prosecutor's "individual case histories" in their entirety led the Chamber to ground its findings that children under the age of 15 years were present in the FPLC between 1 September 2002 and 13 August 2003 on the following:

- Assessment of age predicated on the individuals' physical appearance based on (i) video excerpts and (ii) *viva voce* witnesses claiming to have seen children under the age of 15 years;

- Testimony reporting the statements of individuals who had presented themselves to them as former child soldiers under the age of 15 years;

- The Chamber's interpretation of a document originating from the UPC.

[174] Judgment, para. 643.

139. The Appeals Chamber will find the Trial Chamber's assessment of this material to be marred by grave errors of fact.

2.1 Misjudgment of age based on physical appearance

140. The Chamber's findings on the age of the purported child soldiers in FLPC ranks during the material time rest essentially on subjective assessments of their physical appearance.[175]

141. These findings are tainted by errors of law and fact:

2.1.1 Errors of law

142. The findings contradict the earlier positions adopted by the Chamber at trial, which had led the Defence to understand that the Chamber considered itself unable to determine the age of individuals appearing in the video footage or to accept witnesses' opinions on the matter.

143. Indeed, as far back as February 2009, the Chamber drew attention to the Defence position that physical appearance does not allow the age of an individual to be established.[176] It invited the Prosecutor to contemplate calling an expert on the assessment of age based on physical appearance,[177] adding that it was itself so minded.[178] The Prosecutor never acted on the Chamber's invitation and no such expert was called in the case.

144. In April 2009, the Chamber underscored anew its view that the factual witnesses were not in a position to provide a meaningful assessment of age based on physical appearance. When the Prosecutor asked Witness P-0002 to assess the age of a group of former FPLC soldiers,[179] the Chamber opined:

[175] Judgment, para. 641.
[176] T-132-CONF-FRA-CT, p. 35, lines 5-8.
[177] T-132-CONF-FRA-CT, p. 34, line 22 to p. 35, line 21.
[178] T-132-CONF-FRA-CT, p. 35, lines 12-19.
[179] T-162-FRA-CONF-CT, p. 50, lines 1-4.

"[TRANSLATION] With regret, the witness is certainly no expert on age. He can only hold an opinion, which is of very little value to us."[180]

145. This error vitiates the conviction of the Appellant, since the Chamber's adjudication of an essential element of the crimes charged – the age of FPLC soldiers – contravenes its previous positions on the subject and was founded on a modus operandi which irremediably prejudiced the Defence.

2.1.2 Errors of fact

146. In its Judgment, the Chamber acknowledged the undoubted differences in personal perception as regards estimates of age[181] and the undeniable difficulties raised by age assessments by individual, non-expert witnesses.[182]

147. Nonetheless, the Chamber has now held that notwithstanding a "wide margin of error" it is feasible for non-expert witnesses to differentiate between a child who is undoubtedly less than 15 years old and a child who is undoubtedly over 15 years.[183] To establish the presence of children under the age of 15 years in the FPLC, the Chamber thus (1) drew on video excerpts to make its own assessment of the age of the purported child soldiers and (2) accepted the assessments of certain witnesses.

2.1.2.1 The Chamber's appreciation of age based on video footage

148. Despite acknowledging that it was often difficult to ascertain whether a number of the young soldiers in the video excerpts were older or younger than 15 years, the Chamber drew on some of these video excerpts to find that they depict children who are clearly under the age of 15 years.[184]

[180] T-162-FRA-CONF-CT, p. 50, lines 16-18.
[181] Judgment, para. 643.
[182] Judgment, para. 682.
[183] Judgment, para. 643.
[184] Judgment, para. 644.

149. Firstly, the Chamber erred in law by unduly reversing the burden of proof, casting it on the Appellant to demonstrate the real age of the persons in the video evidence tendered by the Prosecutor.

150. The Prosecutor is duty-bound to prove the guilt of the Accused beyond reasonable doubt[185] and each of the facts material to demonstrating his guilt.[186] The Accused is vested with the fundamental right not to be encumbered by any reversal of the burden of proof or any onus of rebuttal.[187] Since age is one of the elements of the crime, the burden rested with the Prosecution to demonstrate beyond reasonable doubt that the individuals concerned were under the age of 15 years.

151. The decision *a quo* relies on nine video excerpts which, in the view of the Chamber, depict individuals whom it portrays as children under the age of 15 years. Yet, the Prosecutor tendered no evidence of the identity and real age of any of the persons appearing in the excerpts.

152. The fact that the video excerpts show youthful-looking persons did not absolve the Prosecutor from his duty to investigate and demonstrate their age beyond reasonable doubt.

153. This reversal of the burden of proof is particularly unfair to the Appellant, insofar as until judgment was handed down, he was precluded from determining which excerpts the Chamber might rely on. The video excerpts run to several hours and show several hundred individuals. No information as to their identity or age was imparted by the Prosecutor at trial.

154. Not only is the Appellant vested with the fundamental right not to be required to discharge any burden of proof whatsoever, but it would also have been absolutely impossible for the Defence to undertake investigations into all of

[185] Article 66.
[186] For example, ICTR, *Ntagerura et al.*, Judgement, 7 July 2006, para. 175.
[187] Article 67(1)(i).

the youthful-looking soldiers in the excerpts so as to ascertain and demonstrate their identity and age.

155. Similarly, the Chamber gave no indication of those excerpts it was minded to accept. On the contrary, at trial, the Chamber had instead intimated that the opinion of a non-expert witness on the subject of age was of no real value,[188] thereby exacerbating the unfairness of its findings on the video excerpts.

156. Secondly, the Chamber committed multiple errors of fact by finding that it was possible to draw "a safe conclusion"[189] from the video footage as to whether the individuals concerned were undoubtedly under the age of 15 years.

157. The findings of the Chamber were founded on the following video excerpts:

EVD-OTP-00574, 01:49:02

158. The impugned decision found that the individual appearing in the video excerpt was undoubtedly under the age of 15 years. The Judgment makes four references to that excerpt to substantiate the finding that children under the age of 15 years were recruited into the FPLC.[190]

159. The Chamber's findings hinge solely on its own assessment of the individual's age, since the Prosecutor tendered no evidence as to the person's identity or age.

160. The sole witness called to testify on the footage, P-0030, stated that the video was filmed at the Appellant's home on 24 February 2003.[191] No question was put to P-0030 in court on the identity or age of the individual.

[188] T-132-CONF-FRA-CT, p. 35, lines 9-16; T-162-CONF-FRA, p. 50, lines 16-18.
[189] Judgment, paras. 711 and 718.
[190] Judgment, paras. 713, 859, 915 and 1254.
[191] T-129-CONF-FRA-CT, p. 51, lines 6-7.

161. In preparation for the sentencing hearing, the Defence undertook investigations in Ituri and was able to establish that the individual appearing in the video excerpt was called Mbogo Malobi Augustin (D-0040). The Defence met D-0040 for the first time on 19 May 2012 during the mission. The Defence subsequently sought[192] and was granted[193] leave to call D-0040 at the sentencing hearing of 13 June 2012.

162. At the hearing, D-0040 identified himself as the person in the video excerpt.[194] His testimony in that regard was corroborated at the hearing by D-0039.[195] D-0040 stated that he was born on 8 April 1983,[196] as corroborated by his voting card[197] and State diploma.[198]

163. Having regard to a "wide margin of error"[199] in the assessment of D-0040's age, the Chamber determined that he was much younger than 15 years when the footage was shot.

164. However, the Chamber manifestly misjudged D-0040's age, since evidence was adduced that he had in fact been close to 20 years of age at the time. The Chamber's erroneous findings as regards D-0040 prompt three observations.

165. In that video excerpt, out of all those admitted into evidence, the facial features of the individual concerned are the most discernible. Given that the Chamber's finding as to D-0040's age was so manifestly erroneous, whereas his facial features are clearly discernible, it is reasonable to conclude that the

---

[192] ICC-01/04-01/06-2892.
[193] ICC-01/04-01/06-2895.
[194] T-360-CONF-FRA-ET, p. 27, line 21. The Defence has sought to file this evidence at the appeals stage: ICC-01/04-01/06-2942-tENG, paras. 7-15, 42-51.
[195] T-360-CONF-FRA-ET, p. 16, line 26. The Defence met D-0039 for the first time during the same mission, on 19 May 2012 to be specific. The Defence has sought to file this evidence at the appeals stage: ICC-01/04-01/06-2942-tENG, paras. 7-15 and 42-51.
[196] T-360-CONF-FRA-ET, p. 22, line 19.
[197] EVD-D01-01111; T-360-CONF-FRA-ET, p. 23, line 12 to p. 24, line 4. The Defence has sought to file this evidence at the appeals stage: ICC-01/04-01/06-2942, Anx1.
[198] EVD-D01-01112; T-360-CONF-FRA-ET, p. 24, lines 7-15. The Defence has sought to file this evidence at the appeals stage: ICC-01/04-01/06-2942, Anx2.
[199] Judgment, para. 643.

risk of error is even greater in respect of the other video footage tendered into evidence. In certain video excerpts relied on by the Chamber the facial features of the individuals concerned are indiscernible.

166. Moreover, the evidence concerning D-0040 unequivocally shows that it was impossible for the Chamber to determine beyond reasonable doubt whether the individuals appearing in the video excerpts in the record were under the age of 15 years.

167. Lastly, it is manifest that the Chamber unduly reversed the burden of proof, casting it on the Appellant. The onus rested upon the Prosecutor, not the Defence, to investigate the real age of the individual in that excerpt and to lead evidence thereof at trial. However, at trial the Prosecutor neglected to examine any witness or tender any evidence on the identity or age of that individual (D-0040). The burden of proof was reversed for all of the video excerpts relied on by the Chamber.

EVD-OTP-00571, 02:47:15 to 02:47:19

168. The Chamber considered that the individual in the foreground of the excerpt, clad in camouflage clothing, wearing a beret and bearing a rifle on the right shoulder is manifestly under the age of 15 years. It adverted to the excerpt on four occasions in sustenance of its findings.[200]

169. No question as to the age or identity of the individual was put to Witness P-0030, [REDACTED].[201]

170. During a mission to Ituri in September 2012, the Defence was able to identify the individual (D-0041) in the excerpt. The Defence team met D-0041 for the first time on 27 September 2012. D-0041 recognised himself as the person

[200] Judgment, paras. 713, 860, 915 and 1251.
[201] T-128-CONF-FRA-CT, p. 55, lines 4-23.

appearing in that video excerpt[202] and stated that he was born on 2 December 1984,[203] as confirmed by his voting card.[204]

171. D-0041 was therefore close to 19 years of age when the footage was shot, showing yet again that the Chamber erred in relying on the video footage alone to substantiate its findings as to the age of the soldiers appearing therein.

EVD-OTP-00572, 00:00:50, 00:02:47 and 00:28:42

172. The Chamber considered that these three video excerpts – shot during a meeting between a UPC delegation and representatives from the Lendu community in the Lipri region on 14 January 2003 –[205] establish that the FPLC commanders frequently used children under the age of 15 years as bodyguards.[206] The Chamber found that the excerpts show soldiers clearly under the age of 15 years.[207]

173. Although [REDACTED][208] [REDACTED], no part of the Prosecutor's examination sought to establish whether the three excerpts show the same or different individuals. However, the footage suggests that it was in fact the same person. Furthermore, the Prosecutor did not examine [REDACTED] in court as to the identity or age of the individuals appearing in the excerpts.

174. [REDACTED].[209] The sole questions on the two bodyguards' age to be put [REDACTED] in court came from the Defence. [REDACTED] had indicated to the

[202] DRC-D01-0003-5980, para. 8. The Defence has sought to file this evidence at the appeals stage: ICC-01/04-01/06-2942-tENG, paras. 16-19 and 52-54.
[203] *Idem*, para. 5.
[204] DRC-D01-0003-5983. The Defence has sought to file this evidence at the appeals stage: ICC-01/04-01/06-2942-tENG, paras. 16-19 and 52-54.
[205] T-129-CONF-FRA-CT, p. 4, line 14-15.
[206] Judgment, para. 915.
[207] Judgment, para. 854.
[208] Judgment, para. 854.
[209] T-176-CONF-FRA-CT, p. 51 lines 8-11.

investigators of the Office of the Prosecutor that he estimated [REDACTED]'s age as 16.[210]

175. Hence, not only did the Prosecutor fail to produce any evidence of the identity and real age of the individual(s) in the excerpts, but the findings of the Chamber run counter to the sole evidence tendered into the record as to the age of [REDACTED]'s youngest bodyguards.

EVD-OTP-00571, 02:22:52 to 02:22:54

176. The Chamber found one of the soldiers appearing in the excerpt to be significantly below 15 years of age.[211]

177. The contradictory findings of the Chamber as regards this excerpt only confirm that a subjective appraisal of the video footage in the record precludes any determination beyond reasonable doubt as to whether an individual is younger or older than 15 years. Indeed, at footnote 2432 of its Judgment the Chamber stated that the two-second excerpt depicts "children who could be under the age of 15 but they appear too briefly to enable a definite finding". Nonetheless, the Chamber determined at paragraph 1249 of its Judgement that the same excerpt depicted a guard "significantly below 15 years of age".

178. Thus, the Chamber manifestly misjudged individuals' ages on the basis of video footage, whereas it had found that the same footage was insufficient for it to adjudicate with certainty the age of those concerned.

EVD-OTP-00570, 00:06:57

179. This excerpt was extracted from a video shot by P-0030 on 12 February 2003 at the Rwampara training camp.[212] The Chamber found that "the child" visible in the excerpt, clad in military clothing and bearing a weapon, was under the age

[210] T-178-CONF-FRA-CT, p. 45 line 9 to p. 46 line 6.
[211] Judgment, para. 1249.
[212] T-128-CONF-FRA-CT, p. 35, lines 24-25.

of 15 years.[213] The Chamber specified that, in its view, the person was a "young male who is well below the age of 15".[214]

180. However, the Chamber's finding is at odds with the statements of one of the Prosecution witnesses who testified that the soldier was female.[215] This erroneous finding by the Chamber makes clear that it is impossible even to determine the sex of the individual concerned from the footage.

EVD-OTP-00571, 02:02:44

181. As demonstrated for Witnesses D-0040 and D-0041, the Chamber could not find on the basis of the excerpt that the young man clad in camouflage clothing and bearing a weapon was "evidently under the age of 15".[216]

182. No question was put at trial as to the individual's membership in a military group and there is no evidence in the record to prove that he belonged to the FPLC.

EVD-OTP-00410/EVD-OTP-00676, 00:52:14

183. For the reasons aforesaid, the Chamber erred in finding that the young man in the excerpt, clad in camouflage clothing and in the middle of the frame, was "plainly under the age of 15".[217]

184. Further still, that video excerpt does not allow discernment of the individual's facial features, precluding any verification in that regard.

