# Dissenting Opinion of Judge Anita Ušacka

## Content

1. I respectfully disagree with the decision of my colleagues to confirm the Conviction Decision and would have reversed the decision on the grounds that (i) the factual detail in the charges against Mr Lubanga was sufficient only in respect of the nine children who were allegedly conscripted, enlisted and used in hostilities by the UPC/FPLC; these nine cases were excluded from the charges when the Conviction Decision was rendered and Mr Lubanga was convicted of charges that were insufficiently detailed, and (ii) the age element of the crimes was not established to the standard of beyond reasonable doubt. Therefore, I am of the view that it was not reasonable for the Trial Chamber to convict Mr Lubanga of the crimes of conscripting and enlisting children under the age of fifteen years into the UPC/FPLC and of using them to participate actively in hostilities within the meaning of articles 8 (2) (e) (vii) and 25 (3) (a) of the Statute from early September 2002 to 13 August 2003.[1]

2. As explained below, it is my view that, in the case at hand, the factual allegations relating to the nine alleged former child soldiers presented by the Prosecutor were the charges which framed the scope of the trial. These constituted the only material facts underlying the crimes charged, which could be established through evidence and against which Mr Lubanga could defend himself at trial. It is indisputable that, once the allegations relating to these nine individuals are removed from the charges, the remainder of the allegations (of which Mr Lubanga was ultimately convicted) did not contain reference to a single identified victim, while the dates and locations of all of the alleged events were framed in unacceptably broad terms such as "[d]uring 2002 and 2003" and "throughout Ituri".[2] These unspecific factual allegations could not have been considered to be operational, without the individual cases of the nine child soldiers that constituted the vertebral column of the case. As a result, Mr Lubanga defended himself on the understanding that the nine individual cases were the material facts underlying the charges against him.

3. The right to be informed of the charges is a necessary precondition of a fair trial and fairness can never be achieved if the accused is deprived of this right. The abstract nature of the remaining factual allegations allowed vague assertions that children were enlisted or

[1] Therefore, this Dissenting Opinion simultaneously applies to both the Majority Judgment on the appeal of Mr Thomas Lubanga Dyilo against the Conviction Decision and the Majority Judgment on the appeals of Mr Thomas Lubanga Dyilo and the Prosecutor against the Sentencing Decision.
[2] Document Containing the Charges, para. 32; Amended Document Containing the Charges, para. 32.

conscripted into the UPC/FPLC or used to participate actively in hostilities to be presented as evidence, thereby contaminating the evidentiary process and ultimately rupturing the fairness of the trial. In my view, the lack of detail in the evidence presented meant that Mr Lubanga could not meaningfully challenge the information given by witnesses. In these circumstances, the only effective defence available to Mr Lubanga was to affirmatively prove that no children under the age of fifteen had been conscripted, enlisted or used in hostilities by the UPC/FPLC during the period of the charges.

# I. INSUFFICIENT DETAIL OF THE REMAINING CHARGES RESULTING FROM THE ULTIMATE EXCLUSION OF THE NINE INDIVIDUAL CASES

## A. Procedural background as to the charges

4. Article 67 (1) (a) of the Statute provides that the accused has the right to "be informed promptly and in detail of the nature, cause and content of the charge". Article 61 (3) (a) of the Statute states that, within a reasonable time prior to the hearing on the confirmation of charges, the accused shall "[b]e provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial". Rule 121 (3) of the Rules of Procedure and Evidence directs that the "Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing" (emphasis added). Regulation 52 (b) of the Regulations of the Court specifies that the document containing the charges shall include a "statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial […]".

5. The Document Containing the Charges was filed before the Pre-Trial Chamber on 28 August 2006. This document presented the crimes of enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities in two separate sections: (i) a series of general allegations entitled "*Pattern of the FPLC in enlisting and conscripting children under the age of fifteen years and using them to participate actively in hostilities*",[3] and (ii) a series of more specific allegations in relation to six identified children

[3] Document Containing the Charges, paras 30-40.

entitled "*Individual cases"*.[4] The former section provided vaguely formulated and general information, notable in its lack of reference to any specific dates, locations or identities of victims. In contrast, the latter section detailed the individual stories of six alleged former child soldiers, including the approximate dates and locations of their alleged conscription or enlistment, as well as of their alleged participation in battles, together with details of the training they allegedly underwent and notable incidents that allegedly occurred during their time in the UPC/FPLC.

6. Mr Lubanga raised a number of objections to the specificity of the charges as set out in the Document Containing the Charges and requested that the Prosecutor's legal submissions be set out in advance of the confirmation of charges hearing.[5] Regarding the latter request, Mr Lubanga indicated that, in the absence of such, "the relevance of certain factual allegations is opaque at best, and thus violates the right of the Defence to be informed of the nature and details of the charge".[6]

7. In his written submissions at the closing of the confirmation hearing, the former Prosecutor explained that the ""pattern" portion of the Document Containing the Charges" does "not need to provide the same level of details as the portion on the "individual cases"".[7] He asserted that "[t]he necessary detailed information is provided in the portion on the "individual cases"".[8] The former Prosecutor accepted that the "Document Containing the Charges must contain 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".[9] He indicated that the Document Containing the Charges details the identities of the victims and the dates and locations of the crimes in the 'individual cases section'.[10]

[4] Document Containing the Charges, paras 41-84.
[5] *See* Defence Request regarding the Conduct of the Confirmation of Charges, para. 32; Defence Request for Information, paras 1, 3. *See also* Transcript of 24 November 2006, ICC-01/04-01/06-T-44-EN (ET WT), page 63, line 24 to page 73, line 7.
[6] Defence Request for Information, para. 1. *See also* Transcript of 24 November 2006, ICC-01/04-01/06-T-44-EN (ET WT), page 63, line 24 to page 73, line 7.
[7] Prosecutor's Submissions after the Confirmation Hearing, para. 46 (xi).
[8] Prosecutor's Submissions after the Confirmation Hearing, para. 46 (xi).
[9] Prosecutor's Submissions after the Confirmation Hearing, para. 44.
[10] Prosecutor's Submissions after the Confirmation Hearing, para. 45.

8. Before the start of the trial, the Trial Chamber ordered the Prosecutor to file an amended document containing the charges.[11] The Amended Document Containing the Charges maintained the same structure as the Document Containing the Charges with a general section charging a pattern of conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC and a section of specific allegations relating to nine identified former child soldiers.[12] The general allegations section was unchanged from the original Document Containing the Charges and continued to be remarkable in its level of generality. In the '*Individual cases'* section, the factual allegations relating to two of the original six children were omitted, while factual allegations relating to five new cases were added so that the Prosecutor relied on the factual allegations underpinning the experiences of nine former child soldiers at trial.

9. The Prosecutor was also requested to file a document "which explain[ed] its case by reference to the witnesses [he] intend[ed] to call and the other evidence [he] intend[ed] to rely upon" and to explain "how the evidence relate[d] to the charges".[13] Accordingly, the Prosecutor filed the Summary of Evidence, which provided slightly more information than the Document Containing the Charges and linked the factual allegations to the evidence the Prosecutor intended to present at trial to prove them. Crucially, the factual allegations relevant to the cases of the individual child soldiers were supported almost exclusively by reference to the testimony of the children in question.[14]

## B. The defective character of the charges

10. In my view, the division between the 'pattern' and 'individual cases' sections of the charges that was made in the context of this case was extremely problematic. The problem related firstly to the vague formulation of the 'pattern charges' and secondly, to the lack of clarity as to the relationship between the 'pattern section' of the charges and the more detailed charges as to the individual cases. As explained below, from the outset, the Prosecutor's case focused on the charges relevant to the nine identified child soldiers; indeed, certain statements made by the Prosecutor in response to Mr Lubanga's challenge to the specificity of the charges confirmed that this was the case. The potential relevance of the

[11] Order to File an Amended DCC, paras 13, 15.
[12] Amended Document Containing the Charges, paras 30-40, 41-98.
[13] Disclosure Decision, para. 26.
[14] Summary of Evidence, paras 113-172.

general allegations of a pattern of enlistment, conscription and use of children under the age of fifteen was completely understated by the Prosecutor and unclear to any reasonable observer. Indeed, no reasonable defence counsel could have predicted that the Trial Chamber would rely exclusively on the 'pattern section' of the charges for the purposes of conviction. Ultimately, I consider that Mr Lubanga's conviction, which was based exclusively on the imprecisely formulated 'pattern section' of the charges, violated his right to be informed in detail of the nature, cause and content of the charges against him.

11. A full understanding of the inherent level of vagueness at issue in the 'pattern section' of the charges can only be conveyed by rehearsing the relevant paragraphs in full. To take but one example, in relation to conscription, the alleged pattern of conscripting children under the age of fifteen was framed in the following terms:

> During 2002 and 2003 and throughout Ituri, FPLC commanders forcibly recruited children, including children who by their physical appearance were manifestly under the age of fifteen years. FPLC forces systematically abducted mainly boys, but also girls, and forcibly incorporated them into the ranks of the FPLC.[15]

This was supplemented somewhat by the Summary of Evidence, which, in relation to the alleged pattern of conscription, stated that:

> The UPC/FPLC recruitment campaign shows a consistent pattern of repeated and large scale enlistment and conscription of children, including those under the age of 15 years, into the UPC/FPLC. Forcible conscription of children by the UPC/FPLC included individual cases of abductions, large scale abductions and other forms of forced recruitment drives, which were directly or indirectly targeted at youths, including those under the age of 15. In some circumstances, the very children under 15 years who were themselves abducted were forced by their commanders to arrest and abduct children, including girls under the age of 15, into the UPC.
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> As part of its broad child recruitment policy, the UPC/FPLC leadership systematically pressured Hema families in UPC/FPLC-controlled territories to provide children for military service. Emissaries and propaganda were employed to encourage Hema youth to join the UPC/FPLC military. [Footnotes omitted.][16]

Under the section of the Summary of Evidence entitled "*Individual Cases of UPC/FPLC Conscription, Enlistment and/or Use of Children, Including Children under the Age of 15, to Participate Actively in Hostilities*", further vague allegations relevant to conscription

[15] Document Containing the Charges, para. 32; Amended Document Containing the Charges, para. 32.
[16] Summary of Evidence, paras 38-39.

expressed as being characteristic of the individual cases of the child witnesses were made in the following terms:

> The recruitment of the children was typically undertaken through coercion by UPC/FPLC soldiers, on occasion through physical violence. UPC/FPLC soldiers would abduct children from schools and force them onto trucks, and in some circumstances threaten them with death and beatings should they refuse to board the trucks. [Footnotes omitted.][17]

12. The foregoing represents the entirety of the information made available to Mr Lubanga about the alleged pattern of conscripting children in advance of the trial. No detail was provided as to the identities of any victims; the only time-frame given was "[d]uring 2002 and 2003" and the location of the alleged crimes was indicated to be "throughout Ituri".[18] It is trite to observe that these allegations do not meet the minimum requirements explicitly set out in rule 121 (3) of the Rules of Procedure and Evidence and regulation 52 (b) of the Regulations of the Court. In my view, the vague formulations set out above cannot be termed anything more than contextual or background information. Although this information may be important from the perspective of framing the charges within the entirety of the historical record, it serves no purpose in informing the accused person of the charges against him or her and has no place in a charging document.

