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No. ICC-01/04-01/06 A 5
Date: 1 December 2014

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public redacted document

Judgment
on the appeal of Mr Thomas Lubanga Dyilo against his conviction

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence
Ms Catherine Mabille
Mr Jean-Marie Biju-Duval

Legal Representatives of Victims V01
Mr Luc Walleyn
Mr Franck Mulenda

Legal Representatives of Victims V02
Ms Carine Bapita Buyangandu
Mr Paul Kabongo Tshibangu
Mr Joseph Keta Orwinyo

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Lubanga against the decision of Trial Chamber I entitled "Judgment pursuant to Article 74 of the Statute" of 14 March 2012 (ICC-01/04-01/06-2842),

After deliberation,

By majority, Judge Sang-Hyun Song partly dissenting, Judge Anita Ušacka dissenting,

Delivers the following

JUDGMENT

The "Judgment pursuant to Article 74 of the Statute" is confirmed. The appeal is rejected.

REASONS

I. KEY FINDINGS

1. Additional evidence on an appeal pursuant to article 81 (1) of the Statute is admissible if: (i) the Appeals Chamber is convinced of the reasons why such evidence was not presented at trial, including whether it could have been presented with the exercise of due diligence; and (ii) it is demonstrated that the additional evidence, if it had been presented before the Trial Chamber, could have led the Trial Chamber to enter a different verdict, in whole or in part. It is within the Appeals Chamber's discretion to admit additional evidence on appeal despite a negative finding on one or more of these criteria, if there are compelling reasons for doing so.

2. Additional evidence may be admitted on appeal for purposes of demonstrating that the proceedings appealed from were unfair and thereby rendered the decision pursuant to article 74 unreliable.

3. In order to be able to prepare an effective defence, where an accused is not alleged to have directly carried out the incriminated conduct and is charged for crimes committed on the basis of a common plan, the accused must be provided with detailed information regarding: (i) his or her alleged conduct that gives rise to criminal responsibility, including the contours of the common plan and its implementation as well as the accused's contribution (ii) the related mental element; and (iii) the identities of any alleged co-perpetrators. With respect to the underlying criminal acts and the victims thereof, the Appeals Chamber considers that the Prosecutor must provide details as to the date and location of the underlying acts and identify the alleged victims to the greatest degree of specificity possible in the circumstances.

4. The element of compulsion necessary for the crime of conscription can be established by demonstrating that an individual under the age of fifteen years joined the armed force or group due to, *inter alia*, a legal obligation, brute force, threat of force, or psychological pressure amounting to coercion. To show compulsion, it does not have to be established that the person joined the armed force or group against his or her will.

5. In order to determine whether the crime of using children to participate actively in hostilities under article 8 (2) (e) (vii) of the Statute is established, the link between the activity for which the child is used and the combat in which the armed force or group of the perpetrator is engaged has to be analysed.

6. The phrase "[a consequence] will occur" in article 30 (2) and (3) of the Statute refers to future events in respect of which there is virtual certainty that they will occur.

7. A co-perpetrator is one who makes, within the framework of a common plan, an essential contribution with the resulting power to frustrate the commission of the crime. The essential contribution can be made not only at the execution stage of the crime, but also, depending on the circumstances, at its planning or preparation stage, including when the common plan is conceived.

II. PROCEDURAL BACKGROUND

8. On 14 March 2012, Trial Chamber I (hereinafter: "Trial Chamber") delivered the Conviction Decision,[1] in which it convicted Mr Thomas Lubanga Dyilo (hereinafter: "Mr Lubanga") pursuant to articles 8 (2) (e) (vii) and 25 (3) (a) of the Statute, of having committed, inn Ituri (DRC) between early September 2002 and 13 August 2003, in the context of a non-international armed conflict and jointly with others, the following crimes: "[c]onscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities […]".[2]

9. On 3 October 2012, Mr Lubanga filed his Notice of Appeal pursuant to article 81 (1) (b) of the Statute against the Conviction Decision. On 26 November 2012, Mr Lubanga filed the First Additional Evidence Request, which included a request that the Appeals Chamber hear the testimony of two witnesses. On 3 December 2012, Mr Lubanga filed his Document in Support of the Appeal against the Conviction Decision. In his Document in Support of the Appeal, Mr Lubanga alleges violations of his fair trial rights, as well as legal and factual errors.

10. On 4 February 2013, the Prosecutor filed her Response to the Document in Support of the Appeal, wherein she requests that the Appeals Chamber dismiss Mr Lubanga's appeal in its entirety and, in response to Mr Lubanga's First Additional Evidence Request, requests that the Appeals Chamber find the additional evidence inadmissible or, if found admissible, admit one piece of rebuttal evidence.[3]

11. Upon the Appeals Chamber granting Mr Lubanga leave to reply, Mr Lubanga filed the Reply to the Response to the Document in Support of the Appeal.

12. On 23 December 2013, Mr Lubanga filed the Second Additional Evidence Request, in which he requests authorisation to present additional evidence in relation to his appeals against the Conviction and the Sentencing Decisions, as well as to add a new ground of appeal.[4] On 14 January 2014, the Appeals Chamber issued the

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[1] The full citation, including the ICC registration reference, of all designations and abbreviations used in this judgment are included in Annex 4.
[2] Conviction Decision, para. 1358.
[3] Response to the Document in Support of the Appeal, para. 312. *See also* Response to the Document in Support of the Appeal, paras 6, 70, referring to Annex A to the Response to the Document in Support of the Appeal.
[4] Second Additional Evidence Request, para. 11.

Decision on Adding a New Ground of Appeal and Order Regarding the Second Additional Evidence Request, granting Mr Lubanga's request to present an additional ground of appeal.[5] On 17 January, the Prosecutor filed her Response to the Second Additional Evidence Request.

13. On 19 and 20 May 2014, the Appeals Chamber held an oral hearing at which it heard the testimony of the two witnesses, D-0040 and D-0041, who were the subject of the First Additional Evidence Request, as well as further submissions of the parties and participants on the issues arising in the present appeal.[6] Thereafter, on 23 May 2014, Mr Lubanga filed a third request for the admission of additional evidence relevant to documents referred to during the testimony of those witnesses.[7]

14. Victims participated in the proceedings by way of written and oral observations.

15. A more detailed procedural history is set out in annex 3 to this judgment. Furthermore, in this judgment, the Appeals Chamber does not exhaustively set out each submission of the parties and participants. Nevertheless, the Appeals Chamber has carefully considered all of the arguments and submissions of the parties and participants.

III. STANDARD OF REVIEW

A. Articles 81 (1) (b) and 83 (2) of the Statute

16. Pursuant to article 81 (1) (b) of the Statute, in an appeal against a conviction decision, the convicted person may raise (i) procedural errors, (ii) errors of fact, or (iii) errors of law, as well as (iv) "[a]ny other ground that affects the fairness or reliability of the proceedings or decision". Article 83 (2) of the Statute also establishes that the Appeals Chamber may only interfere with a conviction decision if the error of fact or law or a procedural error "materially affected" that decision, and, in respect of unfairness allegations, that the unfairness "affected the reliability of the decision".

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[5] Decision on Adding a New Ground of Appeal and Order Regarding the Second Additional Evidence Request, para. 10.
[6] Transcript of 19 May 2014, ICC-01/04-01/06-T-362-CONF-ENG (CT), with public redacted version, ICC-01/04-01/06-T-362-Red-ENG (WT); Transcript of 20 May 2014, ICC-01/04-01/06-T-363-CONF-ENG (CT), with public redacted version, ICC-01/04-01/06-T-363-Red-ENG (WT).
[7] Third Additional Defence Request.

17. The Appeals Chamber notes its jurisprudence regarding the standard of review in relation to appeals arising under article 82 (1) of the Statute. In the view of the Appeals Chamber, the principles and rules established in this jurisprudence are, in essence, also applicable in relation to legal, factual and procedural errors raised in appeals pursuant to article 81 (1) of the Statute. The Appeals Chamber notes that, while it originally held that article 83 (2) of the Statute is not directly applicable to appeals arising under article 82 of the Statute,[8] it has applied in substance the same standards as those applicable to appeals arising under article 81 (1) of the Statute.[9]

18. Accordingly, the standard of review for legal errors in appeals pursuant to article 82 of the Statute is:

> [T]he Appeals Chamber will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.[10]

19. A judgment is "materially affected by an error of law" if the Trial Chamber "would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error".[11]

20. Regarding procedural errors, the Appeals Chamber has held that such errors may occur in the proceedings leading up to an impugned decision.[12] Therefore, in relation to an appeal against a conviction decision, an allegation of a procedural error may be based on events which occurred during the trial proceedings and pre-trial proceedings. However, as with errors of law, the Appeals Chamber will only reverse a conviction decision if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the judgment would have substantially differed from the one rendered.

21. Regarding factual errors, the Appeals Chamber has held that it will not interfere with factual findings of the first-instance Chamber unless it is shown that the

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[8] *Lubanga* OA 3 Judgment, paras 15-18.
[9] *Bemba et al.* OA 4 Judgment, para. 28; *Kony et al.* OA 3 Judgment, paras 79-80; *DRC* OA Judgment, paras 83-84.
[10] *Banda and Jerbo* OA 2 Judgment, para. 20.
[11] *DRC* OA Judgment, para. 84.
[12] *Kony et al.* OA 3 Judgment, paras 46-47.

Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts.[13] As to the "misappreciation of facts", the Appeals Chamber has also stated that it "will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it".[14]

22. The jurisprudence relevant to appeals brought under article 82 of the Statute indicates that the Appeals Chamber should give a margin of deference to factual findings of a Trial Chamber. Nevertheless, it must be noted that at issue in an appeal against a conviction decision are the findings of the Trial Chamber pursuant to article 66 (3) of the Statute, which requires the Trial Chamber to convict the accused only when it is "convinced of the guilt of the accused beyond reasonable doubt". It is clear that the standard of proof "beyond reasonable doubt" is to be applied only to the facts constituting the elements of the crime and mode of liability of the accused as charged. This is in line with the jurisprudence of the *ad hoc* tribunals. In *Blagojević and Jokić*, the Appeals Chamber of the ICTY held that "a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime and of the mode of liability".[15] Similarly, in *Mrkšić and Šljivančanin*, the Appeals Chamber of the ICTY made clear that, in making a determination about the innocence or guilt of the accused, the Trial Chamber is called upon to determine "in respect of each of the counts charged […] whether it was satisfied beyond reasonable doubt, on the basis of the *totality* of the evidence, that every element of the crime in question charged […], including each form of liability, has been established".[16] Accordingly, "not each and every fact in the Trial Judgment must be proved beyond reasonable doubt, but only those on which a conviction or the sentence depends".[17] In this

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[13] *Ruto et al.* OA Judgment, para. 56; *Kenyatta et al.* OA Judgment, para. 55, footnote 117 referring to *Bemba* OA 2 Judgment, para. 61, citing *Katanga and Ngudjolo* OA 4 Judgment, para. 25. *See also* *Bemba* OA Judgment, para. 52.
[14] *Ruto et al.* OA Judgment, para. 56; *Kenyatta et al.* OA Judgment, para. 55. *See also* *Mbarushimana* OA Judgment, paras 1, 17.
[15] *Blagojević and Jokić* Appeal Judgment, para. 226; *Stakić* Appeal Judgment, para. 219; *Ntagerura et al.* Appeal Judgment, para. 174.
[16] *Mrkšić and Šljivančanin* Appeal Judgment, para. 217.
[17] *Milosević* Appeal Judgment, para. 20 referring to, *inter alia*, *Ntagerura et al.* Appeal Judgment, paras 174-175.

respect, a clear distinction must be made between facts constituting the elements of the crime and mode of liability falling under the subject matter of the case, and any other set of facts introduced by the different types of evidence. Only those facts falling under the subject matter of the case must be proven beyond reasonable doubt, as dictated by article 66 (3) of the Statute. In the view of the Appeals Chamber, when determining whether this standard has been met, the Trial Chamber is required to carry out a holistic evaluation and weighing of *all the evidence taken together* in relation to the fact at issue. Indeed, it would be incorrect for a finder of fact to do otherwise. These principles have guided the Appeals Chamber in its review of the Conviction Decision and, more specifically, of the way in which the Trial Chamber assessed the evidence to reach its findings under article 66 (3) of the Statute.

23. Furthermore, the Appeals Chamber recalls that the Appeals Chambers of the *ad hoc* tribunals have held that

> it is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses' testimonies. It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the 'fundamental features' of the evidence.[18]

24. The Appeals Chambers of the *ad hoc* tribunals apply "a standard of reasonableness in reviewing" a Trial Chamber's factual findings,[19] applying a similar margin of deference to the Trial Chamber's findings as that established by the Appeals Chamber in appeals pursuant to article 82 of the Statute. The rationale for this deferential approach to factual findings is that

> [t]he Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber's duty to provide a reasoned opinion.[20]

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[18] *Kupreškić et al.* Appeal Judgment, para. 31.
[19] *Blagojević and Jokić* Appeal Judgment, para. 9; *Aleksovski* Appeal Judgment, para. 63.
[20] *Kupreškić et al.* Appeal Judgment, para. 32.

25. Therefore, the Appeals Chamber "must *a priori* lend some credibility to the Trial Chamber's assessment of the evidence proffered at trial".[21] However, the Appeals Chamber's intervention is required when "an unreasonable assessment of the facts of the case" carried out by the Trial Chamber "may have occasioned a miscarriage of justice",[22] which constitutes a factual error. The ICTY Appeals Chamber has stated that what constitutes an erroneous evaluation of the evidence can only be determined on a case-by-case basis and that "[t]he Appeals Chamber cannot and should not legislate the circumstances that suffice to meet this test".[23]

26. The Appeals Chambers of the *ad hoc* tribunals have held that

> an appeal is not a trial *de novo*. In making its assessment, the Appeals Chamber will in principle only take into account the following factual evidence: evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote; evidence contained in the trial record and referred to by the parties; and additional evidence admitted on appeal.[24]

27. Having regard to the similarity between the Court's legal framework and those under which the *ad hoc* tribunals operate, the Appeals Chamber considers it appropriate to apply the same standard. Accordingly, when a factual error is alleged, the Appeals Chamber will determine whether a reasonable Trial Chamber could have been satisfied beyond reasonable doubt as to the finding in question. The Appeals Chamber will not assess the evidence *de novo* with a view to determining whether it would have reached the same factual conclusion as the Trial Chamber. The Appeals Chamber will assess the alleged factual errors in the Conviction Decision in light of the above principles.

28. The Appeals Chamber notes that Mr Lubanga alleges several violations of his fair trial rights. In keeping with articles 81 (1) (b) (iv) and 83 (2) of the Statute, these allegations are considered below in relation to whether his rights have been violated and, if so, whether such violations affected the reliability of the Conviction Decision.

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[21] *Gotovina and Markač* Appeal Judgment, para. 50, referring to *Kayishema and Ruzindana* Appeal Judgment, para. 119.
[22] *Gotovina and Markač* Appeal Judgment, para. 50, referring to *Kayishema and Ruzindana* Appeal Judgment, para. 119.
[23] *Kupreškić et al.* Appeal Judgment, para. 225.
[24] *Brđanin* Appeal Judgment, para. 13; *Musema* Appeal Judgment, para. 17.

B. Requirement of substantiation of arguments

29. The Prosecutor requests that the Appeals Chamber summarily dismiss all of Mr Lubanga's arguments raised in the Document in Support of the Appeal under the heading "The Prosecution's violation of its statutory obligations",[25] as well as other specific arguments, based on ICTY and ICTR jurisprudence on "summary dismissal", according to which those tribunals summarily dismiss submissions of the parties for specifically enumerated reasons, such as mere assertions without reference to the trial record and repetition of arguments.[26]

30. The Appeals Chamber notes that its jurisprudence relating to the requirement of substantiation in appeals under article 82 of the Statute adequately addresses the substance of the Prosecutor's request. The Appeals Chamber recalls that, in appeals pursuant to article 82 (1) of the Statute, the appellant is required to set out the alleged error and how the alleged error materially affected the impugned decision.[27] If an appellant fails to do so, the Appeals Chamber may dismiss the argument without analysing it in substance.[28] The Appeals Chamber adopts this jurisprudence for appeals pursuant to article 81 (1) of the Statute.

31. Whether an error or the material effect of that error has been sufficiently substantiated will depend on the specific argument raised, including the type of error alleged. With respect to legal errors, the Appeals Chamber, as set out above, "will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law".[29] Accordingly, the appellant has to substantiate that the Trial Chamber's interpretation of the law was incorrect; contrary to the arguments of the Prosecutor raised elsewhere in her Response to the Document in Support of the Appeal,[30] this may be done including by raising arguments that were previously put before the Pre-Trial and/or Trial Chamber. In addition, the appellant must substantiate that the decision under review would have been substantially different, had it not been for the error.

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[25] Response to the Document in Support of the Appeal, paras 112, 145.
[26] Response to the Document in Support of the Appeal, paras 34-36.
[27] *Kony et al.* OA 3 Judgment, para. 48.
[28] *See* *Kony et al.* OA 3 Judgment, paras 50-51; *Bemba* OA 3 Judgment, paras 103-104; *Bemba* OA 4 Judgment, paras 69-71.
[29] *Supra* para. 18.
[30] Response to the Document in Support of the Appeal, paras 259, 264, *see infra* para. 439.

32. With respect to procedural errors, the substantiation required will also depend on the precise type of error alleged. To the extent that the appellant is arguing that a mandatory procedural provision was violated, this has to be sufficiently substantiated both in fact and in law. To the extent that a discretionary decision of the Trial Chamber is at issue, the arguments of the appellant must be tailored to the specific standard of review for such decisions. Further, when alleging such an error, the appellant must substantiate specifically how the error materially affected the impugned decision.

33. Appellants alleging factual errors need to set out in particular why the Trial Chamber's findings were unreasonable. In that respect, repetitions of submissions made before the Trial Chamber as to how the evidence should be assessed are insufficient if such submissions merely put forward a different interpretation of the evidence.

34. The Appeals Chamber also notes that Mr Lubanga labels many of the alleged errors as factual errors, while they are actually legal errors. Other alleged errors are also categorised as legal errors, while they are procedural errors. Despite this misnomer, if substantiated, the Appeals Chamber accepts these errors as properly raised and will consider them against the relevant standard of review.

IV. PRELIMINARY ISSUES

A. Request to dismiss observations of the legal representatives of victims

35. In Mr Lubanga's Response to the Legal Representatives of Victims' Observations, he requests that those observations be dismissed *in limine* insofar as they concern grounds of appeal that do not affect the victims' personal interests.[31] In Mr Lubanga's view, only the Prosecutor should be able to submit observations regarding any ground related to alleged violations of his fair trial rights.[32]

36. With respect to the observations of the legal representatives of victims, the Appeals Chamber recalls that, in the decision authorising victims to participate in the

[31] Mr Lubanga's Response to the Legal Representatives of Victims' Observations, paras 4-7, referring to Observations of Legal Representatives of Victims V01 and Observations of Legal Representatives of Victims V02.
[32] Mr Lubanga's Response to the Legal Representatives of Victims' Observations, para. 6.

present final appeal, it held that victims could present their views and concerns "in respect of their personal interests affected by the issues raised".[33] The Appeals Chamber has therefore taken into account the observations of the legal representatives of victims, regardless of whether they are explicitly referenced in this judgment,[34] only to the extent that the issue under consideration affects the victims' personal interests. The Appeals Chamber does not consider it necessary to formally dismiss any observations for exceeding the personal interests of the victims and therefore will not address Mr Lubanga's request further.

B. Relationship between enlistment, conscription and use to participate actively in hostilities of children under the age of fifteen years

37. The Appeals Chamber notes that, pursuant to article 8 (2) (e) (vii) of the Statute, the enlistment, conscription and use to participate actively in hostilities of children under the age of fifteen years entail criminal responsibility. The Pre-Trial Chamber and the Trial Chamber considered these prescribed acts to be three separate crimes.[35] This determination has not been challenged on appeal by any of the parties.

38. In these circumstances, the Appeals Chamber[36] has decided not to consider the question of whether 'enlistment', 'conscription' and 'use to participate actively in hostilities' are separate crimes or different prescribed conducts of one crime. Without prejudice to any future consideration of this issue, the Appeals Chamber will proceed for the purposes of this appeal based on the Trial Chamber's understanding that they are separate crimes.

V. MR LUBANGA'S ADDITIONAL EVIDENCE REQUESTS AND ADDITIONAL GROUND OF APPEAL

A. Background

39. The Appeals Chamber recalls that it decided to address Mr Lubanga's additional evidence requests, as well as the Prosecutor's proposed rebuttal evidence, pursuant to

[33] Victim Participation Decision, para. 5. *See also* Additional Evidence Directions, para. 10.
[34] *Supra* para. 15.
[35] Conviction Decision, paras 609, 1358.
[36] Judge Song attaches a partly dissenting opinion on this point.

regulation 62 (2) (b) of the Regulations of the Court,[37] namely to rule upon the admissibility of the additional evidence jointly with the other issues raised in the appeal in this judgment.

40. The Appeals Chamber also recalls that it decided to address Mr Lubanga's request to add an additional ground of appeal,[38] pursuant to regulation 61 of the Regulations of the Court, and that it granted Mr Lubanga's request to add this new ground of appeal.[39]

B. Standard for the admissibility of additional and rebuttal evidence in final appeal proceedings

41. The Appeals Chamber notes that this appeal is the first time that the admissibility standard for additional evidence will be considered within the context of a final appeal pursuant to article 81 of the Statute. In the context of interlocutory appeals pursuant to article 82 of the Statute, the Appeals Chamber recalls that it has considered requests to present additional evidence, namely in the *Kenyatta et al.* OA and the *Ruto et al.* OA proceedings, the *Bemba* OA 3 proceedings, and the *Al-Senussi* OA 6 proceedings.[40] The Appeals Chamber considers that the Court's current jurisprudence on additional evidence within the context of interlocutory appeals is specific to those appeals, particularly in light of the fact that the above-mentioned requests related to appeals against decisions on the admissibility of the case pursuant to article 82 (1) (a) of the Statute.[41]

42. In the present section, the Appeals Chamber will set out the standard applicable to the admissibility of additional evidence in final appeal proceedings in light of the

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[37] Additional Evidence Directions, para. 8; Decision on Adding a New Ground of Appeal and Order Regarding the Second Additional Evidence Request, para. 12.
[38] Second Additional Evidence Request, paras 11, 43-53.
[39] Decision on Adding a New Ground of Appeal and Order Regarding the Second Additional Evidence Request, paras 7, 10.
[40] *See* *Kenyatta et al.* OA Decision; *Ruto et al.* OA Judgment; *Bemba* OA 3 Judgment; *Al-Senussi* OA 6 Judgment.
[41] *See* *Kenyatta et al.* OA Decision, paras 11-12, wherein the Appeals Chamber first noted that proceedings under article 82 (1) (a) of the Statute "are corrective in nature, conducted with the purposes of reviewing the proceedings [...]" and, given this limited scope, concluded that "[f]acts which postdate the Impugned Decision fall beyond the possible scope of the proceedings before the Pre-Trial Chamber and therefore beyond the scope of the proceedings on appeal. As the updated Investigation Report concerns facts which postdate the Impugned Decision, it is not relevant for this appeal and must be rejected *in limine*".

statutory framework of the Court. In the subsequent sections, this standard will be applied to Mr Lubanga's various requests for the admission of additional evidence.

1. The Court's legal framework

43. Article 83 (1) of the Statute provides that the "Appeals Chamber shall have all the powers of the Trial Chamber". Paragraph 2 of this provision states:

> If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:
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> (a) Reverse or amend the decision or sentence; or
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> (b) Order a new trial before a different Trial Chamber.
>
> For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

44. Rule 149 of the Rules of Procedure and Evidence provides that "rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber".

45. Rules 63 and 64 of the Rules of Procedure and Evidence set out the general provisions regarding evidence and the procedure relating to the relevance and admissibility of evidence, respectively. Rule 63 (1) of the Rules of Procedure and Evidence states that "[t]he rules of evidence set forth in this chapter, together with article 69, shall apply in proceedings before all Chambers".

46. Article 69 (4) of the Statute provides:

> The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

47. Regulation 62 of the Regulations of the Court, entitled "Additional Evidence presented before the Appeals Chamber", provides:

> 1. A participant seeking to present additional evidence shall file an application setting out:
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> (a) The evidence to be presented;
>
> (b) The ground of appeal to which the evidence relates and the reasons, if relevant, why the evidence was not adduced before the Trial Chamber.
>
> 2. The Appeals Chamber may:
>
> (a) Decide to first rule on the admissibility of the additional evidence, in which case it shall direct the participant affected by the application filed under sub-regulation 1 to address the issue of admissibility of the evidence in his or her response, and to adduce any evidence in response only after a decision on the admissibility of that evidence has been issued by the Appeals Chamber; or
>
> (b) Decide to rule on the admissibility of the additional evidence jointly with the other issues raised in the appeal, in which case it shall direct the participant affected by the application filed under sub-regulation 1 to both file a response setting out arguments on that application and to adduce any evidence in response.
>
> 3. The responses described in sub-regulation 2 shall be filed within a time limit specified by the Appeals Chamber and shall be set out and numbered, to the extent possible, in the same order as in the application to present evidence.
>
> 4. If several defendants are participants in the appeal, the evidence admitted on behalf of any of them shall, where relevant, be considered in respect of all of them.

48. Finally, with respect to revision proceedings, article 84 (1) (a) of the Statute provides:

> The convicted person […] may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:
>
> (a) New evidence has been discovered that:
>
> (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and
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> (ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict.

2. Jurisprudence of the ad hoc tribunals

49. The Appeals Chamber finds it appropriate to consider the legal framework and approach adopted by the *ad hoc* tribunals in relation to the admission of additional evidence, given that these tribunals deal with comparable crimes and cases. The jurisprudence of the *ad hoc* tribunals demonstrates the importance attached to the

corrective character of appeal proceedings and the principle of finality.[42] These notions were eventually reflected in rule 115 (B) of the ICTY/ICTR Rules of Procedure and Evidence,[43] which provides:

> If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 117.

50. From this rule, the *ad hoc* tribunals have developed extensive jurisprudence regarding the admissibility of additional evidence. This jurisprudence can be broadly summarised as establishing three prerequisites that must be met for the proposed evidence to be admitted on appeal: (i) the party proposing the evidence must substantiate that the evidence was not available at trial despite the exercise of due diligence;[44] (ii) the evidence must be *prima facie* credible and relevant to findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence;[45] and (iii) the evidence could have had an impact on the verdict, in the sense that, if considered in the context of the evidence presented at trial, it could show that the verdict was unsafe.[46] In relation to the impact on the verdict, the burden is on the applicant to demonstrate this impact.[47]

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[42] *See e.g.* *Nahimana et al.* Second Additional Evidence Decision, para. 40; *Popović et al.* Additional Evidence Decision, para. 7.

[43] ICTY Rules of Procedure and Evidence, rule 115; ICTR Rules of Procedure and Evidence, rule 115.

[44] *See* *Popović et al.* Additional Evidence Decision, para. 7. Withholding evidence at trial, for instance as a litigation strategy, does not make the evidence unavailable. *See* *Krajišnik* Additional Evidence Decision, para. 5 referring to *Tadić* Additional Evidence Decision, para. 50**.** With respect to the Prosecution, its responsibility to disclose evidence is also taken into account. However, "the Prosecution may be relieved of its Rule 68 obligation if the existence of the relevant exculpatory material is known to the Defence and if it is reasonably accessible through the exercise of due diligence". *See* *Nahimana et al.* Second Additional Evidence Decision, para. 33 referring to *Karemera et al.* Decision on Prosecutor's Disclosure Obligations, para. 15.

[45] *See* *Nahimana et al.* Second Additional Evidence Decision, para. 28. In *Prosecutor v. Popović et al.*, the Appeals Chamber held that "[e]vidence is relevant if it relates to findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence. Evidence is credible if it appears to be reasonably capable of belief or reliance". *See* *Popović et al.* Additional Evidence Decision, para. 8. Additional evidence will not be admitted only if "it is devoid of any probative value. Otherwise, the decision to admit evidence is without prejudice to a determination of the weight to be afforded to it." *See* *Krajišnik* Rule 115 Decision, para. 17 referring to *Nahimana et al.* First Additional Evidence Decision, para. 19, footnote 64.

[46] *Popović et al.* Additional Evidence Decision, para. 9: "A decision will be considered unsafe if the Appeals Chamber ascertains that there is a realistic possibility that the Trial Chamber's verdict might have been different if the new evidence had been admitted" (footnote omitted). *See also* *Nahimana et al.* Second Additional Evidence Decision, para. 6. *See also* R. Dixon and K. Khan, *Archbold*

51. The jurisprudence allows for exceptions to these criteria in order to avoid a miscarriage of justice.[48] In this respect, the ICTR Appeals Chamber held:

> […] where the evidence is relevant and credible, but was available at trial, or could have been discovered through the exercise of due diligence, the Appeals Chamber may still allow it to be admitted on appeal provided the moving party can establish that the exclusion of it *would* amount to a miscarriage of justice. That is, it must be demonstrated that had the additional evidence been adduced at trial, it *would* have had an impact on the verdict. [Footnotes omitted.][49]

52. Finally, rebuttal evidence may also be admitted once the additional evidence has been admitted. Regarding the standard for admissibility, the ICTR Appeals Chamber has stated that "rebuttal material is admissible if it directly affects the substance of the additional evidence admitted by the Appeals Chamber and, as such, has a different test of admissibility from additional evidence under Rule 115" (footnotes omitted).[50]

3. Determination of the Appeals Chamber

53. The Appeals Chamber notes that Mr Lubanga does not make any submissions as to the applicable standard for the admissibility of additional evidence on appeal, although he makes submissions regarding why the proposed evidence was not presented at trial.[51] The Prosecutor argues that the Appeals Chamber should, in essence, adopt or incorporate in full the criteria for the admissibility of additional evidence on appeal of other international criminal tribunals, namely the ICTY/ICTR jurisprudence.[52] In the view of the Appeals Chamber, while this jurisprudence may be of assistance,[53] the Court's legal texts provide for the criteria that are applicable with regard to the admissibility of evidence on appeal.

54. The Appeals Chamber notes that article 83 (2) of the Statute does not restrict it from hearing evidence on appeal. Pursuant to article 83 (1) of the Statute, in appeals proceedings "the Appeals Chamber shall have all the powers of the Trial Chamber".

International Criminal Courts: Practice, Procedure & Evidence (Sweet & Maxwell, 4th ed., 2013), pages 538-539.

[47] *See* *Krajišnik* Additional Evidence Decision, para. 7.

[48] *See* R. Dixon and K. Khan, *Archbold International Criminal Courts: Practice, Procedure & Evidence* (Sweet & Maxwell, 4th ed., 2013), pages 538-539.

[49] *Nahimana et al.* Second Additional Evidence Decision, para. 6. *See also* *Popović et al.* Additional Evidence Decision, para. 10.

[50] *Nahimana et al.* Rebuttal Material Decision, para. 7.

[51] First Additional Evidence Request, paras 43-53.

[52] Response to the Document in Support of the Appeal, footnote 73.

[53] *Supra* paras 49-52.

Rule 149 of the Rules of Procedure and Evidence specifies, *inter alia*, that provisions applicable at trial are applicable on appeal *mutatis mutandis*. Article 69 (4) of the Statute provides that "the Court may rule on the relevance and admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness". The Appeals Chamber considers that the criteria of relevance, probative value and potential prejudicial effect also apply to the admission of evidence at the appellate stage of proceedings. Indeed, it would be of no use to admit evidence into the record that is irrelevant, devoid of probative value or potentially prejudicial. As to relevance, the Appeals Chamber, noting regulation 62 (1) (a) of the Regulations of the Court, considers that the proposed additional evidence must be shown to be relevant to a ground of appeal raised pursuant to article 81 (1) and (2) of the Statute.

55. The Appeals Chamber notes, however, that the list of criteria for the admissibility of evidence under article 69 (4) of the Statute is not exhaustive, which indicates that criteria other than those listed can be taken into account, especially given the distinct features of the appellate stage of proceedings.

56. The Appeals Chamber considers that appellate proceedings significantly differ in their nature and purpose from pre-trial and trial proceedings. Importantly, appellate proceedings at the Court are of a corrective nature, which finds expression in, *inter alia*, the standard of review on appeal, as set out above. With respect to alleged factual errors, the standard of review is deferential to the determinations of the Trial Chamber and the review is primarily limited to whether the Trial Chamber's factual findings were unreasonable, rather than a *de novo* assessment. Similarly, article 83 (2) of the Statute limits the scope of appellate proceedings by requiring that a procedural error or an error of fact or law must materially affect the conviction or sentencing decision or that the unfairness of the proceedings has the potential to make these decisions unreliable. In this respect, appellate proceedings are not concerned with correcting *all* errors that may have occurred at trial, but rather only those errors that have been shown to have materially affected the relevant decision.

57. The Appeals Chamber recalls that the evaluation of the evidence, which includes the assessment of the credibility of witnesses, its reliability and ensuing

weight, is the primary responsibility of the relevant Trial Chamber, which has heard all the evidence.[54] In this regard, the Appeals Chamber also highlights the Statute's express preference for testimony to be given in person, as provided for in article 69 (2) of the Statute. In the Appeals Chamber's view, this means that the Trial Chamber is much better positioned to assess a piece of evidence in light of all the other evidence presented at trial than the Appeals Chamber. Accordingly, evidence relevant to a decision pursuant to article 74 (2) of the Statute should, with only limited exceptions, be presented *before* that decision is taken. The Appeals Chamber therefore considers that allowing the admission of additional evidence on appeal, without further restriction, entails a real risk of litigation strategies that contemplate the presentation of evidence for the first time on appeal, even if such evidence was available at trial or, with due diligence, could have been produced.

58. It follows from the above that the Appeals Chamber will generally not admit additional evidence on appeal unless there are convincing reasons why such evidence was not presented at trial, including whether there was a lack of due diligence. In this regard, the Appeals Chamber notes that regulation 62 (1) (b) of the Regulations of the Court has been drafted in the same spirit. In regulating what the requesting participant needs to set out in his or her application, one of the main criteria are the reasons, if relevant, why the evidence was not presented before the Trial Chamber.

59. The Appeals Chamber notes that regulation 62 of the Regulations of the Court does not require the applicant to demonstrate the impact of the additional evidence, beyond showing its relevance to a ground of appeal. In the view of the Appeals Chamber, however, it is necessary to introduce the criterion that it must be demonstrated that the additional evidence could have led the Trial Chamber to enter a different verdict, in whole or in part.[55] This criterion derives from the principle that evidence should, as far as possible, be presented before the Trial Chamber and not on appeal. Accordingly, if the additional evidence is not shown to be of sufficient importance and could not have changed the verdict, there is no reason to allow its admission on appeal.

[54] *Supra* para. 24.
[55] *Supra* para. 55.

60. The Appeals Chamber notes the arguments of the Prosecutor that "under existing international practice, the use of additional evidence on appeal is generally confined to material concretely relevant to the guilt or innocence of an accused" (footnotes omitted) and that "new evidence of 'unfairness' (not affecting guilt or innocence)" should not be admissible as additional evidence.[56] The Appeals Chamber notes that while this argument is apparently based on the specific legal framework of the *ad hoc* tribunals, it is not supported by that jurisprudence, which admits additional evidence for this purpose.[57] Accordingly, the Appeals Chamber is not persuaded by the general statement of the Prosecutor that additional evidence on appeal may never relate to questions of whether the proceedings appealed from were unfair. Such an evaluation will depend on the circumstances of the case and the evidence sought to be admitted.