[213] Judgment, para. 792.
[214] Judgment, para. 1242.
[215] P-0010: T-145-CONF-FRA-CT, p. 18, line 22 to p. 19, line 16.
[216] Judgment, para. 861.
[217] Judgment, para. 779.

EVD-OTP-00574, 00:36:21

185. For the reasons set out above, the Chamber should not have found, as it did on four occasions in its Judgment,[218] that the excerpt shows two soldiers clearly under the age of 15 years.

186. Furthermore, that video excerpt does not allow discernment of the individuals' facial features, precluding any verification in that regard.

187. Further still, as the identity of the individuals appearing in the excerpts is unknown, it is impossible to establish with certainty that the excerpts show different individuals.

188. The foregoing observations make clear that the Chamber manifestly misjudged the video excerpts it accepted as establishing the presence of child soldiers under the age of 15 in FPLC ranks during the material time. Manifest errors of this nature vitiate the decision *a quo* insofar as such factual material was largely determinative of its ultimate findings.

2.1.2.2 Age appreciation by non-expert witnesses

189. The impugned decision took account of "non-expert" testimony of witnesses called upon to give their opinion at trial on the age of the purported child soldiers, such testimony being essentially grounded in their recollection of the individuals' physical appearance.[219]

190. The Defence submits that in light of the evidence produced, no reasonable trier of fact could be satisfied that the testimony of "non-expert" witnesses, uncorroborated by objective evidence, suffices to prove beyond reasonable doubt the age of the individuals concerned.

191. As set forth hereabove, it is impossible to determine beyond reasonable doubt whether the individuals appearing in the video excerpts tendered into the

[218] Judgment, paras. 713, 862, 915 and 1252.
[219] Judgment, para. 641.

record are younger than 15 years. Such a ruling is equally untenable where founded on a witness's recollection of the physical appearance of a given individual several years after the events.

192. In its judgment, the Chamber underscored: "[…] the undoubted differences in personal perception as regards estimates of age and, most particularly in the context of this case, the difficulties in distinguishing between young people who are relatively close to the age of 15 (whether above or below)".[220] Moreover, as stated above, the Chamber had intimated at trial that very little value could be attached to a non-expert witness's opinion on age.[221]

193. Furthermore, the majority of the witnesses called to testify in that regard underscored that it was particularly difficult for them accurately to assess the age of the purported child soldiers.[222]

194. Such difficulties are compounded by the fact that physical appearance may be misleading on account of nutritional problems and ethnic origin, as certain witnesses have attested.[223] The expert witnesses similarly stated that bone and dental development may differ greatly according to ethnic group and nutrition and that even x-ray analysis of bones or teeth cannot determine an individual's age with certainty.[224]

195. As with the video excerpts tendered into the record, the opinion of "non-expert" witnesses on age determination could not allow the Chamber to find beyond reasonable doubt that the subjects of their assessments were under the age of 15 years.

---

[220] Judgment, para. 643.
[221] *Supra*, para. 144.
[222] P-0041:T-126-CONF-FRA-CT, p. 55, lines 4-20; P-0055:T-178-CONF-FRA-CT, p. 45 lines 13-18; P-0031:T-200-CONF-FRA-CT, p. 17, lines 3-13; D-0019:T-345-FRA-RT, p. 9 lines 14-24.
[223] T-126-CONF-FRA-CT, p. 55, lines 4-20; T-172-CONF-FRA-CT, p. 94.
[224] P-0358: T-173-FRA-CT, p. 40, line 22 to p. 41, line 10; P-0359: T-172-FRA-CT, p. 95, line 17 to p. 96, line 11.

2.2 Testimony reporting the statements of individuals who presented themselves as former child soldiers under the age of 15 years

196. The Chamber erred in conflating witness credibility with the ability to give reliable evidence.

197. Indeed, that a witness may assess an individual's age with perfect sincerity and in good faith, and hence testify credibly, does not, for the reasons aforesaid, in any way import correctness of such assessment. Testimony appraising age can only be considered reliable where sufficiently corroborated by objective and verifiable information.

198. The same reasoning applies where a witness states that an individual introduced him- or herself as a former soldier under the age of 15 years. Although a witness may be perfectly credible and faithfully report that person's words, such evidence cannot be considered reliable where verification of the testimony is impossible.

199. Indeed, such evidence is akin to hearsay, *scilicet* indirect evidence,[225] and the Court must perforce apply the regime which it instituted itself in the matter.[226] Accordingly, where confronted by indirect evidence, that jurisprudence requires the bench to (1) ensure the relevance and reliability of the evidence in question;[227] (2) verify whether there is corroboration by the other evidence before it;[228] and (3) weigh its probative value and its prejudicial effect vis-à-vis the accused.[229]

---

[225] For hearsay evidence as a species of indirect evidence: *The Prosecutor v. W. Samoei Ruto et al.*, Decision on the confirmation of charges, 23 January 2012, para. 69.
[226] *The Prosecutor v. J-P. Bemba Gombo*, Decision on the confirmation of charges, 15 June 2009, para. 52; *The Prosecutor v. W. Samoei Ruto et al.*, Decision on the confirmation of charges, 23 January 2012, para. 75.
[227] *The Prosecutor v. J-P. Bemba Gombo*, Decision on the confirmation of charges, 15 June 2009, para. 52; *The Prosecutor v. W. Samoei Ruto et al.*, Decision on the confirmation of charges, 23 January 2012, para. 75.
[228] *The Prosecutor v. W. Samoei Ruto et al.*, Decision on the confirmation of charges, 23 January 2012, para. 78; ICC-01/04-01/06-1399, paras. 28-29.
[229] *Idem*, para. 31.

200. In this respect, the bench has had occasion to hold that the relevance and reliability of a piece of evidence must be guided by various factors such as the nature of the evidence, its credibility, reliability, and source as well as the context in which it was obtained.[230]

201. In any event, such evidence must be analysed on a case-by-case basis.[231]

202. Thus, in accepting statements of this kind, the Chamber was duty-bound to ensure that the evidence authorised it to entertain the exact contents of the statements as reported, rather than simply asserting that the witness was reliable overall.[232]

203. By way of example, P-0046's entire testimony is based on the statements of individuals who claimed to have been child soldiers in Ituri during the material time.[233] However in that instance, the Chamber failed to specify how the statements of each child soldier reported by the witness attained a sufficient reliability threshold to found its decision, and neglected furthermore to undertake a case-by-case analysis. The Chamber merely analysed the witness's credibility, disregarding the issue of source reliability and prejudice to the Accused.[234]

204. The Chamber erred in its analysis of P-0046's testimony by disregarding the following:

- The Defence was not privy to the identity of any of these individuals. Although the Chamber underscored that the inability of the Defence to investigate the statements reported by P-0046 may

[230] *The Prosecutor v. W. Samoei Ruto et al.*, Decision on the confirmation of charges, 23 January 2012, para. 68.
[231] *The Prosecutor v. W. Samoei Ruto et al.*, Decision on the confirmation of charges, 23 January 2012, para. 68.
[232] Judgment, para. 655.
[233] Judgment, para. 645.
[234] Judgment, para. 655.

prejudice the Accused, it ultimately relied on this part of the witness's testimony;[235]

- P-0046 herself did not inquire with any diligence into the statements reported by these purported child soldiers, to whom she spoke only "for a few minutes";[236]

- The exclusion from the evidence of the entire testimony of those who presented themselves as former child soldiers and consistently told the Office of the Prosecutor and the Court that they had joined the FPLC when they were under the age of 15 years shows that it is impossible to attach any reliability to evidence of this kind absent proper verification;

- Given the context of individuals passing themselves off as child soldiers at demobilisation centres for the purpose of admission into reintegration programmes,[237] the absence of proper verification by the witness or the Prosecutor and the impossibility of the Defence undertaking investigations, such evidence could not be found admissible in the instant case.

205. Thirdly, the impugned decision is so fraught with factual error as to affect the Chamber's findings on the enlistment and conscription of child soldiers under the age of 15 years into the FPLC. So replete with error is the decision that the Defence will confine its observations to the most blatant:

[235] Judgment, paras. 798-799.
[236] Judgment, para. 797.
[237] See in particular, Judgment, paras. 147 and 736.

- *D-0004's testimony*

206. The Chamber committed a grave error of appraisal in finding that D-0004 testified reliably that children under the age of 15 years were within the ranks of the FPLC.[238]

207. The Chamber adverts to the uncorrected English transcript[239] of D-0004's testimony to determine that at trial he stated that children from his neighbourhood, "who included children between 12 and 15 years of age", voluntarily enrolled in the FPLC.[240] However, that transcript does not reflect the French transcript, which was corrected as a result of a robust challenge to the accuracy of the translation of D-0004's statements made in Swahili on the matter.[241] According to the Defence, the witness ruled out the presence of children aged 12 to 14/15 years in UPC ranks.[242]

208. Moreover, even were the Bench to have relied on the fourth correction to the French transcript of the hearing, it shows D-0004 to have stated: "[TRANSLATION] There weren't also up to 12 years of age", thereby ruling out the enlistment of 12-year-old children. The translation's ambiguous insertion of "[TRANSLATION] others were even 14, 15 and older" does not absolutely demonstrate the presence of 12- to 15-year old children in the FPLC.

209. Further still, there is nothing in D-0004's testimony to indicate, contrary to the Chamber's findings, that the witness was referring to 2002, let alone to events which took place during the material time (1 September 2002 to 13 August 2003): no further information was provided by the witness and no question

---

[238] Judgment, para. 643.

[239] The suffix CT4 indicates that transcript T-243-CONF-FRA-CT4 contains four corrections. The fact that the English transcript is entitled T-243-CONF-ENG-CT indicates that it contains a single correction, since the impugned part was, however, never corrected.

[240] Judgment, para. 767.

[241] In this regard, the Chamber erred in stating that no complaint was made in the final submissions regarding the accuracy of the interpretation (Judgment, para. 113); in fact, the Defence specifically stated in its closing submissions that it was disputing the interpretation of that passage from D-0004's testimony (ICC-01/04-01/06-2773-Conf-tENG, paras. 753-755).

[242] The Defence is of the view that D-0004 stated: "*Bon, hikukua vile mpaka 12, bengine ilikua ata 14, 15… kuendalea*."

was put to him regarding the timeframe when such events purportedly took place.

210. It follows that the Chamber committed a manifestly unreasonable error by relying on that particular testimony.

- *Other testimony*

211. The Chamber determined that P-0024 testified that children aged between 8 ½ and 18 years were demobilised by his NGO in November 2001,[243] before being re-recruited by the FPLC. Contrary to the Chamber's finding,[244] P-0024 did not specify the age of these individuals who were allegedly recruited by the FPLC following their demobilisation.[245]

212. The Chamber determined that P-0012 had stated having seen child soldiers, many of whom were aged under 15 years, in the armed groups in Bunia in 2003. Contrary to that finding,[246] P-0012 stated "[TRANSLATION] there were many of them; even some under 15."[247] At no point did he confirm that children under the age of 15 years were in the FPLC at the time;[248] when questioned on the subject, the witness referred to Chief Kahwa's PUSIC.[249] As to the children who, according to P-0012, were on the frontline during the battle of Bunia on 12 May 2003, nowhere does the testimony specify their age.[250]

213. Moreover, contrary to the Chamber's finding,[251] there is no doubt that the incidents recounted by Witnesses P-0016 and P-0014 predate the material

[243] Judgment, para. 658.
[244] Judgment, footnote 1872.
[245] T-170-CONF-FRA-CT, p. 49, lines 16 *et seq*.
[246] Judgment, paras. 667 and 826.
[247] T-168-CONF-FRA-CT, p. 78, line 7.
[248] This general statement by the witness does not enable the age of the children who he alleges belonged to the FPLC to be ascertained.
[249] T-168-CONF-FRA-CT, p. 78, lines 10 *et seq*.
[250] Judgment, para. 826. Ref. T-168-CONF-FRA-CT, p. 75, lines 19 *et seq*.
[251] The Chamber addresses this testimonial evidence at paras. 788-791 of the Judgment.

time.[252] Nothing admitted into the record indicates that the conduct canvassed did occur during that time.[253]

214. Lastly, contrary to the Chamber's finding, at no point did P-0017's testimony specify the age of the "children" whom he saw at Mongbwalu camp.[254]

215. What is more, the Chamber erred in its indiscriminate use of the expression "children under the age of fifteen years" and others terms which do not necessarily denote children under the age of fifteen years, such as "children", "young people", "*kadogo*" or "PMF" to establish the existence of the crime.[255]

216. The Defence refers furthermore to the other errors raised in Part II Section III of the present brief.

217. This multitude of errors in the appraisal of the factual material which may establish an act of enlistment or conscription proscribed by article 8(2)(e)(vii) vitiates the impugned decision insofar as such material was largely determinative of its ultimate findings.[256]

2.3 Documentary evidence

218. The decision *a quo* relies on a single document to substantiate the finding that children under the age of 15 years joined the FPLC during the material time: a letter dated 12 February 2003 to the FPLC G5 commander from the UPC/RP's

[252] P-0014: The Chamber so observes at paras. 789 and 887. P-0016: P-0016 stated that he was brought to Mandro 14 days after Lopondo left Bunia and that he stayed there for 10 days. He stated that the incident took place four days before he left, that is on 29 August 2002. T-188-CONF-FRA-CT, p. 91, line 13; T-189-CONF-FRA-CT, p. 13, line 2; T-190-CONF-FRA-CT, p. 66, lines 1-2. The date of Lopondo's departure was 9 August 2002: EVD-OTP-00386; The Prosecutor does not dispute this date: Judgment, para. 1084.
[253] Contrary to the Chamber's unfounded assertion, footnote 2216 was silent on the matter. Judgment, para. 789.
[254] The witness specified the age of the "children" whom he allegedly saw in Mandro, not Mongwalu. Judgment, footnote 2287.
[255] As the Chamber so acknowledges: Judgment, paras. 636-640.
[256] Judgment, paras. 1213-1223 and 1356.

National Secretary for National Education, Mr Adubango Biri Marcel [REDACTED].[257]

219. In that letter, the author informed the G5 commander of officer-training activities as part of a demobilisation programme for child soldiers seeking to return to civilian life. The letter mentioned that the programme, denoted by the acronym DDRRR [Disarmament, Demobilisation, Repatriation, Reintegration or Resettlement], was organised in partnership with the NGO Save the Children.