13. I acknowledge, however, that the general allegations set out in the 'pattern section' of the charging documents were not entirely unrelated to the more specific allegations underpinning the individual cases of child soldiers. There is an obvious link between allegations of repeated instances of a particular crime and the overarching inference that may be drawn that the crime was committed on a large scale over a certain time period and across a certain area. In this sense, I do not preclude that a pattern of criminal activity could be charged, for example, by setting out detailed factual allegations in relation to a series of related acts from which such a pattern could be inferred.

14. However, in the instant case, the Prosecutor alleged that a pattern of crimes was committed without resort to any detailed underlying allegations other than those relevant to the nine individual child soldiers. In my view, the only reasonable interpretation of the charges as framed is that the Prosecutor intended to establish a pattern of criminality by

[17] Summary of Evidence, paras 101-102.
[18] Document Containing the Charges, para. 32; Amended Document Containing the Charges, para. 32.

reference to nine individual cases. As the Prosecutor stated at the oral hearing held before the Appeals Chamber, the video evidence was collected "for the purposes of supplementing [the] body of evidence", "simply to show images of children under 15", but not to "explore the identity and personal circumstances of the children shown in the videos".[19] Whether or not nine incidences of enlistment, conscription and use of children to participate actively in hostilities, supplemented by such evidence, would suffice to establish a pattern of crime would have been a question of fact for the Trial Chamber, had the individual cases been proven.

15. Indeed, an interpretation of the charges according to which the general allegations in the 'pattern section' was entirely dependent on the individual cases is entirely consistent with the way in which the former Prosecutor qualified the relationship between the two sections of the charging documents at the close of the confirmation of charges hearing. As indicated above, at this crucial stage in the proceedings, the former Prosecutor indicated that (i) the necessary detail 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 was provided in the 'individual cases section' of the Document Containing the Charges, and (ii) the pattern section does not need to provide the same level of detail as the portion on the 'individual cases'.[20] If the 'pattern section' did not need to provide the minimum level of detail required by the legal framework of the Court in setting out charges, the only possible conclusion to be drawn is that the allegations of a 'pattern' did not have any independent value. Given the lack of detail therein, the 'pattern section' of the charges could only be deemed to comply with the requirements if it were viewed as entirely dependent on the allegations with respect to the individual cases being proven. Indeed, one might reasonably question why the individual cases were charged at all if such broadly formulated charges could be found to satisfy the requirements of informing the accused person in detail of the charges against him.

16. It is worth pointing out that it was entirely unforeseeable at the commencement of this case that the Trial Chamber would ultimately reject the testimony of all nine of the individual child soldiers and thereby find that the portion of the charges relevant to the individual cases had not been established. The focus of the Prosecutor remained on the individual child soldier

[19] *See* Transcript of 20 May 2014, ICC-01/04-01/06-T-363-Red-ENG (WT), page 23, lines 11-15.
[20] Prosecutor's Submissions after the Confirmation Hearing, paras 45, 46 (xi).

cases throughout the trial and right up to the filing of the Prosecutor's Closing Submissions, wherein approximately 70 pages were devoted exclusively to the elaboration of arguments on and discussion of these individual cases.[21] The section of the Prosecutor's Closing Submissions on the more general pattern of crime entitled "*The scale of the conscription, enlistment and use of children by the UPC/FPLC*" was also heavily supported by reference to the individual cases.[22]

17. It was only at the end of the trial, when the Trial Chamber found that none of the individual cases had been established, that the focus shifted from the individual cases to the 'pattern section' of the charges, which was then unsupported by any reference to identified child soldiers. The Trial Chamber therefore convicted Mr Lubanga on the basis of vaguely formulated allegations that had previously played a peripheral and subsidiary role in the case.

18. Consistent with this shift in emphasis, the Prosecutor was forced to backtrack on earlier statements with respect to how the individual cases related to the general factual allegations. In her Response to the Document in Support of the Appeal, the Prosecutor contends that the significance of the individual cases lay exclusively in their value as evidence, that they were "nine sample episodes chosen as evidence".[23] This argument on appeal completely contradicts the statements made before the commencement of the trial. It also attempts to re-categorise as evidence the nine individual cases that were presented as factual allegations, indeed as the core factual allegations underlying the charges.

19. It is clear from the structure of the Conviction Decision, and the dearth of concrete factual findings therein, that the lack of detail in the charges at the outset of the trial was directly reflected in the Conviction Decision at the end of the trial. The Trial Chamber's factual analysis relevant to conscription, enlistment and use of children depends exclusively on (i) the testimony given by witnesses only, including hearsay, but without any direct testimony of an underage member of the UPC/FPLC, (ii) a number of videos in which children, who, in the Trial Chamber's opinion, appear to be under the age of fifteen, and (iii) one item of documentary evidence.[24] This is followed up by six short paragraphs of "overall conclusions", representing the Trial Chamber's findings of fact on the basis of this

[21] Prosecutor's Closing Submissions, paras 356-524.
[22] Prosecutor's Closing Submissions, paras 151-236.
[23] Response to the Document in Support of the Appeal, paras 99, 104.
[24] Conviction Decision, paras 759-908.

evidence.[25] These findings are formulated in terms that are equally vague as those in the charging documents. To return to the example of conscription, the Trial Chamber found that:

> between 1 September 2002 and 13 August 2003, the armed wing of the UPC/FPLC was responsible for the widespread recruitment of young people, including children under the age of 15, on an enforced as well as a "voluntary" basis. The evidence of witnesses P-00055, P-0014 and P-0017, coupled with the documentary evidence establishes that during this period certain UPC/FPLC leaders, including Thomas Lubanga, Chief Kahwa, and Bosco Ntaganda, and Hema elders such as Eloy Mafuta, were particularly active in the mobilisation drives and recruitment campaigns that were directed at persuading Hema families to send their children to serve in the UPC/FPLC army.
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> P-0014, P-0016, P-0017, P-0024, P-0030, P-0038, P-0041, P-0046 and P-0055 testified credibly and reliably that children under 15 were "voluntarily" or forcibly recruited into the UPC/FPLC and sent to either the headquarters of the UPC/FPLC in Bunia or its training camps, including at Rwampara, Mandro, and Mongbwalu. Video evidence introduced during the testimony of P-0030 clearly shows recruits under the age of 15 in the camp at Rwampara. The letter of 12 February 2003, (EVD-OTP-00518) further corroborates other evidence that there were children under the age of 15 within the ranks of the UPC. [Footnotes omitted.][26]

The paucity of detail in the factual findings of the Trial Chamber shows the extent to which vague charges and evidence were relied upon in order to convict Mr Lubanga. None of the evidence relied upon identified a single child under the age of fifteen and much of the witness testimony relied upon did not specify the location where or date when the person who allegedly appeared to be under the age of fifteen was encountered.

20. In these circumstances, it is clear that Mr Lubanga's right to be informed of the nature, cause and content of the charges against him was violated to such an extent that it was utterly impossible for him to defend himself against the charges presented. Over a period of five and a half years, from the initial presentation of the charges up until the Conviction Decision was rendered, Mr Lubanga did not know that the nine individual cases would be struck out and that he would nevertheless be convicted on the basis of the more general charges.[27]

21. Given that he had no precise information about the charges for which he was ultimately convicted, his defence was necessarily limited to challenging specific items of evidence rather than factual allegations. Mr Lubanga had limited information about the content of the

[25] Conviction Decision, paras 911-916.
[26] Conviction Decision, paras 911-912.
[27] It should be noted that the Document Containing the Charges was filed before the Pre-Trial Chamber on 28 August 2006, and the Conviction Decision was delivered on 14 March 2012.

testimony that would be given until the witness actually testified and witnesses often provided little more than vague statements that they had seen or heard of young children forming part of the UPC/FPLC. In circumstances where he was faced with general allegations of widespread crimes being committed throughout Ituri, the only evidence that Mr Lubanga could have presented in his defence with any prospect of success was evidence that not one single child was enlisted, conscripted or used by the UPC/FPLC in Ituri between 2002 and 2003. For this reason, I agree with Mr Lubanga's submission that the burden of proof was effectively reversed in this case.

22. Therefore, I would have found that the requirements for the charging documents explicitly set out in the legal framework of the Court were not fulfilled, and that Mr Lubanga's right to be informed in detail of the nature, cause and content of the charges against him was violated by his conviction for charges formulated in impermissibly vague terms. For this reason, I cannot agree with the position of the Majority of the Appeals Chamber that Mr Lubanga has failed to substantiate his argument that the charges were insufficiently detailed with respect to the dates and places pertaining to instances of enlistment, conscription or participation in hostilities as well as the identities of the victims. In my view, once the Trial Chamber found that the factual allegations underlying the individual cases had not been established beyond reasonable doubt, the only reasonable decision would have been to acquit Mr Lubanga.

## II. THE AGE ELEMENT OF THE CRIMES HAS NOT BEEN ESTABLISHED BEYOND THE ARTICLE 66 (3) THRESHOLD

23. The scope of evidence to be presented at trial and the content of the charges being inextricably intertwined,[28] the remaining "pattern" charges that framed the Conviction Decision explain why the evidence ultimately relied upon by the Trial Chamber was insufficient to reach the article 66 (3) threshold. In this regard, it is interesting to note that, in her Response to the Document in Support of the Appeal, the Prosecutor counters Mr Lubanga's arguments about the insufficiency of the evidence as to the ages of the children by

[28] Triffterer states that "[t]he scope of the trial depends on the charges admitted for trial by the confirmation of the Pre-Trial Chamber according to article 61 or "any amendments to the charges"" (O. Triffterer, "Article 74 Requirements for the decision", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck *et al.*, 2nd ed., 2008), page 1387, at page 1396, marginal note 28).

referring directly to her argument that the charges were sufficiently detailed.[29] This highlights the dramatic changes that can occur in the prosecutorial case, to the detriment of the rights of the defence, when a trial proceeds on the basis of improperly formulated and insufficiently detailed charges. I will illustrate this flaw in the trial proceedings in this case by reference to the Trial Chamber's evaluation of the evidence in relation to the age element of the crimes, although the same analysis could be carried out in relation to the alleged criminal conduct of the convicted person.[30]

## A. Introductory considerations

### *1. Requirements for a conviction*

24. The most important role of the Trial Chamber is to evaluate evidence, including the testimony of a witness, on the basis of whether it is relevant to the fact that needs to be established, whether it is credible and whether it reliably establishes that fact. In making factual findings, the Trial Chamber must, *inter alia*, assess the evidentiary weight of each item of relevant evidence **in light of the entire body of evidence, applying a holistic rather than a piecemeal approach**.[31]

25. The distinction between credibility and reliability is important in this context, even more so when it comes to such a subjective and complex issue as age assessment based on physical appearance.[32] Although a witness may be honest (and therefore credible), the evidence he or she gives may nonetheless be unreliable due to the "vagaries of human perception", or because it relates to facts that occurred a long time ago.[33] For example, in our case, an honest and credible witness may be absolutely convinced that he saw children who he thought were twelve years old, but the children in question may actually have been fifteen.