61. The Appeals Chamber is aware that the above criteria are similar to the two requirements for the admission of "new evidence" in revision proceedings pursuant to article 84 of the Statute, which refers to "final" judgments of conviction or sentence, namely judgments that were either confirmed on appeal or became final with the expiry of the deadline to appeal the trial judgment. Article 84 of the Statute, however, is inapplicable to additional evidence in appeal proceedings. With respect to the interaction between the rules governing the admissibility of additional evidence on appeal and revision proceedings, the Appeals Chamber considers that additional evidence brought by a convicted person on appeal that would be considered in revision proceedings should, as a general matter, be admissible on appeal. In this respect, it would be contrary to the interests of justice and the proper and expeditious administration of judicial proceedings to establish a *more stringent* standard for the admission of evidence on appeal than that which can be considered in revision proceedings. This is because to do so could lead to a person's conviction first being confirmed on appeal because the evidence could not be considered, only then to be overturned in revision proceedings.

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[56] Response to the Document in Support of the Appeal, para. 76.
[57] *See* *Kanyarukiga* Additional Evidence Decision, para. 9; *Krajišnik* Additional Witnesses Decision, paras 23-25.

62. The Appeals Chamber finds that, even beyond those criteria, it enjoys discretion to admit additional evidence, which should be done on a case-by-case basis and in light of the specific circumstances of each case. In this respect, the Appeals Chamber finds that it is within its discretion to admit additional evidence on appeal despite a negative finding on one or more of the above-mentioned criteria, if there are compelling reasons for doing so.

63. The Appeals Chamber notes that the criteria developed on the basis of the Court's legal texts are in many respects similar to those applied by the jurisprudence of the *ad hoc* tribunals referred to above.[58] Where the criteria are similar, the Appeals Chamber considers it appropriate to seek guidance from this jurisprudence.

64. Finally, the Appeals Chamber notes that regulation 62 (2) (a) of the Regulations of the Court directs the other participants affected by an additional evidence request to "adduce any evidence in response only after a decision on the admissibility of [the proposed additional] evidence has been issued". The regulation is silent as to any standard for its admission. On the basis of this provision, the Appeals Chamber finds that evidence submitted in response, that is the "rebuttal evidence", need only be considered if the underlying proposed additional evidence *is* admitted into evidence.

C. Application of the admissibility criteria to Mr Lubanga's Additional Evidence Requests

1. Evidence pertaining to witnesses D-0040 and D-0041

65. On 26 November 2012, Mr Lubanga filed his First Additional Evidence Request with eight annexes thereto.[59] Mr Lubanga requests that the following evidentiary materials relating to witnesses D-0040 and D-0041 be admitted into evidence: (i) an examination of D-0040 as a witness before the Court, or, in the alternative, the transcript of D-0040's testimony at the sentencing hearing;[60] (ii) an examination of D-0041 as a witness before the Court, or, in the alternative, D-0041's written

[58] *Supra* paras 49-52.
[59] First Additional Evidence Request.
[60] Transcript of 13 June 2012, ICC-01/04-01/06-T-360-CONF-FRA, pages 21–33, with public redacted version, ICC-01/04-01/06-T-360-Red-FRA (WT). *See* First Additional Evidence Request, paras 6-15, 42-51.

statement;[61] (iii) witness D-0040's voting card;[62] (iv) witness D-0040's *diplôme d'état*;[63] (v) a transcript of witness D-0039's testimony at the sentencing hearing, who recognised witness D-0040 as the individual in the video excerpt relied upon by the Trial Chamber;[64] and (vi) witness D-0041's voting card.[65]

66. On 21 March 2014, the Appeals Chamber decided to hold an oral hearing for the purposes of hearing the testimony of witnesses D-0040 and D-0041, as well as to hear the submissions and observations of the parties and participants on the issues arising in the appeal.[66] The parties were instructed to address, *inter alia*, the testimony of witnesses D-0040 and D-0041 and any related evidence, without prejudice to a determination as to its admissibility.[67] The parties were also invited to address the reasons that the evidence of witnesses D-0040 and D-0041 was not presented at trial.[68]

67. After hearing the testimony of the witnesses on 19 May 2014, Mr Lubanga filed a third request on 23 May 2014 for the admission of additional evidence relevant to the testimony of those witnesses,[69] requesting, *inter alia*, the admission of: (i) a letter from the *Commission électorale nationale indépendante* dated 4 July 2013, together with attachments containing information relevant to witnesses D-0040 and D-0041,[70] and (ii) a letter from the *Commission électorale nationale indépendante* dated 21 April 2014, together with attachments containing information relevant to witnesses D-0040 and D-0041.[71]

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[61] DRC-D01-0003-5980; Annex 3 to the First Additional Evidence Request; *see* First Additional Evidence Request, paras 6, 16-19, 52-54.
[62] DRC-D01-0003-5977; Annex 1 to the First Additional Evidence Request; *see* First Additional Evidence Request, paras 6-15, 42-51.
[63] DRC-D01-0003-5979; Annex 2 to the First Additional Evidence Request; *see* First Additional Evidence Request, paras 6-15, 42-51.
[64] First Additional Evidence Request, para. 6, referring to Transcript of 13 June 2012, ICC-01/04-01/06-T-360-CONF-FRA, pages 21 to 33, with public redacted version, ICC-01/04-01/06-T-360-Red-FRA (WT).
[65] DRC-D01-0003-5983; Annex 4 to the First Additional Evidence Request; *see* First Additional Evidence Request, paras 6, 16-19, 52-54.
[66] Scheduling Order for a Hearing.
[67] Further Order Regarding the Hearing , page 4, para. 2(C).
[68] Further Order Regarding the Hearing, page 5, para. 2(d)(iii).
[69] Third Additional Defence Request.
[70] DRC-OTP-0236-0487; *see* Third Additional Defence Request, paras 2, 15.
[71] Third Additional Defence Request, paras 19-22.

(a) Submissions of the parties

68. Mr Lubanga submits that witnesses D-0040 and D-0041 are the individuals depicted in two video excerpts whose physical appearance the Trial Chamber relied upon in finding that individuals under the age of fifteen years were present in the FPLC.[72] He requests admission of the additional evidence relevant to them in relation to his ground of appeal alleging errors in the Trial Chamber's establishment of the age element for the crimes of enlistment, conscription, and use to participate actively in hostilities and, specifically, to the following arguments raised therein: (i) "the Trial Chamber erred in finding that assessing an individual's age on the basis of his or her physical appearance is sufficient to determine beyond reasonable doubt whether that individual was under the age of 15 years",[73] thereby challenging the findings based on the assessments of the Trial Chamber and witnesses;[74] and (ii) "the Trial Chamber erroneously reversed the burden of proof by placing on the Defence the responsibility for proving that the individuals shown on the video excerpts were not under the age of 15 years".[75] The Appeals Chamber notes that, although not mentioned in his additional evidence request, Mr Lubanga also refers to this evidence in his second ground of appeal, which alleges that the Trial Chamber erred in holding that "it could not conclude on the basis of the factual evidence it took into account that the Prosecution had committed a serious violation of its obligation to investigate both incriminating and exonerating circumstances".[76]

69. In relation to why the evidence was not tendered at trial, Mr Lubanga makes three arguments, which are: (i) he was not required to do so because it would have reversed the burden of proof;[77] (ii) because the video excerpts contain "hundreds of individuals" and the Prosecutor did not "precisely identify" which individuals she was alleging were under the age of fifteen years, "it was wholly impossible for the Defence to determine prior to the [Conviction Decision] which of these hundreds of individuals […] the Trial Chamber would consider";[78] and (iii) the Trial Chamber "clearly indicated at trial that it did not consider that a non-expert" could assess age

[72] First Additional Evidence Request, paras 9-12, 16-17.
[73] First Additional Evidence Request, para. 7.
[74] First Additional Evidence Request, paras 8, 12.
[75] First Additional Evidence Request, para. 13-15.
[76] *See* Document in Support of the Appeal, paras 28-30.
[77] First Additional Evidence Request, paras 43-44, 53-54, incorporating by reference the arguments at paras 13-15 regarding the reversal of the burden of proof.
[78] First Additional Evidence Request, paras 45-46, 52.

based on physical appearance alone and "never subsequently expressed any different position on the matter".[79]

70. The Prosecutor submits that this evidence should not be admitted.[80] With respect to the reasons as to why the evidence was not adduced at trial, the Prosecutor argues that it was "fully available at trial to counsel acting with due diligence" and that, contrary to Mr Lubanga's arguments, he "had specific and ample notice of the video excerpts the Prosecut[or] sought to admit to establish that children under the age of 15 were in the UPC/FPLC".[81] The Prosecutor also contests Mr Lubanga's assertion that the Trial Chamber indicated that it would not rely on age assessments based on physical appearance[82] and his arguments relevant to the burden of proof.[83]

71. During the appeals hearing on 20 May 2014, Mr Lubanga's arguments mainly focused on the Prosecutor's alleged failure to properly investigate and identify the children featured in the video excerpts.[84] Mr Lubanga submitted that the evidence was not available at trial due to the Prosecutor's alleged non-disclosure of two documents, which are the subject of the Second Additional Evidence Request discussed below.[85] In this regard, Mr Lubanga argued that "if the list of the members of the Presidential Guard and their photos had been properly disclosed to [the] Defence, [the] Defence would have been able to identify, locate and called [*sic*] as witnesses a number of the members of the said Presidential Guard".[86]

72. In response, the Prosecutor pointed out that "the Defence had all necessary information in its possession allowing them to make inquiries as to the identity and age of the children relied upon, including the two witnesses".[87] The Prosecutor argued that "there is no question that Mr Lubanga knew who formed part of his Presidential

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[79] First Additional Evidence Request, paras 47-51.
[80] Response to the Document in Support of the Appeal, para. 49.
[81] Response to the Document in Support of the Appeal, paras 49-50.
[82] Response to the Document in Support of the Appeal, paras 60-63.
[83] Response to the Document in Support of the Appeal, paras 64-65.
[84] Transcript of 20 May 2014, ICC-01/04-01/06-T-363-CONF-ENG (CT), page 9, lines 1-19, with public redacted version, ICC-01/04-01/06-T-363-Red-ENG (WT).
[85] Transcript of 20 May 2014, ICC-01/04-01/06-T-363-CONF-ENG (CT), page 13, lines 8-15, with public redacted version, ICC-01/04-01/06-T-363-Red-ENG (WT).
[86] Transcript of 20 May 2014, ICC-01/04-01/06-T-363-CONF-ENG (CT), page 13, lines 12-15, with public redacted version, ICC-01/04-01/06-T-363-Red-ENG (WT).
[87] Transcript of 20 May 2014, ICC-01/04-01/06-T-363-CONF-ENG (CT), page 22, lines 20-22, with public redacted version, ICC-01/04-01/06-T-363-Red-ENG (WT).

Guard, or at least surely he had the means to find out"[88] and, therefore, "the evidence was wholly available at trial to counsel acting with due diligence".[89]

73. As to the relevance of the evidence to a ground of appeal and the impact of the evidence on the verdict, Mr Lubanga submits that demonstrating the unreliability of age assessments based on physical appearance is "crucial to the instant case, since the majority of the evidence concerning the soldiers' ages- one of the elements of the crime- is founded only on mere assessments by the Chamber and certain witnesses".[90] The Prosecutor argues that this evidence "could not have a decisive impact on the [Conviction Decision] given that the two videos were part of a wider universe of evidence",[91] arguing:

> The two excerpts challenged by the Appellant were used by the Trial Chamber solely to corroborate the evidence from trial witnesses on the presence and/or use of children under the age of 15 in the UPC/FPLC. Thus, even assuming the truth of the newly-proffered evidence that two of the children in the videos were not under 15 at the time, it does not demonstrate a miscarriage of justice. Rather, even if accepted and found to be credible, it would discredit only one item of corroborating evidence, and thus would not impact the [Conviction Decision].[92]

(b) Determination of the Appeals Chamber

74. Mr Lubanga raises two distinct arguments regarding the burden of proof in respect of this additional evidence. First, he avers that the additional evidence is relevant to his argument that the Trial Chamber reversed the burden of proof. The alleged error that the burden of proof was reversed is discussed in the section of this judgment that addresses Mr Lubanga's arguments on the methodology employed by the Trial Chamber in determining the age element of the crimes for which Mr Lubanga was convicted.[93] The Appeals Chamber rejects Mr Lubanga's arguments in this respect because it finds that the additional evidence is not relevant to the alleged

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[88] Transcript of 20 May 2014, ICC-01/04-01/06-T-363-CONF-ENG (CT), page 22, lines 18-19, with public redacted version, ICC-01/04-01/06-T-363-Red-ENG (WT).
[89] Transcript of 20 May 2014, ICC-01/04-01/06-T-363-CONF-ENG (CT), page 21, lines 3-4, with public redacted version, ICC-01/04-01/06-T-363-Red-ENG (WT).
[90] First Additional Evidence Request, para. 12.
[91] Response to the Document in Support of the Appeal, para. 49.
[92] Response to the Document in Support of the Appeal, paras 68-69, referring to Conviction Decision, para. 869, where the Trial Chamber makes its finding relevant to the use of bodyguards under the age of fifteen years.
[93] *See infra "Alleged errors in establishing the age element of the crimes of enlistment, conscription and use to participate actively in hostilities".*

error that the burden of proof was reversed at trial. This argument is accordingly not further discussed in this section.

75. Second, Mr Lubanga argues that the evidence should be deemed to have been unavailable at trial because it would have impermissibly reversed the burden of proof on him, had he been obliged to present such evidence in his defence at trial. With respect to this argument, the Appeals Chamber finds that the question of whether certain evidence *could have been* adduced at trial is unrelated to the question of whether Mr Lubanga was *required* to produce certain evidence in order to disprove the Prosecutor's factual allegations, thereby reversing the burden of proof. The reversal of the burden of proof should not be confused with Mr Lubanga's right to object to the admissibility of evidence, and the right to adduce evidence in support of claims and factual propositions that he made in response to the Prosecutor's allegations. The Appeals Chamber notes that the non-presentation of available evidence at trial can be a defence strategy. An accused person clearly has the right to refrain from presenting any evidence in his or her defence and to argue that the Prosecutor has not met his or her burden of proof. In that case, the question of whether the Prosecutor's case was proved beyond reasonable doubt would be resolved by the Trial Chamber. If the Trial Chamber is satisfied that the standard has been met by the Prosecutor's evidence, the convicted person may argue on appeal that the Trial Chamber erred in reaching this conclusion, but bears the consequences of his or her trial strategy and should not assume that evidence that could have been presented at trial will be admitted on appeal. To allow this would risk the appellate process being transformed into a trial *de novo*.

76. With respect to Mr Lubanga's arguments that (i) it was impossible for him to determine prior to the Conviction Decision which video excerpts would be relied upon and (ii) that the Trial Chamber indicated its position that a non-expert could not assess age based on physical appearance alone, the Appeals Chamber finds that Mr Lubanga misrepresents the trial proceedings and the Trial Chamber's statements. The Appeals Chamber finds that, as argued by the Prosecutor,[94] the Prosecutor did specify

[94] Response to the Document in Support of the Appeal, paras 52-55.

exactly which excerpts she was relying upon,[95] including the very excerpts relevant to witnesses D-0040 and D-0041.[96] Furthermore, the Appeals Chamber notes that Mr Lubanga specifically addressed the video excerpts in the Defence Closing Submissions, stating:

> The Prosecutor relies on various video excerpts which, in his view, provide proof of the presence within the FPLC of recruits "visibly" under the age of 15 years. He presents these video excerpts as being evidence "of particular significance". [Footnotes omitted.][97]

77. Further, the Appeals Chamber notes that, in his Closing Submissions, Mr Lubanga then argued, on the basis of the witnesses' appearance, that the individuals depicted in the videos could not be determined beyond reasonable doubt to be under the age of fifteen years.[98] The Appeals Chamber therefore finds that the record clearly shows that Mr Lubanga was aware of which individuals depicted in the videos were at issue during the trial proceedings.

78. The Appeals Chamber notes that it is not in dispute that witnesses D-0040 and D-0041 were members of the Presidential Guard and were known to Mr Lubanga. In this respect, at the hearing of 20 May 2014, counsel for Mr Lubanga stated that "it is precisely because Thomas Lubanga interacted on a daily basis with the soldiers in his guard that he knew them".[99] The Appeals Chamber considers that Mr Lubanga, as the former commander-in-chief, was well-placed to know or to identify these two witnesses depicted on the video excerpts, particularly as they were part of his Presidential Guard, apparently during the time when this group was relatively small. The Appeals Chamber considers that these facts are crucial in determining whether Mr Lubanga could have discovered and presented this evidence at the trial phase. Indeed, as pointed out by the Prosecutor, it is notable that Mr Lubanga managed to

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[95] *See* Annex 1 to Specification of Video Sequences and Annex 2 to Specification of Video Sequences. *See also* Response to the Document in Support of the Appeal, paras 52-54.
[96] *See* Annex 2 to Specification of Video Sequences, para. 34 (allegedly D-0040), para. 13 (allegedly D-0041). *See also* Response to the Document in Support of the Appeal, paras 52-54.
[97] Defence Closing Submissions, para. 703.
[98] Defence Closing Submissions, paras 703-707.
[99] Transcript of 20 May 2014, ICC-01/04-01/06-T-363-CONF-ENG (CT), page 15, lines 24-25, with public redacted version, ICC-01/04-01/06-T-363-Red-ENG (WT).

identify, trace and obtain statements from witnesses D-0040 and D-0041 by September 2012, within six months of the issuance of the Conviction Decision.[100]

79. For the above reasons, the Appeals Chamber finds that Mr Lubanga could have presented this evidence at trial and is not persuaded by his arguments as to why he failed to do so.

80. Finally, the Appeals Chamber notes that, in deciding whether to hear a witness' testimony in court, the Appeals Chambers of the *ad hoc* tribunals decide upon the question of admissibility prior to calling the witness and only call witnesses where the requirements of rule 115(B) of the ICTY/ICTR Rules of Procedure and Evidence have been satisfied. However, the ICTY/ICTR legal texts do not have a comparable provision to regulation 62 (2) (b) of the Regulations of the Court. The Appeals Chamber further recalls that, when it received Mr Lubanga's additional evidence requests, it decided to proceed pursuant to regulation 62 (2) (b) of the Regulations of the Court and to decide on the admissibility of the additional evidence only at the judgment stage. Finally, the Appeals Chamber recalls that, at the oral hearing, the testimony of witnesses D-0040 and D-0041 was heard "without prejudice to a determination as to its admissibility"[101] and that the parties were also invited to address the reasons why this evidence was not presented at trial.[102] Accordingly, the Appeals Chamber found it to be in the interests of justice to hear the testimony of these two witnesses, despite not having yet decided upon its admissibility. The Appeals Chamber notes that the procedure it followed is specific to regulation 62 (2) (b) of the Regulations of the Court and the circumstances of this appeal.

81. In conclusion, the Appeals Chamber finds that the evidence of witnesses D-0040 and D-0041 is inadmissible as additional evidence pursuant to regulation 62 (2) (b) of the Regulations of the Court. The Appeals Chamber therefore has not considered this evidence with respect to any of the grounds of appeal for which Mr Lubanga seeks its admission. It also rejects those additional evidence requests that are either related to this evidence. It also rejects those additional evidence requests that are either related to their testimony, such as the Third Additional Evidence Request,

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[100] Response to the Document in Support of the Appeal, para. 56.
[101] Further Order Regarding the Hearing , page 4, para. 2. C.
[102] Further Order Regarding the Hearing, page 5, para. 2. d. iii).

or which have been raised in the alternative. Having found this evidence inadmissible, the Appeals Chamber will not address the Prosecutor's proposed rebuttal evidence.

2. Evidence pertaining to Mr Lubanga's bodyguards and additional ground of appeal

(a) Submissions of the parties

82. In the Second Additional Evidence Request, Mr Lubanga seeks the admission of the following documents: (i) a list of names of 33 members of the Presidential Guard;[103] (ii) a list of names of eleven members of the Presidential Guard, together with their photos,[104] (hereinafter: "Lists of Bodyguards"); and (iii) correspondence between the parties in relation to the request for disclosure of the Lists of Bodyguards.[105] The Appeals Chamber recalls that, in the Second Additional Evidence Request, Mr Lubanga also requested leave to add a new ground of appeal based solely on the additional evidence sought to be admitted,[106] which the Appeals Chamber granted.[107]

83. Mr Lubanga argues that the Lists of Bodyguards relate to alleged errors in the Trial Chamber's finding that children under the age of fifteen years formed part of the Presidential Guard, errors which he raises under the grounds of appeal regarding the Trial Chamber's establishment of the age element for the crime of use to participate actively in hostilities and the Trial Chamber's finding regarding his essential contribution to the implementation of the common plan.[108] Mr Lubanga also argues that the Lists of Bodyguards demonstrate that witness D-0040, allegedly aged eighteen at the time, was in the Presidential Guard and that the Trial Chamber erred in finding that children under the age of fifteen years were used as bodyguards by Mr Lubanga.[109]

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[103] DRC-OTP-0014-0280; Second Additional Evidence Request, para. 15, Annex 6 to Second Additional Evidence Request.
[104] DRC-OTP-0003-0032; Second Additional Evidence Request, para. 14; Annex 5 to the Second Additional Evidence Request.
[105] Annexes 1-4 to the Second Additional Evidence Request.
[106] Second Additional Evidence Request, paras 11, 43-53.
[107] *Supra* para. 12.
[108] Second Additional Evidence Request, paras 11, 39-42.
[109] Second Additional Evidence Request, paras 41-42.

84. Mr Lubanga further argues that both documents were in the Prosecutor's possession since 2004, but were only disclosed in December 2013.[110] On this basis, Mr Lubanga seeks to have this additional evidence admitted in relation to his ground of appeal regarding alleged statutory violations by the Prosecutor, specifically the alleged breaches of the Prosecutor's duty to investigate incriminating and exculpatory circumstances equally, pursuant to article 54 of the Statute,[111] and alleged breaches of the Prosecutor's disclosure obligation.[112] Mr Lubanga argues that, had the Lists of Bodyguards been available to him, he would have been able to carry out investigations and to identify, locate and call as witnesses a number of the members of the Presidential Guard.[113]

85. In relation to the relevance of the Lists of Bodyguards to the additional ground of appeal, Mr Lubanga argues that the Prosecutor's failure to disclose these two documents in a timely manner deprived the defence of essential elements that would have allowed a thorough investigation into the age of his bodyguards, and, possibly the production of evidence establishing that none of them were under the age of fifteen years.[114] He further submits that without the aforementioned documents he was not in a position to remember each of his bodyguards and was deprived of the opportunity to investigate and find exculpatory evidence.[115] Mr Lubanga argues that, in these circumstances, it is manifestly unfair to draw conclusions from the evidence presented by the Prosecutor to establish the presence of children under the age of fifteen years in his bodyguard unit.[116] Therefore, he argues that the Appeals Chamber should reverse the Trial Chamber's finding that he used a significant number of children under the age of 15 within his escort and as his bodyguards between September 2002 and 13 August 2003.[117]

86. Mr Lubanga further argues that the Lists of Bodyguards were not available to him at trial due to the Prosecutor's violation of her disclosure obligations and that the

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[110] Second Additional Evidence Request, paras 16, 18.
[111] Second Additional Evidence Request, paras 11, 34-38.
[112] Second Additional Evidence Request, paras 11, 19-33.
[113] Transcript of 20 May 2014, ICC-01/04-01/06-T-363-CONF-ENG (CT), page 13, lines 2-20, with public redacted version, ICC-01/04-01/06-T-363-Red-ENG (WT).
[114] Second Additional Evidence Request, para. 11.
[115] Second Additional Evidence Request, paras 46-47.
[116] Second Additional Evidence Request, para. 11.
[117] Second Additional Evidence Request, para. 53.

information contained therein was not otherwise available to him.[118] First, he recalls the Prosecutor's obligation to investigate incriminating and exculpatory circumstances equally and argues that she was obliged to investigate the ages of the persons appearing on the Lists of Bodyguards.[119] Second, he submits that he could not have obtained the documents by requesting them from MONUC from whom they had been obtained under condition of confidentiality by the Prosecutor.[120] Third, he argues that it cannot seriously be contended that he, or other former members of the UPC/FPLC, could remember the exact identities of his bodyguards many years later.[121]

87. Regarding the alleged violation of her disclosure obligations, the Prosecutor submits that she did not deliberately withhold or fail to disclose the documents and explains that they were (i) obtained under condition of confidentiality pursuant to article 54 (3) (e) of the Statute, (ii) assessed as containing incriminating information and, (iii) deemed unnecessary for the purposes of the prosecution case at trial since witnesses were called "who could directly speak to the age of children within the Presidential Guard".[122] At the oral hearing, the Prosecutor acknowledged that this may not have been the correct assessment of the documents, but emphasised that Mr Lubanga's defence was not prejudiced because the information contained in the documents was available to him at trial.[123]

88. In relation to the additional ground of appeal, the Prosecutor argues that it should be rejected.[124] The Prosecutor submits that there had been no prosecutorial violation or infringement of Mr Lubanga's rights as she has "no duty to disclose incriminating material that [she] does not intend to use at trial" (footnote omitted).[125] She further argues that the two documents, if admitted, would have no impact on the overall assessment of the evidence relied upon by the Trial Chamber and do not relate to, or put into question, the Trial Chamber's finding that Mr Lubanga used a

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[118] Response to Victims Observations on the Second Additional Evidence Request, paras 9-24.
[119] Response to Victims Observations on the Second Additional Evidence Request, para. 11.
[120] Response to Victims Observations on the Second Additional Evidence Request, paras 12-16.
[121] Response to Victims Observations on the Second Additional Evidence Request, paras 17-19.
[122] Response to the Second Additional Evidence Request, paras 2, 16, 19-20, 28-30.
[123] Transcript of 20 May 2014, ICC-01/04-01/06-T-363-CONF-ENG (CT), page 38, line 4 to page 39, line 16, with public redacted version, ICC-01/04-01/06-T-363-Red-ENG (WT).
[124] Response to the Second Additional Evidence Request, paras 36-40.
[125] Response to the Second Additional Evidence Request, para. 38.

significant number of children under the age of fifteen years within his escort and as his bodyguards between September 2002 and 13 August 2003.[126]

89. The Prosecutor argues that the Lists of Bodyguards do not meet the criteria for admission as additional evidence.[127] First, she argues that "the information encompassed in the documents, namely the composition of the Presidential Guard, is information within the personal knowledge of the Appellant which was available at trial by duly diligent Counsel".[128] She submits that Mr Lubanga could have found the same information himself "by carrying out relatively routine investigations", especially considering that his guard was composed of a small group of people.[129] She indicates that a number of the defence witnesses, including witnesses D-0011 and D-0019, who testified as to the composition of the Presidential Guard, as well as an investigator employed by the defence team, who was a high-ranking member of the UPC, could have provided the relevant information.[130] She points out that the identities of at least some of the individuals were known to Mr Lubanga and that he had "never informed the Trial Chamber that he had difficulty in understanding or knowing the identities of those in his close circle".[131]

90. Second, the Prosecutor argues that Mr Lubanga fails to demonstrate the relevance of the documents, which are undated and do not contain the age of any individual and could not therefore impact on the Trial Chamber's findings as to the ages of members of the Presidential Guard.[132]

(b) Determination of the Appeals Chamber

91. At the outset, the Appeals Chamber notes the Prosecutor's request that portions of Mr Lubanga's Response to the Victims' Observations that reply to the Prosecutor rather than the victims be summarily dismissed for lack of judicial authorisation to

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[126] Response to the Second Additional Evidence Request, para. 40.
[127] Response to the Second Additional Evidence Request, para. 2.
[128] Response to the Second Additional Evidence Request, para. 2.
[129] Transcript of 20 May 2014, ICC-01/04-01/06-T-363-CONF-ENG, page 38, line 19 to page 39, line 14 with public redacted version, ICC-01/04-01/06-T-363-Red-ENG (WT).
[130] Response to the Second Additional Evidence Request, para. 26.
[131] Transcript of 20 May 2014, ICC-01/04-01/06-T-363-CONF-ENG, page 39, lines 9-14, with public redacted version, ICC-01/04-01/06-T-363-Red-ENG (WT).
[132] Response to the Second Additional Evidence Request, paras 33-35.

reply to these submissions.[133] The Appeals Chamber considers the issues raised in the impugned portions of Mr Lubanga's response to be of importance to its determination of the additional evidence request,[134] and notes that the parties were given the opportunity by the Appeals Chamber to fully explore these issues at the oral hearing held on 20 May 2014.[135] Accordingly, the Prosecutor's request to strike out these submissions is rejected.

92. The Appeals Chamber is not persuaded by Mr Lubanga's submissions that the information contained in the Lists of Bodyguards was unavailable at trial and is not satisfied by the explanation he gives for failing to carry out investigations that would have provided him with this same information, that is the names of his bodyguards at the relevant time. In this regard, the Appeals Chamber notes that the question of whether some of the bodyguards used by Mr Lubanga were under the age of fifteen years was a central issue at trial, both with respect to the underlying crime of using children under the age of fifteen years to participate actively in hostilities and with respect to Mr Lubanga's criminal responsibility. The Appeals Chamber recalls that Mr Lubanga managed to identify, locate and interview witnesses D-0040 and D-0041, two of his former bodyguards, before he had been provided with the information contained in the Lists of Bodyguards and relatively soon after the issuance of the Conviction Decision. Given the circumstances of this case, the Appeals Chamber finds that Mr Lubanga was in a position to investigate, identify, locate and call as witnesses the former members of his bodyguard unit without the information contained in the Lists of Bodyguards.

93. Furthermore, the Appeals Chamber is not convinced by Mr Lubanga's explanation as to the relevance of the Lists of Bodyguards to his ground of appeal that the Trial Chamber erred in finding that he used children under the age of fifteen years as bodyguards. The Appeals Chamber notes that neither of the lists sought to be admitted contains the dates of birth of Mr Lubanga's bodyguards or any other information from which the ages of these individuals could be derived. In the absence

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[133] Motion to Strike Sections of Mr Lubanga's Response to Victims Observations on the Second Additional Evidence Request, para. 1.
[134] Response to Victims Observations on the Second Additional Evidence Request, paras 17-24.
[135] Further Order Regarding the Hearing, page 4, para. 2(c).

of such information, the Appeals Chamber is not persuaded by Mr Lubanga's submissions.

94. Nonetheless, the Appeals Chamber is of the view that the Lists of Bodyguards contain information material to the preparation of the defence within the meaning of rule 77 of the Rules of Procedure and Evidence and should have been disclosed by the Prosecutor.

95. However, given that the Appeals Chamber has found that Mr Lubanga was in a position to investigate, identify, locate and call as witnesses the former members of his bodyguard unit without the information contained in the Lists of Bodyguards, it is not persuaded that this evidence could potentially result in a different verdict by demonstrating that the Conviction Decision was unreliable due to disclosure violations by the Prosecutor. Accordingly, the Appeals Chamber declines to admit this additional evidence.

96. The Appeals Chamber notes that Mr Lubanga's additional ground of appeal is intertwined with the question of whether the information contained in the Lists of Bodyguards was available at trial and is based on admitting the additional evidence. As the Appeals Chamber does not admit the additional evidence, the additional ground of appeal is devoid of any basis of fact or law. Therefore, the Appeals Chamber dismisses this ground of appeal.

3. Evidence Pertaining to witness P-0297

97. Mr Lubanga requests that the following additional evidence pertaining to witness P-0297 be admitted into evidence: (i) a letter dated 29 June 2011 indicating that witness P-0297 was a member of an organisation that [REDACTED];[136] and (ii) a series of photographs showing [REDACTED], indicating that witness P-0297 was a member of [REDACTED].[137]

98. Mr Lubanga submits that this evidence relates to his ground of appeal alleging statutory violations by the Prosecutor and, specifically, to the following arguments

[136] Annex 5 to the First Additional Evidence Request; First Additional Evidence Request, paras 6, 20-28, 55.
[137] Annex 6 to the First Additional Evidence Request; First Additional Evidence Request, paras 6, 20-28, 55.

raised therein: (i) "in view of the fact that agents working for the Congolese authorities were shown to have interfered in the Court's activities, the Trial Chamber should automatically have found that the proceedings were unfair towards the Accused"; and (ii) "the Trial Chamber erred by failing to appreciate the consequences which the fact that agents working for the Congolese authorities were shown to have interfered in the Court's activities would necessarily have on the entirety of the evidence".[138]

99. Regarding why this evidence was not presented at trial, Mr Lubanga submits that the "evidentiary materials pertaining to P-0297 were not transmitted to the Defence until 10 August 2011" (footnote omitted).[139]

100. Regarding the relevance and potential material effect of this evidence, Mr Lubanga argues that this evidence "shows that the only reasonable finding which the Chamber could reach was that the proceedings against the Accused were unfair, considering that the Congolese authorities' interference in the Court's activities was demonstrated".[140]

101. The Prosecutor argues that Mr Lubanga fails to explain why this evidence could not have been found through the exercise of due diligence during trial, noting that one of the purported [REDACTED] pre-dates witness P-0297's testimony.[141] The Prosecutor also argues that Mr Lubanga "could have asked witness P-0297 about his current or past memberships or political affiliations".[142]

102. The Prosecutor argues that Mr Lubanga's claim of unfairness is unclear and submits that the proposed evidence does not show interference by the Congolese authorities.[143] In this respect, the Prosecutor points out that it was Mr Lubanga who requested that witness P-0297 be called as a witness, after the Prosecutor removed him from its list of witnesses.[144] The Prosecutor further argues that this evidence cannot demonstrate any concern with the reliability of the Conviction Decision

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[138] First Additional Evidence Request, para. 20.
[139] First Additional Evidence Request, para. 55.
[140] First Additional Evidence Request, para. 28.
[141] Response to the Document in Support of the Appeal, para. 74.
[142] Response to the Document in Support of the Appeal, para. 74.
[143] Response to the Document in Support of the Appeal, paras 75, 77, 80.
[144] Response to the Document in Support of the Appeal, para. 78.

because the Trial Chamber did not rely on witness P-0297.[145] The Prosecutor argues that the Trial Chamber carefully considered allegations of Congolese interference with witnesses and that Mr Lubanga's arguments in this regard were fully heard.[146]

103. The Appeals Chamber recalls that Mr Lubanga seeks the admission of the evidence relating to witness P-0297 in support of his argument that the Trial Chamber erred in relation to the purported impact of Congolese interference on the fairness of the proceedings.

104. Considering the additional evidence related to witness P-0297 in terms of its potential effect on the reliability of the verdict, the Appeals Chamber considers that the evidence proposed does not on its face show any Congolese interference. The Appeals Chamber finds Mr Lubanga's arguments in this regard to be speculative and conclusory. Moreover, in the view of the Appeals Chamber, even if attempted interference had been shown, it would not *per se* lead to the conclusion that the trial was unfair or that this attempted interference necessarily prejudiced Mr Lubanga. The Appeals Chamber further notes that the Trial Chamber did not rely on witness P-0297 in the Conviction Decision.