220. Although the letter does not specify the armed group(s) to which the child-soldier beneficiaries of the demobilisation programme belonged, the Chamber misconceived the letter as directed principally at the position of children aged 10 to 16 years in the UPC/FPLC.[258]

221. The error was occasioned by the Chamber's wrongful interpretation.

222. The Prosecutor, with whom the burden of proof rests, tendered this document "from [the] bar table"[259] and did not examine any of the prosecution witnesses at trial on said document, despite the opportunity to do so:

- [REDACTED],[260] [REDACTED], was not called to testify at trial by the Prosecutor. Nor was [REDACTED] called as a witness of the Court, [REDACTED];[261]

- [REDACTED],[262] [REDACTED]. Yet, the 12 February 2003 letter states that the activities connected to the demobilisation programme mentioned were undertaken in partnership with Save the Children;[263]

[257] Judgment, paras. 741-748; EVD-OTP-00518.
[258] Judgment, para. 748.
[259] ICC-01/04-01/06-1981.
[260] [REDACTED].
[261] ICC-01/04-01/06-2033-Anx1, paras. 34 *et seq*.
[262] [REDACTED].
[263] [REDACTED].

- What is more, during the course of his investigations the Prosecutor met [REDACTED] ([REDACTED]), but did not call him to testify.

223. The sole witnesses called to testify to the letter's content were Defence Witnesses D-0011 and D-0019. Despite not setting eyes on the letter until he gave evidence,[264] D-0019 stated that the acronym DDRRR denoted a demobilisation programme "[TRANSLATION] for the ex-FAR, the Interhamwe, and the others in the east of the Congo".[265] This statement was confirmed by D-0011, who explained that DDRRR was a national programme which "[TRANSLATION] was not specific to the UPC/RP", and that it concerned not only the DRC, but also Rwanda and Burundi.[266]

224. Contrary to the findings of the Chamber on this document, D-0019 and D-0011's testimony is clear, specific and corroborated by Prosecution evidence: P-0046 confirmed that the DDRRR programme was aimed at reintegrating foreign, particularly Rwandan, combatants on Congolese territory into their countries.[267] United Nations Security Council resolution 1493 (2003), tendered as evidence by the Prosecution, makes clear that the DDRRR programme was specifically aimed at foreign armed groups.[268]

225. Moreover, D-0019 also explained in detail that it was entirely normal for the letter to be sent to the FPLC's G5 even though it made no specific reference to FPLC soldiers. D-0019 explained that the sphere of authority of a G5 in the FPLC, the force then wielding power in the territory of Ituri, encompassed its entire territory and population.[269] This statement was confirmed by D-0011, who stated that since the UPC/RP had been in power, Save the Children had to go through the UPC/RP or the FPLC to implement the programme.[270]

[264] T-346-FRA-ET, p. 32, lines 8-9.
[265] T-346-FRA-ET, p. 34, lines 10-13.
[266] T-347-CONF-FRA-ET, p. 38, lines 21 to p. 40, lines 5; p. 41, lines 17-21.
[267] EVD-OTP-00493, T-38-FRA-ET, p. 12, lines 18-23 and p. 13, lines 8-11.
[268] EVD-OTP-00628, para. 16.
[269] T-346-FRA-ET, p. 40, lines 3-7.
[270] T-347-CONF-FRA-ET, p. 45, lines 12-20.

226. Evidently, the Chamber's interpretation is not the sole reasonable or possible interpretation of the document, given the evidence admitted into the record. Even setting aside D-0011 and D-0019's testimony, it is reasonable to argue that the reference to "[TRANSLATION] child soldiers aged between 10 to 15/16 years" in that document must be construed as denoting all of the groups targeted by the DDRRR programme.[271]

227. Hence, the Chamber has manifestly misapprehended the sole document relied on to sustain its findings on the age of the children enlisted or conscripted into the FPLC: the Chamber's wrongful interpretation of the 12 February 2003 letter finds no support in the text of the letter itself, which makes no specific reference to children under the age of 15 years in the FPLC, and is at variance with the entire evidence concerning the DDRRR programme. The evidence clearly shows that the 12 February 2003 letter was referring to the foreign combatants, not the FPLC soldiers specifically.

II – CONSCRIPTION OF CHILDREN UNDER THE AGE OF 15 YEARS INTO THE FPLC

1. Errors of law

228. The Chamber committed an error of law by holding that the crimes of conscription and enlistment may be dealt with together,[272] inasmuch as the crime of conscription or enlistment is committed at the moment a child under the age of 15 years is enrolled in or joins an armed force or group, with or without compulsion.[273]

229. Firstly, as the Chamber itself has stated, "[t]he word "recruiting", which is used in the Additional Protocols and in the Convention on the Rights of the

[271] ICC-01/04-01/06-2773-Conf-tENG, paras. 726-730.
[272] Judgment, para. 759.
[273] Judgment, paras. 618 and 759.

Child, was replaced by "conscripting" and "enlisting" in the Statute."[274] The Pre-Trial Chamber also raised the terminological difference.[275]

230. The choice of the terms "conscription" and "enlistment" over "recruitment" reveals the intention of the drafters of the Statute to criminalise two species of conduct, thereby creating two separate offences.

231. Thus, conscription and enlistment cannot be viewed as dual conduct belonging to a same offence. Had the drafters of the Statute so conceived, they would have opted instead for the term "recruitment", a concept construed as enfolding both voluntary and forcible recruitment.[276]

232. Since they constitute two separate offences, conscription and enlistment are separately defined and grounded in different constituent elements, which must be established beyond reasonable doubt for each offence charged. Despite considering that the crimes of enlistment and conscription must be analysed together, the Chamber itself determined that "(…) the three alternatives (viz. conscription, enlistment and use) are separate offences".[277]

233. Secondly, the Chamber erred by conflating voluntary enrollment in the armed group as a defence with voluntariness of such enrollment as a constituent element of the crime of enlistment.[278]

234. The Chamber held that the inability of a child under the age of 15 years to give informed consent to his or her enrollment in a military group obviates the establishment of any distinction between the crime of enlistment and the crime of conscription.[279]

---

[274] Judgment, para. 607.
[275] ICC-01/04-01/06-803-tEN, para. 246.
[276] ICC-01/04-01/06-803-tEN, para. 245; Judgment, para. 607.
[277] Judgment, para. 609.
[278] Judgment, para. 617.
[279] Judgment, para. 618.

235. The Defence does not dispute that the consent of a child under the age of 15 years to joining an armed group is no defence to the crime of enlistment, and never advanced any such argument. It remains the case that voluntariness of recruitment is, as the Chamber itself nonetheless underscored,[280] the criterion which differentiates the crime of enlistment from the crime of conscription. In fact, the decision under appeal held that "'conscripting' is defined as 'to enlist compulsorily'" and that "the distinguishing element" between enlistment and conscription "is that for conscription there is the added element of compulsion."[281]

236. In this respect, the Defence concurs with the Pre-Trial Chamber's holding that "conscripting is forcible recruitment".[282] It follows that the act of child conscription entails the child's incorporation into the armed group against his or her will.

237. Thirdly, the Chamber does not furthermore explain why "the circumstances of this case"[283] warrant joint adjudication of the crimes of conscription and enlistment.

238. Whilst the presence of children under the age of 15 years in an armed group constitutes the absolute minimum to establish the crime of enlistment, it lies with the Prosecutor to establish the compulsoriness of enlistment in order to determine that crime of conscription materialised beyond reasonable doubt.

239. In the case at bar, it must be noted that there is no evidence properly to establish the crime of conscription.

240. Indeed, to determine that "children under the age of 15 were conscripted and enlisted into the UPC/FPLC forces between 1 September 2002 and 13 August

[280] Judgment, para. 607.
[281] Judgment, para. 608.
[282] ICC-01/04-01/06-803-tEN, para. 247 [emphasis added].
[283] Judgment, para. 618.

2003",[284] the Chamber draws on evidence establishing the presence of child soldiers in FPLC ranks during the material time and the mobilisation and recruitment campaigns pursued by UPC/FPLC members.

241. Yet, even were the presence of children under the age of 15 in FPLC ranks to be proven, which was not the case here, mere presence in an armed group alone does not establish the crime of conscription.

242. This error vitiates the Appellant's conviction for the crime of conscription of children under the age of 15 years, since his guilt was predicated on a misconception of the crimes charged.

2. Factual errors

243. The Chamber committed manifest factual errors in its appraisal of the factual material adduced to substantiate the allegations concerning the crime of conscription of children under the age of 15 years.

244. The Chamber erred in finding that "considerable pressure was exerted on various communities to send young people, including children under the age of 15, to join the UPC/FPLC army during the time frame of the charges."[285] The Chamber relied essentially on P-0041's testimony to establish the existence of such "pressure".[286]

245. Such interpretation of P-0041's testimony is manifestly erroneous. The witness made clear that when Bunia was under UPC/RP control, recruitment was not systematic or compulsory.[287] Despite stating that armed groups in Ituri appealed to families to give a boy to work for them, he did not know who issued such appeals.[288] The witness further underscored his difficulty in

[284] Judgment, para. 914.
[285] Judgment, para. 785.
[286] Judgment, para. 781.
[287] T-125-CONF-FRA-CT, p. 68, lines 1-22.
[288] T-125-CONF-FRA-CT, p. 68, lines 4-5.

responding to the questions on recruitment, inasmuch as he had no personal knowledge thereof.[289]

246. It is evident that the recruitment and mobilisation campaigns cannot be considered acts of conscription. The evidence relied on by the Chamber speaks instead of awareness-raising campaigns aimed at persuading the population to join the armed forces voluntarily. Such actions are inherently at variance with a conscription policy, which is purely compulsory in nature.

247. In this respect, the voluntariness of the FPLC recruitment campaigns is apparent from the examples relied on by the Chamber. For instance:

- P-0055 stated that some young people who attempted to join the armed ranks were turned away;[290] He further stated: "There were elders or wise men, along with others referred to as the cadres or senior officials of the party, who raised awareness in the villages and explained the purpose of the UPC, so as to ensure the civilian population's support";[291]

- P-0017 testified that Kisembo asked those who were willing and able to join the army to enlist with the UPC/FPLC;[292]

- P-0016 stated that there was no conscription of children into the FPLC[293] and was particularly insistent in that regard, specifying that they were "[TRANSLATION] keener on volunteering than keenness itself".[294]

248. Furthermore, there is no evidence to sustain the Chamber's finding that "considerable pressure" was exerted on communities.

---

[289] T-125-CONF-FRA-CT, p. 67, lines 15-16.
[290] Judgment, para. 760.
[291] Judgment, para. 771.
[292] Judgment, para. 783.
[293] T-190-CONF-FRA-CT, p. 64, lines 11-18.
[294] T-189-CONF-FRA-CT p. 78, line 24 to p. 79, line 4.

249. Hence, by relying on evidence unfit to establish the crime of conscription, the Chamber committed a manifest factual error in finding that it is established beyond reasonable doubt that children under the age of 15 years were conscripted by UPC/FPLC members during the material time.

250. Further still, there is no evidence to show that FPLC recruitment campaigns resulted in the conscription of children under the age of 15 years. On the contrary, from the Prosecution evidence it is apparent that after one awareness-raising campaign allegedly held in the village of Mbidjo, no child under the age of 15 years was recruited.[295] Moreover, the Chamber does not draw on any specific example to substantiate its findings in his regard.

251. Such manifest errors vitiate the impugned decision insofar as the finding that the FPLC conscripted children under the age of 15 is unfounded.

III - THE CRIME OF USING CHILD SOLDIERS UNDER THE AGE OF 15 YEARS TO PARTICIPATE ACTIVELY IN HOSTILITIES

1. Error of law

252. The impugned decision held 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."[296]

253. The Chamber misconstrued the concept of "active participation in hostilities" by holding that a determination as to a child's active participation in hostilities requires an analysis of the risk incurred by the child in providing support to the combatants,[297] rather than an appraisal of the significance of the child's contribution to the military operations or to the military capacity of a party to an armed conflict.

[295] P-0038: T-114-CONF-FRA-CT, p. 76, line 6 to p. 77, line 5.
[296] Judgment, para. 628.
[297] Judgment, para. 628.

254. Firstly, the Chamber is duty-bound under article 21(1) to apply (a) the Statute of the Court, the Elements of Crimes and the Rules of Procedure and Evidence; and (b) applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict, etc. The introduction to article 8(2)(e) in the "Elements of Crimes" affirms: "[t]he elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict […)".

255. However, the impugned decision departs from established principles of the international law of armed conflict by relying on the concept of "risk" which is wholly unfounded in international law or internationally recognised principles and rules.[298] In support of its holdings, the Chamber cites authorities which are devoid of legal import, thereby violating article 21(1).[299]

256. Yet there is no doubt that the international law of armed conflict makes no distinction between "active participation in hostilities" and "direct participation in hostilities".[300] In this regard, whereas the English version of article 3 common to the Geneva Conventions refers to the concept of "active participation", the French version of the same provision adverts to the concept of "*participation directe* [TRANSLATION: direct participation]".[301] The ICRC makes clear that "[a]lthough the English texts of the Geneva Conventions and Additional Protocols use the words 'active' and 'direct', respectively, the consistent use of the phrase '*participent directement*' in the equally authentic French texts demonstrate that the terms 'direct' and 'active' refer to the same quality and degree of individual participation in hostilities" and that the

[298] Judgment, para. 628.
[299] Judgment, footnotes 1803 and 1804.
[300] International Committee of the Red Cross, *Interpretative guidance on the notion of direct participation in hostilities Under international humanitarian law*, p. 12, "Key legal questions" section. The French version, *Guide interprétatif sur la notion de participation directe aux hostilités en droit international humanitaire*, at p. 14 Section 3 entitled "Key legal questions" reads: "(…) the notion of taking a direct **or active part** in hostilities is found in many provisions of IHL" [emphasis added].
[301] Article 3 common to the four Geneva Conventions of 12 August 1949.

concept must be identically construed in international and non-international armed conflicts.[302]

257. This analysis is confirmed by the case law of the ICTR and ICTY, which have held that these synonymous concepts[303] denote "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[304]

258. Finally, it is generally worth noting the interchangeable use of the expressions "active participation" and "direct participation". By way of example, United Nations General Assembly resolution 2675 of 9 December 1970, which sets forth basic principles for the protection of civilian populations in armed conflicts, and the principle of distinction in particular, states that a "distinction must be made at all times between persons actively taking part in the hostilities and civilian populations".[305]

---

[302] ICRC, *Interpretative guidance, op. cit.*, p. 43, Section 1.