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[29] Response to the Document in Support of the Appeal, para. 152, referring to paras 97-111.
[30] Considering that my conclusion is that the age element of the crimes was not established beyond reasonable doubt, there simply is no need to conduct a similar analysis in relation to the conduct of the convicted person.
[31] *Ntagerura* Appeal Judgment, para. 174. *See also* *Halilović* Appeal Judgment, para. 119.
[32] The ICTY/ICTR's jurisprudence uses the words credibility and reliability as distinct concepts in relation to witness testimony. According to this jurisprudence, the assessment of credibility involves an assessment of whether a witness is truthful and should be believed, which does not necessarily depend on the actual veracity of the evidence presented. In contrast, an assessment of reliability involves an objective determination of whether the evidence presented proves the fact at issue. *See* *Nahimana* Appeal Judgment, para. 194; *Kunarac* Acquittal Decision, para. 7; *Bikindi* Appeal Judgment, para. 114; *Nchamihigo* Appeal Judgment, paras 47, 285; *Brđanin* Trial Judgment, para. 25.
[33] *Brđanin* Trial Judgment, para. 25.

26. Article 74 (5) of the Statute specifies that a conviction decision shall provide "a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions". Rule 64 (2) of the Rules of Procedure and Evidence also stipulates that the "Chamber shall give reasons for any rulings it makes on evidentiary matters". As these are the main instances in which the legal texts specifically require a Chamber to provide reasoning, it appears that reasoning is especially important where evidence is at issue. It is part of the Trial Chamber's obligation to give a reasoned opinion that a fact indispensable for conviction, such as the age element, is established beyond reasonable doubt.[34] Although the Trial Chamber is not required to articulate every step of its reasoning or to address every piece of evidence for each particular finding,[35] a conviction decision nevertheless must enable both the convicted person and the Appeals Chamber to understand *how* the Trial Chamber made its findings based on the evidence before it, to ensure that the accused can exercise his or her right to appeal and for the Appeals Chamber to conduct a meaningful review.[36] Thus, it is incumbent upon the Trial Chamber to set out, with sufficient clarity, **how it came to the conclusion that the children were under the age of fifteen.**

27. Article 66 (3) of the Statute provides that "[…] to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt" (emphasis added). This evidentiary standard is the highest one within the Court's legal framework, and I understand it to mean that "conviction should not occur unless all reasonable hypotheses based on the evidence presented indicate guilt".[37] This standard applies not only to the ultimate question of guilt, but also to the fact-finding stage, specifically to the facts necessary to establish the elements of the crimes charged. It is settled jurisprudence in all other international tribunals

[34] *Karera* Appeal Judgment, para. 20; *Kvočka et al.* Appeal Judgment, para. 23.
[35] *See inter alia* *Karera* Appeal Judgment, para. 20; *Kvočka et al.* Appeal Judgment, para. 23; *Kupreškić et al.* Appeal Judgment, para. 32; *Musema* Appeal Judgment, paras 18, 20.
[36] *Karera* Appeal Judgment, para. 20; *Kunarac* Appeal Judgment, para. 41; the ECtHR has emphasised that "[t]he national courts must, however, indicate with sufficient clarity the grounds on which they based their decision. It is this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him" (*Hadjianastassiou v. Greece*, para. 33). *See also* O. Triffterer, "Article 74 Requirements for the decision", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck *et al.*, 2nd ed., 2008), page 1387, at page 1391, marginal note 10; M. Klamberg, *Evidence in International Criminal Trials, Confronting Legal Gaps and the Reconstruction of disputed Events* (Nijhoff, International Criminal Law Series 2, 2013), page 159.
[37] C. L. Blakesley, "Commentary on Parts 5 and 6 of the Zupthen Inter-Sessional Draft: Investigation, Prosecution, & Trial", in L. S. Wexler and M. C. Bassiouni (eds.), *Observations on the consolidated ICC text before the final session of the preparatory committee* (Érès, Nouvelles Etudes Pénales 13*bis*, 1998), page 69, at page 87. *See also* my Al-Bashir Dissenting Opinion, paras 7-11 on the evidentiary threshold applicable at different stages of the proceedings before the Court; *Kenya* Authorisation of Investigation Decision, paras 28 *et seq*.

that, *inter alia*, all facts material to the elements of the crimes charged must be proven beyond reasonable doubt.[38] The elements of the crimes of conscripting and enlisting children under the age of fifteen years and of using them to participate actively in hostilities within the meaning of article 8 (2) (e) (vii) of the Statute expressly include that (i) the perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities (*actus reus*), and (ii) such person or persons were under the age of fifteen years. Accordingly, these elements should have been proven to the standard of beyond reasonable doubt in the present case. Importantly, as expressly stated in article 66 (2) of the Statute, this means that it is for the Prosecutor to prove before the Court that the accused is guilty to the standard of beyond reasonable doubt.[39] A logical consequence of this onus is that it is for the Prosecutor to adduce sufficient evidence underpinning her case that she is convinced will have a chance of successfully proving the guilt of the accused.[40]

28. In my view, the Conviction Decision in this case does not show that the Trial Chamber gave effect to these obligations in establishing that children conscripted, enlisted and used in hostilities by the UPC/FPLC were under the age of fifteen. The reasoning of the Trial Chamber with respect to evidence relied on as establishing the age of the relevant children was, in my view, insufficient, which made the task of conducting a proper review of the factual findings and evidentiary analysis on appeal difficult.

29. Notably, rather than assessing the reliability of each age estimate given by a witness, the Trial Chamber assessed in the abstract the ability of each witness to estimate the ages of the children that they saw. In so doing, the Trial Chamber isolated statements made by the witnesses in relation to how they determined the age of a particular child and imbued these

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[38] *See* *Kupreškić et al.* Appeal Judgment, para. 226; *Halilović* Appeal Judgment, paras 111-125; *Ntagerura* Appeal Judgment, paras 174-175. *See also* in this respect C. M. Rohan, "Reasonable Doubt Standard of Proof in International Criminal Trials", in K. Khan *et al.* (eds.), *Principles of Evidence in International Criminal Justice* (Oxford University Press, 2010), page 650, at page 656; even the Trial Chamber expressly stated so, *see* Conviction Decision, para. 92.

[39] *See generally* W. A. Schabas, "Article 66 Presumption of innocence", in O. Triffterrer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck *et al*., 2nd ed., 2008), page 1233, at pages 1238-1240, marginal notes 18-22*;* M. Klamberg, *Evidence in International Criminal Trials, Confronting Legal Gaps and the Reconstruction of disputed Events* (Nijhoff, International Criminal Law Series 2, 2013), pages 126-128.

[40] Klamberg states that "[c]onsidering that the prosecutor carries the burden of proof *he or she must collect and later present sufficient evidence before the court to secure conviction*, while an accused person may be acquitted without necessarily presenting a single piece of evidence" (emphasis added), (M. Klamberg, *Evidence in International Criminal Trials, Confronting Legal Gaps and the Reconstruction of disputed Events* (Nijhoff, International Criminal Law Series 2, 2013), page 266). *See also* the wording of article 66 (3) of the Statute.

statements with a general significance in finding that they reflected how the witness generally assessed the ages of all the children that they had seen.[41] In this way, the Trial Chamber inappropriately attached to those statements a general meaning extending far beyond the context in which they were uttered.

30. Once the Trial Chamber had determined in the abstract that a witness could reliably estimate the ages of children that they had seen, it set out in a separate section, a recitation of the evidence given by all of the different witnesses regarding the presence or use of children under the age of fifteen in or by the UPC/FPLC.[42] In this section, it seems that the Trial Chamber unquestioningly accepted any evidence given by that witness that they had seen a child who appeared to be under the age of fifteen, often in the absence of any explanation by the witness as to how they made that evaluation.

31. As a result, when the Conviction Decision is read as a whole, it appears that the Trial Chamber made unexpected findings on age in different sections, each time, based on a single item of indirect evidence, the reliability of which had been assessed in the abstract in advance. It is even unclear sometimes to what extent the Trial Chamber relied upon certain items of evidence, if at all, as well as to why each of them seemed to be given the same weight and probative value at the end, for the purpose of both its findings and sentencing.

32. In that regard, I note that the Trial Chamber failed to elaborate on its interpretation of the applicable evidentiary standard in the Conviction Decision, the first decision pursuant to article 74 of the Statute. In fact, this standard was addressed in one line under the heading "*Burden of proof*", indicating simply that "[f]or a conviction, each element of the particular offence charged must be established 'beyond reasonable doubt'".[43] Although there may be an intrinsic difficulty in defining the standard of 'beyond reasonable doubt' in the abstract, given that the Trial Chamber seems to have employed what is in effect a much lower standard in this case, it would have been useful if it had articulated more clearly what, in its view, this standard requires.

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[41] *See* for example Conviction Decision, paras 680-681, referring to, *inter alia*, Transcript of 25 March 2009, ICC-01/04-01/06-T-154-Red3-ENG (CT WT), page 41, where witness P-0017 indicated how he assessed the ages of children that he saw at Mandro camp, while the Trial Chamber presented this as a statement of how he assessed the ages of children generally.
[42] Conviction Decision, paras 645-740.
[43] Conviction Decision, para. 92.

33. It has been suggested that, in international tribunals, the standard of 'beyond reasonable doubt' faces pressures that are unknown in domestic jurisdictions and the tendency in practice has been to employ a varying and sometimes lower standard.[44] This tendency to relax the standard of 'beyond reasonable doubt' in the international context and to apply in practice a lower standard than that applied at national level is inconsistent with the explicit wording of the applicable legal framework. In my view, if the exigencies of international criminal prosecutions require the application of a lower standard, the proper course of action would be to amend the applicable law, rather than paying lip service to the high threshold required to establish criminal responsibility, while *de facto* applying a lower standard.

34. In relation to most of the more general statements in the findings of the Trial Chamber (for example, that "children" were wounded and killed,[45] "[children], many of whom were under 15 [were] in the armed groups in Bunia",[46] and "between 380 to 420 recruits [were at the Mongbwalu camp] including children under the age of 15"), [47] the Conviction Decision simply does not explain why the Trial Chamber was convinced of these facts to the standard of beyond reasonable doubt.[48] Considering the complexity of the issue at hand and the subjectivity of age estimations by witnesses based on physical appearance, which was acknowledged by the Trial Chamber, I would have expected the Trial Chamber to adhere to an even higher standard of reasoning on this issue.[49]

### 2. *The inherent difficulty of establishing age based on physical appearance exclusively*

35. Considering the vital importance for the conviction of establishing that children under the age of fifteen were part of the UPC/FPLC during the period covered by the charges, and

[44] *See* N. A. Combs, *Fact Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010), pages 343-364. *See also* G. Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013), page 1146, where the author points to counterweights to the standard of proof such as the desire to order to put historical events "on the record" even though the evidentiary threshold has not been met, or the goal of fighting impunity, which requires "a more flexible application of the standards of proof at various stages of the proceedings, to avoid creating an impunity gap".
[45] Conviction Decision, para. 823 in relation to witness P-0038. *See also* more generally Conviction Decision, paras 823-826.
[46] Conviction Decision, para. 826 in relation to witness P-0012.
[47] Conviction Decision, para. 813 in relation to witness P-0017.
[48] This is exemplified by the statement in paragraph 812 of the Conviction Decision that, "[a]s discussed above, the Chamber is of the view that it can rely on the age estimates of these witnesses", which makes reference to the part of the Conviction Decision that discusses the credibility of the witnesses and their ability to assess age.
[49] *See infra* para. 42. *See also* *Kupreškić et al.* Appeal Judgment, paras 34, 39.

that many children do not have a birth certificate or alternative documentation to prove their age, it is obvious that establishing age is much easier with identified child soldiers. In that regard, I wish to recall that it is for the Prosecutor to adduce sufficient evidence in order to prove that the accused is guilty to the standard of beyond reasonable doubt before the Court.