105. In conclusion, the Appeals Chamber finds that this material could not affect the reliability of the verdict. The Appeals Chamber accordingly declines to admit this proposed additional evidence on appeal.

4. Admission into evidence of the FPLC list

106. Mr Lubanga seeks the admission into evidence of a document entitled "Liste Nommiative [*sic*] de F.P.L.C." signed by Bosco Ntaganda and dated 11 December 2004[147] (hereinafter: "2004 FPLC list"), as well as correspondence between the Prosecutor and Mr Lubanga concerning the disclosure of this document.[148] The 2004 FPLC list comprises several thousand names of individuals linked to their grade and function.[149] Mr Lubanga submits that this evidence relates to his ground of appeal that

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[145] Response to the Document in Support of the Appeal, para. 79.
[146] Response to the Document in Support of the Appeal, paras 80-81.
[147] EVD-D01-00985; Annex 7 to the First Additional Evidence Request; *see* First Additional Evidence Request, paras 6, 29-41, page 17.
[148] Annex 8 to the First Additional Evidence Request; *see* First Additional Evidence Request, paras 6, 29-41, page 18.
[149] Annex 7 to the First Additional Evidence Request.

"[t]he Trial Chamber erred in considering that it had remedied any prejudice which may have been caused to the Accused by the incomplete or late disclosure of evidence and that it had thus guaranteed him a fair trial" (footnote omitted).[150]

107. With respect to why the list was not tendered at trial, Mr Lubanga argues that it was only disclosed on 29 October 2012, "more than seven months after" the Conviction Decision.[151] The Prosecutor argues that the document was "facially not exculpatory (and thus [not] subject to disclosure obligations)".[152] However, even if the document should have been disclosed, the Prosecutor argues that it was available to Mr Lubanga with the exercise of due diligence and that "[o]n this basis alone, [his] request to present this evidence on appeal must fail".[153]

108. As to the relevance of the evidence to a ground of appeal and the material effect of that ground of appeal on the verdict, Mr Lubanga argues that, "[e]ven *prima facie*, this document is of paramount importance", submitting that it is "the only apparently exhaustive list of FPLC soldiers in the record".[154] Mr Lubanga submits that the 2004 FPLC list could have been "used to verify witnesses' allegations that they belonged to the FPLC, at least until 9 December 2004", and that this applies to, among others, witness P-0038, who testified that he belonged to the FPLC until 2005.[155]

109. The Prosecutor opposes admission of the FPLC list because "the list does not include all members of the FPLC as of December 2004; according to the Prosecution's understanding, and contrary to [Mr Lubanga's] assertion, the document lists only those FPLC members who were nominated for a process whereby soldiers from rebel armed groups would join the DRC national army".[156] The Prosecutor argues that the title "Liste Nominative" indicates that "the document is nominating a group of persons and that it contains a subset of the full FPLC force as of that point in time".[157] At the oral hearing, the Prosecutor indicated that "[w]hile reasonable minds may differ as to whether the Prosecution's assessment of this document as

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[150] First Additional Evidence Request, para. 29.
[151] First Additional Evidence Request, para. 56.
[152] Response to the Document in Support of the Appeal, para. 83.
[153] Response to the Document in Support of the Appeal, paras 83-85.
[154] First Additional Evidence Request, para. 35.
[155] First Additional Evidence Request, para. 37.
[156] Response to the Document in Support of the Appeal, para. 89.
[157] Response to the Document in Support of the Appeal, para. 89.

incriminatory, […] and not falling within disclosure obligations was correct at the time, the real question again is whether he was materially prejudiced by not having had that".[158]

110. In his Reply to the Response to the Document in Support of the Appeal, Mr Lubanga argues that the Prosecutor's assertion that the list does not contain all of the names of members of the FPLC as of December 2004 is not supported by any evidence.[159] According to Mr Lubanga, the French term "*Liste Nominative*" signifies that the list sets out the names of all individuals, not a group of persons for selection as suggested by the Prosecutor.[160] He contends that the list should have been disclosed so that it could have been put to the witnesses and its exact nature canvassed at trial.[161]

111. At the oral hearing, the Appeals Chamber requested the Prosecutor to provide further information as to why she had concluded that the 2004 FPLC List contained only the names of those members of the FPLC who would join the DRC national army and was not a complete list of the members at that time.[162] The Prosecutor indicated that information on the record shows that there had been several splits in the FPLC along factional lines and that FPLC soldiers were placed in, or allowed to join, the DRC national army at that time, and that she had inferred that this was a list of those soldiers.[163]

112. The Appeals Chamber recalls that Mr Lubanga seeks the admission of the FPLC list in support of his ground of appeal alleging statutory violations by the Prosecutor and, specifically, the argument that the Trial Chamber erred in finding that it had remedied all prejudice that late disclosure may have caused to Mr Lubanga. In the view of the Appeals Chamber, the FPLC list – a list that at least partially identifies members of the UPC/FPLC in 2004, i.e. not long after the period of the charges – was material to the preparation of the defence. Accordingly, the Prosecutor should have

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[158] Transcript 20 May 2014, ICC-01/04-01/06-T-363-CONF-ENG (CT), page 39, lines 18-21, with public redacted version, ICC-01/04-01/06-T-363-Red-ENG (WT).
[159] Reply to the Response to the Document in Support of the Appeal, para. 35.
[160] Reply to the Response to the Document in Support of the Appeal, para. 35.
[161] Reply to the Response to the Document in Support of the Appeal, para. 35.
[162] Transcript of 20 May 2014, ICC-01/04-01/06-T-363-Conf-ENG (CT), page 58, lines 7-14, with public redacted version, ICC-01/04-01/06-T-363-Red-ENG (WT).
[163] Transcript of 20 May 2014, ICC-01/04-01/06-T-363-Conf-ENG (CT), page 59, lines 17-24, with public redacted version, ICC-01/04-01/06-T-363-Red-ENG (WT).

disclosed it to Mr Lubanga pursuant to rule 77 of the Rules of Procedure and Evidence.

113. Nevertheless, the Appeals Chamber has decided not to admit the FPLC list into evidence. This is because Mr Lubanga has not demonstrated that the evidence – had it been available to the Trial Chamber – could have led to a different verdict, in whole or in part.[164] The FPLC list – while material to the preparation of the defence – does not on its face appear of such significance that it could have changed any of the Trial Chamber's factual findings as to the substance of the case. As to the argument of Mr Lubanga that the Trial Chamber erred when it found that it had remedied all prejudice of late disclosure, it must be recalled that the Trial Chamber made this statement in the context of addressing Mr Lubanga's challenge to the entirety of the Prosecutor's evidence.[165] There is no indication that the Trial Chamber's approach to the question of late disclosure would have been different, had it been aware of the non-disclosure of the FPLC list, and that it would have dismissed the Prosecutor's entire evidence on that basis. In this regard, the Appeals Chamber also recalls that the Trial Chamber addressed alleged disclosure violations in the Stay of Proceedings Decision.[166] In that decision, the Trial Chamber noted that "the suggested individual breaches of the accused's right to disclosure (whether viewed individually or collectively) do not constitute such a serious violation of the statutory safeguards as to make [Mr Lubanga's] trial *ipso facto* unfair".[167] On the basis of this approach of the Trial Chamber, it is unlikely that it would have entered a different verdict, had it been aware of the non-disclosure of the FPLC list.

VI. ALLEGED VIOLATIONS OF MR LUBANGA'S RIGHT TO BE INFORMED IN DETAIL OF THE NATURE, CAUSE AND CONTENT OF THE CHARGES

A. Background

114. Under the first ground of appeal, Mr Lubanga alleges that his right under article 67 (1) of the Statute to be informed in detail of the nature, cause and content of the charges against him was violated because, in the Conviction Decision, the Trial

[164] *See supra* para. 59.
[165] Conviction Decision, paras 118-123.
[166] Stay of Proceedings Decision, paras 206-213.
[167] Stay of Proceedings Decision, para. 212.

Chamber excluded all of the evidence presented as "material facts" underpinning the charges, namely the testimony and documentary evidence pertaining to the nine named individual child soldiers mentioned in the Amended Document Containing the Charges.[168] Mr Lubanga submits that, except in respect of these nine individuals, the charges contain only "vague and general information" that was insufficient to inform him "in detail" of the charges against him.[169] Relying on articles 61 (3) (a) and 67 (1) (a) of the Statute, rule 121 (3) of the Rules of Procedure and Evidence, and regulation 52 of the Regulations of the Court, as well as the jurisprudence of the ICTY, Mr Lubanga argues:

> The degree of specificity with which the Prosecution must present the material facts in support of its case depends on the nature of the case, in other words the Prosecution's characterisation of the alleged criminal conduct and the nexus between the accused and the crime. Thus, where the Prosecution alleges that an accused personally committed the criminal acts alleged, it must provide in sufficient detail: (1) the identity of the victim, (2) the place and approximate date of the alleged criminal acts and (3) the means by which the acts were committed. [Footnotes omitted.][170]

115. In sum, Mr Lubanga argues that the nine named individuals were the only victims identified throughout the trial, that no further details were provided regarding dates and places pertaining to "any other instances of enlistment, conscription or participation in hostilities", and, accordingly, "it is inconceivable that [he] could be found guilty without one sole victim being specifically identified".[171] Finally, Mr Lubanga argues that the failure to sufficiently inform him in detail of the charges for which he was convicted prejudiced him by "materially impair[ing]" his ability to prepare his defence.[172] He argues that this rendered the trial unfair and, in such circumstances, he should not have been convicted.[173]

116. The Prosecutor argues that the level of detail in the charges was sufficient to put "[Mr Lubanga] on notice of the precise nature of the charges against him, their cause and their content",[174] submitting that Mr Lubanga "was charged with having made an

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[168] Document in Support of the Appeal, paras 1-9. The alleged individual child soldiers were: witnesses P-0007, P-0008, P-0010, P-0011, P-0157, P-0297, P-0298, P-0213, and P-0294.
[169] Document in Support of the Appeal, para. 11.
[170] Document in Support of the Appeal, para. 6; *see also* paras 10-12.
[171] Document in Support of the Appeal, paras 11-12.
[172] Document in Support of the Appeal, para. 15.
[173] Document in Support of the Appeal, paras 14-15.
[174] Response to the Document in Support of the Appeal, para. 108.

essential contribution to a common plan that resulted, in the ordinary course of events, in the enlistment, conscription and use of children under the age of 15 to participate actively in hostilities".[175] She notes that the Document Containing the Charges "specifically identified [Mr Lubanga's] co-perpetrators and described the common plan, his essential contribution, his awareness that the enlistment, conscription and use of children under the age of 15 would occur in the ordinary course of the implementation of the common plan, the places of recruitment, and the locations of training camps" and that the Document Containing the Charges also particularly alleged that individuals under the age of fifteen years were present in the UPC/FPLC and used to participate actively in hostilities.[176]

117. The Prosecutor argues that, depending on the case, it may "neither be possible nor necessary to provide specific information on the identity of victims".[177] She submits that it has consistently been her case that Mr Lubanga's crimes were committed "on a large scale throughout the region of Ituri over a one-year period" and that, "[g]iven the nature of the crimes in this case, the names of individual child soldiers [are] not essential as an attribute of fairness to provide the Defence with notice of the parameters of the charges" (footnote omitted).[178]

B. Determination of the Appeals Chamber

118. The Appeals Chamber notes that the right of the accused person to be informed of the charges is firmly grounded in the Statute and other legal instruments of the Court and has been the subject of several decisions of various Chambers. Article 67 (1) (a) and (b) of the Statute provides that an accused is entitled "[t]o be informed promptly and in detail of the nature, cause and content of the charge" and "to have adequate time and facilities for the preparation of the defence".

119. 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 further provides

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[175] Response to the Document in Support of the Appeal, para. 108.
[176] Response to the Document in Support of the Appeal, para. 108.
[177] Response to the Document in Support of the Appeal, para. 105, referring to *Kupreškić et al.* Appeal Judgment, paras 89-90; *Kanyarukiga* Trial Judgment and Sentence, para. 32.
[178] Response to the Document in Support of the Appeal, para. 106.

that "[t]he 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". Regulation 52 (b) of the Regulations of the Court, entitled "Document containing the charges", provides, *inter alia*, 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 […]".

120. The right to be informed in detail of the "nature and cause" of the charges is also enshrined in article 14 (3) (a) of the ICCPR,[179] article 6 (3) (a) of the ECHR[180] and article 8 (2) (b) of the ACHR.[181] The requisite level of detail of the charges has been addressed in the jurisprudence of the ECtHR,[182] notably in the case of *Pélissier and Sassi v. France*,[183] wherein the Grand Chamber held:

> The Court observes that the provisions of paragraph 3 (a) of Article 6 point to the need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him […]. Article 6 § 3 (a) of the Convention affords the defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should, as the Commission rightly stated, be detailed. [Footnotes omitted.][184]

121. While the Appeals Chamber has not yet addressed the level of detail required of the charges by article 67 (1) (a) of the Statute, it has stated:

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[179] "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him". *See* ICCPR, article 14 (3).
[180] "Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him". *See* ECHR, article 6 (3).
[181] "During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: […] b. prior notification in detail to the accused of the charges against him". *See* ACHR, article 8 (2).
[182] *See* *Block v. Hungary*, paras 20-21; *Zhupnik v. Ukraine*, para. 37; *Penev v. Bulgaria*, paras 33-34, 42; *Juha Nuutinen v. Finland*, paras 30, 32-33; *I.H. and others v. Austria*, paras 30-31, 34; *Ayçoban and others v. Turkey*, paras 21-22; *Sipavičius v. Lithuania*, paras 27-28; *Sadak and others v. Turkey (No. 1)*, paras 48-49; *Dallos v. Hungary*, para. 47; *Mattoccia v. Italy*, paras 59-61.
[183] *Pélissier v. France*.
[184] *Pélissier v. France*, para. 51.

> The term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged. […] The Appeals Chamber emphasises that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in article 67 (1) (a) of the Statute.[185]

122. The Appeals Chamber notes that Mr Lubanga was charged and convicted based on the notion of co-perpetration based on a common plan, which resulted, in the ordinary course of events, in the enlistment and conscription of individuals under the age of fifteen years and in their use to participate actively in hostilities. The jurisprudence of the *ad hoc* tribunals establishes different levels of specificity required of the charges depending on the form of individual criminal responsibility charged. This is addressed in the *Blaškić* Appeal Judgment in the following terms:

> 210. […] A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in an indictment is the nature of the alleged criminal conduct charged. The materiality of such facts as the identity of the victim, the place and date of the events for which the accused is alleged to be responsible, and the description of the events themselves, necessarily depends upon the alleged proximity of the accused to those events, that is, upon the type of responsibility alleged by the Prosecution.
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> […]
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> 211. A distinction has been drawn in the International Tribunal's jurisprudence between the level of specificity required when pleading: (i) individual responsibility under Article 7(1) in a case where it is not alleged that the accused personally carried out the acts underlying the crimes charged; (ii) individual responsibility under Article 7(1) in a case where it is alleged that the accused personally carried out the acts in question; and (iii) superior responsibility under Article 7(3).
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> […]
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> 213. When alleging that the accused personally carried out the acts underlying the crime in question, it is necessary for the Prosecution to set out the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed "with the greatest precision." However, where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, then the Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question. [Footnotes omitted.][186]

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[185] *Lubanga* OA 15/OA 16 Judgment, footnote 163.
[186] *Blaškić* Appeal Judgment, paras 210-211, 213.

123. In light of the foregoing, the Appeals Chamber finds that, in order to be able to prepare an effective defence, where an accused is not alleged to have directly carried out the incriminated conduct and is charged for crimes committed on the basis of a common plan, the accused must be provided with detailed information regarding: (i) his or her alleged conduct that gives rise to criminal responsibility, including the contours of the common plan and its implementation as well as the accused's contribution (ii) the related mental element; and (iii) the identities of any alleged co-perpetrators. With respect to the underlying criminal acts and the victims thereof, the Appeals Chamber considers that the Prosecutor must provide details as to the date and location of the underlying acts and identify the alleged victims to the greatest degree of specificity possible in the circumstances. In the view of the Appeals Chamber, the underlying criminal acts form an integral part of the charges against the accused, and sufficiently detailed information must be provided in order for the accused person to effectively defend him or herself against them.

124. As to where and how the detailed information about the charges is to be provided to the accused, the Appeals Chamber underlines at the outset that, given the Court's statutory framework and the respective roles of the Prosecutor and the Pre-Trial Chamber in the confirmation process, there can be no doubt that the decision on the confirmation of the charges defines the parameters of the charges at trial.[187] If it were otherwise, a person could be tried on charges that have not been confirmed by the Pre-Trial Chamber, or in relation to which confirmation was even declined. However, this does not necessarily exclude that further details about the charges, as confirmed by the Pre-Trial Chamber, may, depending on the circumstances, also be contained in other auxiliary documents.

125. In this regard, the Appeals Chamber notes that in the case of *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Trial Chamber V held, in relevant part, that "in preparing its updated DCC [document containing the charges], the prosecution is to clearly indicate the material facts and circumstances underlying the charges as confirmed (footnotes omitted)".[188]

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[187] *See* *Ruto and Sang* OA 6 Decision, paras 26-29.
[188] *Kenyatta and Muthaura* Order to File an updated DCC, para. 9.

126. In the case of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Mr Katanga and Mr Ngudjolo sought an amendment to the Prosecutor's updated document containing the charges[189] on the basis that it did not provide, *inter alia*, sufficient detail as to the identity of the victims of the attack on Bogoro.[190] In rejecting this request, the single judge, acting on behalf of Pre-Trial Chamber I, held that the information provided in the updated document containing the charges,[191] along with the related evidence contained in the list of evidence,[192] "[wa]s sufficient to satisfy the requirements of articles 61(3) and 67(1)(a) and (b) of the Statute, rule 121(3) of the Rules and regulation 52 of the Regulations".[193]

127. In the Blaškić Appeal Judgment, the ICTY Appeals Chamber held by reference to the *Kupreškic* Appeal Judgment:

> The Appeals Chamber emphasised that the Prosecution is expected to inform the accused of the nature and cause of the case before it goes to trial. […]
>
> If a trial verdict is found to have relied upon material facts not pleaded in an indictment, it is still necessary to consider whether the trial was thereby rendered unfair.[194]

128. In light of the above, the Appeals Chamber finds that all documents that were designed to provide information about the charges, including auxiliary documents, must be considered to determine whether an accused was informed in sufficient detail of the charges, subject to the following.

129. First, given the strong link between the right to be informed in detail of the nature, cause and content of the charges and the right to *prepare* one's defence, only information made available before the start of the trial hearings may be taken into account. This is because a trial must commence based on a set of clearly defined charges. This is evidenced by the fact that, once the trial has commenced, no

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[189] *Katanga and Ngudjolo* Amended Document Containing the Charges.
[190] *See* *Katanga and Ngudjolo* Defence Motion on the Document Containing the Charges, para. 26.
[191] *See* *Katanga and Ngudjolo* Amended Document Containing the Charges, para. 87, which states that: "Bogoro was razed by the attack. The Prosecution estimates conservatively that at least 200 civilians died in the attack; among those who survived, a certain number were seriously wounded. During and immediately following the attack, civilian property was largely pillaged and destroyed. The surviving residents fled to nearby villages or towns. Even today, families are returning to Bogoro at a slow rate and the population is less than half of the original population."
[192] *Katanga and Ngudjolo* Additional List of Evidence, page 107.
[193] *Katanga and Ngudjolo* Decision on the Three Defences' Requests, para. 28.
[194] *See* *Blaškić* Appeal Judgment, paras 220, 221.

amendment to the charges is permitted, as provided by article 61 (9) of the Statute.[195] Charges may only be withdrawn with the permission of the Trial Chamber. To the extent that further information is provided in the course of the trial, this can only go towards assessing whether prejudice caused by the lack of detail of the charges may have been cured.

130. Second, in line with the jurisprudence of the Court's Pre-Trial and Trial Chambers, where submissions by the Prosecutor made in advance of the trial hearings related to the factual allegations provide additional detail, this can be taken into account when determining whether the accused's right to be informed in detail of the charges has been violated.

131. Turning to the case at hand, the Appeals Chamber notes that Mr Lubanga's arguments relate only to the detail in the charges with respect to the dates and places pertaining to instances of enlistment, conscription or participation in hostilities as well as with respect to the identity of victims, that is, the underlying criminal acts. At issue is therefore only this part of the charges. More specifically, Mr Lubanga argues that he was informed of those underlying criminal acts, except for those in relation to the nine named child soldiers, in insufficient detail. The Appeals Chamber notes that the Document Containing the Charges submitted by the Prosecutor prior to the confirmation proceedings, as well as the Amended Document Containing the Charges submitted before the Trial Chamber before the start of the trial (a document not provided for in the Court's legal instruments), set out the factual allegations relevant to the underlying crimes in two parts, the first presenting a 'pattern' of enlistment, conscription and use of individuals under the age of fifteen years to participate actively in hostilities, which was the same in both documents, and the second setting out factual allegations relevant to named alleged child soldiers.[196]

132. The Appeals Chamber notes that, in relation to the 'pattern' of enlistment, conscription and use of individuals under the age of fifteen years to participate actively in hostilities, the Summary of Evidence indicates the parts of the witnesses' statements as well as the video excerpts upon which the Prosecutor intended to rely

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[195] *See* *Ruto and Sang* OA 6 Decision, paras 27, 31.
[196] Document Containing the Charges, paras 30-40, 41-84; Amended Document Containing the Charges, paras 30-40, 41-98.

and links this evidence to the allegations in the charges.[197] It also describes in more detail than the Amended Document Containing the Charges the underlying conduct. Accordingly, in the present case, not only the Document Containing the Charges and the Decision on the Confirmation of Charges, but also the Amended Document Containing the Charges and the Summary of Evidence provided Mr Lubanga with information about this part of the charges. It follows that the question of whether Mr Lubanga was informed in sufficient detail of this part of the charges must be assessed not only by reference to the former, but also to the latter two documents.

133. The Appeals Chamber notes that in his submissions, Mr Lubanga focuses heavily on the pre-trial stage of the proceedings and related documents and decisions, in particular on the Document Containing the Charges.[198] He only cursorily refers to the Decision on the Confirmation of Charges[199] and does not make reference to the Amended Document Containing the Charges or the Summary of Evidence.

134. The Appeals Chamber finds that Mr Lubanga should have substantiated his submissions by reference to these latter documents. In this respect, the Appeals Chamber stresses that it is for the party raising such allegations to refer to the relevant passages of the charging documents and other auxiliary documents to substantiate that sufficiently detailed information was not provided. In the absence of such substantiation, the Appeals Chamber will not conduct *proprio motu* an exhaustive review of the charging documents and relate the information contained therein to the findings in the Conviction Decision.

135. Moreover, the Appeals Chamber notes that, in this case, when alleging prejudice, Mr Lubanga does not substantiate that his ability to defend himself was materially impaired by reference to the evidence presented at trial and relied upon in the Conviction Decision.[200] The Appeals Chamber notes that the formulation of the charges relevant to the 'pattern' in the Document Containing the Charges did not subsequently change. Mr Lubanga raised no objections before the Trial Chamber as to the procedure leading to the filing of the Amended Document Containing the Charges

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[197] *See e.g.* Summary of Evidence, footnotes relevant to paras 38-45, 83-91, 92-99.
[198] Document in Support of the Appeal, para. 4.
[199] *See* Document in Support of the Appeal, para. 11, page 7.
[200] Document in Support of the Appeal, paras 14-20.

or the Summary of Evidence or as to their content.[201] During the trial, Mr Lubanga did not raise any objection to the introduction of the video evidence depicting unidentified children allegedly under the age of fifteen years or its proposed use as detailed in the Specification of Video Evidence.[202] In addition, the Appeals Chamber notes that Mr Lubanga also addressed the sufficiency of the entirety of the evidence in the Defence Closing Submissions, including by reference to the video evidence and the ability of certain witnesses to reliably determine the ages of the individuals that they had seen.[203]

136. The Appeals Chamber therefore finds 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 with respect to the identity of victims. Furthermore, the Appeals Chamber finds that Mr Lubanga has failed to substantiate the prejudice he suffered because of the allegedly missing detail.

137. Accordingly, the Appeals Chamber dismisses this ground of appeal.

VII. ALLEGED VIOLATIONS OF THE PROSECUTOR'S STATUTORY OBLIGATIONS

138. Under this ground of appeal, Mr Lubanga alleges that the Trial Chamber erred in how it took into account certain purported failings of the Prosecutor to comply with her statutory obligations, which, in Mr Lubanga's view, rendered the trial unfair.

A. Background

139. On 10 December 2010, Mr Lubanga filed the Application for a Stay of Proceedings, requesting that the proceedings against him be permanently stayed because of a number of alleged failings of the Prosecutor to comply with statutory obligations, which he argued rendered the trial unfair.[204]

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[201] Disclosure Decision, para. 26; Transcript of 28 May 2008, ICC-01/04-01/06-T-88-ENG (WT), page 14, line 23 to page 15, line 24; Order to File an Amended DCC, paras 8-10, 13-14.
[202] *See e.g.* Transcript of 16 February 2009, ICC-01/04-01/06-T-128-CONF-ENG CT, page 12, line 19 to page 15, line 8; Transcript of 17 February 2009, ICC-01/04-01/06-T-129-CONF-ENG CT, page 33, line 15 to page 34, line 1; page 64, lines 3-13; Defence Response to the Specification of Video Sequences , para. 2.
[203] *See supra* paras 76-77. Defence Closing Submissions, paras 703-707, 737-756.
[204] Application for a Stay of Proceedings.

140. On 23 February 2011, the Trial Chamber issued the Stay of Proceedings Decision.[205] It found that, taken at their highest, none of the alleged violations rendered the trial unfair[206] and denied the request for a permanent stay of proceedings.[207] The Trial Chamber held that, in relation to each alleged violation, "the appropriate remedy will lie in the Court's approach to the evidence in question, and particularly the extent to which it is to be relied on".[208] Mr Lubanga did not request leave to appeal the Stay of Proceedings Decision.

141. In the Defence Closing Submissions, Mr Lubanga requested that the Trial Chamber consider, *mutatis mutandis*, his arguments set out in the Application for a Stay of Proceedings.[209] Mr Lubanga argued that the alleged prosecutorial violations undermined the reliability of the Prosecutor's entire body of evidence and that therefore the Trial Chamber could not "attach sufficient weight 'beyond all reasonable doubt' to any of the evidence presented by the Prosecutor".[210] Mr Lubanga did not allege any new violations by the Prosecutor in relation to other evidence from those already made in the Application for a Stay of Proceedings.[211]

142. In the Conviction Decision, in response to the above argument, specifically in the section entitled "The defence challenge to the entirety of the prosecution's evidence",[212] the Trial Chamber held:

> 120. The Chamber is unpersuaded by the suggested violations of the prosecution's statutory duties, particularly since the Chamber took measures throughout the trial to mitigate any prejudice to the defence whenever these concerns were expressed. Additionally, the Chamber kept these obligations under review.
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> […]
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> 123. Whenever violations of the prosecution's statutory obligations have been demonstrated, the Chamber has evaluated whether, and to what extent, they affect the reliability of the evidence to which they relate. In each instance, any

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[205] Stay of Proceedings Decision.
[206] Stay of Proceedings Decision, paras 188, 199, 204, 212, 222.
[207] Stay of Proceedings Decision, para. 224.
[208] Stay of Proceedings Decision, paras 204, 212. *See also* Stay of Proceedings Decision, paras 198, 206.
[209] Defence Closing Submissions, para. 3.
[210] Defence Closing Submissions, paras 16-17.
[211] *See* Defence Closing Submissions, paras 1-18.
[212] Conviction Decision, paras 119-123.

problems that have arisen have been addressed in a manner which has ensured the accused has received a fair trial.[213]

143. On appeal, Mr Lubanga primarily challenges these findings, submitting that the Trial Chamber erred. In support of this submission, Mr Lubanga alleges that, in the course of the trial, the Prosecutor violated her statutory duties to: (i) fully investigate exonerating evidence and ascertain the reliability of or "verify" incriminating evidence;[214] (ii) disclose exculpatory evidence and evidence affecting the credibility of incriminating evidence;[215] (iii) remain independent;[216] and (iv) respect Mr Lubanga's right to fairness and impartiality.[217]

144. On that basis, Mr Lubanga argues, first, that the Trial Chamber erred in failing to properly assess the combined effect of the Prosecutor's failings, and that, had it done so, it would have found that the reliability of all of the Prosecutor's evidence at trial was affected such that the only decision that would "safeguard the integrity of the proceedings would be to acquit [him]".[218] Second, Mr Lubanga argues that the Trial Chamber's errors in this regard "cast doubt on the impugned decision, since no finding of guilt can be reached at the outcome of judicial proceedings whose unfairness has been established and which have failed to remedy all the prejudice caused".[219]

145. Mr Lubanga argues in his Reply to the Response to the Document in Support of the Appeal that annex 3 to the Document in Support of the Appeal demonstrates "the Chamber's numerous difficulties concerning [the issue of delayed disclosure], as illustrated in the correspondence appended as Annex 3 of [his] brief".[220] However, Mr Lubanga makes no mention of annex 3 in his arguments related to this alleged error. In the Document in Support of the Appeal itself, annex 3 is only referenced in a footnote to a paragraph in the introductory section regarding the alleged violation of the statutory duty to disclose exculpatory evidence and evidence affecting the

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[213] Conviction Decision, paras 120, 123.
[214] Document in Support of the Appeal, paras 23-27.
[215] Document in Support of the Appeal, paras 40-75.
[216] Document in Support of the Appeal, paras 76-91.
[217] Document in Support of the Appeal, paras 92-102.
[218] Document in Support of the Appeal, paras 103-108.
[219] Document in Support of the Appeal, para. 109.
[220] Reply to the Response to the Document in Support of the Appeal, para. 44.

credibility of the Prosecutor's evidence.[221] The Appeals Chamber also observes that annex 3 contains e-mail correspondence in relation to alleged disclosure violations that were sent to the Trial Chamber in February and March 2010 pursuant to oral orders issued in court.[222] It is unclear what the Trial Chamber did in response to these e-mails or if any findings were made in relation to the information contained therein. The Appeals Chamber therefore will not consider this annex because of the incomplete and unclear nature of its content and the lack of explanation by Mr Lubanga.

146. The Prosecutor argues that the Trial Chamber addressed Mr Lubanga's arguments raised under the present ground of appeal in the Stay of Proceedings Decision and in the Conviction Decision.[223] She requests summary dismissal of this ground of appeal because Mr Lubanga's arguments are "entirely repetitive of arguments at trial that were considered and correctly rejected by the Trial Chamber" and fail "to demonstrate how their rejection constituted an error warranting the intervention by the Appeals Chamber".[224]

B. Determination of the Appeals Chamber

1. Preliminary considerations

147. Before addressing the merits of Mr Lubanga's arguments, the Appeals Chamber recalls that it held in the *Lubanga* OA 4 Judgment that, by virtue of article 21 (3) of the Statute, a Chamber has the power to stay proceedings because of violations of an accused's fundamental human rights.[225] These rights are "first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety" (footnotes omitted).[226] The Appeals Chamber further stated that proceedings may be stayed "[w]here [a] fair trial becomes

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[221] *See* Document in Support of the Appeal, para. 43, footnote 74. Otherwise, it is referred to in respect of the Sentencing Decision. *See* Reply to the Response to the Document in Support of the Appeal, para. 11.
[222] *See* Transcript of 2 February 2010, ICC-01/04-01/06-T-239-CONF-ENG (CT2), page 1, line 13 to page 2, line 18, with public redacted version, ICC-01/04-01/06-T-239-Red3-ENG (CT2 WT); Transcript of 5 March 2010, ICC-01/04-01/06-T-254-CONF-ENG (CT), page 20, line 15 to page 21, line 8, with public redacted version, ICC-01/04-01/06-T-254-Red3-ENG (CT WT).
[223] Response to the Document in Support of the Appeal, para. 113, referring to Stay of Proceedings Decision, paras 170-222 and Conviction Decision, paras 119-123, 179.
[224] Response to the Document in Support of the Appeal, para. 112.
[225] *Lubanga* OA 4 Judgment, paras 36-39. *See also Gbagbo* OA 2 Judgment, paras 100-101, footnote 191.
[226] *Lubanga* OA 4 Judgment, para. 37.

impossible because of breaches of the fundamental rights of the […] accused by his/her accusers" and where the breaches are such "as to make it impossible" for the accused to make his/her defence "within the framework of his rights" as laid out in the Statute.[227]

148. The Appeals Chamber considers that, at the end of a trial, a Trial Chamber can consider submissions that the proceedings should be stayed. Article 21 (3) of the Statute applies to all aspects of the Statute and to all stages of the proceedings. Thus, an accused should be able to raise a claim that his or her fair trial rights have been violated at any stage of the proceedings. When such a claim is considered at the deliberation stage of proceedings, a Trial Chamber should apply the test developed in the *Lubanga* OA 4 Judgment articulated above, considering not only whether there has been a violation of the accused's fundamental human rights, but also, if any are found, whether they are such that the proceedings must be stayed.

149. Furthermore, the Appeals Chamber notes that Mr Lubanga does not relate the allegations in this section to any specific findings of the Trial Chamber, thereby challenging the reliability of specific pieces of evidence. Rather, Mr Lubanga submits that the Trial Chamber should have "acquitted" him.[228] In the view of the Appeals Chamber, a stay of proceedings and an acquittal address two fundamentally different aspects of criminal proceedings. An acquittal is a decision taken on the basis of the merits of the case, that is, it involves a consideration of the evidence presented at trial weighed against the threshold of beyond reasonable doubt for conviction. On the other hand, a permanent stay of proceedings stops proceedings without any such consideration. Accordingly, the Appeals Chamber considers that the Trial Chamber could not have acquitted Mr Lubanga on the basis of the alleged violations of his fair trial rights. The Appeals Chamber interprets Mr Lubanga's arguments as being that the Trial Chamber should have declined to issue a final judgment on the merits and permanently stayed the proceedings on the basis of the alleged fair trial violations.[229]

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[227] *Lubanga* OA 4 Judgment, paras 37, 39.
[228] *See* Document in Support of the Appeal, para. 103.
[229] In the context of this appeal, the Appeals Chamber need not consider whether staying the proceedings at the end of the trial would have resulted in further proceedings against Mr Lubanga for the same conduct being barred under article 20 of the Statute.

2. Analysis of the Appeals Chamber

150. The Appeals Chamber will now address Mr Lubanga's individual arguments. At the outset, the Appeals Chamber notes that in the Conviction Decision, the Trial Chamber's discussion of the alleged fair trial violations is brief and does not go into detail.[230] However, given the specific circumstances of this case and the procedural history, this was not necessary. The Appeals Chamber recalls that, in its Stay of Proceedings Decision, the Trial Chamber denied the request for a stay of proceedings because it found that the standard to stay the proceedings was not met.[231]

(a) Alleged error of law in holding that each of the Prosecution's failings should be assessed individually

151. Mr Lubanga argues that "the Chamber failed to assess the combined effect of all of the Prosecution's failings on the integrity of the proceedings and the fairness of the trial".[232]

152. The Prosecutor responds that Mr Lubanga "merely disagrees" with the Trial Chamber's assessment of the evidence.[233]

153. The Appeals Chamber notes that Mr Lubanga does not refer to any portion of the Conviction Decision in support of his contention that the Trial Chamber "held that each of the Prosecution's failings should be assessed individually".[234] In the Conviction Decision, the Trial Chamber stated that it was "unpersuaded by the suggested violations of the prosecution's statutory duties".[235] Therefore, the Appeals Chamber considers that the Trial Chamber did consider the effect of the combined alleged statutory violations and was "unpersuaded" that these violations impaired the "reliability of the entire body of evidence presented at trial by the Prosecution", as argued by Mr Lubanga in the Defence Closing Submissions.[236] Mr Lubanga has not substantiated why this finding is erroneous and the Appeals Chamber therefore does not, on its own motion, consider the correctness of the Trial Chamber's finding. The Appeals Chamber therefore dismisses Mr Lubanga's argument.