[303] ICTR, *Prosecutor v. Akayesu*, Judgement, 2 September 1998, para. 629; See also article 3 of Geneva Convention IV, wherein the expression "no active part" is rendered by "[TRANSLATION] *not taking a direct part*" in the French version, indicating that the two terms are synonymous, which comports with the official ICRC position, p. 43: *"(…) the terms 'direct' and 'active' refer to the same quality and degree of individual participation in hostilities"*, para. 99; See also Commentary to Additional Protocol I, ICRC, on article 51, p. 618, paras. 1944-1945; F. Kalshoven, *Constraints on the Waging* of War, pp. 99-100: "'to take a direct part in hostilities' must be interpreted to mean that the persons in question perform hostile acts, which by their nature or purpose, are designed to strike enemy combatants or material (…) it is beyond doubt that the notion of direct participation in hostilities is far narrower than that of making a contribution to the war effort. [...] [The latter] […] even under the narrowest conceivable construction covers such activities as the production and transport of arms and munitions of war, or the construction of military fortifications. It is equally certain, however, that such activities do not amount to a direct participation in hostilites."; M. Sassoli and A. Bouvier, *Un droit dans la guerre*, Vol. I, p. 83, footnote 3 (under the word "directly" in the expression 'sparing those who do not or no longer directly participate in hostilities"): "[TRANSLATION] If it is to provide real and objective protection, IHL cannot simply consider all contribution to the war effort as participation in hostilities. Only that contribution which does not direct all contribution towards the war effort, but that which is derived from a military function."

[304] ICTR, *Prosecutor v. Rutaganda*, Judgement, 6 December 1999, para. 99; ICTY, *Prosecutor v. Galić*, Judgement and opinion, 5 December 2003, para. 48.

[305] United Nations General Assembly resolution 2675, 9 December 1970. In *Tadić*, the Appeals Chamber stated that the resolution was declaratory of the principles of customary international law regarding the protection of civilians. ICTY, *Prosecutor v. Tadić*, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, para. 111.

259. Hence, the ICRC interpretation of the concept of direct or active participation[306] in hostilities envisions it as a specific act which must meet three cumulative criteria:

- The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); and

- There must be a direct causal link between the act and the harm likely to result either from that act or from a coordinated military operation of which that act constitutes an integral part (direct causation); and

- The act must be specifically designated to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[307]

260. Accordingly, the Chamber erred in holding that: "[t]he 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."[308]

261. It follows that the trial bench's analysis of the factual material introduced is founded on a misconstruction of the material elements of the crime as regards "active participation in hostilities". This error of law led the Chamber to rely on activities which were blatantly unconnected to the hostilities, such as domestic chores and analogous activities, which are expressly excluded by

[306] See the official ICRC position which considers these two as synonymous: ICRC, *Interpretive Guidance, op. cit.*, p. 12 (p. 14 of the French version), Section 3. "Key legal questions": "[…] the notion of taking a direct **or active part** in hostilities is found in many provisions of IHL" [emphasis added].
[307] Official ICRC position, p. 48.
[308] Judgment, para. 627. [emphasis added].

those instruments established for the interpretation of internationally-recognised principles applicable to the conduct of hostilities.[309]

262. Ultimately, a sweeping interpretation of the Statute which is inconsistent with international custom – albeit briefly discussed during the Rome Statute negotiations but discarded by the drafters –[310] and which is founded on SCSL jurisprudence in contravention of the principle of legality of criminal offences and penalties [311] cannot find application here.

263. The Chamber therefore unfoundedly and in violation of article 22(2)[312] relied on a sweeping interpretation of the concept clearly set forth in the Statute, particularly inasmuch as it does not comport with applicable treaties and principles and rules of international law, including established principles of the international law of armed conflict.

264. Secondly, "risk" is inherent to the crimes of enlistment and conscription committed in armed conflict and the crime of active participation in hostilities.

265. Therefore, from the time of effective incorporation into an armed group a child becomes a potential target on account of his or her military status in the armed conflict.

266. Hence, by drawing on the concept of "risk" so that the concept of active participation in hostilities enfolds activities within the purview of both direct and indirect participation in hostilities, the Chamber's analysis somewhat

---

[309] Report of the Preparatory Committee on the establishment of the ICC: Doc A/CONF.183/2/Add.1, 14/04/1998, p. 21, footnote 12, cited in SCSL *Prosecutor v. Fofana et al.*, Judgement, para. 193; SCSL, *Prosecutor v. Sesay et al.*, *Judgement*, paras. 188, 1730, 139; and ICC-01/04-01/06-803-tEN, para. 261; See also the implicit but undeniable exclusion in the Commentary to articles 43 and 51 of Protocol Additional I, at paras. 1679 and 1944.

[310] Doc A/CONF.183/2/Add.1, 14 April 1998, p. 21.

[311] The Defence refers to its closing submissions: ICC-01/04-01/06-2773-Conf-tENG, para. 46.

[312] The article lays down that the "definition of a crime shall be strictly construed and […] In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

conflates the crimes of enlistment, conscription and use of child soldiers, thereby divesting the three concepts of their substance.

267. As a consequence, the concept of risk in the context of active participation in hostilities must perforce be circumscribed to activities which have a direct part in the conduct of hostilities.

268. Indeed, the other activities, which fall within the ambit of "indirect participation in hostilities", are merely the offspring of the act of enlistment or conscription.

269. Ultimately, only the participation of children under the age of 15 years in combat or their presence on the battlefield may establish the crime of use of children to participate actively in hostilities.

2. Errors of fact

2.1 Age determination

270. In respect of the evidence presented at trial, the Trial Chamber committed a number of factual errors in finding that it has been proven that children under the age of 15 years were used by the FPLC to participate actively in the hostilities.

271. As demonstrated above, the evidence accepted by the Chamber concerning the determination of the age of those individuals it identified as under the age of 15 years is non-specific and general and does not meet the necessary standard of proof to establish the presence of child soldiers in the FPLC, let alone their active participation in hostilities (*supra*, paragraphs 124 to 227).

272. In any event, the Appeals Chamber will find that the Chamber committed grave factual errors in its appraisal of the factual material adduced to establish the FPLC's use of child soldiers under the age of 15 years. No reasonable trier of fact could find that the FPLC used children under the age of 15 years (a) to participate in combat; (b) as military guards; (c) as bodyguards for military

chiefs and other senior UPC/FPLC officials; (d) as Thomas Lubanga's bodyguards; (e) in the *Kadogo* Unit; (f) to perform household chores; and (h) in the self-defence forces. Lastly, there is no evidence to establish that punishment meted out to soldiers was applied, let alone abusively, to children under the age of 15 years, irrespective of their role in the FPLC.

273. The factual material relied on by the Chamber does not prove that the FPLC used children under the age of 15 years during the material time.

2.2 Participation in combat

274. The Chamber erred in finding on the basis of testimony of Witnesses P-0038, P-0016, P-0012 and P-0046 that children under the age of 15 years were used by the UPC/FPLC between September 2002 and 13 August 2003, in order to participate in combat in Bunia, Kobu and Mongbwalu.[313]

275. The error ensues in great part from the credibility wrongly afforded by the Chamber to the incorrect and imprecise statements of Witnesses P-0038, P-0016, P-0012 and P-0046:

- *P-0038's credibility*

276. The Chamber committed a manifest factual error in its judgment of the credibility of Witness P-0038. The following factors cast serious doubt on the witness's sincerity:

- The witness was introduced by Intermediary P-0316[314] and was in frequent contact with agents from the Congolese National Intelligence Agency, the ANR;[315]

[313] Judgment, para. 834.
[314] Judgment, para. 341. EVD-D01-01035, p. 0464, entry 27, EVD-D01-01037, p. 5791 and EVD-D01-01039, p. 5856, #29.
[315] P-0038 acknowledged having been in contact on numerous occasions with P-0316 and his two colleagues, ANR agents P-0183 and [REDACTED]. T-336-CONF-FRA-ET, p. 67, lines 19-20 and T-337-CONF-FRA-ET, p. 13, line 20 to p. 14, line 18, p. 15, lines 21-23. T-337-CONF-FRA-ET, p. 13, line 20 to p.14, line 18; p. 15, lines 21-23.

- It was established that at least five individuals gave false statements at the instigation of P-0316 or his colleague P-0183;[316]

- P-0038 had ties with two[317] of P-0316's colleagues, including P-0183 who also worked for the ANR –[318] one of his colleagues was a member of P-0038's extended family;[319]

- Contrary to the Chamber's findings,[320] P-0038 discussed the substance of his testimony with P-0316;[321]

- P-0038 confirmed that on numerous occasions P-0316 was in a position to have persuaded him to give false statements to the investigators;[322] for example, before his first meeting, he stated that he spent two hours at P-0316's home before meeting one of the Prosecutor's investigators;[323] he also provided incoherent explanations to account for the two hours spent on another occasion at P-0316's home watching television;[324]

- The Chamber found that there were strong reasons to conclude that Intermediary P-0316 persuaded witnesses to lie[325] and that his

---

316 The individuals in question were P-0015, D-0016, P-0028 (*Katanga*), an individual known by the pseudonym [REDACTED] in document EVD-D01-00384, p. DRC-OTP-0232-0276 (the investigators noted that one of the children introduced by P-0316 appeared to have been "coached") and a certain [REDACTED] (to which P-0316 admitted, see EVD-D01-00370).
317 Judgment, para. 341.
318 T-337-CONF-FRA-CT, p. 72, lines 3-4.
319 Judgment, para. 341.
320 Judgment, para. 348.
321 T-336-CONF-FRA-ET, p. 42, lines 5-19 and T-337-CONF-FRA-ET, p. 8, lines 9 *et seq*.
322 T-336-CONF-FRA-ET, p. 44, lines 24 *et seq*; p. 51, lines 8-22; p. 54, lines 7-24; p. 56, line 5 to p. 57, line 5; p. 60, lines 17-25; p. 66, lines 11 *et seq*; p. 68-71; p. 71, lines 6-7; T-337-CONF-FRA-ET, p. 31, lines 10-27, p. 34, lines 2-26; p. 35, lines 4-16;
323 T-336-CONF-FRA-ET, p. 51, line 19.
324 T-337-CONF-FRA-ET, p. 31, lines 22-27: "[TRANSLATION] A. We were at his place, we were like staying … like at home, and we … his wife was there … cooking … no, we stayed at his place, as friends. We didn't talk about anything, we watched television, that's all. We were passing time. We were passing time. We didn't talk about anything at all or … because that was when I had already returned from [REDACTED], when I had already gone through the interview. I didn't have much to … say … there wasn't much to say to him."
325 Judgment, para. 373.

involvement with the ANR[326] precluded any credibility being afforded to P-0038's statements;

- Lastly, as was the case for D-0016, also introduced to the Prosecutor by P-0316, he used handwritten notes to prepare for his interview with the investigators.[327] Moreover, the Chamber accepted that P-0038 may have prepared the notes to assist during the meetings, but observed that the witness's explanations on the subject were unclear.[328]

277. The Chamber paid particular attention to the fact that P-0038 testified that P-0316 did not ask him to perjure himself.[329] This fact pales into insignificance in the face of the finding of strong ties binding the witness and Intermediary P-0316, whom the Chamber ordered to be investigated for offences against the administration of justice (article 70),[330] and P-0183, in relation to whom significant evidence has been admitted into the record.[331]

278. Finally, at the time of the witness's two in-court appearances in 2009 and 2010, the Defence was deprived of a document concealed by the Prosecutor and which was disclosed to it in November 2012.[332] Since the witness's name did not appear on that list, the document would have enabled his statements that he belonged to the FPLC until 2005 to be contradicted.[333] Such statements were in any event vigorously contested by the Defence.[334]

---

[326] Judgment, para. 368.
[327] T-337-CONF-FRA-ET, p. 22, lines 28 *et seq.* and p. 24, lines 7-18. See also EVD-D01-00395.
[328] Judgment, paras. 341 and 348.
[329] Judgment, para. 348.
[330] Judgment, para. 483.
[331] Judgment, para. 321, *The Prosecutor v. Katanga and Ngudjolo,* ICC-01/04-01/07-T-221-Red-FRA, p. 21 lines 8-27, p. 31 lines 1-25, p. 32 lines 20-23.
[332] DRC-OTP-0141-0009, the Defence sought the filing of this document. See ICC-01/04-01/06-2942-Conf.
[333] T-113-CONF-FRA-CT, p. 31 lines 4-8; T-114-CONF-FRA-CT, p. 54, line 16.
[334] ICC-01/04-01/06-2773-Conf-tENG, paras. 456-458.

279. In light of such factors, the Appeals Chamber is moved to determine that no reasonable trier of fact could find that witness credible.

- *P-0012's testimony*

280. The Chamber erred in holding against Mr Lubanga P-0012's statements to the effect that he saw child soldiers, many of whom were aged less than 15 years, in the armed groups in Bunia in 2003. This finding arose from a misinterpretation of the witness's statements,[335] which instead mentioned that he saw numerous child soldiers there, "[TRANSLATION] even some under the age of 15]".[336] Furthermore, this allegation of a general nature concerning the armed groups as a whole does not establish that he actually saw children in the FPLC, and that had he done so, they were under the age of 15 years. Moreover, on close inspection his testimony shows that the witness was essentially referring to children in PUSIC's ranks.[337]

281. As regards the child who purportedly saw P-0012 in Bunia in May 2003, it has not been established, contrary to the Chamber's findings,[338] that he in particular belonged to the FPLC[339] and that he was indeed under the age of 15 years.[340] The Chamber manifestly misjudged P-0012's testimony inasmuch as (1) the witness had recognised that the child was in "[TRANSLATION] ordinary clothing, wearing print fabric",[341] whereas the FPLC soldiers wore military uniform, and (2) the witness's statements[342] clearly revealed that this child, allowing that such a child existed, belonged to the troops of commander

[335] Judgment, para. 826.
[336] T-168-CONF-FRA-CT, p. 78, line 7.
[337] T-168-CONF-FRA-CT, p. 81, lines 16-20.
[338] Judgment, paras. 827-830.
[339] The witness's response does not provide any information on the identity of the commander who allegedly led the child at issue. T-168-CONF-FRA-CT, p. 82, lines 1-22.
[340] The witness's response on the subject was: "[TRANSLATION] I don't even think that he was twelve, eh!". T-168-CONF-FRA-CT, p. 79, lines 15-16.
[341] ICC-01/04-01/06-2773-Conf-tENG, para. 554; T-168-CONF-FRA-CT, p. 79, p. 80, lines 9-14.
[342] This is apparent from a combined analysis of the statements contained in T-168-CONF-FRA-CT, p. 82, lines 1-22 and the cross-examination T-169-CONF-FRA-CT, p. 48, line 4 to p. 50, line 21.

Tchaligonza, who had defected from the UPC since 6 March 2003 to join Chief Kahwa's PUSIC, of which he became Chief of Staff.