36. Age determination based on physical appearance *per se* appears to be one of the most difficult exercises in terms of judicial fact-finding, whether before international or domestic triers of fact, and whether the person is physically present or not. Age determination is indeed often at the heart of judicial proceedings in relation to non-accompanied children (usually asylum seekers), and child pornography cases.

37. In a situation where the person is physically present, experts generally provide age assessments necessary for judicial fact-finding. In that respect, several scientific methods are generally used, such as bone and/or dental age assessments, despite the general acknowledgment that there is a significant margin of error for such age assessments and that these methodologies are particularly affected by racial, socio-economic and nutritional factors.[50] I should note that in the case at hand, no age assessment was provided by any expert witness.

38. In a situation, as in the present case, where a person is not physically present, most of the scientific literature conducted on the reliability of visual age assessment from images and videos seems to agree that medical testimony (meaning expert witnesses) authoritatively stating the age of individuals depicted in child photography images or videos is far from accurate and that there is no established scientific protocol available to provide a precise age-estimate of the depicted individuals.[51] A recent UNICEF discussion paper raises particular

[50] *See* T. Smith and L. Brownless, *Discussion Paper, Age Assessment Practices: a literature review & annotated bibliography* (United Nations Children's Fund, 2011), pages 13-20, with further citations and discussion. *See also* H. Crawley, *Research report, When is a child not a child? Asylum, age disputes and the process of age assessment* (Immigration Law Practitioners'Association, 2007).

[51] *See* A. L. Rosenbloom, "Inaccuracy of age assessment from images of postpubescent subjects in cases of alleged child pornography", 127 *International Journal of Legal Medicine* (2013) page 467; C. Cattaneo *et al*., "The difficult issue of age assessment on pedo-pornographic material", 183 *Forensic Science International* (2009), page 21; M. Cummaudo *et al*., "Pitfalls at the root of facial assessment on photographs: a quantitative study of accuracy in positioning facial landmarks", 127 *International Journal of Legal Medicine* (2013), page 699; C. Cattaneo *et al*., "Can facial proportions taken from images be of use for ageing in cases of suspected child pornography? A pilot study", 126 *International Journal of Legal Medicine* (2012), page 139. *See also* Delphine Roucaute, "L'examen osseux, un «couperet» pour les jeunes immigrés", 8 May 2014, accessed at www.lemonde.fr, citing further European sources calling for cautiousness in relation to age determination for minors.

concerns about the reliability of visual age-assessment carried out by different professionals and practitioners which have little to do with anthropometric measurements and do not consider the expertise of a medical practitioner.[52] Many social workers carrying out assessments base their conclusions "too heavily on physical appearance or demeanour, based on a socially constructed understanding of what a child should look like".[53] Ultimately, there does not appear to be any internationally settled practice on age-assessment based on images, while even scientific methodologies are highly criticised for their margin of error.

39. I furthermore wish to emphasise the increased difficulty in establishing the age element of the crimes in the context of this case.[54] As acknowledged by the Trial Chamber itself, distinguishing between young people who are relatively close to the age of fifteen (whether above or below) seems extremely difficult, not mentioning factors such as diet and features specific to each community.[55] Indeed, it is questionable whether it is possible at all to determine that an unidentified child is under the age of fifteen based solely on physical appearance.

*3. The Trial Chamber's "cautious approach"*

40. The key paragraphs regarding the Trial Chamber's findings on age and its own age assessment in general read as follows:

> Given 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), the Chamber has exercised caution when considering this evidence. Even allowing for a wide margin of error in assessing an individual's age, the Chamber has concluded that 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. Furthermore, the sheer volume of credible evidence (analysed hereafter) relating to the

[52] This material can be found in T. Smith and L. Brownless, *Discussion Paper, Age Assessment Practices: a literature review & annotated bibliography* (United Nations Children's Fund, 2011), pages 20-22 with further citations and discussion. *See also* H. Crawley, *Research report, When is a child not a child? Asylum, age disputes and the process of age assessment* (Immigration Law Practitioners' Association, 2007).
[53] T. Smith and L. Brownless, *Discussion Paper, Age Assessment Practices: a literature review & annotated bibliography* (United Nations Children's Fund, 2011), pages 24-25.
[54] I am aware that this might actually be one of the main difficulties in charging the crimes at hand, but consider that this cannot justify that the article 66 (3) standard of proof be overlooked in that respect. In the present case, the Prosecutor had five years of trial, without mentioning the pre-trial stage, to prove his/her case.
[55] Conviction Decision, para. 643. *See also* the testimony of witness P-0041 in Transcript of 13 February 2009, ICC-01/04-01/06-T-126-CONF-FRA (CT), page 55, lines 14-20; the testimony of witness P-0359 in Transcript of 12 May 2009, ICC-01/04-01/06-T-172-CONF-FRA (CT), page 37, lines 13-18.

> presence of children below the age of 15 within the ranks of the UPC/FPLC has demonstrated conclusively that a significant number were part of the UPC/FPLC army. An appreciable proportion of the prosecution witnesses, as well as D-0004, testified reliably that children under 15 were within the ranks of the UPC/FPLC.
>
> The prosecution relies on a number of video excerpts to establish that some of the UPC/FPLC recruits were "visibly" under the age of 15. The Defence argues that it is impossible to distinguish reliably between a 12 or 13 year-old and a 15- or 16-year-old on the basis of a photograph or video extract alone. The Chamber accepts that for many of the young soldiers shown in the video excerpts, it is often very difficult to determine whether they are above or below the age of 15. Instead, the Chamber has relied on video evidence in this context only to the extent that they depict children who are clearly under the age of 15. [Footnotes omitted.][56]

41. It may be considered reasonable, in the absence of any other reliable method of verifying age, to rely on a video excerpt or a witness' assessment of the age of a particular child in circumstances where the witness comprehensively describes the factors informing his or her evaluation. For example, a video of good quality that clearly shows children visibly under the age of fifteen, that is 6-7 year old children, whose faces and sizes are clearly discernable, could potentially be relied upon in this context. Likewise, the testimony of a witness, for example, about the age of an individual he or she personally knew, or about a child that was so young that it was manifest from their appearance that they were under the age of fifteen, could similarly be given some weight and probative value in order to establish the age element of the crimes to the standard of beyond reasonable doubt.

42. In order to establish an individual's age based upon such evidence, the Trial Chamber must not only apply a cautious approach when assessing the evidence, but also adhere to a higher standard of reasoning in order to demonstrate that the approach has been applied, as age estimation is a complex issue. Such an approach has been adopted at the ICTY in relation to witness testimony identifying the accused under difficult circumstances. The Appeals Chamber held in *Kupreškić*[57] that the Trial Chamber is under an obligation to "carefully articulate the factors relied upon in support of the identification of the accused and adequately

[56] Conviction Decision, paras 643-644.

[57] *Kupreškić et al.* Appeal Judgment, paras 33-41. *See also* *Gotovina and Markač* Appeal Judgment, para. 61, holding after assessing the Trial Chamber's findings, that it lacked an evidentiary basis for its conclusion that a 200 metre margin of error could be applied uniformly to the four towns, without explaining why it relied on this margin. The Appeals Chamber therefore held that "there was a need for an evidentiary basis for the Trial Chamber's conclusions, particularly because these conclusions relate to a highly technical subject" and that the Trial Chamber also failed to provide a reasoned opinion. After a review of all the evidence, the Appeals Chamber reversed the Trial Chamber's finding that the artillery attacks on the four towns were unlawful (*Gotovina and Markač* Appeal Judgment, para. 84).

address any significant factors impacting negatively on the reliability of the identification evidence".[58] In my view, the reasons underlying the more stringent approach in cases of identification witnesses, also apply to age assessments based upon appearance without knowing the identity of persons, namely that "the frailties of human perceptions and the very serious risk that a miscarriage of justice might result from reliance upon even the most confident witnesses who purport to identify an accused without an adequate opportunity to verify their observations".[59]

43. It may be noted that a similar approach in relation to age estimation based on physical appearance seems to have been applied in the jurisprudence of the SCSL.[60] However, in those cases, the age of the individuals alleged to have been child soldiers was not, as such, a contentious issue. While the issue did arise in the *Taylor*,[61] *RUF*,[62] *CDF*[63] and *AFRC*[64] judgments, it was generally accepted by both Prosecution and Defence that the use of

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[58] *Kupreškić et al.* Appeal Judgment, para. 39.
[59] *Kupreškić et al.* Appeal Judgment, para. 34.
[60] Conviction Decision, paras 643-644, compared to *Taylor* Trial Judgment, para. 1361; *RUF* Trial Judgment, paras 1627-1628; *AFRC* Trial Judgment, para. 1246. *See also* the *CDF* Appeal Judgment, paras 128-129, which read as follows:

> The Appeals Chamber notes the Trial Chamber's finding that at the age of 11 years, Witness TF2-021 was initiated by Kondewa, his "sowe" or initiator, into the Kamajor society at Base Zero. According to the Witness there were approximately 400 initiates, 20 of whom the Witness estimated to be almost the same age group as him. The Trial Chamber found that these other young boys were also initiated by Kondewa. As part of the initiation ceremony, the boys "were told that they would be made powerful for fighting and were given a potion to rub on their bodies as protection… before going [into] war."
> **In the absence of evidence concerning the ages of the other boys, the Appeals Chamber finds that no reasonable trier of fact could have found that the testimony of Witness TF2-021 sufficiently establishes the age of the 20 young boys who were initiated with him**. [Footnotes omitted/emphasis added.]