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[230] *See* Conviction Decision, paras 120-123.
[231] Stay of Proceedings Decision, paras 188, 199, 204, 212, 222.
[232] Document in Support of the Appeal, para. 103.
[233] Response to the Document in Support of the Appeal, para. 113.
[234] Document in Support of the Appeal, para. 103.
[235] Conviction Decision, para. 120.
[236] *See* Conviction Decision, paras 119-120, referring to Defence Closing Submissions, paras 13-18.

(b) Alleged failure to investigate exonerating circumstances

154. Regarding Mr Lubanga's argument that the Prosecutor failed to comply with her statutory obligation to investigate exonerating circumstances,[237] the Appeals Chamber notes that the Trial Chamber addressed this issue in the Stay of Proceedings Decision, stating:

> [T]he suggested failure to check and investigate the statements of the prosecution's witnesses, and any other relevant evidence in the Prosecutor's possession […] cannot properly be characterised as "illegal conduct" of a kind that would make it "repugnant" or "odious" to continue the trial of the accused. Similarly, the suggested breaches of the accused's rights under Article 54(1)(a) and (b) of the Statute would not constitute such a serious violation of the statutory safeguards as to make his trial *ipso facto* unfair. The Chamber is persuaded that it will be able, at the end of the case, to review in detail the instances in which it is suggested the prosecution failed in its duty to ensure that it was submitting reliable evidence. If the Chamber concludes that this occurred in any of the instances relied on by the defence, the appropriate remedy will lie in the Court's approach to the evidence in question, and particularly the extent to which it is to be relied on. A failure to ensure that the Chamber has received reliable evidence, especially when the prosecution was on notice that significant doubts existed in relation to material in question, may affect the Chamber's conclusions on the relevant area or issue. On the facts advanced by the defence on this issue, the suggested failings on the part of the prosecution - including the suggestion that on occasion the Prosecutor deliberately avoided the process of verification - are not so egregious as to necessitate the termination of the trial.[238]

155. The Appeals Chamber recalls that "[a] Trial Chamber ordering a stay of the proceedings enjoys a margin of appreciation, based on its intimate understanding of the process thus far, as to whether and when the threshold meriting a stay of proceedings has been reached".[239] It follows that, in circumstances where a Trial Chamber has already addressed and disposed of the substance of allegations that a trial should have been stayed owing to violations of fair trial rights, the Appeals Chamber's role is not to address these allegations *de novo*. Rather, the Appeals Chamber must review the findings of the first-instance Chamber in the relevant decision. As Mr Lubanga has not challenged the approach or findings of the Trial Chamber in the Stay of Proceedings Decision, the Appeals Chamber will not address his submissions as to the failure of the Prosecutor to investigate exonerating circumstances any further. Mr Lubanga's arguments in this regard are dismissed.

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[237] Document in Support of the Appeal, paras 23-39.
[238] Stay of Proceedings Decision, para. 204.
[239] *Lubanga* OA 13 Judgment, para. 84; *Lubanga* OA 18 Judgment, para. 56.

(c) Alleged failure to comply with disclosure obligations

156. Similarly, in respect of Mr Lubanga's argument that the Prosecutor did not comply with her disclosure obligations,[240] the Appeals Chamber notes that the Trial Chamber addressed this issue in the Stay of Proceedings Decision, finding that "the relatively limited instances of alleged deliberate non-disclosure relied on [by Mr Lubanga] do not make it unfair or repugnant to continue the trial".[241] Mr Lubanga does not challenge this finding on appeal. Accordingly, the Appeals Chamber will not address his arguments, save for the following more specific argument that was not addressed in the Stay of Proceedings Decision.

157. Mr Lubanga alleges that "a significant volume of article 67 (2) and rule 77 evidence" was disclosed after the Prosecutor had presented all her evidence, but prior to the conclusion of the trial.[242] Mr Lubanga argues that these "late disclosures *would have* required additional investigations, and *would likely have* resulted in many witnesses being recalled" (emphasis added).[243] In support of this, Mr Lubanga lists, as examples, several witnesses he would have recalled, but then states that, "[g]iven the significant delays in the case, any such request on the part of the Defence would only have aggravated the prejudice which [Mr Lubanga] had already suffered owing to the violation of his right to be tried within a reasonable period of time".[244]

158. The Prosecutor submits that Mr Lubanga "acknowledges that he could have requested additional investigation time or the recalling of witnesses", but chose not to, and highlights that the Trial Chamber had granted these remedies on other occasions.[245]

159. The Appeals Chamber finds that Mr Lubanga's argument is not well founded. Mr Lubanga suggests that he did not request certain remedial steps because such a request would aggravate the prejudice that had already occurred from the unreasonable delay in his trial. This decision as to whether unreasonable delay would have occurred, however, would have had to have been taken by the Trial Chamber. In this context, the Appeals Chamber notes that Mr Lubanga does not indicate whether

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[240] Document in Support of the Appeal, paras 40-75.
[241] Stay of Proceedings Decision, para. 212.
[242] Document in Support of the Appeal, para. 67.
[243] Document in Support of the Appeal, para. 67.
[244] Document in Support of the Appeal, paras 67-68.
[245] Response to the Document in Support of the Appeal, para. 129.

and when he sought such a decision by the Trial Chamber. It is not for the Appeals Chamber to make at this stage of the proceedings a speculative finding as to whether any delay would have rendered the length of the trial unreasonably long. Mr Lubanga's argument is therefore dismissed.

(d) Alleged lack of independence

160. As to Mr Lubanga's arguments concerning the Prosecutor's alleged lack of independence,[246] the Appeals Chamber notes that, in the Stay of Proceedings Decision, the Trial Chamber addressed Mr Lubanga's arguments as to purported influence on the investigation by the Congolese Government in the context of discussing the role of intermediaries.[247] It decided, however, that the issue did not merit a stay of proceedings.[248] Again, Mr Lubanga does not explain on appeal why this approach of the Trial Chamber was incorrect, and his arguments in this regard are therefore dismissed. In addition, the Appeals Chamber finds that the Trial Chamber took adequate measures to ensure that the trial was fair by not relying upon such disputed testimony and evidence. Importantly in this context, Mr Lubanga does not identify an instance where the Trial Chamber *did rely* on evidence that was the product of alleged interference by Congolese authorities.

161. Mr Lubanga further alleges that the Trial Chamber "could [not] reasonably find that the essential, direct part played by militant organisations" in the Prosecutor's investigations did not render the proceedings against him unfair.[249] In support of this argument, Mr Lubanga points to investigatory assignments that the Prosecutor gave to intermediaries P-0143, P-0031, and P-0321.[250] The Prosecutor does not respond to this specific allegation.

162. In the Conviction Decision, the Trial Chamber examined the role of these three intermediaries,[251] particularly in relation to witnesses that they may have "persuaded, encouraged, or assisted […] to give false evidence".[252] The Trial Chamber did not

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[246] Document in Support of the Appeal, paras 76-91.
[247] Stay of Proceedings Decision, paras 183-199.
[248] Stay of Proceedings Decision, para. 199.
[249] Document in Support of the Appeal, para. 89. The Appeals Chamber notes that Mr Lubanga uses the term "militant organisations" to refer to non-governmental organisations that advocate on behalf of child soldiers.
[250] Document in Support of the Appeal, para. 90.
[251] *See* Conviction Decision, paras 206-477.
[252] Conviction Decision, para. 483.

rely on several of those witnesses and withdrew their status as victims in the proceedings because of the nature of their interactions with these three intermediaries.[253] The Trial Chamber also communicated information in relation to these three intermediaries to the Prosecutor because it found that they may have committed offences pursuant to article 70 of the Statute.[254]

163. The Appeals Chamber finds no error in these steps taken by the Trial Chamber with respect to these intermediaries in order to ensure the fairness of the proceedings. Mr Lubanga's argument is therefore rejected.

164. Finally, Mr Lubanga submits that the Trial Chamber held that "it had remedied all violations of [Mr Lubanga's rights]".[255] As an example of a violation of his rights that was not remedied, Mr Lubanga contends that the "[Trial] Chamber provided absolutely no remedy for the patent lack of independence" of the Prosecutor.[256] In this respect, he asserts that the Trial Chamber "even accepted the testimony of P-0038, who was introduced to the Office of the Prosecutor by P-0316".[257] The Prosecutor submits that the Trial Chamber did not err in "appreciating this evidence or [Mr Lubanga's] arguments in relation to it".[258] In respect of witness P-0038, the Prosecutor argues that the Trial Chamber accepted this witness' testimony only after "thoroughly assessing" it and the information related to P-0316.[259]

165. The Appeals Chamber finds that this alleged error mischaracterises the cited portion of the Conviction Decision.[260] The Trial Chamber carefully considered the impact of witnesses P-0038 and P-0316's interactions on P-0038's credibility and reliability.[261] This alleged error is therefore dismissed because it misrepresents the factual finding of the Trial Chamber and ignores other relevant portions of the Conviction Decision.

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[253] *See e.g.* Conviction Decision, para. 484.
[254] Conviction Decision, para. 483.
[255] Document in Support of the Appeal, para. 91, referring to Conviction Decision, para. 123.
[256] Document in Support of the Appeal, para. 91.
[257] Document in Support of the Appeal, para. 91, citing Conviction Decision, para. 368.
[258] Response to the Document in Support of the Appeal, para. 134.
[259] Response to the Document in Support of the Appeal, para. 134, referring to Conviction Decision, paras 688-693.
[260] Conviction Decision, para. 368.
[261] Conviction Decision, paras 340-349.

(e) Alleged lack of fairness and impartiality

166. Mr Lubanga argues that the Prosecutor lacked fairness and impartiality.[262] Mr Lubanga submits, first, that the Prosecutor violated her statutory obligation, pursuant to article 54 (1) (c) of the Statute, to respect Mr Lubanga's right to a fair and impartial trial, pursuant to article 67 (1) of the Statute,[263] by not promptly informing the Trial Chamber when she learned that prosecution witnesses had presented false or inexact testimony.[264] Mr Lubanga argues that the Prosecutor should have informed the Trial Chamber that the testimony of witnesses P-0316, P-0157, P-0007 and P-0008 may have been false "as soon as [she became] aware of the fact".[265] Mr Lubanga contends that these violations rendered the proceedings unfair.[266]

167. The Prosecutor submits that she did not breach her duties of fairness or impartiality and that the examples put forth by Mr Lubanga "fail to demonstrate any such breach".[267] The Prosecutor disputes Mr Lubanga's version of what occurred in respect of witnesses P-0316, P-0157, P-0007, and P-0008.[268]

168. The Appeals Chamber notes that the alleged violations raised by Mr Lubanga were addressed in the Stay of Proceedings Decision, specifically in terms of whether they rendered the trial unfair or, as argued by Mr Lubanga, "fatally prejudiced the position of the accused".[269] In this respect, in the Stay of Proceedings Decision,[270] the Trial Chamber specifically addressed these allegations in relation to witnesses P-0316 and P-0157,[271] holding, in relation to whether the trial was rendered unfair that

> [e]ven taking the accused's submissions at their highest, the suggested failure to check and investigate the statements of the prosecution's witnesses, and any other relevant evidence in the Prosecutor's possession, *or to reveal the alleged weaknesses in the accounts of Intermediary 316 and Witness 157*, cannot properly be characterised as "illegal conduct" of a kind that would make it "repugnant" or "odious" to continue the trial of the accused. Similarly, the suggested breaches of the accused's rights under Article 54(1)(a) and (b) of the

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[262] Document in Support of the Appeal, paras 92-102.
[263] *See* Document in Support of the Appeal, paras 92-95, 97.
[264] Document in Support of the Appeal, paras 98-100.
[265] Document in Support of the Appeal, paras 98-99.
[266] Document in Support of the Appeal, para. 102.
[267] Response to the Document in Support of the Appeal, para. 137.
[268] Response to the Document in Support of the Appeal, paras 138-140.
[269] *See* Stay of Proceedings Decision, para. 200.
[270] Stay of Proceedings Decision, Section V. (ii), "The Prosecutor knew that certain evidence was untruthful or erroneous, or he failed to investigate its reliability", page 82.
[271] Stay of Proceedings Decision, para. 200.

> Statute would not constitute such a serious violation of the statutory safeguards as to make his trial *ipso facto* unfair. [Emphasis added.][272]

169. Mr Lubanga does not challenge this finding on appeal. The Appeals Chamber therefore dismisses this argument, including the allegation regarding witnesses P-0007 and P-0008. While the latter is not specifically addressed in the Stay of Proceedings Decision, the Appeals Chamber finds that a potential additional instance of alleged delay in information being brought to the attention of the Trial Chamber would not have had any impact on the Trial Chamber's assessment as to whether a stay of proceedings should be ordered.

170. Mr Lubanga also submits that the Prosecutor's purported lack of impartiality is demonstrated by certain public statements. Notably, he refers to a public statement of a former staff member of the Office of the Prosecutor, Ms Le Fraper du Hellen.[273] The Trial Chamber addressed this very statement in the Stay of Proceedings Decision and found that it was insufficient to conclude that the proceedings must be stayed.[274] In the absence of submissions by Mr Lubanga as to why the Trial Chamber erred in this regard, the Appeals Chamber dismisses this argument.

171. In addition, Mr Lubanga points to public statements of the Prosecutor at a press conference after the Conviction Decision was rendered.[275] The Prosecutor submits that she did not breach her duties of fairness or impartiality and that Mr Lubanga "fail[s] to demonstrate any such breach".[276] The Prosecutor also argues that Mr Lubanga has failed to demonstrate what impact "this could have on the guilty verdict".[277] The Appeals Chamber is not persuaded by Mr Lubanga's arguments. The Prosecutor's statements, even in the event that they were considered inappropriate, do not establish that the Prosecutor lacked impartiality *at trial*. The Appeals Chamber finds that Mr Lubanga has failed to substantiate any link between the alleged inappropriate statements and the Prosecutor's conduct at trial or how they impact on the fairness of the trial and therefore dismisses this argument.

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[272] Stay of Proceedings Decision, para. 204.
[273] Document in Support of the Appeal, para. 101.
[274] Stay of Proceedings Decisions, paras 221-222.
[275] Document in Support of the Appeal, para. 101.
[276] Response to the Document in Support of the Appeal, paras 136-137.
[277] Response to the Document in Support of the Appeal, para. 142.

(f) Alleged error in limiting the evaluation of the gravity of the Prosecutor's breaches to only the witnesses presented as former child soldiers

172. Mr Lubanga argues that the Trial Chamber erred by restricting its evaluation of the gravity of the Prosecutor's breaches of her statutory duties to only those witnesses presented as former child soldiers, when the Trial Chamber should have evaluated the consequences of these breaches on the entirety of the Prosecutor's evidence.[278]

173. The Appeals Chamber notes that Mr Lubanga raises this argument twice, once in relation to the duty to investigate exculpatory circumstances, as well as in relation to all the alleged violations.[279] Mr Lubanga also argues that the Trial Chamber's limited assessment led to it failing to consider the overall prejudice caused to him.[280] The Prosecutor submits that, contrary to Mr Lubanga's claims, the Trial Chamber did not limit its analysis of alleged violations to one segment of the evidence and points to portions of the Conviction Decision to contradict this claim.[281]

174. The Appeals Chamber notes that, in support of his arguments with respect to an alleged failure to investigate, Mr Lubanga refers to only one paragraph of the Conviction Decision,[282] which is found within the section entitled "Conclusions on the Child Soldiers Called by the Prosecution".[283] To the extent that Mr Lubanga's arguments are intended to demonstrate that the Trial Chamber explicitly limited its assessment of investigatory failures only to evidence relating to alleged child soldiers, the Appeals Chamber considers that Mr Lubanga misrepresents the cited paragraph by insinuating that it reflects the overall scope of the Trial Chamber's assessment of the alleged prosecutorial failings. Mr Lubanga fails to address the section of the Conviction Decision[284] where the Trial Chamber set out its approach to *any* evidence related to alleged prosecutorial violations of its statutory obligations.[285] Therefore, the Appeals Chamber dismisses the specific arguments relevant to this alleged error.

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[278] Document in Support of the Appeal, paras 29, 103, 105-106.
[279] *See* Document in Support of the Appeal, paras 29, 103, 105-106.
[280] Document in Support of the Appeal, para. 33.
[281] Response to the Document in Support of the Appeal, para. 114, referring to Conviction Decision, paras 37-39, 119-123- 178-179.
[282] *See* Document in Support of the Appeal, footnote 50, citing Conviction Decision, para. 482.
[283] Conviction Decision, Section F., comprising paras 478-484.
[284] Conviction Decision, paras 119-123.
[285] *See* Conviction Decision, paras 120-123.

175. The Appeals Chamber finds that this alleged error is also without merit in respect of all the alleged statutory violations. Mr Lubanga has not demonstrated that the Trial Chamber made a holding that limited its evaluation in relation to all the possible statutory violations by the Prosecutor. Rather, it limited its assessment to those statutory violations by the Prosecutor that "have been demonstrated".[286] Further, insofar as Mr Lubanga challenges the Trial Chamber's approach to any demonstrated statutory violations by assessing how they affect the evidence "to which they relate",[287] Mr Lubanga has not articulated any error in this approach or demonstrated that the Trial Chamber ignored statutory violations in respect of evidence pertaining to issues outside of the alleged child soldiers. The Appeals Chamber finds that Mr Lubanga merely disagrees with the Trial Chamber's assessments and has not identified an error that necessitates the Appeals Chamber's intervention. This alleged error is accordingly dismissed.

(g) Alleged error of law in dismissing a piece of evidence

176. In the Conviction Decision, the Trial Chamber held:

> The defence submits that the prosecution "concealed" exonerating testimony from a former bodyguard of the accused to the effect that there were no child soldiers under the age of 15 in the FPLC or within his Presidential Guard until a very late stage in the proceedings, by which point it was impossible for the defence to investigate and arrange for him to testify. In this individual's statement, he suggested that although there were 15 and 17 year old children at [Mr] Lubanga's residence, he never saw 15-year old child soldiers in the UPC and he observed that [Mr] Lubanga was opposed to recruiting child soldiers. Again, this statement lacks credibility given it is contradicted by a wealth of evidence that has been accepted by the Chamber. [Footnotes omitted.][288]

177. Mr Lubanga alleges that, in relation to interview notes pertaining to this individual, [REDACTED], who was alleged to be one of Mr Lubanga's bodyguards,[289] the Trial Chamber found that [REDACTED]'s written statement lacked credibility because it was contradicted by other evidence.[290] He argues that an item of evidence cannot be dismissed simply because it is contradicted by other evidence, citing the ICTR *Muvunyi* Appeal Judgment in support of this contention.[291]

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[286] Conviction Decision, para. 123.
[287] Conviction Decision, para. 123.
[288] Conviction Decision, para. 1261.
[289] Document in Support of the Appeal, para. 70.
[290] Document in Support of the Appeal, para. 72.
[291] Document in Support of the Appeal, para. 73.

178. As a preliminary matter, the Appeals Chamber notes that it is unclear how a purported error in relation to the evaluation of one particular piece of evidence could be a basis to stay the proceedings against Mr Lubanga, as opposed to potentially demonstrating a factual error in the Conviction Decision. In any event, the Appeals Chamber finds that Mr Lubanga mischaracterises the relevant holding of the *Muvunyi* Appeal Judgment, which, as pointed out by the Prosecutor,[292] relates to whether the trial chamber in that case had provided sufficient reasoning for preferring one witness' testimony over another.[293] In the present case, the Trial Chamber set out its reasoning as to why it found the other witnesses and documentary evidence credible, as well as why it found the contradictory testimony of Mr Lubanga's bodyguards not to be credible.[294] The Appeals Chamber does not find the Trial Chamber's findings in this respect to be unreasonable. Accordingly, the Appeals Chamber rejects Mr Lubanga's argument.

VIII. PREJUDICE TO THE INTEGRITY OF THE TRIAL

179. Under a separate but related heading, Mr Lubanga submits that the Trial Chamber noted that the Prosecutor should not have delegated her investigative responsibilities to intermediaries, that there were grounds to believe that persons acting on behalf of the Prosecutor were involved in preparing false witness statements and that the Prosecutor had failed to scrutinise this evidence before tendering it into evidence.[295] He submits that the Prosecutor failed to investigate interference with witnesses, to take disciplinary action against the perpetrators, or to inform the Court and that she is therefore responsible for "extremely serious offences against the judicial process of searching for the truth".[296] He argues that the Trial Chamber failed to make any finding on the Prosecutor's responsibility for the presentation of false

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[292] Response to the Document in Support of the Appeal, para. 128.
[293] *See* *Muvunyi* Appeal Judgment, para. 147, where the ICTR Appeals Chamber stated that: "[t]he Appeals Chamber recalls again that a Trial Chamber has an obligation to provide a reasoned opinion. In this instance, the Appeals Chamber considers that the Trial Chamber did not provide sufficient reasons for preferring the testimony of Witnesses YAI and CCP over that of Witness MO78. The Trial Chamber did not point to any inconsistencies in the evidence of Witness MO78 nor did it identify any reasons for doubting his credibility. The Trial Chamber appears to have deemed Witness MO78 unreliable solely on the basis that his evidence differed from that of Witnesses YAI and CCP. Such an approach is of particular concern given the Trial Chamber's express recognition of the need to treat the evidence of Witnesses YAI and CCP, unlike the evidence of Witness MO78, with caution. The Appeals Chamber therefore finds that the Trial Chamber failed to provide a reasoned opinion on this point" (footnotes omitted).
[294] Conviction Decision, paras 1247-1262.
[295] Document in Support of the Appeal, paras 110-112.
[296] Document in Support of the Appeal, paras 114-115.

evidence and the impact that this had on the integrity of proceedings and "failed to take account of the fact that the gravity of the situation was exacerbated by the Prosecution's conduct".[297] He submits that "the exceptional gravity of such a situation amounts to an abuse of process of such a nature as to warrant [his] acquittal".[298]

180. The Prosecutor argues that these arguments "are entirely repetitive of his arguments under the second ground of appeal" (footnote omitted).[299]

181. The Appeals Chamber observes that under this ground of appeal, Mr Lubanga in essence raises the same arguments as those in the preceding ground of appeal, arguing that the Prosecutor's conduct was of such an "exceptional gravity" that it amounts to an "abuse of process" that should have led the Trial Chamber to acquit Mr Lubanga.[300] To the extent that the arguments are repetitive, the Appeals Chamber will not address them again.

182. Mr Lubanga also appears to argue that the Prosecutor purposefully presented false evidence to the Trial Chamber[301] and that the Trial Chamber should have acquitted him because the Prosecutor's conduct damaged the integrity of the trial.[302] He alleges that the Trial Chamber failed to take into account that "the gravity of the situation was exacerbated by the Prosecutor's conduct"[303] and therefore failed to find that it could not attach sufficient weight to any piece of the Prosecutor's evidence to make findings "beyond reasonable doubt".[304]

183. The Appeals Chamber considers that Mr Lubanga has not substantiated his arguments and that these arguments appear to be based solely on misleading and incorrect assertions by Mr Lubanga regarding the Trial Chamber's findings and statements. They are therefore dismissed *in limine*.

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[297] Document in Support of the Appeal, paras 113-114.
[298] Document in Support of the Appeal, para. 117.
[299] Response to the Document in Support of the Appeal, para. 148.
[300] Document in Support of the Appeal, para. 117.
[301] Document in Support of the Appeal, paras 110-123.
[302] Document in Support of the Appeal, paras 117, 123.
[303] Document in Support of the Appeal, para. 114.
[304] Document in Support of the Appeal, para. 122.

IX. ALLEGED LEGAL AND FACTUAL ERRORS IN THE TRIAL CHAMBER'S DETERMINATION OF MR LUBANGA'S GUILT

184. The crimes for which Mr Lubanga was convicted are defined in article 8 (2) (e) (vii) of the Statute as follows:

> Conscripting and enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

185. Mr Lubanga raises legal and factual errors regarding the Trial Chamber's findings in relation to these crimes. The alleged legal errors relate to the Trial Chamber's findings on the conscription of children under the age of fifteen years and on their use to participate actively in hostilities. The alleged factual errors challenge the entirety of the Trial Chamber's findings on the age element that is necessary for all three crimes, as well as specific factual findings regarding specific acts of enlistment, conscription and use of children under the age of fifteen years. Mr Lubanga also alleges legal and factual errors in the Trial Chamber's findings relating to his individual criminal responsibility. These arguments will be addressed in turn.

A. Alleged errors in establishing the age element of the crimes of enlistment, conscription and use to participate actively in hostilities

186. After addressing the relevant evidence, the Trial Chamber concluded that the "evidence has established beyond reasonable doubt that children *under the age of 15* were conscripted and enlisted into the UPC/FPLC forces between 1 September 2002 and 13 August 2003" (emphasis added).[305] It made a similar finding in respect of the use of children under the age of fifteen years to participate actively in hostilities.[306] Mr Lubanga argues that it was not reasonable for the Trial Chamber to make factual findings on the age element of the crimes based on the evidence that was before it and that the Trial Chamber also made errors of law in respect of the age assessments.[307]

1. Background

187. In the Conviction Decision, the Trial Chamber recalled the difficulties that the Prosecutor faced in investigating the alleged facts,[308] including in relation to determining the age of individuals who allegedly were members of the UPC/FPLC at

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[305] Conviction Decision, para. 914.
[306] Conviction Decision, paras 915-916.
[307] Document in Support of the Appeal, paras 124-227.
[308] Conviction Decision, paras 129-168.

the time of the charges, and detailed the Prosecutor's explanation of why she had decided not to call a forensic expert, but instead decided to rely on the testimony of non-expert witnesses.[309] The Trial Chamber also recalled that, due to security concerns, the Prosecutor's investigators did not contact the families, communities or schools of the alleged child soldiers that they had identified.[310] The Trial Chamber explained in detail why it did not rely on the testimony of two individuals who participated in the proceedings as victims and the nine prosecution witnesses who testified that they had been UPC/FPLC soldiers while under the age of fifteen years.[311]

188. In finding that there were individuals under the age of fifteen years in the UPC/FPLC, the Trial Chamber relied on: a) its own assessment of the age of individuals depicted on video excerpts;[312] b) witnesses who testified that they had seen children in the ranks of the UPC/FPLC who, in their estimation, were under the age of fifteen years;[313] c) the testimony of witness P-0046, who had interviewed former child soldiers and had asked them about their age;[314] and d) one piece of documentary evidence.[315]

189. In relation to the witness testimony, the Trial Chamber expressly noted that its conclusion as to the age of the individuals was based on non-expert witnesses, who assessed "the individual's physical appearance, including by way of comparison with other children; the individual's general physical development (for example, whether a girl had developed breasts, and factors such as height and voice); and his or her overall behaviour" (footnotes omitted).[316] During their testimony, the witnesses were

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[309] Conviction Decision, paras 169-170.
[310] Conviction Decision, paras 171-177.
[311] Conviction Decision, paras 168, 206-484.
[312] Conviction Decision, paras 644, 713, 774, 779, 792, 854, 858, 860, 861, 862, 912, 915, 1122, 1216, 1249, 1251, 1252, 1254, 1260, 1339, referring to EVD-OTP-00582 at 00:34:52; EVD-OTP-00410/EVD-OTP-00676 at 00:52:14; EVD-OTP-00570 at 00:06:54; EVD-OTP-00574 at 01:49:02 and 00:36:21; EVD-OTP-00572 at 00:00:50, 00:02:47, and 00:28:42; EVD-OTP-00571 at 02:47:15-02:47:19, at 02:22:52-02:22:54 and 02:02:44.
[313] Conviction Decision, paras 641-731.
[314] Conviction Decision, paras 645-655.
[315] Conviction Decision, paras 741-748.
[316] Conviction Decision, para. 641, referring in footnotes to P-0017 (Transcript of 27 March 2009, ICC-01/04-01/06-T-157-CONF-ENG, page 63, lines 17-21, with public redacted version, ICC-01/04-01/06-T-157-Red2-ENG; Transcript of 25 March 2009, ICC-01/04-01/06-T-154-CONF-ENG, page 41, lines 17-25, with public redacted version, ICC-01/04-01/06-T-154-Red2-ENG); P-0014 (Transcript of 27 May 2009, ICC-01/04-01/06-T-179-CONF-ENG, page 87, lines 15-18, with public redacted version, ICC-01/04-01/06-T-179-Red2-ENG); and P-0116 (Transcript of 3 July 2009, ICC-01/04-01/06-T-203-

questioned about the age of the individuals they had seen or met. The Trial Chamber assessed the credibility of the witnesses and their ability to assess the age of the individuals they had observed, explaining why it relied on their age assessments.[317]

190. The video excerpts were introduced into evidence primarily through witnesses P-0030 and P-0002.[318] As part of the examination of these witnesses, the Prosecutor posed questions in relation to specific individuals appearing therein, including whether they were, to the knowledge of the witnesses, members of the UPC/FPLC[319] and about their age or identity.[320] Upon the request of the Trial Chamber, the Prosecutor specified, in the Specification of Video Sequences document filed on 25 February 2009,[321] the sequences of the videos upon which she wished to rely and in support of which factual allegations. The Prosecutor indicated which specific

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CONF-ENG, page 36, line 15 to page 37, line 23, with public redacted version, ICC-01/04-01/06-T-203-Red2-ENG).

[317] Conviction Decision, Section X (B) (2), "Age assessments and determinations of witness credibility", paras 641-731.

[318] EVD-OTP-00574 (01:49:02), introduced through P-0030, Transcript of 17 February 2009, ICC-01/01/04-01/06-T-129-CONF-ENG (CT), with public redacted version ICC-01/01/04-01/06-T-129-Red3-ENG (CT WT); EVD-OTP-00571 (02:47:15 to 02:47:19) introduced through P-0030, Transcript of 16 February 2009, ICC-01/04-01/06-T-128-CONF-ENG (CT), with public redacted version ICC-01/01/04-01/06-T-128-Red2-ENG (CT WT); EVD-OTP-00572 (00:00:50, and 00:02:47, and 00:28:42), introduced through P-0030, Transcript of 16 February 2009, ICC-01/04-01/06-T-128-CONF-ENG (CT), with public redacted version ICC-01/01/04-01/06-T-128-Red2-ENG (CT WT); EVD-OTP-00571 (02:22:52 to 02:22:54), introduced through P-0030, Transcript of 16 February 2009, ICC-01/04-01/06-T-128-CONF-ENG (CT), with public redacted version ICC-01/01/04-01/06-T-128-Red2-ENG (CT WT); EVD-OTP, 00570 (00:06:57), introduced through P-0030, Transcript of 16 February 2009, ICC-01/04-01/06-T-128-CONF-ENG (CT), with public redacted version ICC-01/01/04-01/06-T-128-Red2-ENG (CT WT); EVD-OTP-00571 (02:02:44), introduced through P-0030, Transcript of 16 February 2009, ICC-01/04-01/06-T-128-CONF-ENG (CT), with public redacted version ICC-01/01/04-01/06-T-128-Red2-ENG (CT WT); EVD-OTP-00410-EVD-OTP-00676 (00:52:14), introduced through P-0002, Transcript of 2 April 2009, ICC-01/01/04-01/06-T-162-CONF-ENG (CT), with public redacted version ICC-01/01/04-01/06-T-162-Red2-ENG (CT WT); and EVD-OTP-00574 (00:36:21), introduced through P-0030, Transcript of 17 February 2009, ICC-01/01/04-01/06-T-129-CONF-ENG (CT), with public redacted version ICC-01/01/04-01/06-T-129-Red3-ENG (CT WT).

[319] *See* for witness P-0030: Transcript of 16 February 2009, ICC-01/04-01/06-T-128-CONF-ENG (CT), with public redacted version ICC-01/01/04-01/06-T-128-Red2-ENG (CT WT); Transcript of 17 February 2009, ICC-01/04-01/06-T-129-CONF-ENG (CT), with public redacted version ICC-01/01/04-01/06-T-129-Red3-ENG (CT WT); Transcript of 18 February 2009, ICC-01/04-01/06-T-130-CONF-ENG, with public redacted version, ICC-01/01/04-01/06-T-130-Red2-ENG; and Transcript of 19 February 2009, ICC-01/04-01/06-T-131-CONF-ENG, with public redacted version, ICC-01/01/04-01/06-T-131-Red2-ENG. *See* for witness P-0002: Transcript of 2 April 2009, ICC-01/01/04-01/06-T-162-CONF-ENG (CT), with public redacted version ICC-01/01/04-01/06-T-162-Red2-ENG (CT WT); Transcript of 3 April 2009, ICC-01/01/04-01/06-T-164-CONF-ENG (CT), with public redacted version ICC-01/01/04-01/06-T-164-Red2-ENG (CT WT).

[320] *See e.g.* Transcript of 17 February 2009, ICC-01/04-01/06-T-129-CONF-ENG (CT), page 57, lines 21-23, with public redacted version, ICC-01/04-01/06-T-129-Red3-ENG (CT WT).

[321] Specification of Video Sequences; Annex 1 to Specification of Video Sequences and Annex 2 to Specification of Video Sequences. *See also supra* para. 76.

individuals depicted on the video excerpts were, in her view, clearly under the age of fifteen years and submitted that their age could be determined through an assessment of their physical appearance.[322] While witness P-0030 provided estimates of the age of some of the individuals in the video excerpts, the Trial Chamber stated that it had relied solely on its own age assessments[323] and accordingly made its own determination regarding the age of the individuals depicted in the video excerpts, finding specific individuals to be "evidently",[324] "clearly",[325] or "significantly"[326] under the age of fifteen years.

191. The two key paragraphs regarding the Trial Chamber's findings on age and its own age assessment in general are:

> 643. 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 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.
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> 644. 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.][327]

192. On appeal, Mr Lubanga argues that the Trial Chamber made several legal and factual errors by relying, for the purpose of age determination, on its own assessments

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[322] *See* Specification of Video Sequences; Annex 1 to Specification of Video Sequences and Annex 2 to Specification of Video Sequences.
[323] *See* Conviction Decision, para. 718; *see also* para. 713.
[324] Conviction Decision, paras 861, 1254.
[325] Conviction Decision, paras 713, 792, 854, 858, 862, 869, 912, 915, 1348.
[326] Conviction Decision, paras 1249, 1251-1252.
[327] Conviction Decision, paras 643-644.

of the video excerpts and on non-expert witness testimony. The Appeals Chamber notes that several of Mr Lubanga's arguments overlap and are repetitive. Mr Lubanga raises essentially the following errors,[328] which the Appeal Chamber will address in turn:

a. The Trial Chamber could not establish Mr Lubanga's guilt beyond reasonable doubt because the evidence that it relied upon did not disclose the identity (name and date of birth), date and circumstances of recruitment, or use in combat of any specific child soldier and, therefore, was insufficiently specific;

b. The Trial Chamber erred by relying on evidence that had not been verified by the Prosecutor and could not be verified by Mr Lubanga;

c. The Trial Chamber's reliance on the assessment of appearance to determine age was contrary to earlier indications given by the Trial Chamber in the course of the trial;

d. The Trial Chamber's approach to the assessment of the video evidence was unreasonable;

e. The Trial Chamber made errors in relation to its assessment of specific videos;

f. The Trial Chamber's approach to the witness testimony as a basis for age determination was unreasonable and the Trial Chamber conflated the concepts of the credibility of witnesses and the reliability of their age assessments;

g. The Trial Chamber erred in its assessment of the testimony of specific witnesses; and

h. The Trial Chamber erred in its assessment of document EVD-OTP-00518.