282. The Chamber found that "it was not uncommon for soldiers, including from the FPLC, to wear civilian clothing", failing to specify the factual material on which it relied to so determine.[343] Yet the evidence in the record shows, on the contrary, that the UPC soldiers wore "*tache-tache* [camouflage]" military uniforms.[344]

283. Furthermore, the Chamber could not disregard that P-0012 did his utmost to deny that Commander Tchaligonza belonged to PUSIC,[345] the party of which the witness was a member, in order to ascribe the child to the FPLC, whereas he himself had told the Office of the Prosecutor, prior to testifying, that in May 2003 he had been able to confirm that Tchaligonza theoretically belonged to PUSIC.[346] Indeed, the evidence in the record attests to commander Tchaligonza's defection on 6 March 2003 and his PUSIC membership,[347] as well as the impossibility in May 2003 of ascertaining the affiliation of troops present in Bunia.[348] In particular, D-0019 stated that the Ugandan troops instigated and organised the armed mobilisation of the civilian population in Bunia, across all age groups, on the eve of their departure from the town, thereby swelling the ranks of armed youths, including minors, in Bunia and its environs.[349]

284. In light of that evidence, no reasonable trier of fact could find P-0012's testimony on the matter reliable.

---

[343] Judgment, para. 830.
[344] See D-0019's testimony: T-341-FRA-ET, p. 32 lines 13-15; Furthermore, this point is uncontested by the Prosecutor: ICC-01/04-01/06-2748-Conf, paras. 27, 42, 207 and 347.
[345] T-169-CONF-CT, p. 49, lines 9 *et seq*.
[346] T-169-CONF-CT, p. 50, lines 1 *et seq*.
[347] For example: P-0055: T-178-CONF-FRA-CT, p. 61, lines 6-20.
[348] D-0019: T-341-FRA-ET, p. 32, lines 13-25; D-0011: T-347-CONF-FRA-ET, p. 13, line 20 to p. 14, line 24; D-0037: T-349-CONF-FRA-ET, p. 14, lines 4-23.
[349] T-341-FRA-ET, p. 33, line 5, to p. 35, line 4. See also D-0011: T-347-CONF-FRA-ET, p. 13, line 20, to p. 14, line 24.

- *Evidence of P-0046*

285. As for Witness P-0046, the Defence refers to its observations on the prejudicial nature of her statements[350] and submits that her evidence, which in this matter was entirely based on hearsay, cannot be accepted as demonstrating participation in hostilities by children under the age of 15 years within the FPLC during the material time.

286. In particular, the statements by P-0046 relied on by the Chamber at paragraph 833 of the Judgment are grounded in the document "*Histoires individuelles*",[351] which the Chamber expressly excluded in light of the prejudice caused to the Defence because "[it is] unable […] to investigate the circumstances or the accuracy of any of the individual case histories".[352]

287. As already shown, no probative value should be attached to the accounts collected by P-0046.[353]

288. Hence, the Chamber erred in finding on the basis of the evidence examined above that children under the age of 15 years were used by the FPLC to participate in hostilities during the material time.

2.3 Military guards

289. The Chamber erred in fact when it considered that the evidence of Witnesses P-0016 and P-0024 proved beyond reasonable doubt the presence of children under the age of 15 years amongst the military guards.

290. This error resulted largely from the credibility wrongly attached by the Chamber to the inaccurate statements of Witness P-0024. The Chamber was silent on the witness's resentment of the UPC/RP, argued by the Defence,

[350] *Supra,* paras. 203-204.
[351] DRC-OTP-0152-0274.
[352] T-205-CONF-ENG CT, p. 2, lines 13 *et seq.* The document is referred to as Annex 8.
[353] *Supra*, paras. 203-204.

which was such as to have a considerable influence on his testimony.[354] Moreover, as argued above, it is unfair to accept Witness P-0024's visual assessment of the age of unidentified individuals in respect of whom the Prosecution did not disclose any information to the Defence.[355]

291. The general statements of Witness P-0016 on the deployment of "recruits",[356] regardless of age, after their training at Mandro camp does not specifically pertain to children under the age of 15 years, contrary to the findings of the Chamber, and therefore in no wise corroborates P-0024's testimony.

292. In light of the foregoing, the uncorroborated evidence of P-0024 does not constitute proof beyond reasonable doubt that children under the age of 15 years actively participated in hostilities.

2.4 Bodyguards and escorts of military commanders and other high-ranking UPC/FPLC officials

293. On the basis of the evidence of P-0014, P-0017, P-0055 and P-0041, as well as the video excerpt filmed on 14 January 2003 near Lipri, the Chamber found that a significant number of children under the age of 15 were used by the UPC/FPLC as escorts and bodyguards for the main staff and the commanders between September 2002 and 13 August 2003.

294. This conclusion largely resulted from the Chamber's misappraisal of the Prosecution evidence.

295. Firstly, the Chamber relied on video excerpts and certain testimony in concluding that, between September 2003 and 13 August 2003, a significant number of children under the age of 15 years were used by the UPC/FPLC as escorts and bodyguards for the main staff and the commanders.

---

[354] ICC-01/04-01/06-2773-Conf, para. 586.
[355] P-0024 spoke of "*kadogos*" without providing any identifying information. See: T-170-CONF-FRA-CT, p. 75, lines 8-16.
[356] Use of the term "recruits" but never the phrase "children under the age of 15 years": T-189-CONF-FRA-CT, p. 55, lines 15-16; p. 58, lines 16-19.

296. However, as already shown, the Chamber erred in holding that it could reasonably find on the basis of the images in video excerpt EVD-OTP-00572 that the individuals appearing therein were under the age of 15 years.[357]

297. Secondly, the Defence submits that, contrary to the Chamber's findings, the evidence of P-0055, P-0014, P-0017, P-0041 and P-0038 is insufficient to establish that a significant number of children under the age of 15 years were used as bodyguards.

298. The Chamber accepted that the 12 bodyguards assigned to P-0041 were between 13 or 14 and 16 years of age and that none of them had reached the fourth year of primary school.[358] This phrasing does not faithfully reflect his statements: P-0041 stated, insisting that he was not at all sure in this respect ("[TRANSLATION] I do not even know."[359]), that one or two of the guards may have been aged 13 or 14 years, and others were aged 16 years. He also stated that none of the guards had "reached the third year of secondary school".

299. Furthermore, in respect of the information taken into account at paragraph 840, it should be noted that it is not possible to tell from P-0014's statements whether the information provided by the witness came from his personal assessment of the age of the witness and whether, when giving consent, Mr Lubanga was aware of the actual age of the "child" alleged to have served as a bodyguard for his own father. The doubt raised by these two issues should have been construed in the Appellant's favour.

300. Similarly, the evidence of P-0017 cannot found any findings because, although he estimated that the children he claimed to have seen were under the age of 15 years, he admitted that he could not state their exact ages.[360]

---

[357] Defence submissions on video excerpt EVD-OTP-00572*: Supra*, Part II.
[358] Judgment, para. 846.
[359] T-125-CONF-FRA-CT, p. 53, lines 20-25.
[360] T-158-CONF-FRA-CT, p. 17, line 16.

301. Moreover, the Chamber's erroneous finding that according to P-0038, "General Kisembo, Bosco Ntaganda and Chief Kahwa each had children under the age of 15 working as their bodyguards and escorts"[361] is the result of a mistranslation of the witness's particularly ambiguous statements.[362] According to the French version, General Kisembo's bodyguards had picked up children to be in "[TRANSLATION] his court". What is more, the witness gave no information concerning Chief Kahwa's or Bosco Ntaganda's bodyguards.

302. The Defence also refers to its observations on the Chamber's erroneous findings regarding video excerpt EVD-OTP-00572.[363]

303. Finally, the Chamber disregarded the evidence of D-0019, stating: "D-0019's suggestion that the bodyguards who arrived at Mamedi were under the age of 18, but not necessarily under the age of 15, coupled with the testimony of P-0017, is insufficient to contradict the statements[364] that commanders used bodyguards under the age of 15."[365] However, P-0017 and D-0019 were the only witnesses to state that they had personally experienced the events in question. Their differing evidence relied entirely on a subjective assessment of the age of the bodyguards made on the basis of their physical appearance.[366] No clear findings can thus be made from this contradictory evidence.

---

[361] Judgment, para. 852.

[362] The French translation of the Witness's statements in Swahili reads: "*Oui, dans les brigades, les gardes du corps du général Kisembo, quand nous avons fui les Ougandais, dans les routes vers Watsa, il avait récupéré plus ou moins je peux dire trente six ou plus- je n'ai pas un nombre exact de ces enfants- il les avait récupérés pour être dans sa cour*" (T-113-CONF-FRA-CT, p. 36, lines 21-24), whereas the English translation reads: "Yes. In the brigades, the bodyguards of General Kisembo, when we had fled the Ugandans, on the roads towards Watsa, he had gathered three or six or more of those children. I don't know the exact number. He had gathered them to be in his corps" (T-113-CONF-ENG-CT, p. 37, lines 2-5).

[363] Judgment, para. 854.

[364] There is a discrepancy between the French and English versions of the Judgment on this point.

[365] Judgment, para. 844.

[366] P-0017: T-154-CONF-FRA-CT, p. 40, line 7: "[TRANSLATION] I would say", p. 40, lines 11 and 13: "[TRANSLATION] I think", p. 80, line 12, "[TRANSLATION] I would say"; D-0019: T-341-FRA-ET, p. 12, lines 10-13: "[TRANSLATION] There were some people who were… some guards who were small, but does that mean I must say they were children or minors? Well, not necessarily […]"; T-345-FRA-ET, p. 5, lines 15-16: "[TRANSLATION] Well, I would say it is possible they were under 18, although not necessarily under 15."

2.5 Thomas Lubanga's bodyguards

304. The Chamber found on the basis of the testimonies of P-0030, P-0055, P-0016 and P-0041 and on a number of images from three video excerpts[367] that Thomas Lubanga's bodyguards included a significant number of children under the age of 15 years.[368] None of this evidence supports such a finding.

305. Firstly, the Chamber manifestly erred in fact in determining that the following testimony and video excerpts provided proof of the presence of children under the age of 15 years amongst Thomas Lubanga's bodyguards and escort.

306. It has been demonstrated previously that the Chamber's assessment of individuals' ages on the basis of the video images in question does not support the finding beyond reasonable doubt that the individuals were indeed under the age of 15 years.[369]

307. The Chamber relied on P-0030's testimony that he had noticed children aged nine or ten years in Mr Lubanga's bodyguard, stating that this evidence was corroborated by the video filmed on 24 February 2003, in which an individual appears.[370] However, this individual, Witness D-0040, provided evidence confirming that he was 19 years old at the time.[371] In addition to highlighting the difficulty of assessing a person's age on the basis of video images, D-0040's evidence strongly contradicts P-0030's evidence that there were children under the age of 15 years in the Appellant's bodyguard.

308. Whilst P-0041 stated in general terms that "[t]here were adults, but there were also young persons […]" [emphasis added] in Thomas Lubanga's bodyguard, he did not clearly state, contrary to the findings of the Chamber, that these

[367] EVD-OTP-00574, 01:49:02; EVD-OTP-00571, 02:02:44; EVD-OTP-00574, 00:36:21.
[368] Judgment, para. 869.
[369] *Supra*, paras. 144-188.
[370] Judgment, para. 858.
[371] T-360-CONF-FRA-ET, p. 26, line 28, to p. 27, line 2; p. 27, lines 17-22. *Supra*, para. 162.

"young persons" were under the age of 15 years.[372] Likewise, P-0055 referred simply to "children" or "PMFs", without specifying their ages.[373]

309. Finally, at the urging of the Prosecution and for no apparent reason, P-0016 changed his evidence regarding his assessment of the age of the youngest of the president's bodyguards (from 14 to 13 years).[374] Furthermore, contrary to the findings of the Chamber, this witness did not state how he had arrived at this assessment.[375] There is no indication that his uncorroborated evidence is sufficiently reliable to warrant the Chamber's findings as to the presence of children under the age of 15 years amongst the presidential bodyguard.

310. Secondly, the Chamber unjustifiably disregarded the statements of D-0011 and D-0019.[376] The fact that the statements of these witnesses are contradicted by other evidence does not suffice to disregard them without specifying how their credibility is intrinsically affected.[377] On the contrary; the Chamber should have noted that the evidence of D-0011 and D-0019 is corroborated on this point by exonerating testimony[378] from a former bodyguard of the Appellant which was rejected without justification by the Trial Chamber, without the Defence's being afforded the opportunity to call the individual as a witness (see *supra*, paragraphs 70-75). Furthermore, D-0037, whom the Chamber considered to be credible and reliable, confirmed that there were no children under the age of 15 years in the FPLC.[379]

---

[372] T-125-CONF-FRA-CT, p. 59, lines 3-18.
[373] T-176-CONF-FRA-CT, p.49, lines 6-7, and p. 50, line 1. See Judgment, para. 640, for the Chamber's analysis of the terms "*kadogo*" and "PMF".
[374] T-189-CONF-FRA-CT, p. 30, line 25, and p. 33, line 24, to p. 35, line 11.
[375] The Chamber's findings (Judgment, para. 687) do not relate solely to the individuals whom he claims to have observed at the Mandro camp.
[376] Judgment, para. 869.
[377] See ICTR, *The Prosecutor v. Muvunyi*, Judgment, paras. 146-147.
[378] EVD-D01-00773. The witness confirmed categorically that there were no child soldiers under the age of 15 years in the FPLC or, for that matter, within his "Presidential Guard". See ICC-01/04-01/06-2657, paras. 279-280.
[379] Judgment, paras. 726-727.

2.6 The *kadogo* unit

311. The Chamber's finding that there were children under the age of 15 years in a "*kadogo* unit" established by Chief of Staff Kisembo in Mamedi is grounded in an incorrect assessment of the evidence given by P-0017 and D-0019.

312. Firstly, the Chamber did not provide grounds for its decision to reject the testimony of Witness D-0019; it merely stated that the witness had "demonstrated partiality on this matter during his testimony".[380] And yet, a careful reading of the witness's testimony does not reasonably allow for such a finding.

313. Secondly, the Chamber wrongly found that P-0017's evidence establishes that the members of the *kadogo* unit were involved in military activities. On the contrary, P-0017 stated that these individuals "[TRANSLATION] did not have any duties" and asserted, "[TRANSLATION] I did not see them go on patrol, fetch water or carry out any of the other activities that we were asked to do."[381] These statements were corroborated by D-0019.[382]

2.7 The individuals used for domestic work

314. None of the evidence relied on by the Chamber at paragraphs 878 to 882 provides grounds to conclude that female (or even male) children under the age of 15 years carried out domestic work analogous to active participation in hostilities. Whilst Witness P-0055 did state that some PMFs serving as soldiers had carried out domestic tasks, his evidence clearly demonstrates that "PMF" relates to females without specifically referring to girls under the age of 15 years.[383] Likewise, P-0016 did not give the ages of the girls who he alleged had carried out domestic work.[384]

---

[380] Judgment, para. 877.
[381] T-158-CONF-FRA-CT, p. 22, lines 14-23.
[382] T-345-CONF-FRA-ET, p. 7, lines 14-19.
[383] T-174-CONF-FRA-CT, p. 38, lines 8-10; On this specific issue, the witness gave no indication of the ages of the PMFs: T-178-CONF-FRA-CT, p. 75, lines 4-7; See also Judgment, para. 640.
[384] T-189-CONF-FRA-CT, p. 25, line 25, to p. 26, line 3.