[61] *See* *Taylor* Trial Judgment, paras 1470-1472, in which the Trial Chamber rejected the evidence of a witness concerning children under fifteen years being involved in extortion of money because of inconsistencies in the testimony of the witness. *See also* *Taylor* Trial Judgment, para. 1495, in which a witness was challenged as to his age assessment but the Trial Chamber nevertheless relied upon it because of his clear observations that they were ten to eleven years old and because of his experience as a father; *Taylor* Trial Judgment, para. 1574, in which the Trial Chamber rejected the evidence of a witness alleged to have been abducted by a rebel boy because she testified that she guessed his age but was not sure of his age because she did not ask.
[62] *See* for example *RUF* Appeal Judgment, para. 222, in which the Appeals Chamber found that the Trial Chamber's finding that "girls as young as 6 years old were trained to fight at Bunumbu" was supported by the testimony of numerous witnesses and an exhibit. *See also* *RUF* Appeal Judgment, para. 919, in which the Appeals Chamber rejected one of the appellant's arguments that it had not been established beyond reasonable doubt that children under the age of fifteen were within the RUF training bases because two former child soldiers testified to their age at the time of the abduction and were found credible by the Trial Chamber.
[63] *See* *CDF* Appeal Judgment, paras 128-129.
[64] Notably the Defence did not challenge the widespread recruitment and use of children under the age of fifteen for military purposes in the AFRC within the period of the indictment, and the issue was therefore not contested; *see* *AFRC* Trial Judgment, paras 1250-1251. The Trial Chamber nevertheless assessed the evidence in paragraphs 1252-1278, *see in particular* paragraph 1262, in which the Trial Chamber rejected the testimony of a witness relied upon to establish the age of child soldiers because he did not provide an approximate age of the three rebel boys that were alleged to have abducted him.

children under the age of fifteen as combatants by the parties to the conflict in Sierra-Leone was widespread.[65] Therefore, the issue of age determination only arose in these cases in relation to discrete allegations and was not directed at the totality of the charges, as it is in the present case.[66] A second significant difference lies in the fact that the evidence relied upon by the various trial chambers at the SCSL to determine that children under the age of fifteen were in the ranks of the armed groups was mainly bolstered by direct testimonial evidence, if not expert evidence.[67]

44. I am of the view that, in the present case, the "cautious approach" to the evidence adopted in theory by the Trial Chamber was not exercised in practice. In this regard, it should be noted that the "cautious approach", although apparently similar to that adopted by the SCSL, was very different in its practical application in the present case. In my view, there was no comparison in terms of the quantity and quality of evidence relied upon between the present case and, for example, *Taylor*, in particular when the amount of direct evidence (for example, child soldiers testifying themselves) and expert evidence in that case is taken into account.[68] In the Conviction Decision, the only evidence held to be reliable by the Trial Chamber when establishing that children under the age of fifteen were in the ranks of the UPC/FPLC were the age assessments provided by indirect witnesses, one item of corroborative documentary evidence and a series of video excerpts. The statement of the Trial Chamber that the "sheer volume of credible evidence" relating to the presence of children under the age of fifteen in the ranks of the UPC/FPLC "has demonstrated conclusively that a significant number were part of the UPC/FPLC" belies this reality.[69] As explained *infra*, in the present case, I find the evidence adduced by the Prosecutor in order to establish the age

[65] *See* for example *Taylor* Trial Judgment, paras 1410, 1412-1416, 1421, 1433-1434, 1467, 1486, 1488, 1503, 1504, 1512 in which the testimony of several witnesses was stated to be unchallenged by the Defence and was, therefore, accepted by the Trial Chamber. *See also AFRC* Trial Judgment, paras 1250-1251.
[66] *See* for example *Taylor* Trial Judgment, para. 1495. *See also CDF* Appeal Judgment, paras 128-129.
[67] *See* for example in the *Taylor* Trial Judgment, paras 1355-1607, showing that the Trial Chamber included a detailed analysis of the evidence it relied upon for its findings as to the ages of the children: this included expert evidence and the testimony of former child soldiers, as well as the testimony of witnesses who observed the events and documentary evidence. It is also noteworthy that the assessment of the age of individuals alleged to be child soldiers by non-expert witnesses was accepted by the Trial Chamber often on the basis that the Defence did not challenge the witness on the age issue. *See also RUF* Trial Judgment, paras 1615-1623, 1625 *et seq.* in which the Trial Chamber in a similar fashion, relied upon expert evidence in verifying the ages of child soldiers in Sierra-Leone.
[68] Conviction Decision, paras 643-644, 645-914, compared to *Taylor* Trial Judgment, paras 1361, 1355-1607.
[69] Conviction Decision, para. 643.

element of the crimes insufficient and I cannot see how the Trial Chamber could reasonably have reached any other conclusion on this basis.

45. In my view, it is necessary that future prosecutions of these crimes at the Court rely upon more convincing first-hand evidence. If rule 63 (4) of the Rules of Procedure and Evidence makes it clear that no legal requirement for corroboration may be imposed by Chambers, in practice much depends on the probative value of the item of evidence at hand.

## B. The insufficiency of the evidence at hand to establish age to the standard of beyond reasonable doubt.

46. For the reasons that follow, I am firmly of the view that the evidence the Trial Chamber ultimately relied upon in relation to the age element of the crimes of which it convicted Mr Lubanga, namely enlistment, conscription and use of children under the age of fifteen to participate actively in hostilities between 1 September 2002 and 13 August 2003, did not warrant a conviction. For its finding on age, the Trial Chamber ultimately appears to have relied upon (i) its own assessment of the age of individuals depicted on ten video excerpts that had been presented as evidence;[70] (ii) the testimony of witness P-0046, who had interviewed former child soldiers and asked them about their age; (iii) the testimony of witnesses P-0024, P-0055, P-0012, P-0017, P-0016, P-0038, P-0041, P-0014, P-0030,[71] who assessed the ages of children they had seen within the UPC/FPLC; and (iv) one item of documentary evidence (EVD-OTP-00518).[72] The Trial Chamber thereby effectively established that a conviction may be entered in the absence of any direct evidence of a crime being committed, based on several items of indirect evidence each of which individually speaks to the appearance of a crime having been committed.

47. In my opinion, following the exclusion of the evidence of the nine individual cases, no reasonable trier of fact could have reached the conclusion that "the sheer volume of credible evidence"[73] analysed demonstrated conclusively that there were children under the age of

[70] EVD-OTP-00574 (at 01:49:02), EVD-OTP-00574 (at 00:36:21), EVD-OTP-00571 (at 02:47:15 to 02:47:19), EVD-OTP-00571 (at 02:22:50 to 02:22:52), EVD-OTP-00571 (at 02:02:44), EVD-OTP-00572 (at 00:00:50, 00:02:47 and 00:28:42), EVD-OTP-00570 (at 00:06:57), EVD-OTP-00410/EVD-OTP-00676 (at 00:52:14). In that regard, it should be noted that the public cannot access the video excerpts at hand, which I find deeply regrettable.
[71] Conviction Decision, paras 645-731, 759-882, 911-915.
[72] Conviction Decision, paras 741-748, 912.
[73] Conviction Decision, para. 643.

fifteen within the UPC/FPLC, based on the items of evidence left before the Trial Chamber, taken either in isolation or altogether.

*1. Video Evidence*

48. In my view, the issue at hand is whether the ten video excerpts relied on by the Trial Chamber in this case are sufficient to meet the article 66 (3) standard. While I agree with my colleagues from the Majority as to the applicability of the deferential standard of review for factual errors,[74] I believe that fairness of the proceedings require the Appeals Chamber to play a role in correcting fact-finding errors, in particular where "it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it".[75]

**(a) The required level of review of the video excerpts on appeal**

49. It appears from the Majority Judgment that my colleagues generally accept that a "cautious approach" was applied by the Trial Chamber to age determination based on video excerpts were satisfied with this approach. Respectfully however, in my view, in light of the lack of reasoning in the Conviction Decision in relation to the video evidence, coupled with the extreme difficulty inherent in assessing the age of an individual based on his or her physical appearance, the Appeals Chamber could only properly evaluate the reasonableness of the Trial Chamber's findings by carrying out its own assessment thereof. This would be the only way to properly review whether the "cautious approach", which it *in abstracto* previously validated, had been applied in practice.

50. In my opinion, in cases where the appellant has adequately substantiated his or her arguments, the Appeals Chamber must assess the evidence at hand compared to the factual findings of the Trial Chamber, in order to decide whether these findings were reasonable or not,[76] and to give effect to the important safeguards that the right of appeal is intended to provide.[77] I also recall the requirement for the Trial Chamber to provide sufficient reasoning

[74] Majority Judgment, paras 21-27.
[75] *Bemba* OA 10 Judgment, para. 16.
[76] In the jurisprudence of the *ad hoc* tribunals there are several examples of judgments in which the Appeals Chamber conducted careful assessments of the evidence compared to the factual findings of the Trial Chamber. *See* for example *Muhimana* Appeal Judgment, paras 46-53; *Ndindabahizi* Appeal Judgment, paras 110-117; *Seromba* Appeal Judgment, paras 178-182, in particular paras 181-182.
[77] *See* G. Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013), page 1005; D. Marshall, "A Comparative Analysis of the Right To Appeal", 22 *Duke Journal of Comparative & International Law* (2011), page 1, at pages 2-4. *See also* article 14 (5) of ICCPR; United

in respect of its factual findings,[78] which is of heightened importance when complex or technical issues are involved. Concerning the Appeals Chamber's standard of review of such complex or technical evidence, the Appeals Chamber in *Kupreškić* held *despite the deference* it must give to the Trial Chamber that nonetheless, "an appellate body will carefully consider the manner in which identification evidence, particularly where identification is made under difficult circumstances, has been assessed by the fact-finder".[79] Thus, in such cases, the Appeals Chamber is obliged to carefully assess the evidence compared to the Trial Chamber's findings. This was particularly the approach of the Appeals Chamber in *Kupreškić* concerning an identification witness, witness H. The Appeals Chamber concluded after a careful review of the trial record compared to the Trial Chamber's findings that the Trial Chamber's assessment "is seriously at odds with the extensive difficulties revealed on the evidentiary record and discussed at length in the preceding paragraphs, which strike at the core of Witness H's evidence".[80] The Appeals Chamber found that the reasoning was not sufficient as the Trial Chamber failed to consider several matters going directly to the credibility of witness H and that the errors combined made the findings "wholly erroneous" as it diverged significantly from that apparent upon review.[81] The Appeals Chamber therefore allowed the appeal against the conviction for the crime of persecution.[82]

51. In the present case, I accept the "manifestly underage" test if linked with a "cautious approach", because of the particular level of difficulty associated with age determination based on physical appearance and therefore believe that the Appeals Chamber must review whether the Trial Chamber correctly applied the said-cautious standard.[83] In practice, this means that the review on appeal would entail a review of the video excerpts challenged by Mr Lubanga, in order to assess whether they indeed speak for themselves, as the "manifestly

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Nations, Human Rights Committee, *General Comment No. 32*, *Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, paras 45-51, in particular para. 48.

[78] *See supra* paras 26 *et seq.*, 42.

[79] *Kupreškić et al.* Appeal Judgment, para. 130. *See also* Gotovina and Markač Appeal Judgment, paras 58-63, 64-84, where the Appeals Chamber of the ICTY assessed the Trial Chamber's findings compared to the evidence on the trial record in order to conclude that the Trial Chamber lacked an evidentiary basis for the 200 metre margin of error. The Appeals Chamber found that "[i]n view of this legal error, the Appeals Chamber will consider *de novo* the remaining evidence on the record to determine whether the conclusions of the Impact Analysis are still valid" (*Gotovina and Markač* Appeal Judgment, para. 64).

[80] *Kupreškić et al.* Appeal Judgment, para. 223.

[81] *Kupreškić et al.* Appeal Judgment, paras 224-225.

[82] *Kupreškić et al.* Appeal Judgment, page 168.