193. The Prosecutor argues that the Trial Chamber did not err and requests that the Appeals Chamber reject Mr Lubanga's arguments.[329]

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[328] All the references to the Document in Support of the Appeal for the following arguments of Mr Lubanga are provided in the specific paragraphs addressing them.
[329] Response to the Document in Support of the Appeal paras 151-173.

2. Alleged error – the evidence was insufficiently specific to establish guilt beyond reasonable doubt

194. Mr Lubanga asserts that the child soldier witnesses constituted the core of the Prosecutor's case.[330] Referring to arguments made in relation to the specificity of the charges,[331] Mr Lubanga contends that, from the start of the proceedings, the Prosecutor maintained that the named individual child soldier witnesses were essential to her case.[332] Mr Lubanga argues that, because the Trial Chamber decided to exclude this "core evidence", it could not reasonably have found him guilty beyond reasonable doubt.[333]

195. Mr Lubanga argues that the remaining evidence was not specific enough for a finding of guilt beyond reasonable doubt as to the age of the individuals at issue.[334] Mr Lubanga notes that, as the testimony of the child soldier witnesses was excluded, there was no specific and verifiable example of the recruitment of individuals under the age of fifteen years into the UPC/FPLC that would establish the identity of any individual, his or her date of birth, the date and conditions of his or her recruitment, his or her military experience and where he or she was deployed to fight, and the date when he or she left the UPC/FPLC.[335]

196. The Appeals Chamber is not persuaded by Mr Lubanga's argument that the evidence on which the Trial Chamber relied was unspecific because it did not disclose the identity and/or precise age of certain individuals.

197. The Appeals Chamber notes that the Trial Chamber found individuals to be under the age of fifteen years without knowing their names and in the absence of any other identifying information. Nevertheless, the Appeals Chamber finds that it is not *per se* impermissible to make a finding on the age element of the crimes in circumstances where the identity of the victim is unknown.

198. Article 8 (2) (e) (vii) of the Statute and the required elements of the crimes listed in that article, as provided in the Elements of Crimes, do not require that the

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[330] Document in Support of the Appeal, paras 125-129.
[331] *See* Document in Support of the Appeal, para. 126.
[332] Document in Support of the Appeal, para. 126.
[333] Document in Support of the Appeal, para. 129.
[334] Document in Support of the Appeal, para. 130.
[335] Document in Support of the Appeal, paras 127-129.

exact age of a victim of the crime be established. Rather, the text only requires that the victim is under the age of fifteen years. Thus, it suffices that it is established that the victim is within a certain *age range*, namely *under* the the age of fifteen years. The Appeals Chamber finds that the question of whether such a finding can be established in circumstances where the identity and exact date of birth of the victim are unknown is a question of fact and must be decided on a case-by-case basis taking into account the specific facts and circumstances of the case and individual at issue. Accordingly, the Appeals Chamber rejects Mr Lubanga's argument that the identities of the victims must be known to establish the age element of the crimes for which he was convicted.

199. The Appeals Chamber also dismisses as misleading Mr Lubanga's argument that the Trial Chamber has held that the "former child soldiers constituted the 'primary' evidence on which the charges rested" (footnote omitted),[336] an argument also raised in relation to the specificity of the charges.[337] The transcript reveals that the Presiding Judge of the Trial Chamber used this phrase in order to distinguish between expert evidence on the background of the events in Ituri/DRC in 2002/2003 and evidence on facts that may establish the elements of the crime.[338]

3. Alleged error – the Trial Chamber relied on "unverified and unverifiable" evidence

200. Mr Lubanga alleges that the evidence on which the Trial Chamber relied to determine the age of individuals was 'unverified' by the Prosecutor and could not be verified by him because the individuals' identities were unknown.[339] Mr Lubanga submits that knowing their identities would have permitted him to verify their age or their membership in the UPC/FPLC.[340] The Prosecutor requests that the Appeals

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[336] Document in Support of the Appeal, para. 126.
[337] *See* Document in Support of the Appeal, para. 13.
[338] Transcript of 16 January 2009, ICC-01/04-01/06-T-104-ENG, page 5, line 23 to page 6, line 8 reads: "Although the Chamber has previously indicated that the Prosecution's expert on background matters should be the first witness in the case since it will be possible for communities in the DRC and elsewhere to follow these proceedings (wherever a computer and internet connection is available), the court acknowledges the force in the argument that the hearing is likely to be more readily comprehensible if the first testimony relates to the "primary" evidence in the case which is said to support the charges the accused faces. There is a real risk that if immediately following the opening statements the court turns to matters of history and context, it will be difficult to understand the nature and true course of the trial to come".
[339] Document in Support of the Appeal, paras 130-131.
[340] Document in Support of the Appeal, paras 130-137.

Chamber reject this "blanket statement". She incorporates arguments she raises in relation to the first and second grounds of appeal.[341]

201. The Appeals Chamber dismisses Mr Lubanga's argument that the Trial Chamber, in establishing the age element of certain individuals, relied on evidence "with regard to whom […] the Prosecutor undertook no verification".[342] The Appeals Chamber finds this argument to be vague and unclear. Nevertheless, it notes in this context that Mr Lubanga's arguments relevant to the Prosecutor's investigation have been addressed elsewhere in this judgment,[343] that the relevant video excerpts were authenticated and that the witnesses who gave age estimates appeared in person before the Trial Chamber.

202. As to whether the evidence could be verified by Mr Lubanga, the Appeals Chamber notes that it was open to Mr Lubanga to challenge the admissibility of the Prosecutor's evidence when she presented it, including for lack of probative value. Challenges could have been raised throughout the trial with regard to specific witnesses who testified that they had seen individuals under the age of fifteen years, as well as in respect of the age of individuals appearing on video sequences. In relation to the latter, the Appeals Chamber again recalls that, in the Specification of Video Sequences, the Prosecutor identified the individuals whose age she requested the Trial Chamber to assess based on their physical appearance. Mr Lubanga, however, does not point to any challenges that he raised against such evidence or to any decisions of the Trial Chamber rejecting challenges to the admission of this evidence during the trial, nor does he explain how the Trial Chamber erred in that regard. Therefore, the Appeals Chamber dismisses the broadly formulated argument that the evidence was unverified and unverifiable.

203. Nevertheless, the Appeals Chamber will consider Mr Lubanga's allegations that the Trial Chamber's approach to the need to verify and rely on verifiable evidence for the purposes of determining age is contradictory to its prior approach and to its approach in the Conviction Decision in respect of other evidence.[344] It will also

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[341] Response to the Document in Support of the Appeal, paras 151-153.
[342] Document in Support of the Appeal, para. 131.
[343] *Supra* paras 151-178 .
[344] Document in Support of the Appeal, paras 132-135; *see infra* paras 204-206.

address Mr Lubanga's arguments relating to the video evidence relied on by the Trial Chamber to assess the age of individuals depicted therein.[345]

204. Mr Lubanga argues that the Trial Chamber rejected the admission into evidence of a document entitled "*Histoires individuelles*", which were witness P-0046's notes of interviews with 34 individuals who were allegedly under the age of fifteen years.[346] Mr Lubanga contends that the Trial Chamber ruled that admitting this document would prejudice Mr Lubanga because he was "unable […] to investigate the circumstances or the accuracy of any of the individual case histories" contained in the notes.[347] Mr Lubanga submits that, for the same reasons, the Trial Chamber should not have relied on the testimony of witnesses as to the age of unidentified individuals.[348]

205. The Appeals Chamber dismisses Mr Lubanga's argument because it misrepresents the Trial Chamber's holding. When declining to admit the "*Histoires individuelles*" into evidence, the Trial Chamber did not rule generally that evidence could not be admitted if Mr Lubanga was unable to investigate the identity of child soldiers mentioned therein. Rather, the Trial Chamber noted that the Prosecutor intended to introduce the document for the limited purpose of establishing the working methods of witness P-0046 and, given that this could be explained during her testimony, "the merits of the suggested purpose for introducing this document are so slight that the arguments as regards prejudice are persuasive".[349]

206. Mr Lubanga also contends that the Trial Chamber decided not to rely on three logbooks introduced as evidence because the witness who was questioned about these documents had not verified the information contained therein.[350] The Appeals Chamber notes that there were several reasons why the Trial Chamber did not rely on

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[345] Document in Support of the Appeal, paras 149-155, *see infra* paras 206-208.
[346] Document in Support of the Appeal, para. 132, referring to Transcript of 7 July 2009, ICC-01/04-01/06-T-205-CONF-ENG (CT), page 1, line 24 to page 3, line 21, with public redacted version, ICC-01/04-01/06-T-205-Red3-ENG (CT WT).
[347] Document in Support of the Appeal, referring to Transcript of 7 July 2009, ICC-01/04-01/06-T-205-CONF-ENG (CT), page 3, lines 1-19, with public redacted version ICC-01/04-01/06-T-205-Red3-ENG (CT WT).
[348] Document in Support of the Appeal, para. 137.
[349] Transcript of 7 July 2009, ICC-01/04-01/06-T-205-CONF-ENG, page 3, lines 12-19 (CT), with public redacted version ICC-01/04-01/06-T-205-Red3-ENG (CT WT).
[350] Document in Support of the Appeal, paras 133-134, referring to the Conviction Decision, paras 739-740. These arguments relate to the logbook EVD-OTP-00739, the list EVD-OTP-00474, and the logbook EVD-OTP-00476.

these documents, including the fact that two of the logbooks did not contain any information about the armed group or groups to which the children mentioned therein belonged and that the information in the third was potentially unreliable when it was originally provided and was not sufficiently verified thereafter. In this regard, the witness in question, P-0031, was one of the intermediaries whose testimony the Trial Chamber decided to treat "with particular care".[351] The Appeals Chamber does not consider that the decision not to rely on the logbooks demonstrates that the Trial Chamber would only rely on evidence that could be verified by Mr Lubanga and therefore rejects Mr Lubanga's argument in this regard.

207. Additionally, the Appeals Chamber also rejects Mr Lubanga's argument that the Trial Chamber was required to indicate during the trial the specific video excerpts on which it would ultimately rely.[352] The Appeals Chamber notes that the evaluation of evidence takes place during deliberations and, pursuant to article 74 (2) of the Statute, that evaluation is the basis for the decision on conviction or acquittal. In the Conviction Decision, the Trial Chamber set out its evaluation of the video excerpts, discussing those it had relied upon[353] and those that it had not relied upon.[354] Mr Lubanga could not have expected that the Trial Chamber would disclose its evaluation of the evidence before the end of the trial.

208. Furthermore, the Appeals Chamber finds that the burden of proof was not reversed due to the Trial Chamber's findings in relation to individuals depicted in the video excerpts whose identities were unknown. The Trial Chamber did not require Mr Lubanga, either directly or indirectly, to inquire about the identities of these individuals or to disprove the Prosecutor's allegations. Rather, the Trial Chamber evaluated the evidence before it and assessed whether it established beyond reasonable doubt that the individuals concerned were under the age of fifteen years based on their appearance. As noted above, in order to come to such a conclusion, it was not necessary to know the individuals' identities. As with respect to the other evidence presented by the Prosecutor, it was open to Mr Lubanga to challenge the Prosecutor's reliance on the video excerpts. Regarding Mr Lubanga's arguments that

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[351] Conviction Decision, para. 477.
[352] Document in Support of the Appeal, para. 155.
[353] *See e.g.* Conviction Decision, paras 644, 792, 854, 860, 861, 862, 1242, 1249, 1251, 1252, 1254.
[354] *See* Conviction Decision, paras 1250, 1253, 1255, 1257.

the Trial Chamber reversed the burden of proof because, *inter alia*, the "video excerpts run to several hours and show several hundred individuals",[355] the Appeals Chamber has already addressed this assertion, finding it to misstate the procedural history in this case, and, accordingly, will not further address this argument.[356]

209. In relation to specific video excerpts, Mr Lubanga argues that the Prosecutor did not attempt to verify the age of the individuals depicted therein by questioning certain witnesses, particularly witness P-0030, regarding the age of the individuals.[357] The Appeals Chamber recalls that witness P-0030 was, at times, asked about the age of certain individuals depicted on the video excerpts.[358] However, in relation to the video excerpts at issue under this ground of appeal, he was not asked about the age of the individuals. The Appeals Chamber notes that Mr Lubanga has in his submissions not identified any legal basis that would require the Prosecutor to put specific questions to witnesses. In addition, the Appeals Chamber considers that Mr Lubanga was in a position to challenge the evidence and to question witness P-0030 himself.[359] The Appeals Chamber accordingly rejects this argument.

4. Alleged error – age determination based on physical appearance was contradictory to the Trial Chamber's earlier statements

210. Mr Lubanga submits that the Trial Chamber's decision to base its findings establishing the age element on assessments of physical appearance contradict statements it made in the course of the trial as to whether it was possible to determine the age of individuals based on viewing video excerpts or to accept the testimony of non-expert witnesses in this regard.[360] The Prosecutor requests that the Appeals Chamber reject these arguments, submitting that Mr Lubanga misinterprets the Trial Chamber's statements.[361] She recalls that "nearly every fact witness for the

[355] Document in Support of the Appeal, para. 153.
[356] *See supra* paras 190-202.
[357] *See* Document in Support of the Appeal, paras 160, 169, 182, 183.
[358] *See supra* para. 190; Conviction Decision, paras 717-718, referring to Transcript of 19 February 2009, ICC-01/04-01/06-T-131-CONF-ENG (CT), page 8, line 2 to page 9, line 9, with public redacted version, ICC-01/04-01/06-T-131-Red2-ENG (CT WT).
[359] *See supra* paras 202, 209.
[360] Document in Support of the Appeal, paras 142-145.
[361] Response to the Document in Support of the Appeal, para. 154.

Prosecut[or] was permitted to provide evidence on their assessment of the age of child soldiers in the UPC/FPLC".[362]

211. In support of his argument, Mr Lubanga refers to the trial hearing of 20 February 2009, shortly after witness P-0030's testimony, in the course of which several video excerpts were introduced into evidence. During this hearing, the Trial Chamber addressed the implications of this evidence on the trial and the need for the Prosecutor to specify the purpose of introducing the video excerpts into evidence.[363] Mr Lubanga submits that the Trial Chamber invited the Prosecutor to consider calling an expert on age determination, but that the Prosecutor did not act on this invitation and such an expert was not called.[364]

212. The Appeals Chamber dismisses these arguments, which are labeled as 'errors of law', because they misrepresent the procedural history of the case and the Trial Chamber's statements. First, the Appeals Chamber notes that the Trial Chamber invited both parties to consider calling an expert witness on the issue.[365] The Trial Chamber also considered "whether this is something that the [C]hamber ought to contemplate doing of its own accord".[366] Second, the Appeals Chamber finds that the statements of the Presiding Judge during the hearing of 20 February 2009 do not suggest that the Trial Chamber decided that it was unable to determine the age of individuals on the basis of physical appearance. Rather, it considered the question of whether or not an individual's age could be established based on his or her appearance to be a "live issue".[367] The Trial Chamber expressly stated that the Prosecutor was inviting the Trial Chamber to conclude "that there are particular people who, in the Prosecutor's submission, are self-evidently below the age of 15".[368] The Appeals

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[362] Response to the Document in Support of the Appeal, para. 154.
[363] Document in Support of the Appeal, para. 143, referring to Transcript of 20 February 2009, ICC-01/04-01/06-T-132-CONF-ENG (CT), page. 34, line 8 to page 35, line 10, with public redacted version, ICC-01/04-01/06-T-132-Red-ENG (WT).
[364] Document in Support of the Appeal, para. 143.
[365] *See* Transcript of 20 February 2009, ICC-01/04-01/06-T-132-CONF-ENG (CT), page 35, lines 1-6, with public redacted version, ICC-01/04-01/06-T-132-Red-ENG (WT).
[366] Transcript of 20 February 2009, ICC-01/04-01/06-T-132-CONF-ENG (CT), page 35, lines 5-6, with public redacted version, ICC-01/04-01/06-T-132-Red-ENG (WT).
[367] Transcript of 20 February 2009, ICC-01/04-01/06-T-132-CONF-ENG (CT), page 34, lines 8-15, with public redacted version, ICC-01/04-01/06-T-132-Red-ENG (WT).
[368] Transcript of 20 February 2009, ICC-01/04-01/06-T-132-CONF-ENG (CT), page 34, lines 8-15, with public redacted version, ICC-01/04-01/06-T-132-Red-ENG (WT).

Chamber finds that this clearly indicates that the Trial Chamber did *not* exclude the possibility of assessing age based on physical appearance.

213. Furthermore, referring specifically to a hearing in April 2009, Mr Lubanga argues that the Trial Chamber indicated during the trial that the appearance of a person was insufficient to determine the age range of a person.[369] At this hearing, the Prosecutor asked witness P-0002 to assess the age of a group of former FPLC soldiers who were depicted on one of the video excerpts, to which the Presiding Judge said: "I doubt whether the witness is an expert on age. His opinion as to that, I don't think it has very much value, does it?".[370] Mr Lubanga repeats this argument elsewhere in his Document in Support of the Appeal.[371]

214. The Appeals Chamber notes that, in this instance, the Presiding Judge intervened to stop the Prosecutor from repeatedly asking witness P-0002 his opinion about the ages of certain individuals, in circumstances where the witness had already indicated that they were of different ages, that he did not have more precise information and had not asked them how old they were.[372] The Appeals Chamber finds that Mr Lubanga could not have reasonably believed that this specific statement represented the overall position of the Trial Chamber on the subject and that Mr Lubanga is distorting its meaning and significance by removing it from the context in which it was made.

215. In conclusion, the Appeals Chamber dismisses Mr Lubanga's argument that he was led to believe that the Trial Chamber was of the view that age determination based on appearance was not possible.

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[369] Document in Support of the Appeal, paras 144, 155, referring to Transcript of 2 April 2009, ICC-01/04-01/06-T-162-CONF-ENG (CT), page 49, lines 6-8, with public redacted version, ICC-01/04-01/06-T-162-Red2-ENG (CT WT) and Transcript of 20 February 2009, ICC-01/04-01/06-T-132-CONF-ENG (CT), page 35, lines 9-16, with public redacted version, ICC-01/04-01/06-T-132-Red-ENG (WT).

[370] Transcript of 2 April 2009, ICC-01/04-01/06-T-162-CONF-ENG (CT), page 49, lines 6-8, with public redacted version, ICC-01/04-01/06-T-162-Red2-ENG (CT WT).

[371] *See* Document in Support of the Appeal, para. 192.

[372] When asked about his "opinion" of the age of the youngest individuals seen on the video footage EVD-OTP-00410 (00:26:03-00:33:14), after confirmation that he was present when the video was recorded, P-0002 responded "[t]he young boys were of different ages. **I don't have more precise information. I didn't ask them how old they were**", and being directly asked again, he said "[…] if you have a look at this footage, I would say that there are some who were minors amongst these children, underage." (emphasis added) (Transcript of 2 April 2009, ICC-01/04-01/06-T-162-CONF-ENG (CT), page 48, line 25 to page 49, line 5, with public redacted version, ICC-01/04-01/06-T-162-Red2-ENG (CT WT).

5. *Alleged error – unreasonableness of the Trial Chamber's approach to age assessment on the basis of video excerpts*

216. The Appeals Chamber notes that Mr Lubanga's overarching argument is that it was unreasonable for the Trial Chamber to assess the age of individuals on the basis of video excerpts.[373] The Prosecutor argues that the approach of the Trial Chamber was reasonable because the Trial Chamber "was fully entitled to evaluate the videos and reach reasonable conclusions as to the age of the persons depicted on them"[374] and that the Trial Chamber "exercised caution when considering this evidence".[375]

217. The first issue to be addressed is whether, as a matter of law, the age element of these crimes can be established beyond reasonable doubt on the basis of the video excerpts.

218. The first question that arises in that regard is whether the Trial Chamber could reach conclusions on the age of individuals based on the video excerpts in the absence of any corroborating evidence. The Appeals Chamber notes that article 66 (3) of the Statute provides that the Trial Chamber must be convinced beyond reasonable doubt of the facts that constitute the legal elements of the crime, and that article 74 (2) of the Statute provides that "the Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings".[376] Rule 63 (4) of the Rules of Procedure and Evidence states:

> Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.

Accordingly, the Appeals Chamber finds that there is no strict legal requirement that the video excerpts had to be corroborated by other evidence in order for the Trial Chamber to be able to rely on them. Depending on the circumstances, a single piece of evidence, such as a video image of a person, may suffice to establish a specific

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[373] *See also* First Additional Evidence Request, paras 7-12, 19. *See also* Transcript of 20 May 2014, ICC-01/04-01/06-T-363-CONF-ENG (CT), page 6, line 10 to page 8, line 25, with public redacted version, ICC-01/04-01/06-T-363-Red-ENG (WT).
[374] Response to the Document in Support of the Appeal, para. 162.
[375] Response to the Document in Support of the Appeal, para. 165, referring to the Conviction Decision, para. 643.
[376] *See also supra*, para. 57.

fact. However, as recognised by the Trial Chamber, this does not mean that *any* piece of evidence provides a sufficient evidentiary basis for a factual finding.[377]

219. The second question is whether video images can, as a type of evidence, establish that a person depicted therein is below a given age. In that regard, the Prosecutor argues that, according to the jurisprudence of the ICTY and ICTR, as well as that of domestic courts, courts may rely on video images because "video footage […] speaks for itself".[378] In agreement with Mr Lubanga,[379] the Appeals Chamber finds that this argument does not address the specific point. It is not generally at issue that video images may be relied upon to establish facts. Rather, the question is whether video images may be relied upon to establish the *age* of the individuals beyond reasonable doubt.

220. The Appeals Chamber notes in this regard that the SCSL, when dealing with charges for enlistment, conscription and use of children under the age of fifteen years, has relied on various forms of evidence to determine the age of the children concerned. In one such instance, the SCSL Trial Chamber in the *Taylor* case established the age of a witness based on its assessment of his appearance.[380] Noting that there was no official document to corroborate the witness' date of birth, the Trial Chamber stated that "he looked young at the time he gave evidence in 2008 ten years after the incidents he testified about".[381]

221. Domestic jurisprudence, especially in child pornography cases, as also referred to by the Prosecutor,[382] shows that approaches vary with regard to relying on video images to determine age. Some courts assess age on the basis of video images before them,[383] while other courts require the calling of expert witnesses or additional

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[377] Conviction Decision, para. 110. In that respect, the Appeals Chamber notes the Pre-Trial Chamber's jurisprudence requires corroboration under certain circumstances. *See e.g.* *Ruto et al.* Decision on the Confirmation of Charges, para.78, referring to *Bemba* Decision on the Confirmation of Charges, paras 50-51.
[378] *See* Response to the Document in Support of the Appeal, para. 162, quoting *Karadžić* Admission of Evidence Decision, para. 20. *See also* *Krstić* Trial Judgment, paras 354, 409, 410.
[379] *See* Reply to the Response to the Document in Support of the Appeal, para. 48, referring to the cases cited in the Response to the Document in Support of the Appeal, at footnotes 273-277.
[380] *Taylor* Trial Judgment, paras 1425, 1431.
[381] *Taylor* Trial Judgment, para. 1431.
[382] Response to the Document in Support of the Appeal, paras 162-163.
[383] *See* *Silva* Order, para. 43: "All the girls appear to be aged between about five years old and about 10 years old (the bulk of the images are of girls at the older end of the range)". However, it must be noted that in this case, the estimated age range of the children was 5-10 years old (substantially lower than

corroborating evidence.[384] The Appeals Chamber finds that this jurisprudence demonstrates that the question of whether video evidence can be relied upon to establish the element of age is a question of fact. Further, this jurisprudence indicates that one factor relevant to reviewing whether a Trial Chamber's factual finding was reasonable is whether it appropriately exercised caution when assessing the age of an individual on the basis of video images.

222. The Appeals Chamber considers that the Trial Chamber was indeed aware of the limitations of determining age on the basis of physical appearance, including video images, and expressed caution with regard to age assessment on that basis.[385] It found, in relation to several individuals depicted in the video excerpts, that it was not convinced that they were under the age of fifteen years.[386] Only with respect to a limited number of video excerpts did it conclude that certain individuals depicted therein were under the age of fifteen years. The Appeals Chamber notes that the Trial Chamber indicated that it applied a large margin of error and made findings as to the age of the children only where the children were, in its assessment, "clearly" under the age of fifteen years.[387] The Appeals Chamber considers that such an approach is not unreasonable, even though the reasoning of the Trial Chamber in that regard could have been more extensive, which, in the view of the Appeals Chamber, would have facilitated appellate review.

223. Accordingly, the Appeals Chamber finds that the Trial Chamber's approach to the video excerpts was not unreasonable and that Mr Lubanga has failed to establish an error in that regard.

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the legal requirement of 18 years old). The case-law in the United States establishes that where the images are of prepubescent children, there may be no need to present expert testimony as to whether the image depicts a person under the age of eighteen. *See* *Fox* Appeal Judgment, page 12; *Kimler* Appeal Judgment, page 9. Even in instances where the images are of children who are not clearly prepubescent, the images can sometimes be introduced without expert opinion evidence where other evidence is provided as to the child's age, such as admission evidence from the accused. *See* *Hilton* Appeal Judgment, page 12; *Rearden* Appeal Judgment, para. 13; *O'Malley* Appeal Judgment, paras 15-18.

[384] *See* *Kennedy* Judgment; *Anderton* Appeal Judgment; *Broyles* Appeal Judgment; *Rayl* Appeal Judgment; *Snow* Appeal Judgment. *See also* Inadmissibility Judgment, pages 8-9; *Loring* Ruling, paras 14-15; *Garbett* Judgment, paras 84-93; *Keough* Judgment, para. 121 (Manderscheid J); *Lanning* Judgment, paras 23-24; *Katz* Appeal Judgment, para. 21; *Riccardi* Appeal Judgment, page 3.

[385] Conviction Decision, paras 643-644.

[386] Conviction Decision, paras 1250, 1253, 1255, 1257.

[387] Conviction Decision, para. 644.

6. Alleged errors in the evaluation of specific video evidence

224. Mr Lubanga also alleges specific errors in the Trial Chamber's assessment of the age of several individuals appearing in ten video excerpts.[388] In that regard, the Appeals Chamber notes that several arguments are repetitions or variations of his more general arguments, relating, for instance, to the verification and verifiability of the evidence or the purported need to establish the identities of the victims. In addition, Mr Lubanga raises arguments that are dependent on his proposed additional evidence,[389] which, however, was not admitted.[390] The Appeals Chamber has already addressed these arguments above, and will not reconsider them again. Accordingly, the analysis that follows is limited to Mr Lubanga's arguments that have not already been addressed above.

225. Mr Lubanga argues that the individual depicted in video excerpt EVD-OTP-00570 (at 00:06:57) was not, as indicated by the Trial Chamber in the Conviction Decision,[391] male, but according to witness P-0010's testimony, female.[392] The Prosecutor argues that this error is harmless, as witness P-0010 stated that this individual was below the age of twelve years.[393] The Appeals Chamber notes that witness P-0010 stated that the individual in question was a female friend of hers.[394] The Appeals Chamber finds that, in relation to this video excerpt, an error as to gender does not affect the reasonableness of the Trial Chamber's finding that the individual was clearly under the age of fifteen years. Given that an error as to gender is the only argument put forward by Mr Lubanga for why the Trial Chamber's finding on the individual's age was unreasonable, the Appeals Chamber dismisses this alleged error.

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[388] Document in Support of the Appeal, paras 158-188.
[389] *See* Document in Support of the Appeal, paras 161-166; 170-171, referring to video excerpts EVD-OTP-00574 (at 01:49:02) and EVD-OTP-0571 (at 02:47:15 to 02:47:19).
[390] *Supra* paras 76-81.
[391] Conviction Decision, para. 1242.
[392] Document in Support of the Appeal, para. 180, referring to Transcript of 6 March 2009, ICC-01/04-01/06-T-145-CONF-ENG (CT), page 18, line 22 to page 19, line 16, with public redacted version, ICC-01/04-01/06-T-145-Red3-ENG (CT WT).
[393] Response to the Document in Support of the Appeal, para. 159.
[394] Conviction Decision, para. 254. *See also* Transcript of 6 March 2009, ICC-01/04-01/06-T-145-CONF-ENG (CT), page 13, line 16.

226. Mr Lubanga argues with respect to three video excerpts in which individuals appear together with UPC commanders[395] that witness [REDACTED] should have been asked about the age and identity of these specific individuals[396] and that these individuals were in fact one individual shown at different frames of the video.[397] The Appeals Chamber reiterates that Mr Lubanga was in a position to challenge this evidence by questioning witness [REDACTED] about his knowledge of the identities and respective ages of the individuals depicted therein and could therefore have put any such questions to witness [REDACTED] himself. The Appeals Chamber finds that Mr Lubanga's arguments before the Appeals Chamber as to the possible effect of posing questions to witness [REDACTED] during his testimony is speculative and accordingly dismisses this argument. As to the argument that it was only one individual and not several, the Appeals Chamber finds that Mr Lubanga does not substantiate his arguments in a manner that would allow the Appeals Chamber to reach an informed decision on this issue. This argument is therefore dismissed.

227. Mr Lubanga argues that the facial features of the individuals appearing on video EVD-OTP-00410/EVD-OTP-00676 (at 00:52:14) and on video EVD-OTP-00574 (at 00:36:21) are not visible.[398] The Appeals Chamber notes with respect to the first video excerpt that the Trial Chamber referred to this video excerpt in relation to its factual finding that individuals under the fifteen years of age were within the ranks of the UPC/FPLC.[399] However, it did not rely on this video excerpt in its overall conclusions.[400] Therefore, the Appeals Chamber finds that this alleged error does not have any impact on the Trial Chamber's overall conclusions and will not consider it any further.

228. As to the second video excerpt, referred to several times in the Conviction Decision,[401] the Appeals Chamber notes that it shows Mr Lubanga returning to his residence after an event at the Hellenique Hotel on 23 January 2003.[402] The Trial Chamber found that he was travelling in a vehicle accompanied by members of the

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[395] EVD-OTP-00572 (at 00:00:50, 00:02:47 and 00:28:42).
[396] Document in Support of the Appeal, para. 173.
[397] Document in Support of the Appeal, para. 173.
[398] Document in Support of the Appeal, paras 184, 186.
[399] Conviction Decision, para. 779.
[400] *See* Conviction Decision, para. 911.
[401] Conviction Decision, paras 713, 862, 915, 1252.
[402] Conviction Decision, paras 862 and 1252.

presidential guard, who were armed and wearing military clothing.[403] It further found that, on the back of the truck, there were two individuals in camouflage clothing.[404] It compared these two individuals with the other individuals present in the video excerpt and found that the latter were "taller".[405] Therefore, the Trial Chamber took into account the individuals' "size and general appearance"[406] in coming to the conclusion that they were significantly under the age of fifteen years.[407]

229. In the view of the Appeals Chamber, the Trial Chamber's approach was not unreasonable. While it is true that the Trial Chamber did not make reference to the facial features of the individuals concerned, it provided reasons as to why it considered these individuals to be under the age of fifteen years, focusing on their size and also on their "general appearance". The Appeals Chamber considers that the size of an individual, when compared to the other individuals present in the video excerpt, can be a determining factor for finding that the person is under the age of fifteen years, if considered in connection with their general appearance. Mr Lubanga has not made any arguments as to why the Trial Chamber's reliance on size and general appearance in relation to the video excerpt at issue was unreasonable and the Appeals Chamber therefore dismisses this argument.

230. Finally, Mr Lubanga argues that the Trial Chamber made a contradictory finding in relation to an individual in the back of a truck appearing in video excerpt EVD-OTP-00571 (at 02:22:50 to 02:22:52).[408] The Appeals Chamber finds that the Trial Chamber made contradictory statements, insofar as it stated at footnote 2432 of the Conviction Decision that the video excerpt depicts "children who could be under the age of 15 but they appear too briefly to enable a definite finding", while it found at paragraph 1249 of the Conviction Decision that one of these individuals is "significantly below 15 years of age". However, the Appeals Chamber notes that the Trial Chamber did not rely on this video excerpt in any of its conclusions.[409]

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[403] Conviction Decision, paras 862 and 1252.
[404] Conviction Decision, paras 862 and 1252.
[405] Conviction Decision, para. 1252.
[406] Conviction Decision, para. 862.
[407] Conviction Decision, para. 1252.
[408] Document in Support of the Appeal, para. 177, referring to Conviction Decision, footnote 2432 and paragraph 1249. The time stamp mentioned in the Conviction Decision is 02:22:52 to 02:22:54; however, the individual at issue appears at time stamp 02:22:50 to 02:22:52.
[409] *See* Conviction Decision, para. 915.

Accordingly, any error that the Trial Chamber might have made in this regard was not material to Mr Lubanga's conviction.