315. For his part, D-0019 stated that he was unable to assess the age of the girl he referred to, saying only that she had been under the age of 18 years: "[TRANSLATION] between 14 and 16 years".[385]

316. In any event, as demonstrated above, the domestic work carried out to assist the Chief of Staff's wife, who was herself a civilian, cannot be regarded as amounting to active participation in hostilities.[386]

2.8 The self-defence forces

317. The Chamber said it accepts that "the evidence of D-0007 demonstrates that some children below the age of 15 were sent to the UPC/FPLC for training and never returned".[387] The Court will note that no trier of fact could reasonably make such a finding on the basis of D-0007's evidence.

318. The witness's evidence in no wise warrants such a finding. On the contrary; the witness explicitly stated that those sent for training with the FPLC had been adults.[388]

319. Moreover, no trier of fact could reasonably dismiss the logical explanation provided by the witness in this regard[389] simply because he or she does not feel that version to be "plausible" without supporting his or her reasoning with concrete evidence from the record.[390] Yet, there is no evidence in the record of the case showing that children under the age of 15 years sent by self-defence groups were indeed admitted into UPC/FPLC training centres.

---

[385] D-0019: T-345-ENG-CT, p. 10, line 17.
[386] *Supra,* para. 261.
[387] Judgment, para. 907 [emphasis added].
[388] T-348-CONF-FRA-ET, p. 33, lines 3-6.
[389] The witness stated, "[TRANSLATION] We took their age into account because … a soldier, you cannot send a child. You have to send someone who knows, is resilient, who can withstand hunger and be able to defend himself and know what to do, because it wasn't just about how to handle a weapon; the training was also physical, I believe." T-348-ET, p. 33, lines 26 *et seq*.
[390] Judgment, para. 902.

320. In any event, there is no evidence showing that those individuals sent by the self-defence groups for training actively participated in hostilities as part of the FPLC.

2.9 The difficult conditions experienced by children in the FPLC

321. The Chamber found that "a number of recruits would have been subjected to a range of punishments during training with the UPC/FPLC, particularly given there is no evidence to suggest they were excluded from this treatment".[391]

322. Contrary to the Chamber's finding, there is no doubt that the incidents reported by P-0016[392] and P-0014[393] took place prior to the material time.

323. Moreover, the Chamber noted that "there is no indication that there was demobilisation in August 2002" and that P-0014's testimony therefore provided proof that certain practices had no doubt continued during the material time. The Defence submits that this finding is highly detrimental to the fairness of the trial; by adopting this approach, the Chamber imposed the onus of rebuttal upon the Accused, in violation of article 67(1)(i). The Chamber cannot find that practices which took place before the material time continued merely because the Defence has not demonstrated the contrary, when there is no evidence to support such a finding.

324. The other evidence relied on by the Chamber, such as the testimony of P-0017, speaks of individuals or "[TRANSLATION] young soldiers", but makes no particular mention of children under the age of 15 years.

325. All of these errors in the Chamber's judgment of the factual information for the establishment of the "active participation" required by article 8(2)(e)(vii)

---

[391] Judgment, para. 889.

[392] P-0016 stated that he had been taken to Mandro two weeks after Lompondo's departure from Bunia and that he remained there for ten days. He stated that the incident had taken place four days before his departure, i.e. on 29 August 2002. T-188-CONF-FRA CT, p. 91, line 13; T-189-CONF-FRA-CT, p. 13, line 2; T-190-CONF-FRA-CT, p. 66, lines 1-2. For Lopondo's departure date of 9 August 2002: EVD-OTP-00386; this information has not been challenged by the Prosecutor, Judgment, para. 1084.

[393] The Chamber noted this at para. 887.

vitiate the impugned decision in that its findings relied heavily upon this factual information.[394]

[394] Judgment, paras. 1213-1223 and 1356.

PART III: GROUNDS OF APPEAL RELATING TO INDIVIDUAL CRIMINAL RESPONSIBILITY

326. The Chamber rightly noted in its sentencing decision that there are no grounds to find that "Mr Lubanga meant to conscript and enlist boys and girls under the age of 15 into the UPC/FPLC and use them to participate actively in hostilities".[395] However, it erred gravely in fact and law when it held in its Judgment convicting the Appellant that the Appellant's individual criminal responsibility had been proven.

I – THE OBJECTIVE REQUIREMENTS FOR LIABILITY

1. Errors of law

1.1 The "critical element of criminality" of the "common plan"

327. According to the impugned decision, to establish the presence of the "critical element of criminality" of the "common plan", it is necessary to identify "the manner that the plan is mirrored in the mental element".[396] To this end, the decision holds that "[…] the agreement on a common plan leads to co-perpetration if its implementation embodies a sufficient risk that, in the ordinary course of events, a crime will be committed".[397]

328. However, the concept of "sufficient risk", which is related to that of "*dolus eventualis*"[398] which was not adopted by the drafters of the Statute,[399] is not consonant with the definition of criminal intent set forth in article 30(2)(b); as highlighted by Pre-Trial Chamber II, the criminal intent required by this provision assumes that the accused is aware that "the occurrence of such

[395] ICC-01/04-01/06-2901, para. 52.
[396] Judgment, para. 985.
[397] Judgment, paras. 984 and 987.
[398] Indeed, the Pre-Trial Chamber, whose view the Trial Chamber echoed in its Judgment, has established clearly that the concept of "risk" is connected to that of "*dolus eventualis*". ICC-01/04-01/06-803-tEN, para. 352; Judgment, para. 1009.
[399] As expressly emphasised by the Chamber: Judgment, para. 1011.

crimes was a virtually certain consequence of the implementation of the common plan".[400]

329. It follows that by relying on the concept of "sufficient risk" to establish the "critical element of criminality" of the common plan necessary for co-perpetration, the Chamber erred in law.

330. This error vitiates the impugned decision insofar as it led the Chamber to convict the Appellant on the basis of his participation in "a common plan […] to build an effective army in order to ensure the UPC/FPLC's political and military control over Ituri"[401] whereas, even allowing that its existence had been proven, this "common plan" could not in and of itself be regarded as being designed to further a criminal purpose within the meaning of article 30(2)(b) of the Statute.

331. As the Defence noted in its closing submissions, "[c]riminal responsibility on the basis of co-perpetration requires evidence of a criminal purpose linking the co-perpetrators.[402] Participation in a 'plan' which in itself is not criminal but merely capable of creating conditions conducive to the commission of criminal acts cannot be regarded as characterising the *actus reus* of criminal co-perpetration."[403]

1.2 The "essential contribution"

332. The Chamber erred in law when it found that the responsibility under article 25(3)(a) does not require personal and direct participation in the crime itself and that merely exercising, "jointly with others, control over the crime" was

[400] ICC-01/04-01/08-424, para. 369 (emphasis added).
[401] Judgment, para. 1136.
[402] Even the theory of extended joint criminal enterprise, appreciably broader than the notion of co- perpetration under article 25(3)(a) and not applicable before the ICC, requires that finding; ICTY, *Prosecutor v. Radislav Krstić*, Judgment, 2 August 2001, para. 616; ICTY, *Prosecutor v. Tihomir Blaškić*, Judgment, 29 July 2004, para. 33 (citing *Prosecutor v. Mitar Vasiljević*, Judgment, 25 February 2004, para. 101: "[…] With regard to the extended form of joint criminal enterprise, what is required is the intention to participate in and further the common criminal purpose of a group.")
[403] ICC-01/04-01/06-2773-Conf-tENG, para. 77.

sufficient to establish the "essential contribution" required for this mode of liability.[404]

333. Firstly, as pointed out by Presiding Judge Fulford in his separate opinion, "[t]he control of the crime theory is unsupported by the text of the Statute".[405] This theory is based merely "on a minority view from the ad hoc tribunals"[406] and appears to have been "imported directly from the German legal system".[407] Consequently, in accepting the responsibility of the Accused on the basis of this form of criminal participation, which is not provided for by the Statute, the Chamber contravened the requirements of articles 21 and 22 as well as, more generally, the principle of legality, and prejudiced the rights of the Accused afforded by article 67(1)(a).

334. Secondly, and also with regard to the responsibility of "those who, in spite of being far away from the scene of the crime, control or dominate its commission because they decide whether and how the offence will be carried out",[408] the Chamber expressly contemplated the responsibility of the persons giving orders, which is specifically and exclusively provided for in article 25(3)(b), or that of superiors provided for in article 28. These forms of responsibility are distinct from those provided for in article 25(3)(a), which exclusively pertains to those who personally and directly "commit" the crime. Accordingly, the Chamber erred in law by holding that those who "decide whether and how the offence will be committed" could be held responsible on the basis of article 25(3)(a), whereas this was only possible on the basis of article 25(3)(b).

335. As a result of this error of law, the Chamber considered the Appellant's leadership position and knowledge of the crimes charged as constituent

[404] Judgment, paras. 1002-1003.
[405] Judgment, Separate Opinion of Judge Fulford, para. 6.
[406] Judgment, Separate Opinion of Judge Fulford, para. 10, footnotes 19 and 20.
[407] Judgment, Separate Opinion of Judge Fulford, para. 10.
[408] Judgment, para. 1003.

elements of this "essential contribution";[409] these elements are essential to the responsibility provided for in article 28 but irrelevant to an assessment of that provided for in article 25(3)(a).

336. Relying on of article 25(3)(a), the Chamber in fact held the Appellant responsible for crimes on the basis of facts exclusively governed by article 25(3)(b) or article 28.[410]

337. This error vitiates the impugned decision, as the Chamber could in no wise find the Accused responsible on the basis of a form of criminal participation other than that expressly set forth in the *Decision on the confirmation of charges*, to wit, responsibility under article 25(3)(a).

338. As the Defence pointed out in its closing submissions,[411] by prosecuting the Accused for a form of responsibility based on indirect participation under article 25(3)(b) or article 28, the impugned decision is antithetical to the requirements of fairness established by article 67(1)(a).

2. Errors of fact

2.1 The common plan

339. The impugned decision is tainted by multiple errors of fact affecting the Chamber's findings on the alleged relationship between the co-perpetrators before and during the material time, the content of the common plan ascribed to them, and the Appellant's role before and during the material time; whilst these errors as a whole necessarily influenced the conviction of the judges, the

[409] Judgment, para. 1221.
[410] Indeed, in its analysis of Mr Lubanga's essential contribution to the common plan, the Chamber in fact sought to assert that the Accused was in a position to give orders (Judgment, paras. 1213, 1218, 1220, 1267 and 1270), which were carried out through an organised chain of command and information (Judgment, paras. 1190, 1197, 1218, 1219, 1220 and 1270), and that he was aware of the presence of children under the age of 15 years in the ranks of the FPLC when he did so (Judgment, paras. 1234, 1236 and 1262).
[411] ICC-01/04-01/06-2773-Conf-tENG, paras. 48-57.

Defence will not examine them systematically in this brief and refers the Appeals Chamber instead to its trial submissions.[412]

340. Beyond these multiple errors of fact, the Appellant's conviction relied on the factually incorrect finding that the "common plan […] to build an effective army in order to ensure the UPC/FPLC's political and military control over Ituri" resulted "in the conscription, enlistment and use of children under the age of 15 to participate actively in hostilities, a consequence which occurred in the ordinary course of events".[413]

341. The Appeals Chamber will note that from the evidence presented at trial, no trier of fact could reasonably consider it to have been established that the "common plan […] to build an effective army" ascribed to the Appellant would necessarily have as its "virtually certain consequences" "the conscription, enlistment and use of children under the age of 15 to participate actively in hostilities […] in the ordinary course of events".[414]

342. Firstly, the Chamber did not specify which evidence, in its view, demonstrates that the formation of this armed force, and the recruitment policy which it would have required, would necessarily "in the ordinary course of events" have resulted in the commission of the crimes charged; consequently, the Appeals Chamber can only rule that the Chamber's conclusion that a "critical element of criminality" existed affecting the "common plan" does not rely on any factual finding.

343. Indeed, as the Defence pointed out in its closing submissions,[415] the creation of an armed force, which was legitimate in the circumstances, cannot in and of itself be regarded as an operation with the "virtually certain consequence" that crimes would be committed; the Chamber did not note any specific

[412] ICC-01/04-01/06-2773-Conf-tENG, paras. 771-801.
[413] Judgment, para. 1136.
[414] Judgment, para. 1136.
[415] ICC-01/04-01/06-2773-Conf-tENG, paras. 767-770 and 867-889.

circumstance showing that the recruitment operations under the "common plan" could not have failed to result in the commission of the crimes charged. On the contrary, all of the evidence of individuals alleging that they were conscripted as part of the recruitment operations in schools was disregarded for lack of credibility.[416] Absent such circumstances, no trier of fact could reasonably consider that the execution of a "common plan" of this kind would necessarily have led to the commission of the crimes charged.

344. Secondly, this finding is all the less tenable as the evidence shows that, as part of the "common plan" they are alleged to have created, the Appellant and some of those presented as his "co-perpetrators" ordered measures to obstruct or end the crimes charged.[417]

345. This error of fact vitiates the impugned decision insofar as it leaches of any factual basis the allegation that the "common plan" to which the Appellant purportedly contributed contained a "critical element of criminality";[418] it thus invalidates any conviction on the basis of co-perpetration.

2.2 The "essential contribution" to the commission of the crimes

2.2.1 "Thomas Lubanga's role in the UPC"

– *Irrelevance of the factual evidence relied on by the Chamber*

346. The Chamber committed a manifest misappraisal equal to a serious error of fact by grounding its findings regarding the existence of an "essential contribution" on factual considerations in respect of "Thomas Lubanga's role in the UPC";[419] these facts, proven or not, which claim to establish that he had command responsibility and knowledge of the crimes charged, are irrelevant to an assessment of the existence of a positive, personal and direct "essential

[416] The evidence of Witnesses P-0007, P-0008, P-0157, P-0213, P-0297 and P-0298 was all judged by the Chamber to lack credibility: see Judgment, paras. 247 (P-0007 and P-0008), 473 (P-0157), 406 (P-0213), 429 (P-0297), and 441 (P-0298).
[417] See, *infra*, paras. 396-408.
[418] Judgment, para. 984.
[419] Judgment, paras. 1141-1223.

contribution" to the commission of the crimes; as previously stated, the Appellant was not prosecuted either for his supposed capacity to give orders (article 25(3)(b)), or his supposed exercise of command responsibility with effective control over the perpetrators or accomplices to the crimes charged (article 28).