[83] *See Kupreškić et al.* Appeal Judgment, para. 130; *Gotovina and Markač* Appeal Judgment, paras 58-63, 64-84.

underage" test requires. Only video excerpts depicting "manifestly underage" children could, in my view, explain how the Trial Chamber reached its conclusions. This seems even more necessary to me in light of the fact that the Trial Chamber simply drew an inference from the image or physical appearance of the individuals in question, without providing a reason as to why, in its view, it was so manifest that they were under the age of fifteen. For example, in light of the fact that age determination based on physical appearance is so error-prone that it requires a "cautious approach", the Trial Chamber could first have explained and described how a fifteen year old child in Ituri could be expected to look and then how the individuals on the video excerpts manifestly appeared to be younger.[84] As part of this assessment, the Trial Chamber ought to have described the socio-economic conditions prevalent in Ituri at the time, especially in light of the ongoing armed conflict and the particular vulnerability of children in such circumstances, and explained how these factors could be expected to impact on the physical development and appearance of children. Instead, without any further reasoning, the Trial Chamber appears to have directly assessed the age of a dozen individuals appearing on ten video excerpts taken from a total of five videos.[85] Under such circumstances, I find it essential to carry out a *de novo* review of each of the video excerpts the Trial Chamber found to depict an individual who was "clearly", "visibly" or "manifestly" under the age of fifteen.

**(b) Analysis of the video excerpts**

52. Such a review should be carried out on the basis of objective factors, in particular the quality of each excerpt relied upon, the appearance of the person found to be under the age of fifteen, including their facial features if discernable, or their size compared to other surrounding individuals.

53. Applying these objective factors to the ten video excerpts at hand shows that the stated "cautious approach" was not applied in practice by the Trial Chamber. The video excerpt EVD-OTP-00574 (at 01:49:02) is, compared to all other excerpts, the strongest one. It is of good quality in terms of the lighting and the clarity of images. The video excerpt also depicts the relevant individual at close range, making his facial features quite discernible, although part of his face is in the shadow of his cap. However, the video excerpt at issue has no

[84] *See* *Kupreškić et al.* Appeal Judgment, para. 130*;* *Gotovina and Markač* Appeal Judgment, paras 58-63, 64-84.
[85] EVD-OTP-00574, EVD-OTP-00571, EVD-OTP-00572, EVD-OTP-00570, and EVD-OTP-00410/EVD-OTP-00676.

objective comparators that would make it possible to compare this person to others. It is noted that, only a few seconds before the relevant video excerpt, the person can partly be seen in the background sitting down, just before the insect moves from the hand of one person to the arm of the person at issue. However, the full size of the other person is not discernible. As the Prosecutor included this video excerpt (01:48:41-01:49:04) by "appearance only (played without sound)",[86] the pitch of the voices cannot have been a factor for the Trial Chamber in taking the decision. The main objective factor for determining whether the Trial Chamber was reasonable in its finding in relation to this video sequence is thus the appearance and demeanour of the depicted individual. Considering that this excerpt is by far the strongest one, and that I could find the Trial Chamber's finding in this respect reasonable (without stating whether I would personally find that he was "manifestly" under the age of fifteen on the basis of that excerpt), I would consider this video excerpt in light of Mr Lubanga's First Additional Evidence Request.

54. In that regard, I recall that Mr Lubanga has filed three requests to present additional evidence and the Prosecutor filed a request to present one piece of evidence in response. These additional evidence requests relate, *inter alia*, to the determination of the ages of two individuals whom Mr Lubanga presents as additional witnesses D-0040 and D-0041, submitting that they appear respectively on video excerpts EVD-OTP-00574 at 01:49:04 (individual with insect on the arm) and EVD-OTP-00571 at 02:47:15 (individual with cap and rifle). He adduces evidence relevant to their identities and alleges that they were respectively 18 and 19 years old at the time the videos were shot.[87] In addition to challenging the Trial Chamber's specific findings on the basis of those two video excerpts, he seeks to also attack the Trial Chamber's application of the cautious approach because the additional evidence demonstrates that it was impossible to determine the age based on appearance.[88]

55. The Appeals Chamber heard witnesses D-0040 and D-0041 at the oral hearing held on 19 May 2014. Importantly, besides the aforementioned documents adduced to establish their

[86] Annex 1 to Specification of Video Sequences, page 2 (MFI-P-00032).
[87] *See* First Additional Evidence Request, paras 6, 7-12, 16-19; Third Additional Evidence Request, paras 2, 5-9, 12-13, 16-22 referring to witness D-0040's voting card, witness D-0040's *diplôme d'état*, witness D-0041's voting card, and two letters from the *National Independent Electoral Commission* dated 4 July 2013 and 21 April 2014 respectively, together with attachments containing information relevant to witnesses D-0040 and D-0041.
[88] *See* First Additional Evidence Request, paras 10-11, 19. *See also* Transcript of 20 May 2014, ICC-01/04-01/06-T-363-Red-ENG (WT), page 7, line 12 to page 8 line 25.

age, both confirmed before the Appeals Chamber, their dates of birth, which showed that they were aged between 19 and 20, and between 17 and 18 respectively during the period relevant to the charges.[89] In my view, this casts reasonable doubt on the Trial Chamber's application of the "cautious approach" towards video excerpts, if it does not entirely discredit its reliance on these video excerpts.

56. I should first state that I respectfully disagree with my colleagues from the Majority not to admit this additional evidence.[90] In my opinion, the key criterion to be considered in that respect is whether the submitted additional evidence could have resulted in a different verdict. In light of the overall weakness of the evidence establishing that some children were under the age of fifteen, the submitted additional evidence in relation to witnesses D-0040 and D-0041 clearly has the potential to demonstrate that this approach was flawed and thereby have an impact on the conviction.

57. This is especially true when the evidence in relation to Mr Lubanga's own bodyguards is considered. In this regard, the Trial Chamber relied upon four witnesses, including witnesses P-0055 and P-0041, neither of whom stated that the children in question were under the age of fifteen, and witness P-0016, who simply indicated that a number of the bodyguards were between thirteen and fourteen years of age, without specifying how he arrived at that conclusion.[91] The fourth witness relied upon was witness P-0030 who indicated in response to a question about the ages of the child soldiers outside the office of the President that "[t]hey were young, like this one that we can see on the screen", referring to the image of witness D-0040.[92] In order to further support its findings in this section, the Trial Chamber relied upon a number of video excerpts, including those of witnesses D-0040 and D-0041, whom it found to be clearly under the age of fifteen based solely on their physical appearance.[93]

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[89] *See* Transcript of 19 May 2014, ICC-01/04-01/06-T-362-Red-ENG (WT), page 7, lines 2-3 for witness D-0040; Transcript of 19 May 2014, ICC-01/04-01/06-T-362-Red-ENG (WT), page 29, lines 13-16 for witness D-0041.
[90] Majority Judgment, paras 74-81.
[91] *See infra* paras 68 *et seq.*
[92] Transcript of 17 February 2009, ICC-01/04-01/06-T-129-Red3-Eng (CT WT), page 57, lines 14-23.
[93] *See* Conviction Decision, paras 858, 860 for witness D-0040 and witness D-0041 respectively; the Trial Chamber also found witness D-0040 to be "evidently under the age of 15" (para. 1254) and witness D-0041 to be "significantly below 15 years of age" (para. 1251).

58. In my view, the testimony of witnesses D-0040 and D-0041, combined with the documentary evidence as to their identities and ages, clearly shows that the margin of error applied by the Trial Chamber was simply not sufficient to reach the article 66 (3) threshold.[94] Moreover, it shows that some of Mr Lubanga's bodyguards appeared to be very young, but were in fact well over the age of fifteen. In these circumstances, it would be difficult to see how the Trial Chamber with this evidence before it could have nevertheless found that Mr Lubanga had bodyguards under the age of fifteen on the basis of witness testimony relating to 'children', 'very young children', 'kadogos', or thirteen or fourteen year old children. I should add that, here again, had the Trial Chamber made an overall assessment of the evidence underpinning its findings on age, instead of referring to a "sheer volume of credible evidence" in the abstract,[95] the exact impact of this video excerpt would be known, which would have allowed the Appeals Chamber to assess it accordingly.

59. While the quality of the nine other video excerpts cannot be compared to the one of EVD-OTP-00574 (at 01:49:02), the particular poor quality of video excerpts EVD-OTP-00574 (at 00:36:21), EVD-OTP-00571 (at 02:02:44), EVD-OTP-00570 (at 00:06:57), and EVD-OTP-00410/EVD-OTP-00676 (at 00:52:14) must be noted.

60. The facial features of the relevant depicted persons are only discernable on two excerpts: EVD-OTP-00574 (at 01:49:02), and EVD-OTP-00572 (at 00:00:50). However, as to this second excerpt, the size of the person cannot be assessed and the identity of the other persons standing around him and their actual sizes are unknown factors. With the exception of video excerpts EVD-OTP-00572 (at 00:28:42) and EVD-OTP-00410/EVD-OTP-00676 (at 00:52:14), none of the eight other video excerpts allow for a meaningful use of the size of people close to the concerned individuals as comparators.

61. Video excerpt EVD-OTP-00574 (at 00:36:21), which is based on a very short sequence and blurred images, does not show the individuals closely and, in particular, does not show their faces. Furthermore, the Trial Chamber relied mainly on the size of the two individuals, although they are seated. Video excerpt EVD-OTP-00571 (at 02:47:15 to 02:47:19), which is of poor technical quality shows the individual for a few seconds, without showing him in full.

[94] In relation to witness D-0041, as explained below, considering that the video excerpt EVD-OTP-00571 at (02:47:15 to 02:47:19) is of poor quality and does not allow the face of the person to be seen because it is heavily shadowed by his cap, I find this evidence unconvincing any way.
[95] Conviction Decision, para. 643.

His face is heavily shadowed by his cap, which does not allow his eyes to be seen or to determine whether he had an adam's apple or any signs of a beard.[96] Furthermore, people on this video excerpt are of varied size and it is rather unclear whether the ground is flat or uneven.

62. The Trial Chamber made a contradictory finding in relation to video excerpt EVD-OTP-00571 (at 02:22:50 to 02:22:52), first finding that it depicts "children who could be under the age of 15 but they appear too briefly to enable a definite finding",[97] before reaching the opposite conclusion, namely that this same excerpt depicts a "noticeably smaller" person, "significantly below 15 years of age".[98]

63. In relation to video excerpt EVD-OTP-00571 (at 02:02:44), it is hard to discern a face or see the person as a whole, while the perspective from which the video was filmed makes it difficult to compare the size of the person at issue to that of the other persons depicted further in the background. Furthermore, it is unclear from the Conviction Decision which depicted individual the Trial Chamber actually referred to as "evidently under the age of 15".[99]

64. In relation to the three video excerpts EVD-OTP-00572 (at 00:00:50, 00:02:47 and 00:28:42), the Conviction Decision fails to explain why the three individuals on the videos, compared to the surrounding persons, are found to be below the age of fifteen years and on what basis they were found to be bodyguards. The issue raised in general terms by Mr Lubanga[100] of whether the individuals identified by the Trial Chamber may actually be one and the same person is not addressed.[101] While the first video excerpt shows the face of the person, their size cannot be assessed and the identity and actual sizes of the other persons

[96] I recall that this is the video excerpt depicting witness D-0041, who testified before the Appeals Chamber in May 2014, that he was born in 1984 and therefore he was above fifteen at the time the video footage was made. *See* Transcript of 19 May 2014, ICC-01/04-01/06-T-362-Red-ENG (WT), page 29, lines 13-16.
[97] Conviction Decision, para. 860, footnote 2432.
[98] Conviction Decision, para. 1249.
[99] Conviction Decision, para. 861.
[100] Document in Support of the Appeal, para. 173.
[101] However, the Trial Chamber's reference to the transcripts of the hearing of witness P-0030 could be read as indicating that the Trial Chamber adopted witness P-0030's conclusions that suggest that these were different individuals of different ages (but below the age of fifteen years, or very young) and that they were bodyguards or guards, including of Commander Ali. *See* Conviction Decision, para. 854, footnote 2420. In addition, with respect to the age assessments of witness P-0030, it is recalled that the Trial Chamber held that it evaluated the videos itself and did not rely on witness P-0030's age evaluations *See* Conviction Decision, para. 718: "The Chamber has independently assessed the ages of the children identified in the video footage and about whom this witness expressed a view, to the extent that it is possible to draw a safe conclusion based on their appearance".

standing around him and their actual sizes are unknown. The individual on the second video excerpt is never fully visible, as only parts of his body are depicted. There is a zoom-in on the face, but it is overshadowed and partly covered by a cap. As to objective comparators, although there are other people standing around him, their size cannot be ascertained. The individual on the third video can briefly be seen fully, but his face is not visible. He can be compared to the size of the weapon he is carrying and, at least to a degree, to the size of persons standing around him.