7. Alleged error – unreasonableness of the Trial Chamber's reliance on witness testimony and the conflation of the legal concepts of witness credibility and reliability

231. Mr Lubanga challenges the Trial Chamber's reliance on non-expert witnesses, who gave assessments of the age of individuals that they had seen in the UPC/FPLC based on those individuals' physical appearance.[410] Mr Lubanga also challenges the Trial Chamber's reliance on the evidence of witnesses who testified about statements of "individuals who presented themselves [to the witnesses] as former child soldiers under the age of 15 years", thereby primarily challenging the testimony of witness P-0046,[411] who testified about individuals who had told her their purported age. The Prosecutor argues that the Trial Chamber's approach was reasonable because it exercised caution in assessing the evidence of non-expert witnesses.[412]

232. The Appeals Chamber considers that Mr Lubanga raises two main arguments.

233. The first is that a witness' recollection of the physical appearance of another person in the years 2002 and 2003 can only form the basis of a Trial Chamber's finding on age if corroborated by other objective evidence; otherwise it is merely an opinion.[413] In that respect, he recalls that the witnesses testified many years after the events at issue[414] and that many of the witnesses found it difficult to accurately assess the age of young individuals.[415] According to Mr Lubanga, "[t]estimony appraising age can only be considered reliable where sufficiently corroborated by objective and verifiable information".[416]

234. The Appeals Chamber notes that these arguments mostly repeat those already raised and which have been addressed in relation to other alleged errors relevant to age determination. The Appeals Chamber recalls that it has already addressed

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[410] Document in Support of the Appeal, paras 189-195, 197.
[411] Document in Support of the Appeal, paras 196-217.
[412] Response to the Document in Support of the Appeal, para. 165.
[413] Document in Support of the Appeal, paras 190-192, 197.
[414] Document in Support of the Appeal, para. 191.
[415] Document in Support of the Appeal, para. 193.
[416] Document in Support of the Appeal, para. 197.

arguments as to the need for corroboration.[417] It also recalls that it finds the Trial Chamber's assessment of age on the basis of video excerpts to not be unreasonable.[418]

235. The Appeals Chamber is not persuaded by Mr Lubanga's argument that the majority of the witnesses called to testify found it difficult to accurately assess the age of the child soldiers.[419] In support of this argument, Mr Lubanga refers to three witnesses on whose testimony the Trial Chamber relied for the purposes of age determination, namely witnesses P-0041 and P-0055 (called by the Prosecutor) and witness D-0019 (called by Mr Lubanga).[420] Mr Lubanga also refers to witness P-0031, without noting, however, that the Trial Chamber did not rely on his testimony for purposes of age determination. The Appeals Chamber notes that Mr Lubanga raised the same arguments in the Defence Closing Submissions.[421] The Trial Chamber addressed these arguments as well as arguments raised in respect of the other witnesses on whose statements it relied in the section of the Conviction Decision entitled "Age assessments and determinations of witness credibility".[422] In the introductory paragraphs of this section, the Trial Chamber emphasised that it was aware of the difficulties related to age assessments by witnesses and especially the differences in personal perception.[423] The Trial Chamber also specifically addressed the arguments raised by Mr Lubanga in the Defence Closing Submissions. It then set out, with respect to each of the witnesses, why it did or did not rely on his or her testimony. In assessing the ability of various witnesses to determine the ages of the children, the Trial Chamber took into account factors such as their experience in dealing with demobilised children, their knowledge of the conditions in the area and the level of contact that they had with the children, and explanations that the witnesses gave as to the behaviour of the children, which would indicate that they were under the age of fifteen years. The Appeals Chamber therefore finds that the Trial Chamber took full account of Mr Lubanga's arguments in this regard and that Mr Lubanga has not demonstrated how the Trial Chamber's approach in separately assessing each witness' credibility and ability to assess age was unreasonable. Rather,

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[417] *Supra* para. 217.
[418] *Supra* paras 216-223.
[419] Document in Support of the Appeal, para. 193.
[420] *See* Document in Support of the Appeal, footnote 222.
[421] *See* Defence Closing Submissions, paras 385-392 (P-0041), paras 488-495 (P-0055).
[422] Conviction Decision, page 290.
[423] Conviction Decision, paras 641-643.

the Trial Chamber carefully assessed each witness' capability to assess age and evidently took into account the passage of time between their testimonies and the time at which they saw such individuals. Accordingly, the Appeals Chamber also rejects Mr Lubanga's argument that "[s]uch a ruling is equally untenable where founded on a witness's recollection of the physical appearance of a given individual several years after the events".[424]

236. Mr Lubanga argues that the difficulties of age assessment are "compounded by the fact that physical appearance may be misleading on account of nutritional problems and ethnic origin", referring in this context to forensic expert witnesses' statements as to teeth and bone assessments for age determination purposes.[425] As noted above,[426] the Trial Chamber was aware of the difficulties of age assessment based on physical appearance and indicated in this regard that, "[g]iven 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".[427] The Appeals Chamber finds that, given the margin of error applied by the Trial Chamber, its approach was not unreasonable. The Appeals Chamber also finds that the Trial Chamber did not have to consider in this context the two forensic expert witnesses to whom Mr Lubanga refers. They merely confirmed that forensic age assessment of an individual using a combined bone and teeth assessment is imprecise.[428] In addition, the Appeals Chamber notes that Mr Lubanga could have asked, for example, for an expert on age assessment, on the basis of physical appearance, to testify during the trial. The Appeals Chamber recalls that the Trial Chamber offered the parties the opportunity to call an expert on age determination during the trial.[429]

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[424] Document in Support of the Appeal, para. 191.
[425] Document in Support of the Appeal, para. 194.
[426] *Supra* para. 235.
[427] Conviction Decision, para. 643.
[428] Transcript of 12 May 2009, ICC-01/04-01/06-T-172-CONF-ENG (CT), pages 37-38, page 92, line 4 to page 93, line 1, page 93, line 16 to page 94, line 9, with public redacted version, ICC-01/04-01/06-T-172-Red3-ENG (CT WT); Transcript of 13 May 2009, ICC-01/04-01/06-T-173-ENG (CT WT), page 40, line 17 to page 42, line 10.
[429] *See* Transcript of 20 February 2009, ICC-01/04-01/06-T-132-CONF-ENG (CT), page 35, lines 1-6, with public redacted version, 01/04-01/06-T-132-ENG (WT); *supra* para. 212.

237. Mr Lubanga's second main argument is that the Trial Chamber conflated the credibility of a witness with the reliability of his or her testimony in that it focused on the credibility of the witnesses in its assessment.[430] He argues that a witness may be perfectly sincere and testify credibly, but nevertheless be wrong.[431] Mr Lubanga therefore repeats that "[t]estimony appraising age can only be considered reliable where sufficiently corroborated by objective and verifiable information".[432] The Prosecutor addresses this argument only with respect to witness P-0046's testimony and avers that Mr Lubanga has not demonstrated an error in the Trial Chamber's assessment.[433]

238. The Appeals Chamber considers that Mr Lubanga does not substantiate his arguments with respect to specific witnesses, except for witness P-0046.[434] Nevertheless, in addressing the argument in general terms, the Appeals Chamber finds that the Trial Chamber did not conflate the concepts of credibility and reliability and rejects Mr Lubanga's argument for the following reasons.

239. In assessing the weight to be given to the testimony of a witness, a Trial Chamber needs to assess the credibility of the witness and the reliability of his or her testimony. While the Statute and the Rules of Procedure and Evidence do not specifically refer to these concepts, they are part of the evaluation of evidence required of a Trial Chamber by article 74 (2) of the Statue. The Appeals Chamber notes that there is a strong link between the two concepts, as reflected in the jurisprudence of the *ad hoc* international criminal tribunals.[435] This jurisprudence shows that, while credibility is generally understood as referring to whether a witness is testifying truthfully, the reliability of the facts testified to by the witness may be confirmed or put in doubt by other evidence or the surrounding circumstances.[436] Thus, although a witness may be honest, and therefore credible, the evidence he or

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[430] Document in Support of the Appeal, paras 196, 197.
[431] Document in Support of the Appeal, para. 197.
[432] Document in Support of the Appeal, para. 197.
[433] Response to the Document in Support of the Appeal, para. 166.
[434] Document in Support of the Appeal, footnote 232 and para. 203 *et seq*.
[435] *Karemera et al.* Decision on Admission of Evidence Rebutting Adjudicated Facts, para. 15, footnote 38.
[436] *Nahimana et al.* Appeal Judgment, para. 194; *Kunarac et al.* Acquittal Decision, para. 7; *Bikindi* Appeal Judgment, para. 114; *Nchamihigo* Appeal Judgment, paras 47, 285; *Brđanin* Trial Judgment, para. 25.

she gives may nonetheless be unreliable because, *inter alia*, it relates to facts that occurred a long time ago or due to the "vagaries of human perception".[437]

240. The Appeals Chamber is not persuaded that the Trial Chamber unduly conflated these concepts. The Appeals Chamber recalls that the Trial Chamber assessed each of the witnesses separately as to his or her credibility as well as to whether their age assessment could be relied upon. While this assessment was done in a separate section entitled "Age assessments and determinations of witness credibility" and not directly in connection with the factual findings, the Trial Chamber explained in relation to each witness why it considered his or her age assessment of particular individuals reliable.

241. In discussing the witnesses, the Trial Chamber generally applied a two-step process. First, it considered the overall credibility of the witness. Then, as a second step, it established the witness' ability to reliably assess age. In so doing, the Trial Chamber considered whether the witness had frequent contact with young persons in the region, the witness' profession, and other factors that the Trial Chamber found important. As noted above,[438] the Trial Chamber also clarified that the witnesses' assessments were "based on the individual's physical appearance, including by way of comparison to other children; the individual's general physical development (*e.g.* whether a girl had developed breasts, and factors such as height and voice); and his or her overall behaviour" (footnotes omitted).[439] In addition, the Appeals Chamber recalls that the Trial Chamber was aware of the difficulties of appearance-based age determination and indicated that it approached the witness statements with "caution" and allowed a "wide margin of error".[440]

242. The above shows that the Trial Chamber was fully aware that it not only had to determine the credibility of a witness, but also whether the witness' assessment of the age of individuals was reliable. Accordingly, Mr Lubanga's argument is rejected.

243. With respect to witness P-0046, Mr Lubanga argues that her testimony was akin to hearsay because she merely related what the individuals she had interviewed told

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[437] *Brđanin* Trial Judgment, para. 25.
[438] *See supra* para. 189.
[439] Conviction Decision, para. 641.
[440] Conviction Decision, para. 643.

her about their age.[441] Therefore, he submits that the Trial Chamber should have applied the Court's jurisprudence on hearsay or indirect witnesses, which, in his opinion, shows that hearsay evidence must be corroborated,[442] and that the Trial Chamber should have carried out a careful case-by-case analysis.[443] Elsewhere in the Document in Support of the Appeal, he argues that the witness' testimony as to the participation in combat of 26 individuals is grounded in the "*Histoires Individuelles*", which the Trial Chamber excluded due to its prejudicial effect, given that the Defence was unable to investigate any of the individual case histories.[444]

244. The Appeals Chamber is unpersuaded by Mr Lubanga's arguments in relation to witness P-0046. With regard to the documents consulted by witness P-0046 during the course of her testimony, the Appeals Chamber notes from the transcript of the witness' testimony that she appears to have relied on the database of the 687 child soldiers with whom she met, rather than on the "*Histoires Individuelles*".[445] The Trial Chamber permitted the witness to use this and other documents in order to refresh her memory during her testimony.[446] Nevertheless, the Appeals Chamber understands Mr Lubanga's arguments regarding the witness' reliance on the "*Histoires Individuelles*" as exemplifying his concerns about the prejudicial effect of the anonymous hearsay evidence of the witness. In other words, it does not consider this argument to constitute a separate challenge to the Trial Chamber's reliance on this witness' testimony.

245. With regard to Mr Lubanga's arguments that the Trial Chamber erroneously relied on hearsay evidence, the Appeals Chamber notes that, in considering the testimony of witness P-0046, the Trial Chamber deemed it important that the witness "worked in MONUC's child protection programme during the period covered by the charges" and that her testimony "focussed on her professional knowledge of children recruited and used by the UPC/FPLC and her experience of the demobilisation

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[441] Document in Support of the Appeal, paras 203-205.
[442] Document in Support of the Appeal, paras 199-201.
[443] Document in Support of the Appeal, paras 201, 203.
[444] Document in Support of the Appeal, para. 286.
[445] Transcript of 7 July 2009, ICC-01/04-01/06-T-205-CONF-ENG, page 71, line 20 to page 73, line 5, with public redacted version, ICC-01/04-01/06-T-205-Red3-ENG (CT WT).
[446] Transcript of 7 July 2009, ICC-01/04-01/06-T-205-CONF-ENG, page 7, lines 14-23, with public redacted version, ICC-01/04-01/06-T-205-Red3-ENG (CT WT).

process".[447] The Trial Chamber also noted that "the witness was closely monitoring the situation in the area during the relevant period" and "made a series of site visits to Ituri between January 2002 and March 2003".[448]

246. According to the Trial Chamber, witness P-0046 did not simply repeat what individuals had told her, but verified information she had received, including by comparing the dates the children provided "with a chronology created by military and political observers from MONUC" (footnote omitted),[449] and by seeking verification from NGOs when "there were doubts about the age or affiliation of a particular child".[450] The Trial Chamber noted that "interviewers reviewed the children's stories, their recruitment history and the battles in which they participated, in order to check their accounts" (footnote omitted).[451] Additionally, "[t]rained social workers were used to conduct detailed interviews with the children, and the latter were asked questions about their families […] and their academic records", and the witness "focussed on the children's individual stories in order to establish certain key dates, and the latter were cross-checked against the information they had provided" (footnotes omitted).[452] Finally, the Appeals Chamber notes that witness P-0046 also relied on her own assessment of the physical appearance of the children, taking into account what they said and their demeanour.[453] The Trial Chamber concluded that "P-0046's professional history and personal experience with the children she interviewed enabled her to provide realistic age estimates".[454] Thus, contrary to what Mr Lubanga argues, the witness did not merely relate what individuals had told her about their age.

247. The Appeals Chamber notes that Mr Lubanga does not substantiate any of the errors he alleges in the Trial Chamber's specific assessment of witness P-0046's testimony. He points, for example, to the fact that, in drawing conclusions on other items of evidence,[455] the Trial Chamber also took into account that individuals may have falsely claimed to have been child soldiers in order to obtain financial and other

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[447] Conviction Decision, para. 645.
[448] Conviction Decision, para. 646.
[449] Conviction Decision, para. 650.
[450] Conviction Decision, para. 650.
[451] Conviction Decision, para. 652.
[452] Conviction Decision, para. 651.
[453] Conviction Decision, paras 652, 653.
[454] Conviction Decision, para. 655.
[455] Document in Support of the Appeal, para. 134, referring to Conviction Decision, para. 740.

benefits.[456] In the Appeals Chamber's view, instead of showing an error in the Trial Chamber's assessment of witness P-0046's testimony, this indicates that the Trial Chamber was well aware of the risk that children who came to the demobilisation centres might not be truthful in their accounts.

248. Finally, Mr Lubanga repeats arguments that he raised in the Defence Closing Submissions that were addressed by the Trial Chamber. The Appeals Chamber considers that mere repetition of an argument is insufficient to substantiate a factual error. For example, he alleges that witness P-0046 did not inquire with diligence into the statements of the alleged child soldiers.[457] The Trial Chamber took this argument into account when evaluating witness P-0046's testimony.[458] Furthermore, he refers to a purported contradiction in the Trial Chamber's finding on the fact that the identities of children in the Rwampara camp were not known.[459] The finding at issue addresses Mr Lubanga's argument in the Defence Closing Submissions regarding children in the Rwampara camp at the end of March 2003.[460] The Trial Chamber found that witness P-0046's testimony regarding the presence of UPC/FPLC child soldiers at the camp was "credible, consistent and reliable",[461] but stated in the preceding paragraph that this evidence was approached "with particular care, given the risk of prejudice to the accused because the defence was unable to conduct relevant investigations".[462] The Appeals Chamber considers that this is not a contradiction. The Trial Chamber simply acknowledged that Mr Lubanga could not investigate the identities of the children. In conclusion, Mr Lubanga has not substantiated any error by the Trial Chamber and the Appeals Chamber dismisses these arguments.

8. Alleged errors relevant to the evaluation of specific testimonies of witnesses on whom the Trial Chamber relied for the purposes of age determination

249. Mr Lubanga alleges that the Trial Chamber's factual findings on enlistment and conscription of child soldiers under the age of fifteen years are "replete with error"

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[456] Document in Support of the Appeal, para. 204, referring to Conviction Decision, para. 736.
[457] Document in Support of the Appeal, para. 204, second dash.
[458] *See* Conviction Decision, paras 649-655.
[459] Document in Support of the Appeal, para. 204, first dash.
[460] Conviction Decision, paras 798-799, referring to Defence Closing Submissions, para. 649.
[461] Conviction Decision, para. 799.
[462] Conviction Decision, para. 798.

and that he will therefore confine his observations to "the most blatant".[463] The Appeals Chamber notes that this general allegation has been substantiated by reference to a series of errors specifically alleged by Mr Lubanga.[464] These arguments are addressed hereunder.

(a) Errors alleged with respect to the Trial Chamber's assessment of witness D-0004

250. Mr Lubanga contests the Trial Chamber's reliance on witness D-0004's testimony that street children in Bunia, who included children between twelve and fifteen years of age, voluntarily enrolled as child soldiers in the UPC/FPLC.[465] Mr Lubanga raises two errors in this regard. However, the Appeals Chamber notes that the Trial Chamber did not ultimately rely on the testimony of witness D-0004 to support its overall conclusion as to the conscription and enlistment of children into the UPC/FPLC.[466] The Trial Chamber did not specifically consider the question of whether the events described by the witness fell within the time period relevant to the charges, but merely noted that the "evidence suggests this must have been in 2002" (footnote omitted).[467] Moreover, the Trial Chamber concluded its analysis of this aspect of the witness' testimony by reiterating that "significant and extensive questions have arisen as to the reliability of [witness] D-0004" and indicated that it had "approached this witness's testimony with considerable caution".[468] Given that the Trial Chamber did not attribute any weight to the testimony of witness D-0004 for the purposes of supporting its overall conclusions, the Appeals Chamber dismisses Mr Lubanga's arguments in this regard.

(b) Error alleged with respect to the Trial Chamber's assessment of witness P-0024

251. Mr Lubanga submits that the Trial Chamber determined that witness P-0024 testified that children aged between eight and a half and eighteen years were re-recruited by the UPC/FPLC following their demobilisation in November 2001.[469] Mr Lubanga argues that "[c]ontrary to the Chamber's finding, P-0024 did not specify the

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[463] Document in Support of the Appeal, para. 205.
[464] Document in Support of the Appeal, paras 206-215.
[465] Document in Support of the Appeal, para. 207, referring to Conviction Decision, para. 767.
[466] Conviction Decision, paras 911-914.
[467] Conviction Decision, para.767.
[468] Conviction Decision, para.767.
[469] Document in Support of the Appeal, para. 211, referring to Conviction Decision, para. 658.

age of these individuals who were allegedly recruited by the FPLC following their demobilisation".[470] The Prosecutor responds that witness P-0024's evidence is not inconsistent with the Trial Chamber's findings and submits that the same arguments were correctly addressed by the Trial Chamber in the Conviction Decision.[471]

252. The Appeals Chamber notes that witness P-0024 testified that the demobilisation program was not a success, that "pretty well all of those children went back to the armed forces" and that by November 2002, when "it was difficult for the mission to continue", only "seven to eight children" remained in the program.[472] Although the witness did not specify the ages of the children re-recruited by the UPC/FPLC at that time, read in the context of his testimony as a whole, it is apparent that he was referring to the children who had entered the demobilisation programme and who, according to him, were between eight and a half and eighteen years old.[473] In view of the foregoing, the Appeals Chamber finds that Mr Lubanga has failed to establish any error in the Trial Chamber's assessment of witness P-0024's testimony and this argument is accordingly dismissed.

(c) Errors alleged with respect to P-0012

253. Mr Lubanga argues that the Trial Chamber erred in relying on witness P-0012's testimony that he had seen children in armed groups in Bunia in 2003 because, *inter alia*, the witness did not specify that the children were in the FPLC.[474]

254. Mr Lubanga raises similar arguments in relation to this witness' testimony, which are analysed elsewhere in this judgment. For the reasons set out in that section of the judgment,[475] the Appeals Chamber finds that the Trial Chamber committed an error of fact in relying on the testimony of witness P-0012 in this regard.

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[470] Document in Support of the Appeal, para. 211, referring to Conviction Decision, footnote 1872 and to Transcript of 7 May 2009, ICC-01/04-01/06-T-170-CONF-FRA (CT), page 49, line 16 *et seq.*, which corresponds to Transcript of 7 May 2009, ICC-01/04-01/06-T-170-Red-ENG (CT WT), page 50, line 4 *et seq*.
[471] Response to the Document in Support of the Appeal, para. 169.
[472] Transcript of 7 May 2009, ICC-01/04-01/06-T-170-CONF-ENG, page 50, line 13, to page 51, line 1, with public redacted version, ICC-01/04-01/06-T-170-Red-ENG (CT).
[473] Transcript of 7 May 2009, ICC-01/04-01/06-T-170-CONF-ENG, page 47, lines 3-7, with public redacted version, ICC-01/04-01/06-T-170-Red-ENG (CT).
[474] Document in Support of the Appeal, para. 212.
[475] *See infra* paras 353-361.

(d) Errors alleged with respect to witnesses P-0016 and P-0014

255. Mr Lubanga contests the Trial Chamber's reliance on the testimony of witnesses P-0016 and P-0014 to support its conclusion that "children under the age of 15 were trained by the UPC/FPLC at its headquarters from July 2002 and this continued after September 2002".[476] Mr Lubanga claims that contrary to the Trial Chamber's findings, the incidents recounted by witnesses P-0016 and P-0014 predate the period relevant to the charges.[477] The Prosecutor responds that the Trial Chamber made no error in accepting witnesses P-0016 and P-0014's evidence to support its conclusions and contends that Mr Lubanga fails to explain how the Trial Chamber's conclusions were unreasonable.[478]

256. The Appeals Chamber has reviewed the relevant portions of the witnesses' testimonies in light of Mr Lubanga's submissions. Witness P-0014 testified that he saw children under the age of fifteen years being trained at the UPC headquarters in Bunia between 30 July and 20 August 2002.[479] He further indicated that the recruitment of child soldiers continued after Mr Lubanga's return from detention in Kinshasa and that "it did not come to an end in 2002", but continued on a higher scale after the UPC took over Bunia under Mr Lubanga.[480] The Appeals Chamber notes that the Trial Chamber's reasoning accurately reflects the witness' testimony.[481]

257. Mr Lubanga argues that witness P-0016 testified that Mr Lubanga's visit to the troops, which included individuals under the age of fifteen years, at the UPC/FPLC headquarters took place four days before his departure from Mandro on 29 August 2002.[482] However, the Appeals Chamber notes that the section of the transcript to which Mr Lubanga refers in support of this argument relates to a different incident

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[476] Document in Support of the Appeal, para. 213, referring to Conviction Decision, paras 788-791.
[477] Document in Support of the Appeal, para. 213, referring, *inter alia*, to Conviction Decision, paras 788-791.
[478] Response to the Document in Support of the Appeal, para. 171.
[479] Conviction Decision, para. 789; Transcript of 27 May 2009, ICC-01/04-01/06-T-179-CONF-ENG (CT), page 65, lines 13-24, with public redacted version, ICC-01/04-01/06-T-179-Red2-ENG (CT WT).
[480] Transcript of 29 May 2009, ICC-01/04-01/06-T-182-CONF-ENG, page 11, line 22 to page 12, line 7, with public redacted version, ICC-01/04-01/06-T-182-Red2-ENG and Transcript of 27 May 2009, ICC-01/04-01/06-T-182-CONF-ENG, page 60, lines 15-20, with public redacted version, ICC-01/04-01/06-T-179-Red2-ENG.
[481] Conviction Decision, para. 789.
[482] Document in Support of the Appeal, footnote 252, referring to Transcript of 11 June 2009, ICC-01/04-01/06-T-190-CONF-FRA (CT), page 66, lines 1-2, which corresponds to Transcript of 11 June 2009, ICC-01/04-01/06-T-190-Red2-ENG (CT WT), page 65, lines 8-10.

that occurred during the witness' training in Mandro.[483] Regarding Mr Lubanga's visit to the troops at the UPC/FPLC headquarters, the witness indicated that it took place "at the beginning of the time we came out of Mandro".[484]

258. In conclusion, the Appeals Chamber considers that Mr Lubanga has failed to identify any error in respect of how the Trial Chamber relied on witnesses P-0014 and P-0016 and his arguments are therefore dismissed.

(e) Errors alleged with respect to witness P-0017

259. Mr Lubanga challenges the Trial Chamber's statement that witness P-0017 saw children under the age of fifteen years at the training camp in Mongbwalu between either late August or early September 2002 and August 2003.[485] He argues that, to the contrary, witness P-0017 did not actually specify the age of the children he saw there.[486] The Prosecutor submits that it was reasonable for the Trial Chamber to infer from witness P-0017's testimony that the "children" he saw in Mongbwalu included children under the age of fifteen years "given the context of his evidence that children under the age of 15 were in various locations and training camps".[487]

260. The Appeals Chamber notes that, when questioned as to whether there were only adults or also children in the Mongbwalu camp, witness P-0017 answered that "there were adults and there were children".[488] No questions were put to the witness as to the age range of the children in question and the witness did not give any indication in this regard. However, immediately prior to his testimony about the Mongbwalu camp, the witness also spoke about the presence of children at the Mandro camp.[489] When asked what age range he meant when he spoke about children, he responded that they were "probably 12, 13, some even 14".[490]

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[483] Transcript of 11 June 2009, ICC-01/04-01/06-T-190-CONF-ENG (CT), page 65, lines 3-10, with public redacted version, ICC-01/04-01/06-T-190-Red2-ENG.
[484] Transcript of 11 June 2009, ICC-01/04-01/06-T-190-CONF-ENG (CT), page 17, lines 5-9, with public redacted version, ICC-01/04-01/06-T-190-Red2-ENG.
[485] Document in Support of the Appeal, para. 214, referring to Conviction Decision, footnote 2287.
[486] Document in Support of the Appeal, para. 214.
[487] Response to the Document in Support of the Appeal, para. 172.
[488] Transcript of 25 March 2009, ICC-01/04-01/06-T-154-CONF-ENG, page 45, line 11 to page 46, line 3, with public redacted version, ICC-01/04-01/06-T-154-Red3-ENG.
[489] Transcript of 25 March 2009, ICC-01/04-01/06-T-154-CONF-ENG, page 40, line 24 to page 41, line 11, with public redacted version, ICC-01/04-01/06-T-154-Red3-ENG.
[490] Transcript of 25 March 2009, ICC-01/04-01/06-T-154-CONF-ENG, page 41, lines 12-13, with public redacted version, ICC-01/04-01/06-T-154-Red3-ENG.

261. The Trial Chamber relied upon the witness' clarification as to the age range he included in the term "children" when discussing the children that he saw at the Mandro camp and, on that basis, considered that witness P-0017's reference to children in the Mongbwalu camp also included children under the age of fifteen years.[491] Considering witness P-0017's testimony as a whole and the fact that he consistently clarified that the "children" that he saw in different places were under the age of fifteen years,[492] the Appeals Chamber finds that the Trial Chamber's reliance on the evidence of this witness was not unreasonable. Accordingly, Mr Lubanga's arguments in this regard are rejected.

(f) Indiscriminate use of general terms

262. Mr Lubanga also alleges that the Trial Chamber erred in its use of the expression 'children under the age of fifteen years' and other terms which are unspecific regarding age, such as 'kadogo', 'children', 'young people' and '*personnel militaire féminin*' or 'PMF'.[493] However, he fails to substantiate this argument by specifying where in the Conviction Decision the Trial Chamber committed this alleged error.[494] Accordingly, his argument is dismissed.

9. Reliance on document EVD-OTP-00518 as corroborating material

263. Mr Lubanga argues that the Trial Chamber erred in its interpretation of document EVD-OTP-00518, a letter dated 12 February 2003 from the UPC National Secretary for Education and Youth to the "G5 Commander of the FPLC" and copied to several unnamed people, including the "President, UPC/RP, Bunia", which the Trial Chamber considered to be a reference to Mr Lubanga (hereinafter: "Letter").[495] Mr Lubanga argues that the Trial Chamber's interpretation of this document finds no support in the text of the Letter itself, "which makes no specific reference to children

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[491] Conviction Decision, para. 813.
[492] The Appeals Chamber notes that when asked at the same hearing about the specific age range of the children he saw in Lalo, the witness said that they were not younger than ten, but some were under the age of fifteen years. *See* Transcript of 25 March 2009, ICC-01/04-01/06-T-154-CONF-ENG, page 81, line 12 to page 82, line 3, with public redacted version, ICC-01/04-01/06-T-154-Red3-ENG.
[493] Document in Support of the Appeal, para. 215, referring to Conviction Decision, paras 636-640.
[494] In paragraphs 636-640 of the Conviction Decision to which Mr Lubanga refers, the Trial Chamber merely noted that the terms "children", "kadogo" or "PMF" were used by different witnesses, but did not necessarily refer to children under the age of fifteen years.
[495] Document in Support of the Appeal, paras 218-227, referring to Conviction Decision, paras 741-748.

under the age of 15 years in the FPLC".[496] By reference to the testimony of witnesses D-0011, D-0019 and P-0046, Mr Lubanga submits that the Trial Chamber's interpretation "is at variance with the entire evidence concerning the [demobilisation] programme", which, in his view, "clearly shows" that the Letter referred to any foreign combatants and not specifically to soldiers in the FPLC.[497]

264. In the Conviction Decision, the Trial Chamber noted that the Letter was "sent by the UPC/FPLC's national secretary for education to the UPC/FPLC's G5 (whose key responsibilities were training, morale and recruitment)", and referred to the demobilisation of child soldiers between the age of ten and fifteen or sixteen years.[498] It found that the Letter was "clearly directed principally at the position of children in the UPC/FPLC".[499] It concluded that "this document significantly corroborates other evidence before the Chamber that child soldiers under the age of 15 were part of the UPC/FPLC during the period of the charges".[500]

265. The Appeals Chamber is not persuaded by Mr Lubanga's arguments, which are largely repetitive of arguments raised in the Defence Closing Submissions and considered by the Trial Chamber in some detail in the Conviction Decision.[501] In particular, the Trial Chamber, noting that witness D-0011 was frequently "evasive and argumentative" during questioning about this document, considered but rejected his testimony to the effect that the Letter "did not concern child soldiers within the ranks of the FPLC".[502] The Trial Chamber also took into account the testimony of witness D-0019, who confirmed that the demobilisation programme concerned child soldiers in the UPC.[503] Mr Lubanga has failed to establish that the Trial Chamber's assessment of these witnesses' testimony and the Letter was unreasonable. Accordingly, his arguments are dismissed.

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[496] Document in Support of the Appeal, para. 227.
[497] Document in Support of the Appeal, paras 223-227.
[498] Conviction Decision, paras 746-748.
[499] Conviction Decision, para. 748.
[500] Conviction Decision, paras 748 and 912.
[501] Defence Closing Submissions, paras 726-731.
[502] Conviction Decision, paras 744-748.
[503] Conviction Decision, para. 746, referring to Transcript of 7 April 2011, ICC-01/04-01/06-T-346-ENG, page 45, lines 11-18.

B. Alleged errors in the findings on the conscription of children under the age of fifteen years into the UPC/FPLC

266. Under this ground of appeal, Mr Lubanga challenges his conviction for the crime of conscription pursuant to article 8 (2) (e) (vii) of the Statute, which criminalises in relevant part, in the case of an armed conflict not of an international character, the act of "[c]onscripting […] children under the age of fifteen years into armed forces or groups".

1. Background

267. In the Conviction Decision, the Trial Chamber held that enlistment, conscription and use of children under fifteen years of age to participate actively in hostilities are three separate crimes.[504] The Trial Chamber defined "enlistment" as "to enrol on the list of a military body" and "conscription" as "to enlist compulsorily".[505] Based on these definitions, the Trial Chamber found that the distinguishing "element" between the two crimes is that conscription has an "added element of compulsion".[506]

268. The Trial Chamber then went on to hold that "[i]n the circumstances of this case, conscription and enlistment are dealt with together, notwithstanding the Chamber's earlier conclusion that they constitute separate offenses".[507]

269. Pursuant to article 74 (2) of the Statute, the Trial Chamber found Mr Lubanga guilty, *inter alia*, of "the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC"[508] and sentenced him to thirteen years imprisonment for the crime of conscription and to twelve years for the crime of enlistment.[509]

270. Mr Lubanga raises alleged legal and factual errors in relation to his conviction for the crime of conscription, which amount, in essence, to one set of errors relevant to the Trial Chamber's findings as to what establishes the element of compulsion and

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[504] Conviction Decision, para. 609.
[505] Conviction Decision, para. 608, referring to *Oxford Dictionary*, page 491, M. Cottier *et al.*, "Article 8" 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 472 at marginal note 231 and K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary* (ICRC and Cambridge University Press, 2003), page 377.
[506] Conviction Decision, para. 608.
[507] Conviction Decision, para. 618.
[508] Conviction Decision, para. 1358.
[509] Sentencing Decision, para. 98.

to one error relevant to how the Trial Chamber dealt with the separate crimes of enlistment and conscription in the Conviction Decision.

271. Mr Lubanga argues that the Trial Chamber committed legal errors in its interpretation of the element of compulsion that is necessary in order to establish that the crime of conscription occurred. Mr Lubanga's arguments relate to: (i) which underlying acts can establish the element of compulsion,[510] and (ii) whether it must also be established that the individuals who were conscripted did not want to join the armed force or group.[511]

272. Mr Lubanga also submits that the Trial Chamber erred in holding that the crimes of conscription and enlistment, while separate crimes under the Statute, could nonetheless be dealt with together,[512] an error addressed at the end of this section.

2. Alleged errors in considering acts that cannot establish the element of compulsion necessary for the crime of conscription

(a) Background

273. Mr Lubanga argues that "recruitment and mobilisation campaigns cannot be considered acts of conscription" because they are "aimed at persuading the population to join the armed forces voluntarily", which cannot be equated to compulsion.[513] Thus, he argues that the evidence relating to such campaigns was "unfit to establish the crime of conscription".[514] Mr Lubanga submits that the Trial Chamber relied on "evidence establishing the presence of child soldiers in FPLC ranks" in order to find that the crime of conscription had been committed (emphasis in original).[515] He argues that, even if it was proven that children were present, "mere presence […] alone" cannot establish the crime of conscription.[516]

274. The Prosecutor submits that "conscription requires that [armed] forces forcibly recruit children into their ranks through acts of coercion", which can include physical violence, as well as psychological pressure.[517] The Prosecutor submits that the

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[510] Document in Support of the Appeal, paras 238-242, 246.
[511] Document in Support of the Appeal, paras 233-236.
[512] Document in Support of the Appeal, paras 228-232.
[513] Document in Support of the Appeal, para. 246.
[514] Document in Support of the Appeal, para. 249.
[515] Document in Support of the Appeal, para. 240.
[516] Document in Support of the Appeal, para. 241.
[517] Response to the Document in Support of the Appeal, para. 180.

mobilisation campaigns in the present case "included both compulsory conscription through the use of physical force (such as abductions), as well as by psychological pressure and fear or threats of harm exerted by elders and wise men, the cadres and the army".[518] Moreover, the Prosecutor argues that the Trial Chamber correctly considered the context in which the mobilisation campaigns took place, namely the "reality of daily living conditions in the DRC at the time", which "resulted in children feeling compelled to join armed groups for survival".[519] With respect to findings relevant to the presence of individuals under the age of fifteen years, the Prosecutor submits that the Trial Chamber did not, as Mr Lubanga contends, base its determination regarding the crime of conscription on "the mere presence of children in the ranks [of the UPC/FPLC]".[520]

(b) Determination of the Appeals Chamber

275. Before addressing Mr Lubanga's specific arguments, the Appeals Chamber will address the scope of the crime of "conscripting" individuals under the age of fifteen years within the meaning of article 8 (2) (e) (vii) of the Statute.

(i) Underlying elements of the crime of conscription

276. The Statute criminalises the act of "conscripting […] children under the age of 15 years" in the context of both international armed conflicts and those not of an international character. Article 8 (2) (b) (xxvi) of the Statute relates to an international conflict and therefore prohibits the acts of conscripting such individuals "into the national armed forces", while article 8 (2) (e) (vii) of the Statute, the provision under which Mr Lubanga was convicted, is applicable to armed conflicts not of an international character. In this context, the provision applies to the act of conscripting individuals under the age of fifteen years into "armed forces or groups".