347. Even allowing that it has been demonstrated, the factual information relied on by the Chamber to describe the leadership or coordinating role ascribed to the Appellant does not make it possible to establish the "essential contribution" required by article 25(3)(a) because it does not provide proof of positive, personal and direct participation in the commission of the crimes charged. Hence, the Chamber's factual findings on these issues are irrelevant.[420]

348. The same is true of the factual considerations in respect of the role ascribed to the Appellant in providing logistical support and supplies;[421] the fact that the Appellant played a part in these areas within the organisation of which he was the president does not justify any findings regarding his specific involvement in the commission (within the meaning of article 25(3)(a)) of the crimes charged.

349. This manifest misappraisal of the factual elements which may establish the "essential contribution" required by article 25(3)(a) vitiates the impugned decision because those factual elements were largely determinative of the Chamber's ultimate findings.[422]

– *Errors of fact*

350. Firstly, the Chamber erred in fact by finding that the Appellant played an essential part in decision-making affecting the army and military operations.[423]

[420] ICC-01/04-01/08-2773-Conf-tENG, paras. 818-820.
[421] Judgment, para. 1270.
[422] Judgment, paras. 1213-1223 and 1356.
[423] Judgment, paras. 1213-1223.

351. This error largely arises from the credence wrongly given by the Chamber to the inaccurate statements of Witness P-0014. Indeed, although it highlighted that this witness was not a member of the UPC[424] and was rarely in Ituri during the period of the charges,[425] and that the majority of the information in his account came from scattered sources and not his own personal experience,[426] the Chamber considered his evidence to have been "credible and reliable".[427] And yet, the mere fact that the witness had distinguished "clearly between the events he had witnessed and those that were reported to him"[428] is wholly insufficient to appraise the credibility and reliability of his statements, in particular in light of the patent inconsistencies in his evidence which emerged over the course of his testimony.[429]

352. Thus, the Chamber dismissed the direct evidence presented by [REDACTED] of the FPLC [REDACTED], relying essentially on hearsay. Contrary to the Chamber's findings, Witnesses P-0055 and P-0016 confirmed that the Appellant did not participate in organising or carrying out military operations; at most he merely stayed informed of them and authorised, where necessary, the use of certain resources.[430] This is equally clear from the statements of other Prosecution witnesses.[431]

---

[424] Judgment, para. 1058.
[425] Judgment, para. 699
[426] Judgment, para. 702; see T-179-CONF-ENG-CT, p. 3, lines 9-12, in which the Chamber itself recalled that the Prosecutor's questions regarding this witness should not bear on "something which he or she has no personal knowledge of".
[427] Judgment, para. 706.
[428] Judgment, para. 706.
[429] See ICC-01/04-01/06-2773-Conf-tENG, paras. 562-578.
[430] P-0016: T-190-CONF-FRA-CT, p. 9, lines 12-17, and P-0055: T-178-CONF-FRA-CT, p. 60, line 19, to p. 61, line 4.
[431] For example: T-160-CONF-FRA-CT, p. 43, line 24, to p. 44, line 9, and p. 45, lines 7-19 (P-0017). The Chamber was thus wrong to consider that the evidence of P-0016 on this issue was "improbable when compared with other witnesses on this issue" (Judgment, para. 1150), as the lone piece of evidence – hearsay – provided by P-0014 could not seriously be considered sufficient to counter the evidence of P-0016 on this issue.

353. Secondly, the Chamber erred in fact by finding that the Appellant had exercised effective control, within a hierarchical structure, over the entirety of the organisation of which he was the president.[432]

354. As the Defence stated in its closing submissions,[433] there is a wealth of evidence demonstrating that in recruitment, the training of recruits and military operations, the military authorities in charge of these areas possessed, beyond simple functional autonomy, actual authority which they were not at all reticent in exercising, where necessary in contradiction to the instructions of the Appellant himself.

355. These errors of fact vitiate the impugned decision in that they were largely determinative of the Chamber's findings.

2.2.2 "Thomas Lubanga's individual contribution"

356. The Chamber committed serious errors of fact in its appraisal of "Thomas Lubanga's individual contribution"[434] to the commission of the crimes charged.

357. Firstly, the Chamber grounded its finding of the Appellant's "personal involvement in the recruitment process" on the statements of Witnesses P-0055, P-0046 and D-0011;[435] none of these statements supports such a finding.

– *Evidence of P-0055*

358. The Chamber found that the evidence of P-0055 demonstrates the Appellant's "personal involvement in the recruitment process".[436]

[432] Judgment, paras. 1213-1223.
[433] ICC-01/04-01/06-2773-Conf-tENG, paras. 811-817.
[434] Judgment, paras. 1224-1262.
[435] Judgment, para. 1227.
[436] Judgment, para. 1227.

359. The Appeals Chamber will note that no trier of fact could reasonably attach such significance and scope to this evidence.

360. The witness merely stated, "[TRANSLATION] [a]nd the president, who was following this, added that they were often trying to convince people to make youngsters available and to provide food, but they didn't want to."[437]

361. These statements, which convey a vague, general impression of efforts to elicit support from the population, in no way identify the initiators of these efforts ("they") and in no wise support the finding that the Appellant himself was personally involved; what is more, even if it were established that the Appellant had been involved in encouraging the civilian population to support the armed forces intended to defend them, this cannot be equated to personal involvement in the recruitment operations themselves.

– *Evidence of P-0046*

362. The Chamber relied on the account of P-0046 "concerning the child abducted in Mongbwalu" to find that "Thomas Lubanga was actively involved in the exercise of finding recruits";[438] no trier of fact could reasonably consider that this uncorroborated, hearsay evidence could legitimately support such a finding.

363. Firstly, no other evidence suggests that the Appellant himself enrolled any recruits, of any age. On the contrary, numerous Prosecution and Defence witnesses testified that he was not involved in this activity.[439]

---

[437] T-176-CONF-FRA-CT, p. 22, lines 5-7.

[438] Judgment, para. 1234.

[439] As stated by P-0016, the Accused was not a soldier and, therefore, was not, *a fortiori*, responsible for recruitment: T-190-CONF-FRA-CT, p. 9 line 15, to p. 10, line 2; this is corroborated by the evidence of D-0019: T-341-FRA-ET, p. 10, lines 12-16, and T-345-FRA-RT, p. 22, lines 9-12; D-0037: T-349-FRA-ET, p. 54, line 27, to p. 55, line 9; P-0055 T-175-CONF-FRA-CT, p. 11, lines 9-15; P-0017: T-160-CONF-FRA-CT, p. 43, line 15, to p. 45, line 19, and p. 48, lines 16-24.

364. Secondly, P-0046 confirmed that the account she had collected from this child had never been verified;[440] such hearsay evidence cannot form a sufficiently reliable basis for such an important finding.

365. Finally, attaching any probative value whatsoever to this part of P-0046's testimony is seriously detrimental to the fairness of the trial. Whilst this child's identity is known to the witness, the Chamber did not authorise its disclosure to the Defence,[441] thereby denying the Defence the opportunity to conduct any investigations in respect of this individual. Hence, the Chamber should have declared this part of P-0046's evidence inadmissible, or at the very least not relied on it in support of its findings.

366. For all these reasons, the Chamber manifestly erred in fact by finding that this testimony provided evidence of the Appellant's active, personal involvement in the exercise of finding recruits.

– *Evidence of D-0011*

367. The Chamber noted "[t]he statement of his personal secretary, D-0011 that in February 2003 the accused would have had an interest in mobilising troops, rather than demobilising them, supports the conclusion that the accused was informed about, and actively influenced, the decisions on recruitment."[442]

368. In contrast, the Appeals Chamber will note that the witness's statements in no wise support such a conclusion; the witness merely acquiesced, *in abstracto*, to the suggestion that the renewed attacks in February 2003 would be more inclined to lead to mobilisation of troops than to demobilisation. None of

[440] T-208-CONF-FRA-ET, p. 30, line 7, and p. 31, lines 23-24.
[441] P-0046 referred to a statement by an individual from the document entitled "*Histoires individuelles*". The Chamber declined to admit this document as evidence because, as the identity of the "children" has been redacted, the Defence is unable to investigate "the circumstances or the accuracy of any of the individual case histories": T-205-CONF-ENG-CT, p. 2, line 19, to p. 3, line 19. (The document is referred to as Annex 8).
[442] Judgment, para. 1234.

D-0011's statements support the conclusion that "the accused was informed about, and actively influenced, the decisions on recruitment".[443]

369. Consequently, no trier of fact could reasonably rely on this evidence to conclude that the Appellant was personally involved in the exercise of recruitment and thereby made an "essential contribution" to the crimes charged.

370. There is no evidence to suggest that the Appellant personally contributed to the crime of "conscription" through the forced enlistment of children under the age of 15 years or encouraged the commission of this crime or indeed that he was personally informed about it; the same is true of the participation of children under the age of 15 years in hostilities.

371. Secondly, the Chamber made a manifest misappraisal analogous to an error of fact by finding that the Appellant's visits to the training camps, whether or not they were accompanied by speeches,[444] constitute an "essential contribution" to the commission of the crimes charged.[445]

372. Even if established as described by the witnesses referred to by the Chamber, these visits can in no wise be regarded as constituting active, direct involvement on the part of the Accused in the commission of the crimes or as potentially falling within the ambit of article 25(3)(a).

373. As for the crime of enlistment, it is noteworthy that the Chamber described the Appellant's visits and speeches to recruits and the civilian population as encouragement or exhortations rather than as positive recruitment activities;[446] yet such acts only fall within the ambit of article 25(3)(b) and do not correspond to the concept of "commission" under article 25(3)(a). Clearly, then, if established, these visits and speeches could have had only a negligible

[443] T-347-CONF-FRA-ET, p. 52, lines 17-28.
[444] Judgment, paras. 1236-1246.
[445] Judgment, para. 1266.
[446] Judgment, paras. 1266 and 1270.

effect *a posteriori* on the enlistment of recruits; they can in no wise constitute an "essential contribution" to the crime, that is, a contribution absent which the crime could not have been committed.[447]

374. Moreover, as previously stated, the Chamber erred in fact by accepting as being established beyond reasonable doubt that children under the age of 15 years were amongst the recruits visited by the Appellant.[448]

375. As for the other crimes charged, there is no evidence to suggest that during these visits the Appellant personally contributed to the crime of "conscription" or encouraged its commission, or even that he was personally informed about it; the same is true of the participation of children under the age of 15 years in hostilities.

376. Consequently, no trier of fact could reasonably rely on these visits and speeches to conclude that the Appellant made an "essential contribution" to the crimes charged. On the contrary, it is clear from the evidence presented at trial that both the design and the execution of recruitment operations were the exclusive responsibility of the military authorities;[449] these recruitment operations were allegedly carried out in identical circumstances, even when the "contributions" ascribed to the Appellant (if established) did not exist.

377. Thirdly, the Chamber is satisfied that the Appellant possessed bodyguards under the age of 15 years and that soldiers close to him were clearly under the age of 15 years,[450] and it appears to consider that these facts constitute evidence of an "essential contribution" on the part of the Appellant to the crimes charged.[451]

---

[447] ICC-01/04-01/06-803-tEN, para. 347, cited in the Judgment, para.989.
[448] See *supra*, Part II.
[449] ICC-01/04-01/06-2773-Conf-tENG, paras. 834, 838 and 840.
[450] Judgment, paras. 1247-1262.
[451] Judgment, para. 1270.

378. However, as shown above, the Chamber erred in fact by accepting as established beyond reasonable doubt that there were children under the age of 15 years amongstst the bodyguards and soldiers close to Mr Lubanga.[452]

379. Thus, the Trial Chamber manifestly erred in considering that the objective criteria entailing Mr Thomas Lubanga's responsibility for the crimes charged were met.

II. THE MENTAL ELEMENT

1. Error of law

380. In its decision, the Chamber found as follows: "In the view of the Majority of the Chamber, the '*awareness that a consequence will occur in the ordinary course of events*' means that the participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence will occur in the future. This prognosis involves consideration of the concepts of 'possibility' and 'probability', which are inherent to the notions of 'risk' and 'danger'."[453]

381. By relying on the concepts of "risk", "probability" and "possibility" to characterise criminal intent within the meaning of article 30(2)(b), the Chamber erred in law.

382. Firstly, this finding contradicts the following statement by the Chamber: "The drafting history of the Statute suggests that the notion of *dolus eventualis*, along with the concept of recklessness, was deliberately excluded from the framework of the Statute […]. The plain language of the Statute, and most particularly the use of the words 'will occur' in Article 30(2)(b) as opposed to 'may occur', excludes the concept of *dolus eventualis*."[454]

383. Secondly, as demonstrated by Pre-Trial Chamber II in its decision on the confirmation of charges in *Bemba*, "the suspect could not be said to have

[452] See *supra*, paras. 304-310.
[453] Judgment, para. 1012.
[454] Judgment, para. 1011.

intended to commit any of the crimes charged, unless the evidence shows that he was at least aware that, in the ordinary course of events, the occurrence of such crimes was a virtually certain consequence of the implementation of the common plan".[455]

384. By equating awareness that a consequence will occur "in the ordinary course of events" to awareness that a risk exists, that is, a "possibility" or a "probability", that this consequence may occur, the Chamber, applying the concept of "*dolus eventualis*", adopted an excessively broad interpretation of article 30 and thereby erred in law.

385. This error invalidates the conviction against the Appellant, as the Chamber accepted his individual criminal responsibility on the basis of this erroneously broad interpretation of article 30(2)(b).

2. Errors of fact

2.1 The crime of enlistment

386. The Chamber's findings on the existence of criminal intent are based, firstly, on the proposition that the Accused was aware that the actions carried out by him and his organisation had effectively resulted, "in the ordinary course of events", in the enlistment and conscription of the children under the age of 15 years[456] and, secondly, on the proposition that "the behaviour of the accused was wholly incompatible with a genuine intention to avoid recruiting children into, or to demobilise children from, the FPLC".[457]

387. Both of these propositions are factually erroneous and vitiate the impugned decision.

[455] ICC-01/05-01/08-424, para. 369 [emphasis added].
[456] Judgment, para. 1347.
[457] Judgment, para. 1335.

2.1.1 Awareness of the enlistment of children under the age of 15 years "in the ordinary course of events"

388. Firstly, the Chamber's finding on the mental element is largely based on the proposition that the Appellant was aware of the enlistment of children under the age of 15 years.