65. Video excerpt EVD-OTP-00570 (at 00:06:57) is rather blurred. As to objective comparators, the person at issue stands in front. All persons behind the individual appear to be about the same height. As the Trial Chamber did not refer to sequence 00:23:23, in relation to which witness P-0010 indicated that the same person is depicted, I would also not find it reasonable to rely on this sequence.

66. Video excerpt EVD-OTP-00410/EVD-OTP-00676 (at 00:52:14) does not allow the face of the depicted person to be discerned, but his size can be compared to that of the people surrounding him (though the Trial Chamber did not comment on the relative size). Furthermore, the age of the other people is unknown. While there are some very tall persons compared to the surrounding individuals and to the person in question, it is unclear whether this is because they are older or because of other reasons.

67. In my opinion, a review of the ten video excerpts at hand shows that they all have several problematic aspects. Overall, none of the individuals are depicted clearly – either only parts of the person are visible, or, if the person as such is discernible, the face cannot be seen, because the person is shown from the back or the side or because there is a cap shadowing the face. Therefore, size is often the most important criterion. However, the relevance of the size of comparators, such as surrounding persons, is unclear because, most of the time, those persons, including their age, are also unknown. Also, the exact height of a truck or a gun is not known, or at least, not explained by the Trial Chamber. Therefore, it is my strong view that reliance on all of these video excerpts was unreasonable. In my opinion, none of the video excerpts speaks for itself or shows individuals that are "manifestly underage", and reliance on these video excerpts does not comply with the "cautious approach" articulated by the Trial Chamber.

*2. Witness testimony*

68. In my view, the witness statements relied on by the Trial Chamber, whether assessed individually or collectively, do not establish to the standard of beyond reasonable doubt that children under the age of fifteen were conscripted, enlisted or used to participate actively in hostilities. Despite the Trial Chamber's indication that it applied a cautious approach to age estimates given by witnesses because of the high risk of error, it is clear that this caution was not exercised in practice.

69. In most cases, the Trial Chamber relied on age estimates given by witnesses, in the absence of any explanation as to how the witness arrived at the conclusion that the child in question was under the age of fifteen, and frequently in circumstances where the witness was referring to children that were close in age to fifteen. For example, the Trial Chamber relied on witness P-0017's age estimates of two bodyguards of Commander Bosco Ntaganda,[102] in relation to whom the witness simply testified "I can't say the exact age, but I think they were under 15".[103] The Trial Chamber also relied on the testimony of witness P-0017 as regards a group of children in Mamedi whom he thought were under the age of fifteen, while disregarding contradictory evidence from witness D-0019 on the basis simply that the witness demonstrated bias towards Mr Lubanga.[104] Similarly, despite acknowledging that witness P-0024 gave no indication as to how he assessed the ages of the children that he encountered,[105] the Trial Chamber was satisfied, solely based on his interaction with children and professional background, that the estimates that he gave were reliable.[106] In relation to witness P-0016, the Trial Chamber stated that, although the witness did not specify how he came to the conclusion that a number of Mr Lubanga's bodyguards were between thirteen and fourteen years of age, it was satisfied that "he was in a position to make a precise evaluation in this regard".[107] Similarly, witness P-0016's testimony that children between thirteen and seventeen were present at a speech given by Mr Lubanga in September 2002 was

[102] Conviction Decision, para. 841, referring to Transcript of 31 March 2009, ICC-01/04-01/06-T-158-Red2-ENG (CT WT), page 17, line 8 to page 19, line 18.
[103] Transcript of 31 March 2009, ICC-01/04-01/06-T-158-Red2-ENG (CT WT), page 19, line 2.
[104] Conviction Decision, paras 842-845, referring to Transcript of 31 March 2009, ICC-01/04-01/06-T-158-Red2-ENG, page 21, line 12 to page 22, line 16; Transcript of 5 April 2011, ICC-01/04-01/06-344-Red-ENG, page 42, line 20 to page 44, line 11; Transcript of 6 April 2011, ICC-01/04-01/06-345-ENG, page 3, line 24 to page 6, line 6.
[105] Conviction Decision, paras 662-663.
[106] Conviction Decision, paras 662-663, 765, 836-838.
[107] Conviction Decision, para. 864.

relied on in the absence of any explanation from the witness as to how he assessed the ages of those children.[108] Witness P-0014 testified about a fourteen year old boy who acted as a bodyguard and this testimony was accepted by the Trial Chamber, again in the absence of any explanation as to how the witness knew that the child in question was fourteen.[109] Witness P-0014's testimony that he saw two injured children who were fourteen or younger in October 2002 was also accepted without any explanation of how the witness assessed the ages of the children.[110] In my view, the Trial Chamber showed a marked lack of caution in its evaluation of this evidence, none of which would suffice to establish to the standard of beyond reasonable doubt that the children in question were under the age of fifteen.

70. The Trial Chamber also accepted explanations of how witnesses distinguished between children who were over the age of fifteen and those who were under the age of fifteen based on the games that the children played, the way that they behaved and their size as well as level of physical development.[111] In my view, these criteria do not allow a reliable distinction to be drawn between children within the thirteen to seventeen year old age range. Children do not mature uniformly; the behaviour and physical development of many children who are aged thirteen or even younger could give the appearance that they are much older, while, on the other hand, many children who are fifteen and older, may appear, on the basis of the same evaluation, to be much younger. In my view, an evaluation of the behaviour and physical development of children close to the age of fifteen cannot ground a finding beyond reasonable doubt that the children in question are below the age of fifteen.

71. In other instances, the Trial Chamber relied on the testimony of witnesses as to the presence of 'children' or 'kadogos', in the absence of any specific statement that the children

[108] Conviction Decision, para. 790, referring to Transcript of 11 June 2009, ICC-01/04-01/06-T-190-Red2-ENG (CT WT), page 13, line 11 to page 17, line 9.
[109] Conviction Decision, para. 840, referring to Transcript of 3 June 2009, ICC-01/04-01/06-T-185-CONF-ENG (CT), page 12, line 25 to page 13, line 2 and page 26, line 21 to page 27, line 8.
[110] Conviction Decision, para. 832, referring to Transcript of 29 May 2009, ICC-01/04-01/06- T-182-Red2-ENG (CT WT), page 41, lines 4-16.
[111] Conviction Decision, paras 804-808, where the Trial Chamber accepted witness P-0016's testimony about children aged between thirteen and seventeen at the Mandro camp based on his explanation that "their manner of playing, and the way they lived in the community, demonstrated that they were very young", (*see* Conviction Decision, para. 807). *See also* Conviction Decision, paras 680-681, where the Trial Chamber accepted that witness P-0017 could distinguish between children in this age range based on the assumption that girls over the age of fifteen, as well as a number of those who are thirteen or fourteen, have developed breasts, while boys under the age of fifteen "would cry for their mother when they were hungry", "would whine at night, and during the day they were playing games, children's games […] Their voices hadn't yet broken, so they were children […] still" (*see* Conviction Decision, para. 681, referring to Transcript of 25 March 2009, ICC-01/04-01/06-T-154-Red2-ENG (CT WT), page 41, lines 20-25).

in question were under the age of fifteen. In this regard, I agree with the reasoning and conclusion of the Majority that it was unreasonable for the Trial Chamber to rely on witness P-0055's testimony as to "children" and "kadogos" and witness P-0041's testimony as to "young persons" in Mr Lubanga's presidential guard to support its conclusion that some of the individuals concerned were under the age of fifteen years.[112] However, I note that the Trial Chamber gave weight to such vague statements on other occasions. For example, the Trial Chamber accepted witness P-0017's age estimates of children in the training camp in Mongbwalu, whom the witness referred to only as 'children' without specifying that they were under the age of fifteen.[113]

72. The Trial Chamber also relied on contradictory and weak evidence that was unsupported by any other evidence on the record. For example, witness P-0030 testified initially that the youngest of Mr Lubanga's bodyguards were perhaps nine or ten years old,[114] but when cross-examined as to whether he had previously told Prosecution investigators that these kadogos were aged between fourteen and fifteen, the witness was evasive in his response and referred in support of his statement to the images of the children in question that he had recorded.[115] The Trial Chamber found, without explanation, that the witness had not contradicted himself, and relied on his original statement that the youngest children acting as Mr Lubanga's bodyguards were nine years old throughout the Conviction Decision.[116] This testimony was contradicted by (i) the subsequent testimony of the witness himself, (ii) the testimony of witness P-0016, who testified that the youngest of Mr Lubanga's bodyguards were aged between thirteen and fourteen, and (iii) the testimony of witnesses D-0011 and D-0019, who both stated that they had never seen children under the age of eighteen acting as

[112] In my view this analysis applies to all of the unspecific statements made by witness P-0055 about 'kadogos' or 'young children'. Although the Trial Chamber indicated that it would rely upon witness P-0055's testimony only where it was corroborated by other witnesses, because he generally referred to kadogos, whom he stated to be between thirteen and sixteen years old (*see* Conviction Decision, para. 839), it went on to rely extensively on witness P-0055's testimony whenever he referred to 'children' or 'kadogos' in circumstances where he had not specified that the children in question were under the age of fifteen (*see* Conviction Decision, paras 760-764, 775, 786, 794-795, 863, 869).
[113] Conviction Decision, para. 813, referring to Transcript of 25 March 2009, ICC-01/04-01/06-T-154-Red2-ENG (CT WT), page 41, lines 12-13 (where the witness stated that 'children' means those from twelve to fourteen years of age); page 44, line 21 to page 46, line 3.
[114] Transcript of 16 February 2009, ICC-01/04-01/06-T-128-CONF-ENG (CT), page 20, line 25 to page 21, line 4.
[115] Transcript of 19 February 2009, ICC-01/04-01/06-T-131-Red2-ENG (CT WT), page 8, lines 15-24.
[116] Conviction Decision, paras 713-718, 858-859.

Mr Lubanga's bodyguards.[117] It was also uncorroborated by any other evidence, including the videos that were referred to in support of his statement by the witness.[118] In my view, the Trial Chamber failed to evaluate this evidence with the appropriate degree of caution in view of the uncertainty on the part of the witness and the wealth of contradictory evidence on the record.