277. According to article 31 of the Vienna Convention on the Law of Treaties, treaty provisions are to be interpreted according to their ordinary meaning in their context and in the light of the object and purpose of the treaty. The ordinary meaning of

[518] Response to the Document in Support of the Appeal, para. 178.
[519] Response to the Document in Support of the Appeal, para. 178.
[520] Response to the Document in Support of the Appeal, para. 181.

conscription is the "compulsory enlistment of persons into military service".[521] The purpose of articles 8 (2) (b) (xxvi) and 8 (2) (e) (vii) of the Statute, as well as the provisions of international law upon which they are based,[522] specifically article 77 (2) of Additional Protocol I,[523] article 4 (3) (c) of Additional Protocol II,[524] and article 38 (3) of the Convention on the Rights of the Child,[525] is to protect children who are under the age of fifteen years from being recruited into armed forces or groups.[526]

278. The Appeals Chamber considers that the element of compulsion necessary for the crime of conscription can be established by demonstrating that an individual under the age of fifteen years joined the armed force or group due to, *inter alia*, a legal obligation, brute force, threat of force, or psychological pressure amounting to coercion. As explained below, the Appeals Chamber is of the view that this interpretation is consistent with other comparable provisions of the Statute involving an element of compulsion, as well as the jurisprudence of the SCSL.

279. The Appeals Chamber notes that the Elements of Crimes provide indirect support for this interpretation in its definition of the crimes of 'compelling service in hostile forces', 'taking hostages' and 'rape'. The crime of compelling service in hostile forces includes the element that the perpetrator "*coerced* by act or *threat*" (emphasis added).[527] Similarly, the crime of taking hostages contains the element that the perpetrator "*threatened* to kill, injure or continue to detain […] intend[ing] to

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[521] B. A. Garner, *Black's Law Dictionary* (West, 9th ed., 2009), under "draft". *See also* C. Farrell, *Children's Rights* (ABDO Publishing Company, 2010) page 104, where "conscription" is defined as: "Enlistment by force, especially into a militia or other military group".
[522] *See* C. Garraway, "Art. 8(2)(b)(xxvi)-Using, Conscripting or Enlisting Children", in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), page 183 at page 205.
[523] The relevant article reads: "The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. […]".
[524] The relevant article reads: "[C]hildren who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities".
[525] The relevant article reads: "State Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. […]".
[526] J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. I (ICRC and Cambridge University Press, 2009), pages 482-484. *See also* article 4 of the Optional Protocol to the Convention on the Rights of the Child, which reads, in relation to *non-government actors*, that: "Armed groups that are distinct from the armed forces of a State should not […] recruit […] persons under the age of 18 years."
[527] *See Elements of Crimes*, article 8 (2) (a) (v), subparagraph 1.

compel" (emphasis added).[528] Furthermore, the crime of rape may be committed *inter alia* by "force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against [the victim] or another person, or by taking advantage of a coercive environment […]".[529] Thus, crimes under the Statute that relate to an accused compelling someone to do a certain act, or forcing themselves on someone include force, threat of force and/or psychological pressure as an element of these crimes, specifically in respect of *how* the accused sought to 'compel' the affected person to do the relevant act.

280. The Appeals Chamber also notes the articulation of the scope of the crime of "conscription" as expressed in the *RUF* Trial Judgment:

> The Chamber recalls that conscription means the "compulsory enlistment of persons into military service." In the context of lawful governments, conscription is generally legitimized through constitutional or legislative powers. However, conscription also encompasses what is commonly known as "forced recruitment", wherein individuals are recruited through illegal means, for instance through the use of force or following abduction. [Footnotes omitted.][530]

281. The Appeals Chamber further notes that the SCSL Appeals Chamber considers enrolment into an armed force or group by brute force, such as abduction, to constitute the crime of conscription.[531] The SCSL has not explicitly considered either

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[528] *See* *Elements of Crimes*, articles 8 (2) (a) (viii), subparagraph 2 and 8 (2) (c) (iii), subparagraphs 2-3.

[529] *See* *Elements of Crimes*, articles 8 (2) (b) (xxii)-1, subparagraph 2 and 8 (2) (e) (vi)-1, subparagraph 2.

[530] *RUF* Trial Judgment, para. 186. *See also* Dissenting Opinion of Justice Robertson, para. 5, stating that the SCSL Statute, which is identical in wording to that of the Rome Statute, criminalises, *inter alia*, "*conscripting* children (which implies compulsion, albeit in some cases through force of law" (emphasis in original).

[531] *See* *AFRC* Appeal Judgment, paras 303, 306, upholding the Trial Chamber's finding of the crime of conscription on the basis of evidence of children being abducted and placed into military training camps; *AFRC* Trial Judgment, paras 1252-1254. *See also* *RUF* Appeal Judgment, paras 1176-1177, reversing on the grounds that, *inter alia*, the Prosecutor had not eliminated all doubt as to whether the children were in fact under the age of fifteen years, However, that the brute force used to "re-recruit" these child soldiers was the crime of conscription was not contested. *See also* Dissenting Opinion of Justice Robertson, paras 4-5, wherein the dissenting judge outlines the drafting history of article 4 (c) of the SCSL Statute from its initial formulation as presented by the Secretary-General to the United Nations Security Council in October 2000, which would have endowed the court with jurisdiction over "*[a]bduction and forced recruitment* of children under the age of fifteen years into armed forces or groups for the purpose of using them to participate actively in hostilities" (emphasis added). *See also* C. Farrell, *Children's Rights* (ABDO Publishing Company, 2010), page 104, where "conscription" is defined as: "Enlistment by force, especially into a militia or other military group".

threat of force or psychological pressure to constitute conscription,[532] which, however, is explained by the fact that this issue has not arisen before the SCSL. Nonetheless, in the context of forced marriages in the *RUF* Appeal Judgment, the SCSL Appeals Chamber held that the legal requirements of that offence were met when "an accused, by force, threat of force, or coercion, or by taking advantage of coercive circumstances, causes one or more persons to serve as a conjugal partner".[533]

282. Bearing this in mind, the Appeals Chamber considers that the determination as to whether the element of compulsion has been established should be carried out on a case-by-case basis, taking into account whether the force, threat of force or psychological pressure applied was of such a degree and so pervasive, that individuals can be said to have been forced to join the armed force or group.

(ii) Mr Lubanga's arguments with respect to the Trial Chamber's findings on conscription

283. The Appeals Chamber recalls that Mr Lubanga argues that the Trial Chamber, in establishing the crime of conscription, relied solely on evidence on recruitment and mobilisation campaigns, which, in his submission, did not involve compulsion, as well as evidence that demonstrates the presence of individuals under the age of fifteen years.[534] For the reasons that follow, the Appeals Chamber is not persuaded by Mr Lubanga's arguments.

284. As to the argument that the Trial Chamber relied on non-compulsory "recruitment and mobilisation campaigns" to establish the crime of conscription, the Appeals Chamber notes, as a preliminary matter, that it cannot be said in the abstract that "recruitment and mobilisation campaigns" always (or never) constitute the crime of conscription.

285. In this respect, the Appeals Chamber recalls the drafting history of article 8 (2) (e) (vii) of the Statute. During the negotiations, the term 'recruitment' was replaced with the terms "enlisting and conscripting" due to concerns by some delegates that

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[532] *See*, however, Dissenting Opinion of Justice Robertson, para. 4, in which the dissenting Judge explains that, in his view, article 4 (c) of the draft Statute as proposed by the Secretary-General "made the *actus reus* turn on the use of physical force *or threats* in order to recruit children" (emphasis added).
[533] *RUF* Appeal Judgment, para. 736.
[534] Document in Support of the Appeal, paras 240-242, 246, 249.

"the term recruiting could be understood as also prohibiting *recruitment campaigns* addressed to children under the age of fifteen, even though such endeavours to have persons join the armed forces do not necessarily aim at an immediate beginning of military training within the armed forces".[535] The Appeals Chamber notes that public appeals and encouragement to enlist in an armed force are regular features of recruitment campaigns in countries that have voluntary military forces, even more so during on-going armed conflicts, and that recruitment campaigns of this nature do not, without more, amount to coercion.[536] In the view of the Appeals Chamber, a finding that recruitment campaigns generally attempting to get individuals to enlist always suffice to establish the requisite element of compulsion would overly expand the scope of this crime.

286. This, however, does not mean that 'recruitment and mobilisation campaigns' never involve an element of compulsion. Rather, the specific circumstances of the case have to be considered to determine whether or not this element has been established. The Appeals Chamber notes in this regard that the Prosecutor argues that the overall recruitment that occurred in the case at hand included acts of conscription and that this is sufficient to dismiss Mr Lubanga's arguments.[537]

287. The Appeals Chamber recalls that the Conviction Decision contains two paragraphs of overall conclusions as to the crimes of enlistment and conscription, paragraphs 911 and 912, which provide:

> 911. The Chamber finds 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 [*sic*], 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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[535] M. Cottier *et al.*, "Article 8" 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 275 at pages 472-473.
[536] *See supra* para. 284.
[537] Response to the Document in Support of the Appeal, paras 194-196.

> 912. 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.][538]

288. The Appeals Chamber notes that these concluding paragraphs do not specifically single out 'recruitment and mobilisation campaigns' as a separate form of conscription. Rather, all findings of the Trial Chamber in relation to the crimes of enlistment and conscription are briefly summarised as a basis for the Trial Chamber's overall finding that it was "established beyond reasonable doubt that children under the age of 15 were conscripted and enlisted into the UPC/FPLC forces between 1 September 2002 and 13 August 2003".[539] Similarly, the sub-section of the Conviction Decision entitled "*Rallies, recruitment drives and mobilisation campaigns*"[540] must be read in the context of the entire section on "*Conscription and enlistment between September 2002 and 13 August 2003*",[541] as well as with the other relevant parts of the judgment.

289. In this regard, the Appeals Chamber notes that the Trial Chamber, in concluding that the crime of conscription had been established, relied on evidence to the effect that children under the age of fifteen years were conscripted through brute force or threat of force to join the UPC/FPLC. For example, in the Conviction Decision, the Trial Chamber relied upon witness P-0014's testimony that he saw children "taken from the streets", which he referred to as being "enlisted by force" into the UPC/FPLC.[542] The Trial Chamber found that witness P-0014's evidence was "credible and reliable" "as a whole",[543] and relied on this witness' evidence,

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[538] Conviction Decision, paras 911-912.
[539] Conviction Decision, para. 914.
[540] Conviction Decision, paras 770-785.
[541] Conviction Decision, paras 759-819.
[542] Conviction Decision, para. 708, citing ICC-01/04-01/06-T-182-CONF-ENG, page 36, line 5 to page 37, line 25, with public redacted version, ICC-01/04-01/06-T-182-Red2-ENG.
[543] *See* Conviction Decision, para. 706 ("Assessing P-0014's evidence as a whole, the Chamber is of the view his account was credible and reliable.").

specifically in respect of its conclusion that children under the age of fifteen years were "forcibly recruited".[544]

290. The Trial Chamber also relied upon witness P-0046's testimony regarding recruitment that took place near Ndrele around 15 February 2003.[545] Witness P-0046 testified that "[t]his was on a market day and the armed men involved, wearing uniforms and carrying Kalashnikovs, […] recruited between 50 and 60 individuals", including individuals under the age of fifteen years.[546] While the word "forcible" does not appear in this extract, the Appeals Chamber considers that it is clear, in the context of the discussion of this testimony in the Conviction Decision, that the fact that the 'recruiters' were armed was considered as evidence of a threat of force, that is, of forcible recruitment.

291. In addition, the Trial Chamber relied upon witness P-0024's testimony that, in respect of "re-recruit[ing]" children who had left predecessor armed groups into the UPC/FPLC, the children and their families would be "threatened or attacked" if they did not re-enlist.[547] He testified that children who were re-recruited threatened those that had not yet re-enlisted and that the situation deteriorated when Mr Lubanga was the leader of the UPC.[548] The Appeals Chamber finds that this testimony, upon which the Trial Chamber relied, demonstrates conscription by threat of force, if not by force.

292. The Trial Chamber's evaluation of this evidence demonstrates that it reached its conclusions on the crime of conscription on the basis of recruitment of children by way of force and threat of force. Mr Lubanga does not raise any arguments with respect to the Trial Chamber's evaluation of this evidence. The Appeals Chamber considers that these unchallenged findings are, on their own, sufficient to establish the element of compulsion, as defined above.

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[544] Conviction Decision, para. 912.
[545] Conviction Decision, para. 766, citing ICC-01/04-01/06-T-206-CONF-ENG, page 45, line 1 to page 46, line 11, with public redacted version, ICC-01/04-01/06-T-206-Red2-ENG.
[546] Conviction Decision, para. 766, citing ICC-01/04-01/06-T-206-CONF-ENG, page 44, lines 8-15, with public redacted version, ICC-01/04-01/06-T-206-Red2-ENG.
[547] Conviction Decision, para. 765, citing ICC-01/04-01/06-T-170-CONF-ENG, page 51, lines 9-19, with public redacted version, ICC-01/04-01/06-T-170-Red2-ENG.
[548] Conviction Decision, para. 765.

293. Regarding the question as to whether the Trial Chamber, as suggested by the Prosecutor,[549] also considered 'the daily living conditions' of children in the DRC, the Appeals Chamber notes that, in the section entitled "*The Law*",[550] the Trial Chamber referred to two expert witnesses. The first had testified that, "from a psychological point of view children cannot give 'informed' consent when joining an armed group",[551] while the second had testified as to the "context" of children's lives during the conflict in the DRC that led them to join armed groups.[552] Furthermore, the Trial Chamber "endorse[d]" both witnesses' conclusions in the sense that children under the age of fifteen years are frequently "unable to give genuine and informed consent when enlisting in an armed group".[553] The Prosecutor argues that, in endorsing the experts' conclusions, "[t]he Trial Chamber accepted that the practical reality of daily living conditions in the DRC […] resulted in children feeling compelled to join armed groups for survival".[554] The Appeals Chamber has certain doubts as to whether the Prosecutor representation as to how the Trial Chamber relied on this testimony is correct. Nevertheless, the Appeals Chamber will address whether the daily living conditions in the DRC could establish the required element of compulsion.

294. The Appeals Chamber notes that the Trial Chamber took into account specific conditions in Ituri that had the capacity to create an obligation for communities to provide children under the age of fifteen years to the UPC/FPLC and which were exploited by the UPC/FPLC in their recruitment and mobilisation campaigns. For example, the Trial Chamber noted evidence which indicated that "elder Gegere wise men persuaded the population to make young people available to the UPC, for enlistment in the armed forces *in order to contribute to the protection of their ethnic group against the Lendu*" (emphasis added, footnote omitted).[555] The Trial Chamber also considered evidence of statements made by the UPC/FPLC Chief of Staff, Mr Kisembo, to the effect that "in order to bring peace and to *avoid future problems*, the

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[549] Response to the Document in Support of the Appeal, para. 178.
[550] Conviction Decision, paras 607-618.
[551] *See* Conviction Decision, para. 610, the expert witness referred to was Ms Elisabeth Schauer (CHM-0001).
[552] Conviction Decision, paras 611-612, the expert witness referred to was Ms Radhika Coomaraswamy (CHM-0003).
[553] *See* Conviction Decision, para. 613.
[554] *See* Response to the Document in Support of the Appeal, para. 178.
[555] Conviction Decision, para. 771, citing ICC-01/04-01/06-T-174-CONF-ENG, page 30, lines 20-24 and page 32, lines 5-11, with public redacted version, ICC-01/04-01/06-T-174-Red3-ENG.

community *needed* to contribute to the UPC forces and provide individuals for training" (emphasis added, footnote omitted).[556] Further, the Trial Chamber noted witness P-0041's testimony that "some families acted under an obligation, in the sense that nearly all the groups in Ituri asked parents to give one of their sons for 'work', although he was unable to say who made this request" (footnote omitted).[557]

295. The Appeals Chamber is of the view that a distinction must be made between the circumstances described above and other factors that were all too frequently part of the life experiences of children in Ituri during the relevant time period, such as the loss of their parents, or a lack of food. Although such conditions may have induced certain children to join an armed group, they are not *per se* sufficient to establish the requisite degree of compulsion on the part of the UPC/FPLC. Thus, the Appeals Chamber finds that the general living conditions of a population cannot on its own establish the element of compulsion necessary to find that the crime of conscription was committed. Nevertheless, having found that there are sufficient factual findings in the Conviction Decision to establish the element of compulsion, the Appeals Chamber considers that there is no need to consider this matter any further.

296. The Appeals Chamber recalls that Mr Lubanga raises a number of factual errors in respect of the Trial Chamber's analysis of the evidence of pressure stemming from the recruitment and mobilisation campaigns.[558] However, having found that the element of compulsion has been established in the Conviction Decision, it is unnecessary for the Appeals Chamber to address these arguments.

297. In sum, the Appeals Chamber considers that, in the present case, while not all aspects of the "recruitment and mobilisation campaigns" carried out by the UPC/FPLC involved compulsion, in light of all relevant findings by the Trial Chamber recalled above, it cannot be said that no compulsion was used in the course of these campaigns. Accordingly, Mr Lubanga's argument is rejected. For the same reason, the Appeals Chamber rejects Mr Lubanga's allegation that the Trial Chamber's finding that children were conscripted into the UPC/FPLC between 1

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[556] Conviction Decision, para. 783, citing ICC-01/04-01/06-T-157-CONF-ENG, page 83, line 11 to page 84, line 3, with public redacted version, ICC-01/04-01/06-T-157-Red2-ENG.
[557] Conviction Decision, para. 781, citing ICC-01/04-01/06-T-125-CONF-ENG, page 65, lines 5-12, with public redacted version, ICC-01/04-01/06-T-127-Red3-ENG.
[558] Document in Support of the Appeal, paras 243-251.

September 2002 and 13 August 2003 relied on evidence that only shows the presence of individuals within the UPC/FPLC with respect to his conviction for the crime of conscription.[559]

(iii) Mr Lubanga's argument that compulsion requires that an individual entered into an armed force or group "against his/her will"

298. The Appeals Chamber recalls that Mr Lubanga argues that the distinction between the crime of enlistment and that of conscription is that "the act of child conscription entails the child's incorporation into the armed group against his or her will" (emphasis in the original).[560]

299. The Prosecutor submits that "the lack of a child's consent" is not an element of the crime of conscription.[561] Further, she argues that "'consent' does not automatically equate absence of coercion".[562] Finally, she submits that the consent of a child is not relevant to establishing voluntary or compulsory recruitment, as it is "the accused's conduct [that] will be an important consideration to the circumstances of the enlistment or conscription".[563]

300. As discussed above, the Trial Chamber held that the crime of conscription contains the "element of compulsion".[564] The Trial Chamber also held that "the consent of a child to his or her recruitment does not provide an accused with a valid *defence*" (emphasis added).[565] The Appeals Chamber notes that Mr Lubanga does not dispute that compulsion is an element of the crime of conscription.[566] Rather, the Appeals Chamber understands Mr Lubanga to argue that the element of compulsion is only established if it has been specifically demonstrated that the person was recruited into the armed force or group against his or her will.

301. The Appeals Chamber is not persuaded by Mr Lubanga's arguments and considers that he confuses the issues of what does or does not constitute a potential

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[559] *See* Document in Support of the Appeal, paras 240-241.
[560] Document in Support of the Appeal, paras 235-236.
[561] Response to the Document in Support of the Appeal, para. 177.
[562] Response to the Document in Support of the Appeal, para. 178.
[563] Response to the Document in Support of the Appeal, para. 180, referring to *Taylor* Trial Judgment, para. 442; *AFRC* Trial Judgment, para. 735; Conviction Decision, para. 608.
[564] Conviction Decision, para. 608.
[565] Conviction Decision, para. 617.
[566] *See e.g.* Document in Support of the Appeal, para. 235.

defence to a crime with the elements required to be proven with respect to that crime. First, the Appeals Chamber considers that, in a situation where an individual has been conscripted into an armed force through the imposition of a legal obligation to serve, the question of whether participating in such service is against a specific individual's will is not relevant to whether the individual was conscripted by force of law into an armed force. Indeed, the Appeals Chamber finds that it would be contrary to common sense and a manifestly illogical result to hold that a military draft is not conscription on the basis that it is necessary to also prove that an individual who was drafted into the military by virtue of a law did not *want* to join that armed force. In addition, this would entail that, absent such evidence, the individual was not conscripted into service, but rather enlisted. The Appeals Chamber considers that it follows from the above that lack of consent, or the requirement that the act is against the conscripted individual's will generally does not form an element of the crime of conscription, including in circumstances such as the present case.

302. Further, the Appeals Chamber notes that other crimes under the Statute that contain an element of compulsion, such as the crime of taking hostages, do not require proof that the victim of the proscribed conduct did not consent or that it was "against his/her will".[567] Rather, the elements of these crimes focus on the conduct of the perpetrator. In addition, the Appeals Chamber notes that SCSL appellate jurisprudence has established that lack of consent (or that the act was against a person's will) is not a necessary element of the crime of conscription. In the *RUF* Appeal Judgment, the SCSL Appeals Chamber, in finding that the lack of consent was not an element of forced marriage,[568] held that "where the Prosecution has proved the legal requirements of the offence […] consent […] is not a relevant consideration".[569]

303. Based on the foregoing, the Appeals Chamber rejects Mr Lubanga's argument in this regard.

(c) Conclusion

304. For these reasons, the Appeals Chamber finds that the Trial Chamber, in its overall conclusions, established that acts constituting the crime of conscription, within

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[567] *See* e.g. *Elements of Crimes*, article 8 (2) (a) (v) ("crime of compelling service in hostile forces"); articles 8 (2) (a) (viii) and 8 (2) (c) (iii) ("crime of taking hostages").
[568] *RUF* Appeal Judgment, para. 734.
[569] *RUF* Appeal Judgment, para. 736.

the meaning of article 8 (2) (e) (vii) of the Statute, had taken place. Mr Lubanga does not challenge these findings and accordingly they have not been addressed by the Appeals Chamber. It follows that Mr Lubanga's arguments that the element of compulsion has not been established must be rejected.

3. Alleged error in the Trial Chamber's decision to assess conscription and enlistment together

(a) Background

305. In the Conviction Decision, the Trial Chamber, held that, "[i]n the circumstances of this case, conscription and enlistment are dealt with together, notwithstanding the Chamber's earlier conclusion that they constitute separate offences".[570]

306. Mr Lubanga submits that the Trial Chamber erred in holding that the separate crimes of conscription and enlistment could nonetheless be dealt with together.[571] In this context, he argues that the Trial Chamber failed to explain its reasoning, namely "the circumstances of this case", for determining that it would deal with these crimes together.[572] The Prosecutor contends that the Trial Chamber's decision to consider the two crimes together is correct.[573]

(b) Determination of the Appeals Chamber

307. For the reasons that follow, the Appeals Chamber is not persuaded by Mr Lubanga's arguments. The Appeals Chamber considers that, although it is problematic that the overall conclusions of the Trial Chamber do not clearly identify which facts establish the distinguishing element of compulsion, the Trial Chamber's decision to deal with these two crimes together does not amount to a legal error.

308. The Appeals Chamber notes that the Trial Chamber relied on the *CDF* Trial Judgment regarding the "somewhat contrived" distinction between "voluntary […] and forced enlistment".[574] The paragraph of that judgment cited, in part, in the Conviction Decision states:

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[570] Conviction Decision, para. 618.
[571] Document in Support of the Appeal, para. 228.
[572] Document in Support of the Appeal, para. 237 citing Conviction Decision, para. 618.
[573] Response to the Document in Support of the Appeal, para. 179.
[574] *See* Conviction Decision, para. 616, citing, in part, *CDF* Trial Judgment, para. 192.

> The Chamber therefore finds that the term "enlistment" could encompass both *voluntary* enlistment and *forced* enlistment into armed forces or groups, forced enlistment being the aggravated form of the crime. In the Chamber's opinion, however, the distinction between the two categories is somewhat contrived. Attributing voluntary enlistment in the armed forces to a child under the age of 15 years, particularly in a conflict setting where human rights abuses are rife, is, in the Chamber's view, of questionable merit. **Nonetheless, for the purposes of the Indictment, where "enlistment" alone is alleged, the Accused is put on notice that both voluntary and forced enlistment are charged.** [Italics in the original, emphasis added.][575]

309. The Appeals Chamber is of the view that, when the above paragraph is considered in context, it is clear that the circumstances of the *CDF* case are inapposite to that of the present case. Unlike in the *Lubanga* case, in the *CDF* case the accused were *only* charged with the crime of enlistment, not the crimes of enlistment and conscription,[576] notwithstanding that the SCSL Statute provides for both crimes.[577] Thus, the *CDF* Trial Chamber determined that, where the indictment only charges the crime of enlistment, it could still consider acts of forced enlistment, which would otherwise be charged as conscription, under the crime charged and that the accused was on notice that "forced" enlistment was included in these charges. Under the *CDF* Trial Chamber's approach in the circumstances of how the charges were laid in that case, forced enlistment is the "aggravated form of the crime" of enlistment and this was solely relevant to sentencing.

310. In contrast, the Appeals Chamber recalls that Mr Lubanga was charged with and convicted of the crimes of enlistment and conscription of children under the age of fifteen years. The Appeals Chamber notes that the Trial Chamber imposed different individual sentences on Mr Lubanga for each crime.[578] Therefore, in the Appeals Chamber's view, the circumstances that led the *CDF* Trial Chamber to assess enlistment and "forced enlistment" together do not apply to the *Lubanga* case.

311. Nevertheless, the Appeals Chamber considers that it is not erroneous as such to discuss the evidence relevant to crimes with overlapping legal requirements together,

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[575] *CDF* Trial Judgment, para. 192.
[576] *See* *CDF* Trial Judgment, para. 190.
[577] *See* *CDF* Trial Judgment, paras 190, 192.
[578] *See* Sentencing Decision, para. 98 (13 years' imprisonment for the crime of conscription and 12 years' imprisonment for the crime of enlistment).

as long as it is clearly stipulated which facts establish the legal requirements that are different for each crime; in this case, the element of "compulsion".

312. In that respect, the Appeals Chamber notes that the element of compulsion was not separately addressed in the Conviction Decision. This rendered the review of the Trial Chamber's findings and conclusions difficult, particularly in respect of the crime of conscription. The Appeals Chamber considers that this also led to some ambiguity and understandable confusion on the part of Mr Lubanga regarding whether the factual findings relevant to the presence of individuals under the age of fifteen years within the UPC/FPLC were relied upon to establish the element of compulsion. However, the Appeals Chamber does not find that a failure to separately address the element of compulsion amounts to an error because the Trial Chamber's findings relevant to that element were nonetheless discernable and reviewable for both Mr Lubanga and the Appeals Chamber.

313. Nevertheless, the Appeals Chamber stresses that, for reasons of clarity, the Appeals Chamber's ability to review impugned decisions, and an effective and meaningful right to appeal, Trial Chambers should set out with clarity which factual findings are the basis for each of the elements of a crime, including the subjective elements. They also need to clearly define each of the requisite legal elements of the crime.

C. Alleged errors in the findings on the use of children under the age of fifteen years to participate actively in armed hostilities

314. Mr Lubanga raises legal and factual errors in relation to the Trial Chamber's finding that he was guilty of having used, jointly with others, children under the age of fifteen years to participate actively in hostilities.[579] These alleged errors are discussed in turn below.

1. Alleged legal errors

(a) Background

315. In the Conviction Decision, the Trial Chamber held:

[579] Document in Support of the Appeal, paras 252-325.

> The use of the expression "to participate actively in hostilities", as opposed to the expression "direct participation" (as found in Additional Protocol I to the Geneva Conventions) was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence of using children under the age of 15 actively to participate in hostilities.[580]

316. In determining the scope of activities that may fall within the crime of use "to participate actively in hostilities", the Trial Chamber found:

> Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an "indirect" role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target. In the judgment of the Chamber these combined factors – the child's support and this level of consequential risk – mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them. [Footnotes omitted][581]

317. Mr Lubanga argues that the Trial Chamber's "sweeping interpretation" of the term 'to participate actively in hostilities' disregards the applicable law under article 21 (1) of the Statute and violates the principle of legality enshrined in article 22 (2) of the Statute.[582] He submits that the Trial Chamber's interpretation "does not comport with applicable treaties and principles and rules of international law, including established principles of the international law of armed conflict".[583]

318. First, Mr Lubanga argues that the international law of armed conflict makes no distinction between 'active participation in hostilities' and 'direct participation in hostilities'.[584] In support of this argument, he highlights the interchangeable use of these terms in the English and French versions of Common Article 3 to the Geneva Conventions, which establishes protection for persons taking no active or direct part in hostilities.[585] He highlights the fact that, in this context, the ICRC has specified that

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[580] Conviction Decision, para. 627.
[581] Conviction Decision, para. 628.
[582] Document in Support of the Appeal, paras 262-263. *See also* para. 254.
[583] Document in Support of the Appeal, para. 263.
[584] Document in Support of the Appeal, para. 256, referring to N. Melzer, *Interpretative guidance on the notion of direct participation in hostilities under international humanitarian law* (ICRC, 2009).
[585] Document in Support of the Appeal, para. 256, pointing out that the English version of Common Article 3 to the Geneva Conventions refers to "[p]ersons taking no active part in the hostilities", whereas the French version refers to "personnes qui ne participent pas directement aux hostilitiés".

"the terms 'direct' and 'active' refer to the same quality and degree of individual participation in hostilities".[586] Mr Lubanga finds further support for his view that active and direct participation in hostilities are "synonymous concepts" in the case law of the ICTY and ICTR[587] and in the interchangeable use of these terms in other documents such as the *Basic principles for the protection of civilian populations in armed conflicts*.[588]

319. Second, Mr Lubanga submits that the Trial Chamber "misconstrued the concept of 'active participation in hostilities'" in determining that it required "an analysis of the risk incurred by the child in providing support to the combatants, rather than an appraisal of the significance of the child's contribution to the military operations or to the military capacity of a party to an armed conflict" (footnote omitted).[589] He argues that the Trial Chamber's reliance on the concept of 'risk' is wholly unfounded in international law or internationally recognised principles and rules.[590] Mr Lubanga submits that the Trial Chamber's reliance on the concept of 'risk' so that both direct and indirect participation are included within the concept of active participation in hostilities conflates the crimes of enlistment, conscription and use of child soldiers.[591] Instead, only "activities which have a direct part in the conduct of hostilities" can be considered as active participation in hostilities.[592]

320. Mr Lubanga argues that the Trial Chamber's errors led it "to rely on activities which were blatantly unconnected to the hostilities, such as domestic chores and analogous activities" to establish that children under the age of fifteen years had been used to participate actively in hostilities.[593] He submits that "only the participation of

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[586] Document in Support of the Appeal, para. 256, referring to N. Melzer, *Interpretative guidance on the notion of direct participation in hostilities under international humanitarian law* (ICRC, 2009), page 43, section 1.
[587] Document in Support of the Appeal, para. 257, referring to *Rutaganda* Trial Judgment, para. 99; *Galić* Trial Judgment, para. 48.
[588] Document in Support of the Appeal, para. 258, referring to Basic principles for the protection of civilian population and noting that in the *Tadić* Jurisdiction Decision, para. 111, the ICTY Appeals Chamber stated that those principles were "declaratory of the principles of customary international law regarding the protection of civilians".
[589] Document in Support of the Appeal, para. 253.
[590] Document in Support of the Appeal, para. 255.
[591] Document in Support of the Appeal, para. 266.
[592] Document in Support of the Appeal, para. 267.
[593] Document in Support of the Appeal, para. 261.

children under the age of 15 years in combat or their presence on the battlefield may establish the crime of use of children to participate actively in hostilities".[594]

321. The Prosecutor submits that the Trial Chamber's interpretation of 'active' participation complies with articles 21 and 22 (2) of the Statute and is consistent with international humanitarian law, the drafting history of the Statute, academic commentaries and relevant jurisprudence.[595] She submits that Mr Lubanga's arguments erroneously extend the protection of civilians who do not take direct part in hostilities under international humanitarian law to children participating in hostilities.[596] The Prosecutor argues that the restrictive definition of direct participation put forward by Mr Lubanga "does not correspond with (and is much narrower than) the international humanitarian law concept of direct (or active) participation of civilians in hostilities".[597] She submits that, even if this latter definition were to be adopted, it would encompass all of the activities that the Trial Chamber found to be active participation.[598] The Prosecutor argues that Mr Lubanga misrepresents the Conviction Decision as having included within the concept of active participation in hostilities all situations where a child is placed at risk.[599] The Prosecutor emphasises that the Trial Chamber set out two cumulative criteria: the child's support to the combatants and the child's exposure to real danger as a potential target.[600] The Prosecutor emphasises that the Trial Chamber did not find that domestic work alone constituted use to participate actively in hostilities.[601]

(b) Determination of the Appeals Chamber

322. The Appeals Chamber notes that the range of activities that may constitute 'use to participate actively in hostilities' under article 8 (2) (e) (vii) of the Statute is not explicitly set out in the Statute, the Rules of Procedure and Evidence or the Elements of Crimes. The *chapeau* to article 8 (2) (e) (vii) of the Statute makes reference to "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, *within the established framework of international law*"

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[594] Document in Support of the Appeal, para. 269.
[595] Response to the Document in Support of the Appeal, paras 199, 202-210.
[596] Response to the Document in Support of the Appeal, paras 200, 211.
[597] Response to the Document in Support of the Appeal, para. 200.
[598] Response to the Document in Support of the Appeal, para. 212.
[599] Response to the Document in Support of the Appeal, para. 201.
[600] Response to the Document in Support of the Appeal, para. 201.
[601] Response to the Document in Support of the Appeal, para. 213.

(emphasis added). The introduction to article 8 in the Elements of Crimes provides, *inter alia*, that "the elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict". These provisions, read together with article 21 of the Statute, make clear that the interpretation of article 8 (2) (e) (vii) of the Statute must be consistent with international law, and international humanitarian law in particular.

(i) Alleged error in failing to apply the definition of 'active participation' to determine when civilians lose their protected status

323. At the outset, the Appeals Chamber considers that Mr Lubanga's argument is correct that, in the context of Common Article 3 of the Geneva Conventions, 'active' and 'direct' participation in hostilities are used interchangeably. This is supported not only by the French and English versions of this article,[602] but also by the ICRC Interpretative guidance on the notion of direct participation in hostilities under international humanitarian law,[603] scholarly commentators[604] and the ICTY/ICTR jurisprudence[605]. Common Article 3 of the Geneva Convention is relevant to the *distinction* between persons who are afforded certain protection under the Geneva Conventions, including civilians, and those who are excluded from that protection. The purpose of Common Article 3 of the Geneva Conventions is to afford protection to those persons who are "taking *no* active part in the hostilities" (emphasis added).

324. Nevertheless, and contrary to Mr Lubanga's submissions, the Appeals Chamber finds that the term 'participate actively in hostilities' in article 8 (2) (e) (vii) of the Statute does not have to be given the same interpretation as the terms active or direct participation in the context of the principle of distinction between combatants and civilians, as set out, in particular, in Common Article 3 of the Geneva Conventions.

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[602] The English text of Common Article 3 states: "[p]ersons taking no active part in the hostilities […]"; the French version states: "Les personnes qui ne participent pas directement aux hostilitiés […]".
[603] N. Melzer, *Interpretative guidance on the notion of direct participation in hostilities under international humanitarian law* (ICRC, 2009), pages 43-44.
[604] *See* for a discussion of what is required of 'direct' participation: Y. Sandoz *et al.*, *Commentary on the Additional Protocols of June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), page 619, paras 1944 and 1945, page 516, para. 1679 and page 1453, para. 4787; F. Kalshoven and L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (ICRC and Cambridge University Press, 4th ed., 2012), page 102.
[605] *Akayesu* Trial Judgment, para. 629, with reference to Common Article 3 (1) of the Geneva Conventions of 1949 and Art. 4 (1) of Additional Protocol II; *Galić* Trial Judgment, para. 48, citing Y. Sandoz *et al.*, *Commentary on the Additional Protocols of June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), para. 619.