389. However, even if the presence of recruits under the age of 15 years were proven, there is no evidence to establish that the Appellant was personally aware of this. The extreme uncertainty of an evaluation of age based on the physical appearance of individuals, which the Chamber itself highlighted,[458] should have led it to conclude, in the Appellant's favour, that there was "reasonable doubt" as to whether he was indeed aware of the presence of such recruits. Accordingly, the Appellant's awareness that such a situation existed was not proven beyond reasonable doubt. The proposition that the Appellant "was aware that the FPLC was recruiting and using child soldiers who were clearly below the age of 15 […]"[459] therefore constitutes an error of fact invalidating his conviction.

390. Secondly, no trier of fact could reasonably consider that the Appellant was aware that his activities during the period of the charges would necessarily result, "in the ordinary course of events", in the enlistment of children under the age of 15 years.

391. It cannot generally be held that the act of creating an armed force and using it in an armed conflict will of itself have the "virtually certain consequence" of the enlistment of children under the age of 15 years; this proposition requires the demonstration of specific circumstances.

392. In the case at bar, the Chamber did not rely on any evidence establishing the existence of specific circumstances known to the Appellant as a result of

[458] Judgment, paras. 643 and 682.
[459] Judgment, para. 1278.

which, "in the ordinary course of events", the military recruitment operations carried out would necessarily lead to the enlistment of children under the age of 15 years. On the contrary; as highlighted above, the few testimonies alleging that children were abducted from schools were disregarded outright by the Chamber as lacking in credibility;[460] therefore, there is no evidence to establish that the Appellant was aware of such circumstances.

393. The Chamber's statements that the Appellant was involved in persuading the population to make "young people" available to the army and that he had close relations with the military leaders involved in the enlistment and training of recruits,[461] whether founded or not, do not provide a basis on which to establish that he personally encouraged the enlistment of children under the age of 15 years.

394. Conversely, evidence was brought to show that the age of the recruits had to be verified at the time of enlistment[462] and that decisions had been transmitted down the military hierarchy prohibiting the enlistment of minors;[463] these measures sought to combat the enlistment of children under the age of 15 years.

395. Consequently, far from being the "virtually certain consequence" of the recruitment operations, the enlistment of children under the age of 15 years could only have resulted from specific, deliberate actions committed in violation of the orders issued by the Appellant. Therefore, by finding that the Appellant's activities within the organisation of which he was the president must necessarily, "in the ordinary course of events", have led to the enlistment of children under the age of 15 years into the FPLC, the Chamber committed an error of fact invalidating the impugned decision.

---

[460] *Supra*, footnote 417.
[461] Judgment, para. 1277.
[462] P-0055, T-175-CONF-FRA-CT, p. 82, lines 3-11.
[463] *Infra*, paras. 396-408.

2.1.2 The Appellant's "genuine intention" to prohibit the enlistment of minors and arrange their demobilisation

396. The Chamber erred in fact by considering that the Defence evidence regarding the ordering and implementation of measures prohibiting the enlistment of minors and arranging their demobilisation did not establish the Appellant's genuine intention to obstruct or end the crimes charged.

397. The Appeals Chamber will note that none of the Chamber's reasoning supports this conclusion.

398. Firstly, the proposition that these prohibition and demobilisation measures were imposed in response to pressure from MONUC and NGOs is irrelevant; whether or not it is founded, it is insufficient to deny the genuineness of the measures. The fact that NGOs or MONUC may have pressed the civil or military authorities, respectively, to demobilise minors does not mean it can be concluded that the subsequent measures were necessarily insincere or deliberately ineffective.

399. Secondly, the allegation[464] that the decision to make public all the measures and the documents supporting them was, in the Prosecution's words, a "sham" is unfounded; of the nine documents testifying to the prohibition on enlisting minors and to the measures implemented to demobilise them,[465] only two[466] were made public when they were originally prepared; the other seven remained confidential until they were adduced at trial.[467] Contrary to the Chamber's assessment, the existence of the documents that remained confidential, which provide unequivocal evidence of the Appellant's wish to demobilise minors, can only be explained by his genuine desire to ensure that this demobilisation was implemented.

---

[464] Judgment, para. 1303.
[465] ICC-01/04-01/06-2773-Conf-tENG, paras. 890-957.
[466] Letter dated 21 October 2002, EVD-OTP-00696, see Judgment, para. 1296; decree of 1 June 2003, EVD-OTP-00728. See Judgment, para. 1332.
[467] ICC-01/04-01/06-2773-Conf-tENG, paras. 900, 903, 915 and 945.

400. The Chamber particularly neglected to make findings from the report prepared on 16 June 2003 by Witness D-0037 demonstrating unequivocally the Appellant's desire, which he conveyed to the military authorities, to implement the demobilisation of minors;[468] the probative value of this document, which was corroborated by handwritten notes[469] tendered into the record by the Prosecution, is incontestable, particularly since the fact that it was confidential is in no doubt. The same is true of the report of the 25 February 2003 meeting between the Appellant and representatives of the self-defence committees, which demonstrates unequivocally the Appellant's desire to end the committees' use of children.[470] By making no findings in regard to these documents, whose probative value is not in dispute, the Chamber wrongly neglected essential evidence demonstrating the absence of any criminal intent.

401. Thirdly, the Defence evidence is not accurately reflected by the allegation: "[h]owever, the effective implementation of this order, as well as the other demobilisation instructions, has not been demonstrated, even on a *prima facie* basis".[471] Defence witnesses D-0011, D-0019 and D-0007 described the demobilisation programme in detail;[472] Prosecution witnesses P-0046,[473] P-0024,[474] P-0041[475] and P-0031[476] also acknowledged that demobilisation

---

[468] EVD-D01-01098. Judgment, para. 1331. See also ICC-01/04-01/06-2773-Conf-tENG, paras. 949-955.
[469] EVD-OTP-00668.
[470] "*Compte-rendu de la rencontre avec le Président de l'UPC/RP*" [Report of the meeting with the president of the UPC/RP], EVD-D01-01095; See also the evidence of Witness D-0007: T-348-FRA-ET, p. 23, line 26, to p. 26, line 15.
[471] Judgment, para. 1321.
[472] D-0019: T-340-FRA-ET, p. 64, line 12, to p. 66, line 19; T-341-FRA-ET, p. 6, line 21, to p. 8, line 8; p. 31, lines 7-17; and p. 35, lines 6-25; D-0011: T-347-CONF-FRA-ET, p. 16, line 10, and p. 17, line 5; and T-348-CONF-FRA-ET, p. 4, lines 20 *et seq.*; D-0007: T-348-FRA-ET, p. 24, line 20, to p. 26, line 14; p. 35, lines 2-5; p. 50, lines 1-18; and p. 51, lines 6-23; On the programme mentioned in document EVD-OTP-00518: T-346-FRA-ET, p. 38, lines 2-18. See also D-0011: T-347-CONF-FRA-ET, p. 38, line 21, to p. 40, line 5.
[473] EVD-OTP-00494, T-39-FRA-ET, p. 96, lines 1-6; T-206-CONF-FRA-ET, p. 56, line 22, to p. 57, line 15.
[474] T-170-CONF-FRA-CT, p. 52, lines 1-6.
[475] T-125-CONF-FRA-CT, p. 45, line 24, to p. 46, line 3.
[476] P-0031 confirmed that 68 children were demobilised in June 2003: T-200-CONF-FRA-CT, p. 35, lines 7-17.

measures had indeed been taken, although they downplayed them excessively; and there is also documentary evidence confirming that effective demobilisation of minors did occur.[477]

402. In this regard, the Chamber unduly disregarded D-0011's and D-0019's statements about the ordering and implementation of the demobilisation measures;[478] the fact that these witnesses' statements were contradicted by other evidence is insufficient to disregard them without setting out the exact factors intrinsically affecting their credibility.[479]

403. Moreover, and especially, the Trial Chamber itself recognised that the demobilisation orders issued by the Accused had been followed. It cited them expressly when it held that Mr Lubanga "issued orders that were communicated and followed within the UPC/FPLC".[480] The Trial Chamber cannot, then, find to the detriment of the Appellant that the demobilisation measures were not effective without contradicting itself.

404. Fourthly, the allegations of continued enlistment of children under the age of 15 years despite the demobilisation orders[481] and of "lack of cooperation on the part of the UPC/FPLC with the NGOs working within the field of demobilisation and the threats directed at human rights workers who were involved with children's rights",[482] which allegations the Defence has contested,[483] are insufficient to deny any genuine intent on the Appellant's part to carry out demobilisation.

---

[477] EVD-D01-1096, EVD-D01-1097, EVD-D01-1098, page DRC-D01-0003-5902: "[TRANSLATION] With regard to the few child soldiers seen around town, we need to work on them, as you did with the self-defence militias in the field."
[478] Judgment, paras. 1282 and 1299.
[479] See ICTR, *The Prosecutor v. Muvunyi*, Judgment, 29 August 2008, paras. 146-147.
[480] Judgment, para. 1218.
[481] Judgment, paras. 1299 and 1346.
[482] Judgment, para. 1348.
[483] See *supra*, Part II.

405. For one thing, criminal intent must be proved against the Appellant himself, in accordance with the principle of individual criminal responsibility; the Chamber thus erred in grounding its assessment of the mental element on the purported behaviour of others, in this case civilian and military members of the "UPC/FPLC", without establishing that they were acting on the Appellant's express orders.

406. For another, even if established, the continued enlistment of minors despite the steps taken by the Appellant does not of necessity lead to the conclusion that he was not personally motivated by a genuine intention to carry out demobilisation; multiple factors related to the prevailing circumstances and the conditions in which the Appellant was obliged to carry out his duties provide an explanation as to why the measures ordered by him to prohibit enlistment and carry out demobilisation of minors were not fully implemented or were consciously disregarded.

407. For example, Prosecution Witness P-0055 emphasised that some unit commanders acted on their own initiative, without reporting to their superiors, in the enlistment of recruits;[484] Defence Witnesses D-001 and D-0019 described the chaos in which the enlistments were made,[485] rendering any control by the Appellant illusory.

408. Consequently, at the very least, the absence of "genuine intent" to demobilise cannot be considered the sole reasonable explanation possible for the continuation of enlistment; accordingly, the circumstantial evidence taken from the continued enlistment should not have been relied upon by the

[484] See the evidence of P-0055: T-175-CONF-FRA-CT, p. 63, line 13, to p. 64, line 8, and T-176-CONF-FRA-CT, p. 63, line 15, to p. 64, line 25.
[485] D-0011: T-347-CONF-FRA-ET, p. 13, line 20, to p. 14, line 16; D-0019: T-341-FRA-ET, p. 28, lines 2-20.

Chamber to establish the mental element of the crimes charged against the Accused.[486]

409. Fifthly, the Appellant's visit to the Rwampara training camp on 12 February 2003, for the first and only time during his presidency, cannot be interpreted as evidence of his approval of the enlistment of children under the age of 15 years.[487]

410. As already shown, no evidence was brought to show beyond reasonable doubt that children under the age of 15 years were amongst the recruits present during that visit.[488]

411. The Appellant's speech during that visit contained no praise or approval directed towards the military commanders present, and indeed cannot be interpreted as providing evidence of approval or encouragement of the enlistment of minors.

2.2 The crime of conscription

412. The Chamber manifestly erred in fact by finding that the mental element of the crime of conscription had been proven against the Appellant.

413. Firstly, even if such forced enlistments were proven, there is no evidence to show that the Appellant was aware of this fact; likewise, there is no evidence

---

[486] It is established in the jurisprudence of the international tribunals that to rely on circumstantial evidence, the fact-finder must be of the view that it is the only reasonable inference available from the evidence adduced. See, in particular, ICTR, *The Prosecutor v. Bagosora and Nsengiyumva*, Judgement, 14 December 2011, paras. 279-284, 312-316, 318-324, 562; ICTR, *The Prosecutor v. Nchamihigo*, Judgement, 18 March 2010, para. 80; ICTY, *Prosecutor v. Stakić*, Judgement, 22 March 2006, para. 219; ICTY, *Prosecutor v. Karera*, Judgement, 2 February 2009, para. 34; ICTY, *Prosecutor v. Ntagerura* et al., Judgement, 7 July 2006, paras. 306 and 399; ICTY, *Prosecutor v. Krstić*, Judgement, 19 April 2004, para. 41, and *Prosecutor v. Čelebići*, Judgement, 20 February 2001, para. 458. Furthermore, the Trial Chamber must show how each of its inferences was the only reasonable inference it could have made. See *The Prosecutor v. Bagosora* et al., Judgement, 14 December 2011, para. 577; ICTR, *The Prosecutor v. Renzaho*, Judgement, 1 April 2011, para. 319; ICTR, *The Prosecutor v. Nchamihigo*, Judgement, 18 March 2010, para. 83.

[487] Judgment, para. 1333.

[488] See *supra*, Part II.

to suggest that the Appellant encouraged or approved the commission of this crime.

414. Secondly, at no time did the Chamber specify which evidence or considerations it relied on in finding that the crime of conscription was the "virtually certain consequence" ("in the ordinary course of events") of the implementation of the "common plan" ascribed to the Appellant, in the Chamber's words, "to build an effective army in order to ensure the UPC/FPLC's political and military control over Ituri".[489]

415. The fact is that except where the existence of very exceptional specific circumstances is shown, the mere performance of military recruitment operations can in no wise be considered to have the "virtually certain consequence" of the abduction and forced enlistment of children under the age of 15 years. In the case at bar, those circumstances did not exist.

416. Consequently, by finding that the Accused was aware of the commission of the crime of conscription and that this crime was the result, "in the ordinary course of events", of the "common plan to ensure that the UPC/FPLC had an army strong enough to achieve its political and military aims", the Chamber erred in fact.

417. This error of fact vitiates the impugned decision because it is the basis for the Chamber's finding regarding the Appellant's criminal intent in respect of the crime of conscription.

2.3 Use of children under 15 years to participate actively in hostilities

418. The foregoing observations regarding the mental element of the crimes of enlisting and conscripting children under the age of 15 years apply *mutatis mutandis* to the mental element of the crime of using children under the age of 15 years to participate actively in hostilities.

[489] Judgment, para. 1355.

419. Thus, the Chamber manifestly erred in holding that it could make a finding of criminal co-perpetration when no criminal intent or personal contribution to the crimes charged can be ascribed to the Appellant and when it has been established that, far from being part of an organised criminal plan, his involvement in the political leadership of the UPC/RP was motivated by the fact that he "hoped that peace would return to Ituri".[490]

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO

GRANT this appeal;

SET ASIDE the conviction of Mr Thomas Lubanga and ACQUIT him;

and

ORDER his immediate release.

[signed]

Ms Catherine Mabille, Counsel

Done on 3 December 2012

At The Hague, The Netherlands

[490] ICC-01/04-01/06-2901, para. 87.