73. Similarly, the Trial Chamber accepted the testimony of witness P-0014 that children aged between five and eighteen years old were trained between 30 July and 20 August 2002, although there is no other corroborating evidence on the record that children as young as five formed part of the UPC/FPLC.[119]

74. The Trial Chamber also extensively relied on the testimony of witness P-0038, disregarding objective factors that, in my view, demonstrated that the credibility of this witness had been compromised. Witness P-0038 had been a member of the UPC/FPLC from 2001, having previously been a member of Laurent Kabila's army since 1997.[120] He was in contact with members of the Congolese National Intelligence Agency at the time of the Prosecution investigation.[121] He testified that he had been introduced to investigators from the Office of the Prosecutor by intermediary P-0316.[122] The Trial Chamber found that "there are strong reasons to conclude [intermediary P-0316] persuaded witnesses to lie as to their involvement as child soldiers within the UPC" and indicated that "[t]his conclusion potentially affects the Chamber's attitude to the witnesses called by the prosecution at trial with whom P-0316 had contact", including witness P-0038.[123] The Trial Chamber, nevertheless, concluded that witness P-0038 was a reliable witness whose evidence was "truthful and accurate", without any explanation as to how it reached this determination despite the existence of objective factors strongly suggesting that the evidence of this witness

[117] Conviction Decision, paras 864, 866-867.
[118] EVD-OTP-00574 (at 01:49:02); EVD-OTP-00571 (at 02:47:15-02:47:19); EVD-OTP-00571 (at 02:02:44); EVD-OTP-00574 (at 00:36:21).
[119] Conviction Decision, paras 788-789, referring to Transcript of 27 May 2009, ICC-01/04-01/06-T-179-CONF-ENG (CT), page 65, lines 13-24; Transcript of 27 May 2009, ICC-01/04-01/06-T-179-Red2-ENG (CT WT), page 83, line 8 to page 84, line 18; Transcript of 2 June 2009, ICC-01/04-01/06-T-184-CONF-ENG (CT), page 60, lines 7-11.
[120] Conviction Decision, para. 340.
[121] Defence Closing Submissions, para. 451. *See also*, Document in Support of the Appeal, para. 276.
[122] Conviction Decision, para. 341, referring, *inter alia*, to Transcript of 25 November 2010, ICC-01/04-01/06-T-337-CONF-ENG (ET), page 45, lines 2-5 and Transcript of 24 November 2010, ICC-01/04-01/06-T-336-Red2-ENG (WT), page 43, line 4 to page 44, line 20.
[123] Conviction Decision, paras 373-374.

was compromised.[124] Thereafter, the Trial Chamber uncritically accepted any statements made by this witness that there were children under the age of fifteen in the UPC/FPLC at the relevant time. In my view, this approach does not display the degree of caution necessary in weighing evidence of this kind.

75. The Trial Chamber also relied extensively on witness P-0046, who testified as to the age of children that she came into contact with while working in MONUC's child protection programme. In my view, the weight placed on this witness' testimony by the Trial Chamber was excessive in view of the numerous problems affecting the value of her testimony. First, although the witness described the steps that she and other members of her organisation took to verify the stories of the children that she encountered, these methods of verification were not to the standard applied during a criminal investigation, the purpose of which is to establish certain facts beyond reasonable doubt. In this regard, I reiterate my concerns about reliance on anonymous hearsay evidence,[125] especially when such evidence emanates from the work of states, international organisations or non-governmental organisations.[126] This is because the mandates and objectives of such organisations do not require their working methods to reach the level required by the "more exacting process of establishing a legally sufficient case for prosecution".[127] Second, it is notable that the witness did not reveal the identities of any of the children about whom she testified.[128] Her notes, which contained *inter*

[124] Conviction Decision, para. 348.
[125] Bearing this in mind, I recall that for the purpose of her testimony the Trial Chamber authorised witness P-0046 to use "memory-refreshing documents", including her redacted notes from the time. *See* Transcript of 6 July 2009, ICC-01/04-01/06-T-204-ENG (WT), page 1, line 11 to page 2, line 8, page 15, line 1 to page 26, line 12; Transcript of 7 July 2009, ICC-01/04-01/06-T-205-Red3-ENG (CT WT), page 1, line 11 to page 8, line 5.
[126] *See* my *Ntaganda* Dissenting Opinion, paras 14-20, in particular para. 15. Importantly, I note that when assessing P-0046's credibility, the Trial Chamber stated that "P-0046 considered the situation of children associated with the armed conflict in Ituri, along with the work of MONUC and other NGOs who dealt with demobilised children, during the period covered by the charges" (emphasis added, *see* Conviction Decision, para. 645). Notably, NGOs' reports generally refer to "child soldiers", without indicating any age, or refer to children under eighteen when an age is mentioned. *See* for example André Kölln, *DDR in the Democratic Republic of Congo: an overview* (Peace Direct, November 2011), available at http://www.peacedirect.org/wp-content/uploads/DDR-in-the-DRC-by-Andre-Kolln.pdf; Save the Children, "Save the Children UK: DR Congo emergency update Aug 2003", 20 August 2003, accessed at http://reliefweb.int/report/democratic-republic-congo/save-children-uk-dr-congo-emergency-update-aug-2003; B. Verhey, *Going home: Demobilising and reintegrating child soldiers in the democratic Republic of Congo* (Save the Children, 2003), pages 12, 14, 29 available at http://www.savethechildren.org.uk/sites/default/files/docs/going_home_1.pdf.
[127] *See* M. J. Keegan, "Preparation of Cases for the ICTY", 7 *Transnational Law and Contemporary Problems* (1999), page 119, at page 124; L. Reydams *et al.* (eds.), *International Prosecutors* (Oxford University Press, 2012), page 58.
[128] *See* Transcript of 7 July 2009, ICC-01/04-01/06-T-205-ENG (WT) to Transcript of 14 July 2009, ICC-01/04-01/06-T-209-Red2-ENG (WT).

*alia* a record of identified children that she encountered,[129] were not disclosed to the defence due to the confidentiality restrictions of MONUC.[130] There is no indication as to why the Prosecutor did not request that these confidentiality restrictions be lifted so that the essence of the information on which witness P-0046's testimony was based, namely the identities of the children that she encountered, could be disclosed to the defence and tested before the Court. In my view, the ability of Mr Lubanga to investigate and challenge the evidence presented by witness P-0046 was impermissibly restricted by virtue of the fact that the identities of all of these children were withheld from the defence. In such circumstances, I consider that the probative value of this evidence was outweighed by its prejudicial effect and it was unreasonable for the Trial Chamber to have relied on the testimony of witness P-0046 for the purposes of its findings that children under the age of fifteen were conscripted and enlisted into the UPC/FPLC or used to participate actively in hostilities.

76. Finally, I agree with the reasoning and conclusion of the Majority that the Trial Chamber erred in relying on the evidence of witnesses P-0012, given the lack of clarity as to whether the children he referred to were actually part of the UPC/FPLC at the relevant time.[131]

### *3. Letter of 12 February 2003 (EVD-OTP-00518).*

77. For the purpose of age determination, the Trial Chamber also relied on the letter of 12 February 2003 (EVD-OTP-00518), which it found to "further corroborate other evidence that there were children under the age of 15 within the ranks of the UPC".[132] This letter was sent from the UPC National Secretary for Education and Youth to the G5 Commander of the FPLC and copied to several people including the "President, UPC/RP, Bunia".[133] Its purpose was to (i) inform the recipients about a Disarmament, Demobilization, Repatriation, Reintegration and Resettlement (hereinafter: "DDRRR") program for child soldiers between the ages of ten and fifteen or sixteen, who were willing to "voluntarily return to civilian life"

[129] Transcript of 7 July 2009, ICC-01/04-01/06-T-205-Red3-ENG (CT WG), page 1, line 10 to page 3, line 19; page 7, line 14 to page 8, line 5; *see* for example page 73, lines 16 to 23. *See* another example Transcript of 8 July 2009, ICC-01/04-01/06-T-206-Red2-ENG (WT), page 12, lines 4 to 24.
[130] *See* Transcript of 6 July 2009, ICC-01/04-01/06-T-204-ENG (ET), in particular at page 23, lines 8-21.
[131] Majority Judgment, paras 353-361.
[132] Conviction Decision, para. 912; *see also* paras 741-748.
[133] Which has been considered by both the Prosecutor and the Trial Chamber as referring to Mr Lubanga, even though it then interestingly decided not to rely upon it for its finding that Mr Lubanga was aware of the presence of children under the age of fifteen within the UPC/FPLC. *See* Conviction Decision, paras 1309-1312.

and (ii) to invite the recipients to designate military staff to participate in demobilisation training.

78. Surprisingly, the Trial Chamber inferred from the letter's author, addressees and content that it "significantly corroborates other evidence before [it] that child soldiers under the age of 15 were part of the UPC/FPLC during the period of the charges" (emphasis added).[134] However, the DDRRR process referred to in the letter deals with the child soldiers as a concern in the entire region, not specifically within UPC/FPLC. In fact, all the letter shows is that the DDRRR process had a much wider scope than the UPC/FPLC. Notably, the letter does not mention that there were child soldiers below the age of fifteen within the UPC/FPLC. I therefore do not consider that this item of documentary evidence assists in establishing the age element of the crimes.

## III. GENERAL CONCLUSION

79. For the reasons set out above, in my view, the abstract nature of the remaining charges contaminated the entire proceedings as it allowed evidence to be presented consisting of vague assertions that children were enlisted or conscripted into the UPC/FPLC or used to participate actively in hostilities. I therefore believe that the Trial Chamber's exclusion, without previous notice, in the Conviction Decision of the incidents that needed to be proven in order to establish the alleged pattern contaminated the entirety of the evidentiary process and ultimately ruptured the fairness of the trial. Ultimately, I find that, based on the evidence at hand, a reasonable trier of fact could not reach the conclusion that children under the age of fifteen were conscripted, enlisted and used to participate in the hostilities within the UPC/FPLC during the period covered by the charges, in particular in relation to the age element of the crimes. In my view, the accused must always be given the benefit of any doubt as to the proof of guilt. In the present case, there is no video excerpt that truly "speaks for itself", namely depicts an individual that is "manifestly under fifteen". Looking at the age estimates by witnesses in this case, I see a series of major problems in relation to reliance on indirect evidence only and a lack of reasoning on the part of the Trial Chamber as to how it reached its conclusion based on the evidence at hand without any explanation of these major issues. In that respect, I find the overall statement of the Trial Chamber at paragraph 643 of the Conviction Decision that there was a "sheer volume of credible evidence […]" even more

[134] Conviction Decision, para. 748. *See also* Conviction Decision, para. 912.

open to doubt, in particular because it is not even clear from the Conviction Decision what evidence was actually relied upon and what weight was given to it. In my view, the Conviction Decision simply lacks a sufficient convincing evidentiary basis for the age element of the crimes. Accordingly, I would conclude that Mr Lubanga's conviction as a whole cannot stand, because a requisite element of the crimes has not been established to the standard of beyond reasonable doubt. It is my hope that future prosecutions of these crimes at the Court will adduce direct and more convincing evidence and preserve the fairness of proceedings, which lies at the heart of criminal prosecutions and should not be sacrificed in favour of putting historical events on the record.

Done in both English and French, the English version being authoritative.

**Judge Anita Ušacka**

Dated this 1st day of December 2014

At The Hague, The Netherlands