This is because, despite the use of similar terminology, the purpose of article 8 (2) (e) (vii) of the Statute is different from that of Common Article 3 of the Geneva Conventions. The latter provision establishes, *inter alia*, under which conditions an individual loses protection as a civilian because he or she takes direct part in hostilities.[606] On the other hand, article 8 (2) (e) (vii) of the Statute seeks to protect individuals under the age of fifteen years from being used to 'participate actively in armed hostilities' and the concomitant risks to their lives and well-being.[607] Therefore, the Appeals Chamber finds that the interpretation given to Common Article 3 of the Geneva Conventions in the context of the principle of distinction cannot be simply transposed to that of article 8 (2) (e) (vii) of the Statute. Rather, the term 'participate actively in hostilities' must be given an interpretation that bears in mind that provision's purpose.

325. This is supported by the provisions in international humanitarian law that deal specifically with children in armed conflict, namely article 77 (2) of Additional Protocol I and article 4 (3) (c) of Additional Protocol II.[608] The latter prohibits the use of children in non-international armed conflicts in the following terms: "[c]hildren who have not attained the age of fifteen years shall neither be recruited in the armed

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[606] According to the ICRC, "[i]n order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria: 1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)". *See* N. Melzer, *Interpretative guidance on the notion of direct participation in hostilities under international humanitarian law* (ICRC, 2009), page 19 at page 20.

[607] Y. Sandoz *et al.*, *Commentary on the Additional Protocols of June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), page 901, para. 3187; G. P. Suárez, *Kindersoldaten im Völkerstrafrecht* (BVW, 2009), page 101; S. SáCouto and K. Cleary, "The Adjudication Process and Reasoning at the International Criminal Court: The Lubanga Trial Chamber Judgment, Sentencing and Reparations", 30 *IUS Gentium* (2014), page 131 at pages 140-141; H. Von Hebel, "Crimes Within the Jurisdiction of the Court" in R. S. K. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, 1999), page 79 at page 119; M-T. Dulti and A. Bouvier, "Protection of children in armed conflict: the rules of international law and the role of the International Committee of the Red Cross", 4 *International Journal of Children's Rights* (1996), page 181 at 185; M. Bothe *et al.*, *New Rules for Victims of Armed Conflicts-Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Nijhoff, 2nd edition, 2013), page 536; J-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. I (ICRC and Cambridge University Press, 2009), pages 482-484; G. Werle and F. Jessberger, *Principles of International Criminal Law* (Oxford University Press, 3rd ed., 2014), para. 1246; T. Keshelava and B. Zehnder, "Art. 264f" in M. A. Niggli and H. Wiprächtiger (eds.), *Basler Kommentar, Strafrecht II, Besondere Bestimmungen*, (Helbing Lichtenhahn Verlag, 3rd ed., 2013), page 2203, margin number 2.

[608] *See also* Conviction Decision, para. 627.

forces or groups nor allowed to take part in hostilities". The former is applicable in international armed conflicts and reads as follows:

> The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.

326. The Appeals Chamber notes that article 77 (2) of Additional Protocol I refers to children taking "a *direct* part in hostilities" (emphasis added). Similar language is used in article 38 (2) of the Convention on the Rights of the Child.[609] However, despite the apparently more restrictive wording of article 77 (2) of Additional Protocol I, the ICRC Commentary on Additional Protocols states that children under the age of fifteen years should not be required to perform direct or indirect acts of participation:

> The text refers to taking a 'direct' part in hostilities. The ICRC proposal did not include this word. Can this lead to the conclusion that indirect acts of participation are not covered? Examples would include, in particular, gathering and transmission of military information, transportation of arms and munitions, provision of supplies etc. The intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict, and consequently they should not be required to perform such services […].[610]

327. Thus, the ICRC suggests that article 77 (2) of Additional Protocol I should be interpreted based on the provision's purpose to protect children. It does not suggest an interpretation of the term based on the principle of distinction between combatants and civilians. In this regard, the Appeals Chamber observes that articles 8 (2) (b) and 8 (2) (e) of the Statute do not make any such distinction between international and non-international armed conflicts in terms of the requisite level of participation; both equally criminalise the use of children under the age of fifteen years "to participate actively in hostilities". It is notable in this regard that, referring *inter alia* to the relevant articles of the Statute, rule 137 of the ICRC Study on Customary

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[609] The provision reads as follows: "States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities."

[610] Y. Sandoz *et al.*, *Commentary on the Additional Protocols of June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), page 901, para. 3187. *See* M-T. Dulti and A. Bouvier, "Protection of children in armed conflict: the rules of international law and the role of the International Committee of the Red Cross", 4 *International Journal of Children's Rights* (1996), page 181 at page 185; G. P. Suárez, *Kindersoldaten im Völkerstrafrecht* (BVW, 2009), page 101; M. Bothe *et al., New Rules for Victims of Armed Conflicts-Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Nijhoff, 2nd edition, 2013), page 536.

International Humanitarian Law indicates that "State practice establishes […] as a norm of customary international law applicable in both international and non-international armed conflicts" that "[c]hildren must not be allowed to take part in hostilities".[611] Once again, no suggestion is made that the term be interpreted based on the principle of distinction.

328. In sum, the Appeals Chamber finds that the provisions of international humanitarian law do not establish that the phrase "participate actively in armed hostilities" should be interpreted so as to only refer to forms of direct participation in armed hostilities, as understood in the context of the principle of distinction and Common Article 3 of the Geneva Conventions. Accordingly, Mr Lubanga's argument in that regard is rejected.

(ii) Alleged error in finding that active participation in hostilities requires an analysis of the risk to the child

329. The Trial Chamber found that "[t]he decisive factor […] in deciding if an 'indirect' role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target" (footnote omitted).[612]

330. In reaching this conclusion, the Trial Chamber referred *inter alia* to the Pre-Trial Chamber's interpretation of article 8 (2) (e) (vii) of the Statute, set out in the Decision on the Confirmation of Charges in the following terms:

> 261. "Active participation" in hostilities means not only direct participation in hostilities, combat in other words, but also covers active participation in combat-related activities such as scouting, spying, sabotage and the use of children as decoys, couriers or at military check-points.
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> 262. In this respect, the Chamber considers that this article does not apply if the activity in question is clearly unrelated to hostilities. Accordingly, this article does not apply to food deliveries to an airbase or the use of domestic staff in married officers' quarters. [Footnotes omitted.][613]

331. Despite the Trial Chamber's express reference to the interpretation of the Pre-Trial Chamber, the Appeals Chamber observes that there is a principled difference

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[611] *See* J-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. I (ICRC and Cambridge University Press, 2009), page 485.
[612] Conviction Decision, para. 628.
[613] Decision on the Confirmation of Charges, paras 261-262.

between the two interpretations that is not addressed in the Conviction Decision. The former focuses on the danger to which the child was exposed as a result of the activity, while the latter focuses on the relationship between the child's activity and the hostilities. The Trial Chamber did not elaborate on the legal basis for its determination and did not, in its factual findings on the use of children to participate actively in hostilities, refer to the danger to which they were exposed by such use.

332. For the reasons set out below, the Appeals Chamber finds that the Trial Chamber erred insofar as it found that 'use to participate actively in hostilities' requires that the child provides support to the combatants, which exposes him or her to real danger as a potential target.[614]

333. The Appeals Chamber notes that neither the wording of articles 8 (2) (e) (vii) or 8 (2) (b) (xxvi) of the Statute, nor their corresponding provisions in international humanitarian law,[615] refer to "exposure to real danger as a potential target" as a criterion for determining whether a child was used to participate actively in hostilities. A plain interpretation of the relevant provisions in their context reveals that the crime of using children to participate actively in hostilities requires the existence of a link between the activity and the hostilities. Although the extent to which the child was exposed to risk due to the activity in which he or she was engaged may well be an indicator of the existence of a sufficiently close relationship between the activity of the child and the hostilities, an assessment of such risk cannot replace an assessment of the relationship itself.

334. As to the requisite proximity between the child's activities and the hostilities, the Appeals Chamber notes that the ICRC commentary on the Additional Protocols indicates that article 4 (3) of Additional Protocol II prohibits participation in "military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage".[616] In relation to the equivalent

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[614] Conviction Decision, para. 628.
[615] Article 77 (2) of Additional Protocol I and article 4 (3) (c) of Additional Protocol II.
[616] Y. Sandoz *et al.*, *Commentary on the Additional Protocols of June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), page 1380, para. 4557: "The principle of non-recruitment also prohibits accepting voluntary enlistment. Not only can a child not be recruited, or enlist himself, but furthermore he will not be 'allowed to take part in hostilities', i.e., to participate in military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage". S*ee also* M-T. Dulti and A. Bouvier, "Protection of children in armed conflict: the rules of

provision under Additional Protocol I, the ICRC Commentary on the Additional Protocols states that children under the age of fifteen years should not be required to perform indirect acts of participation, including, "in particular, gathering and transmission of military information, transportation of arms and munitions, provision of supplies etc".[617] The Appeals Chamber also notes the explanatory footnote to the phrase 'to participate actively in hostilities' provided in the Preparatory Committee's Draft Statute, which set out the parameters of the requisite participation stating:

> The words 'using' and 'participate' have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase of the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.[618]

335. On the basis of the foregoing, the Appeals Chamber finds that, in order to determine whether the crime of using children to participate actively in hostilities under article 8 (2) (e) (vii) of the Statute is established, it is necessary to analyse the link between the activity for which the child is used and the combat in which the armed force or group of the perpetrator is engaged. In determining the existence of such a link, the Appeals Chamber will be guided by the lists of activities set out in the ICRC commentary on the Additional Protocols and in the Preparatory Committee's Draft Statute. The Appeals Chamber does not consider it appropriate to give further guidance on the parameters of the notion of "active participation in hostilities" in the abstract in view of the complex and unforeseeable scenarios presented by the rapidly changing face of warfare in the modern world. Rather, a determination as to whether a particular activity falls within this definition must be made on a case-by-case basis.[619]

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international law and the role of the International Committee of the Red Cross", 4 *International Journal of Children's Rights* (1996), page 181 at page 185: "In non-international armed conflicts, Article 4, para. 3(c), of Additional Protocol II prohibits the participation in hostilities of children below 15 years of age. This prohibition is absolute, covering both direct and indirect participation."

[617] Y. Sandoz *et al.*, *Commentary on the Additional Protocols of June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), page 901, para. 3187.

[618] *See* 1998 Report of the Preparatory Committee on the Establishment of an International Criminal Court, page 21, footnote 12.

[619] The Appeals Chamber notes that the Trial Chamber found that "[g]iven the different types of roles that may be performed by children used by armed groups, the Chamber's determination of whether a

336. In the present case, the Trial Chamber found that children under the age of fifteen years were deployed by the UPC/FPLC as soldiers and participated in combat.[620] Although Mr Lubanga alleges numerous factual errors in the Trial Chamber's analysis of the evidence in this regard, the Appeals Chamber considers it to be beyond dispute that use of children to participate in actual combat, if such findings are found to be reasonable, would sufficiently support on their own the conclusion that the UPC/FPLC used children under the age of fifteen years to participate actively in hostilities.

337. The Trial Chamber also made findings on the UPC/FPLC's use of children under the age of fifteen years as military guards, and their use as bodyguards by military chiefs and senior UPC/FPLC officials, including Mr Lubanga himself.[621] All of the children in question carried out these activities in an active conflict-zone.[622] In these circumstances, the Appeals Chamber considers that the above-mentioned activities were linked to the combat in which the UPC/FPLC was engaged. Although Mr Lubanga also alleges numerous factual errors in the Trial Chamber's analysis of the evidence in this regard, the Appeals Chamber finds that these factual findings, if found to be reasonable, would also support the Trial Chamber's overall conclusion that the UPC/FPLC used children to participate actively in hostilities.

338. The Trial Chamber also found that the formation of a special '*Kadogo* unit', comprised principally of children under the age of fifteen years, constituted use of children to participate actively in hostilities.[623] In the view of the Appeals Chamber, the formation of a unit within an armed group cannot, in and of itself, constitute use of children under the age of fifteen years to participate actively in hostilities.

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particular activity constitutes 'active participation' can only be made on a case-by-case basis". *See* Conviction Decision, para. 628. Judge Odio Benito disagreed with the decision not to enter a comprehensive legal definition of the concept of "use to participate actively in the hostilities", but instead to leave it to a "case-by-case determination, which ultimately will be evidence-based and thus limited by the charges and evidence brought by the prosecution against the accused". Judge Odio Benito considered that "[a] case-by-case determination can produce a limited and potentially discriminatory assessment of the risks and harms suffered by the child" and that the "Chamber has the responsibility to define the crimes based on the applicable law, and not limited to the charges brought by the prosecution against the accused". *See* Separate and Dissenting Opinion of Judge Odio Benito, paras 4-8, 15.

[620] *See* Conviction Decision, para. 915.

[621] *See* Conviction Decision, para. 915.

[622] *See* Conviction Decision, paras 821-877.

[623] Conviction Decision, para. 915.

339. Finally, although the Trial Chamber concluded from its assessment of the evidence that "girls under the age of 15 were used for domestic work, in addition to the other tasks they carried out as UPC/FPLC soldiers", it did not ultimately find that this equated to use to participate actively in hostilities.[624]

(c) Conclusion

340. The Appeals Chamber considers that the Trial Chamber erred in law in finding that "[t]he decisive factor […] in deciding if an 'indirect' role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target".[625] However, the Appeals Chamber finds that the Trial Chamber did not err in finding that the expression 'to participate actively in hostilities', imports "a wide interpretation to the activities and roles that are covered by the offence of using children under the age of 15 actively to participate in hostilities".[626] In assessing whether an activity or role falls within the scope of article 8 (2) (e) (vii) of the Statute, it is necessary to analyse the link between the activity for which the child is used and the combat in which the armed force or group of the perpetrator is engaged. The Appeals Chamber is satisfied with the Trial Chamber's findings that the deployment of children under the age of fifteen years as soldiers and their participation in combat, as well as their use as military guards and bodyguards, fulfil this requirement and thus constitute use to participate actively in hostilities within the meaning of article 8 (2) (e) (vii) of the Statute. In conclusion, the Appeals Chamber finds that the Trial Chamber's error in law did not have any material impact on Mr Lubanga's conviction for this crime.

2. Alleged factual errors

341. Mr Lubanga argues that no reasonable trier of fact could find that the UPC/FPLC used individuals under the age of fifteen years: (i) to participate in combat; (ii) as military guards; (iii) as bodyguards for military chiefs and other senior UPC/FPLC officials; or (iv) as Thomas Lubanga's bodyguards.[627] The errors relevant to these findings are discussed below.

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[624] *See* Conviction Decision, paras 878-882, 915.
[625] Conviction Decision, para. 628.
[626] Conviction Decision, para. 627.
[627] Document in Support of the Appeal, para. 272.

342. Mr Lubanga also argues that no reasonable trier of fact could find that the UPC/FPLC used individuals under the age of fifteen years in the '*Kadogo* unit', to perform household chores, in self-defence forces, and experienced difficult conditions in the UPC/FPLC.[628] The Appeals Chamber recalls that it held above that, as a matter of law, the mere "formation" of a military unit cannot establish use to actively participate in hostilities.[629] Accordingly, Mr Lubanga's arguments relevant to the Trial Chamber's finding that children under the age of fifteen years were used to form a '*Kadogo* unit' will be addressed below only to the extent that they overlap with and are relevant to other arguments as to the actual use of the children who allegedly formed part of the '*Kadogo* unit'.

343. As to the Trial Chamber's findings related to the performance of household chores, the punishment of individuals under the age of fifteen years and their use in the self-defence forces,[630] the Appeals Chamber finds that the Trial Chamber did not rely upon these findings to support its overall conclusion that individuals under the age of fifteen years were used to participate actively in hostilities.[631] Therefore, the Appeals Chamber does not consider it necessary to address Mr Lubanga's alleged errors in respect of these findings.

344. The Appeals Chamber notes that Mr Lubanga also incorporates his submissions relevant to the findings on the age element of the crime in this section.[632]

(a) Use of individuals under the age of fifteen years to participate in combat

345. Mr Lubanga submits that the Trial Chamber erred in finding that individuals under the age of fifteen years were used to participate in combat based on the allegedly incorrect and imprecise testimony of witnesses P-0038, P-0016, P-0012 and P-0046.[633] His arguments in relation to P-0046 have been considered and rejected in paragraphs 244-248 above. His arguments in relation to the remaining witnesses are addressed below.

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[628] Document in Support of the Appeal, paras 272, 311-313 ('*Kadogo* unit'), 314-316 (domestic work), 317-320 (self-defence forces), 321-325 (punishment).
[629] *See supra* para. 338.
[630] Conviction Decision, paras 878-882 (domestic work), 883-889 (punishment), 897-908 (self-defence forces).
[631] *See* Conviction Decision, para. 915; *see also* paras 889, 907.
[632] *See* Document in Support of the Appeal, paras 270-273; *see also* para. 216.
[633] Document in Support of the Appeal, paras 274-275.

(i) Witness P-0038

346. The Trial Chamber relied on the testimony of witness P-0038, a former UPC soldier,[634] to establish, *inter alia*, that individuals under the age of fifteen years fought within the ranks of the UPC/FPLC in Bunia in May 2003, in Mongbwalu in November/December 2002 and in Kobu in February and March 2003.[635]

347. Mr Lubanga argues that the following factors cast serious doubt on witness P-0038's credibility: (i) he was introduced to investigators from the Office of the Prosecutor by intermediary P-0316, had frequent contact with agents from the Congolese National Intelligence Agency, and was connected to individuals who the Trial Chamber found to have induced witnesses to give false statements, including intermediary P-0316; (ii) he discussed the substance of his testimony with intermediary P-0316 and confirmed that, on numerous occasions, P-0316 was in a position to have persuaded him to give false statements; and (iii) he used handwritten notes to prepare for his interview with the investigators.[636]

348. The Prosecutor submits that the Trial Chamber "conducted a thorough assessment of the reliability of [witness P-0038] and the possible interference with his evidence by intermediary P-0316" and "concluded that 'he was a reliable witness whose evidence is truthful and accurate'".[637] She adds that none of the transcripts referred to by Mr Lubanga call into question the veracity of witness P-0038's evidence and that Mr Lubanga's arguments as to the witness' involvement with P-0316 and P-0183 are inaccurate or irrelevant.[638]

349. The Appeals Chamber notes that, in assessing the role played by intermediary P-0316, the Trial Chamber found that there were "strong reasons to conclude he persuaded witnesses to lie as to their involvement as child soldiers within the UPC"[639] and 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".[640] The Trial

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[634] Conviction Decision, para. 340.
[635] Conviction Decision, paras 823-824, 915.
[636] Document in Support of the Appeal, paras 276-277.
[637] Response to the Document in Support of the Appeal, para. 218, referring to Conviction Decision, para. 348.
[638] Response to the Document in Support of the Appeal, paras 218-219.
[639] Conviction Decision, para. 373.
[640] Conviction Decision, para. 374.

Chamber decided to disregard evidence as to the substance of the charges provided by witness P-0015, who was also potentially affected by contact with intermediary P-0316.[641]

350. As regards witness P-0038, the Trial Chamber, having scrutinised his evidence, determined that his testimony was not affected in the same way.[642] The Trial Chamber found that witness P-0038 was a "reliable witness whose evidence is truthful and accurate".[643] In reaching this conclusion, the Trial Chamber deemed the following statements of witness P-0038 to be relevant: (i) that he had never spoken to intermediary P-0316 about what he was supposed to say to investigators from the Office of the Prosecutor; (ii) that P-0316 had not told him to provide false stories or promised rewards for giving particular information; and (iii) that the OTP investigator had told him not to talk to P-0316 about the contents of their meetings.[644] The Trial Chamber accepted that the witness "may have prepared notes to assist during the meetings" with investigators from the Office of the Prosecutor. It observed that the witness' explanation for this was unclear, but found that there was "no evidence to support the assumption that he was prepared in order to give false testimony".[645]

351. Referring to witness P-0038's statement that he discussed his experiences as a soldier when he initially met intermediary P-0316, Mr Lubanga argues that, contrary to the Trial Chamber's findings, the witness did in fact discuss the substance of his testimony with intermediary P-0316.[646] However, having reviewed the relevant portions of the witness' testimony, the Appeals Chamber is not persuaded that there is any contradiction between witness P-0038's account of the conversation he had with intermediary P-0316 when he first met him and his subsequent testimony that he had not discussed what he *should* tell the investigators with P-0316.

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[641] Conviction Decision, para. 374.
[642] Conviction Decision, para. 374.
[643] Conviction Decision, para. 348.
[644] Conviction Decision, para. 348, referring to Transcript of 24 November 2010, ICC-01/04-01/06-T-336-CONF, page 78, with public redacted version, ICC-01/04-01/06-T-336-Red2-ENG and Transcript of 25 November 2010, ICC-01/04-01/06-T-337-CONF-ENG, page 13, with public redacted version, ICC-01/04-01/06-T-337-Red2-ENG.
[645] Conviction Decision, para. 348.
[646] Document in Support of the Appeal, para. 276, referring to Conviction Decision, para. 348; Transcript of 24 November 2010, ICC-01/04-01/06-T-336-CONF-FRA-ET, page 42, lines 5-19, English version, ICC-01/04-01/06-T-336-CONF-ENG page 45, line 20 to page 46, line 6, with public redacted version, ICC-01/04-01/06-T-336-Red2; Transcript of 25 November 2014, ICC-01/04-01/06-T-337-CONF-FRA-ET, page 8, line 9 *et seq.*, English version, ICC-01/04-01/06-T-337-CONF-ENG, page 8, line 9 to page 9, line 6, with public redacted version, ICC-01/04-01/06-T-337-Red2.

352. In the view of the Appeals Chamber, Mr Lubanga has not identified any error in the Trial Chamber's reasoning as to witness P-0038's credibility. The Appeals Chamber finds that the Trial Chamber's conclusion was not unreasonable. Accordingly Mr Lubanga's arguments are rejected.

(ii) Witness P-0012

353. The Trial Chamber relied on the testimony of witness P-0012, a former high-ranking official within the PUSIC political party,[647] to establish, *inter alia*, that individuals under the age of fifteen years fought within the ranks of the UPC/FPLC in Bunia in May 2003.[648] The Trial Chamber noted that the witness testified that he saw child soldiers, many of whom were under the age of fifteen years, in the armed groups in Bunia in 2003, that is, not only in the UPC/FPLC.[649] The Trial Chamber was satisfied that witness P-0012 gave accurate testimony in relation to one particular child soldier from the UPC/FPLC, whom he met around May 2003 in Bunia wearing civilian clothing and carrying a Kalashnikov, and who did not reach the witness' shoulder in height.[650]

354. Mr Lubanga alleges that the witness' testimony did not establish that this child belonged to the UPC or that he was under the age of fifteen years of age. He points out that the witness indicated that the child he saw in May 2003: (i) belonged to the troops of Commander Tchaligonza, who had defected from the UPC to join PUSIC on 6 March 2003, and (ii) was in ordinary clothes, whereas UPC/FPLC members wore military uniforms.[651] Mr Lubanga highlights other evidence on the record which shows that UPC/FPLC soldiers wore military uniforms, that Commander Tchaligonza was a member of PUSIC at the relevant time, and that it was impossible in May 2003

[647] Conviction Decision, para. 664.
[648] Conviction Decision, paras 826-830, 915.
[649] Conviction Decision, para. 826, referring to Transcript of 5 May 2009, ICC-01/04-01/06-T-168-CONF-ENG, page 73, line 11 *et seq.*, page 75, line 22 to page 76, line 1, with public redacted version, ICC-01/04-01/06-T-168-Red2-ENG.
[650] Conviction Decision, paras 827-830, referring to Transcript of 5 May 2009, ICC-01/04-01/06-T-168-CONF-ENG, page 76, line 19 to page 80, line 15, with public redacted version, ICC-01/04-01/06-T-168-Red2-ENG.
[651] Document in Support of the Appeal, para. 281.

to establish the affiliation of troops present in Bunia.[652] Mr Lubanga asserts that "no reasonable trier of fact could find P-0012's testimony on the matter reliable".[653]

355. The Prosecutor contends that Mr Lubanga's arguments selectively quote the witness, who "clearly testified that the child that he encountered in Bunia, in May 2003 belonged to UPC".[654]

356. In reviewing the relevant portions of the witness' testimony, the Appeals Chamber notes that the witness initially stated that the child was a member of the UPC/FPLC.[655] When questioned the following day, the witness seemed to suggest that the child formed part of the troops of Commander Tchaligonza, although his response was not entirely clear.[656] The witness went on to testify that, although Commander Tchaligonza and others had in theory defected from the UPC/FPLC in March 2003, in practice they remained part of the UPC/FPLC until [REDACTED].[657] The witness provided a detailed explanation of Commander Tchaligonza's relationship with the UPC/FPLC between March 2003 [REDACTED].[658]

357. In addressing similar arguments raised by Mr Lubanga in the Defence Closing Submissions,[659] the Trial Chamber noted that witnesses D-0037 and D-0019 had testified that the situation in Bunia in May 2003 was chaotic and that "it was very difficult to distinguish between the FPLC and other military forces", that almost everyone wore UPC/FPLC uniforms, and that "the only way to identify the force to which a soldier belonged was by identifying his commander".[660] The Trial Chamber concluded that the testimony of witness P-0012 concerning the young UPC soldier he saw in May 2003 was accurate and that he was well placed to give evidence about these matters as "he was inside the MONUC zone in Bunia where he was able to

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[652] Document in Support of the Appeal, paras 282-283.
[653] Document in Support of the Appeal, para. 284.
[654] Response to the Document in Support of the Appeal, para. 221.
[655] *See* Transcript of 5 May 2009, ICC-01/04-01/06-T-168-CONF-ENG, page 77, lines 6 to page 78, line 11, with public redacted version, ICC-01/04-01/06-T-168-Red2-ENG.
[656] Transcript of 6 May 2009, ICC-01/04-01/06-T-169-CONF-ENG, page 47, lines 5-25, with public redacted version, ICC-01/04-01/06-T-Red2-ENG CT WT.
[657] Transcript of 6 May 2009, ICC-01/04-01/06-T-169-CONF-ENG, page 48, lines 13-21, with public redacted version, ICC-01/04-01/06-T-Red2-ENG CT WT.
[658] Transcript of 6 May 2009, ICC-01/04-01/06-T-169-CONF-ENG, page 38, line 21 to page 40, line 20, with public redacted version, ICC-01/04-01/06-T-Red2-ENG CT WT.
[659] Defence Closing Submissions, para. 554.
[660] Conviction Decision, para. 829.

photograph UPC/FPLC soldiers and he could talk with the relevant UPC/FPLC commander".[661]

358. The Appeals Chamber notes that the reasoning of the Trial Chamber does not address Mr Lubanga's arguments that Commander Tchaligonza had defected from the UPC/FPLC and was actually a member of PUSIC at the relevant time. As just set out, the Trial Chamber, in the context of discussing whether this individual belonged to the UPC/FPLC, expressly referred to witness D-0037's testimony that it was, at that time, essential to identify the commander. Therefore, the Appeals Chamber considers that the question of whether Commander Tchaligonza was in command of the boy in question, and, if so, whether he was affiliated to the UPC/FPLC at the relevant time was essential to any determination that the boy formed part of the UPC/FPLC.

359. The Appeals Chamber notes that the explanation given by witness P-0012 as to Commander Tchaligonza's allegiance to the UPC/FPLC in May 2003 is contradicted by the testimony of other witnesses such as P-0002 and D-0019, all of whom indicate that Commander Tchaligonza defected from the UPC/FPLC on 6 March 2003.[662] Furthermore, the Appeals Chamber notes that, during the testimony of witness P-0002, a video was shown of the troops of Commanders Kasangaki and Tchaligonza, who were presented as having refused to fight in the conflict between the UPDF and the UPC/FPLC.[663]

360. In view of the foregoing, the Appeals Chamber finds that it was unreasonable for the Trial Chamber to conclude, based on the testimony of witness P-0012 that the individual that he saw in Bunia in May 2003 formed part of the UPC/FPLC. It follows from the above that references to the UPC/FPLC by witness P-0012 may also have included other armed groups that were not part of the UPC/FPLC at the relevant time. Therefore, this error also affects the Trial Chamber's reliance on the witness' more

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[661] Conviction Decision, para. 830.
[662] *See* Testimony of witness P-0002, Transcript of 2 April 2009, ICC-01/04-01/06-T-162-CONF-ENG CT, page 45, lines 1-14, page 46, lines 2-8, page 49, lines 15-25, page 57, lines 6-9, page 58, lines 8-19, page 60, line 7 to page 61, line 4, with public redacted version ICC-01/04-01/06-T-162-Red2-ENG CT WT; Testimony of D-0019, Transcript of 31 March 2011, ICC-01/04-01/06-T-341-ENG ET WT, page 24, line 15 to page 25, line 2, page 27, lines 1-16, page 33, line 10 to page 34, line 17. *See also* Transcript of 26 May 2009, ICC-01/04-01/06-T-178-CONF-ENG, page 63, line 17 to page 64, line 8; *see also* page 18, line 17 to page 19, line 8.
[663] Transcript of 2 April 2009, ICC-01/04-01/06-T-162-CONF-ENG CT, pages 43-48, with public redacted version ICC-01/04-01/06-T-162-Red2-ENG CT WT, referring to video excerpt EVD-OTP-00410, DRC-OTP-0081-0007, minutes 00:26:03 to 00:33:14.

general statements that individuals under the age of fifteen years fought within the ranks of the UPC/FPLC in the front line at the battle of Bunia in May 2003.[664]

361. Accordingly, the Appeals Chamber finds that it was unreasonable for the Trial Chamber to rely on the testimony of witness P-0012 to support its conclusion that child soldiers were deployed by the UPC/FPLC to the battle of Bunia in May 2003.

(iii) Conclusion on the use of individuals under the age of fifteen years to participate in combat

362. The Trial Chamber relied on the testimony of witnesses P-0038, P-0016, P-0012, P-0046 and P-0014 to establish that "children under the age of 15 were used by the UPC/FPLC between September 2002 and 13 August 2003, in order to participate in combat in Bunia, Kobu and Mongbwalu, amongst other places".[665] The Appeals Chamber has found that it was unreasonable for the Trial Chamber to rely on witness P-0012, whose testimony was found to support the Trial Chamber's conclusion that individuals under the age of fifteen years participated in battle in Bunia in May 2003, that is, during the relevant time-frame. Nevertheless, it finds that the Trial Chamber's overall conclusion as to the participation of individuals under the age of fifteen years in combat in the battles mentioned by the Trial Chamber is not materially affected by this error as it is amply supported by the evidence of the other witnesses relied upon by the Trial Chamber.

(b) Use of individuals under the age of fifteen years as military guards

363. Mr Lubanga argues that the Trial Chamber erred in relying on the evidence of witnesses P-0016 and P-0024 to establish the presence of individuals under the age of fifteen years amongst military guards.[666] His arguments in relation to each witness will be addressed in turn below.

(i) Witness P-0024

364. Witness P-0024 was a social worker who was employed from 2001 until November 2002 by SOS Grands Lacs, an NGO with a mission in Bunia dealing with

[664] *See* Conviction Decision, para. 826.
[665] Conviction Decision, para. 834; *see also* para. 915.
[666] Document in Support of the Appeal, paras 289-292.

the demobilisation and reintegration of child soldiers.[667] The Trial Chamber relied on witness P-0024's testimony that, in October 2002, he was arrested by the UPC/FPLC, detained in a pit by the EPO School and guarded by soldiers aged between ten and twelve years old.[668]

365. Mr Lubanga argues that the Trial Chamber's assessment of witness P-0024's credibility failed to take account of the "witness' resentment of the UPC/RP […] which was such as to have a considerable influence on his testimony".[669]

366. The Prosecutor submits that Mr Lubanga failed to establish how the Trial Chamber's disregard for witness P-0024's purported resentment towards the UPC impacted upon the conviction and argues that the Trial Chamber undertook a careful assessment of the credibility of witness P-0024.[670]

367. The Appeals Chamber finds that the Trial Chamber did not err in failing to specifically address the arguments of Mr Lubanga, which appear to be speculative in nature. The Appeals Chamber notes that Mr Lubanga raised the possibility of witness P-0024 nursing resentment against the UPC as a result of his detention in the Defence Closing Submissions,[671] but that this argument was not addressed in the Conviction Decision. However, the Appeals Chamber finds that the Trial Chamber did not need to address this argument because (i) Mr Lubanga does not point out when and how during witness P-0024's testimony he showed that he resented the UPC/RP, (ii) Mr Lubanga did not raise the possibility of the witness bearing resentment towards the UPC/RP during his examination of the witness, and (iii) the Trial Chamber found that the witness gave "honest, consistent and reliable evidence as regards his work with demobilised children".[672]

368. Finally, the Appeals Chamber notes that Mr Lubanga argues that it was unfair of the Trial Chamber to accept the witness' "visual assessment of the age of unidentified individuals in respect of whom the [Prosecutor] did not disclose any

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[667] Conviction Decision, para. 656.
[668] Conviction Decision, para. 836.
[669] Document in Support of the Appeal, para. 290.
[670] Response to the Document in Support of the Appeal, para. 228.
[671] Defence Closing Submissions, para. 586.
[672] Conviction Decision, para. 661.

information to the Defence".[673] Given that the Appeals Chamber has considered and rejected this argument elsewhere in the present judgment,[674] it is not further addressed here.

(ii) Witness P-0016

369. The Trial Chamber relied on the testimony of witness P-0016, a high-ranking official in the UPC/FPLC in 2002,[675] that 'children' were deployed in Bunia to act as guards at "the military headquarters, the presidency or Camp Ndromo", and used to guard the border between the Congo and Uganda, the port at Mahagi and other areas.[676]

370. Mr Lubanga argues that witness P-0016's general statements on the "deployment of 'recruits', regardless of age, after their training at Mandro camp does not specifically pertain to children under the age of 15 years, contrary to the findings of the [Trial] Chamber, and therefore in no wise corroborates P-0024's testimony".[677]

371. The Prosecutor argues that Mr Lubanga "misrepresents and selectively quotes the witness's evidence".[678]

372. The Appeals Chamber notes that the Trial Chamber, in recounting the testimony of witness P-0016 as to the use of individuals under the age of fifteen years as military guards, refers generally to the deployment of 'children' and 'soldiers' from Mandro camp without any indication as to whether the witness' testimony related to individuals under the age of fifteen years.[679]

373. However, when the Conviction Decision is read as a whole, the Appeals Chamber is satisfied that the Trial Chamber found that the witness was referring to the deployment of 'children' of all ages and that this included individuals under the age of fifteen years. In the section of the Conviction Decision relevant to the Mandro camp, the Trial Chamber relied on the testimony of witness P-0016 to the effect that in August or early September 2002 there were "over a hundred recruits and others at the

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[673] Document in Support of the Appeal, para. 290.
[674] *See supra* paras 235-236.
[675] Conviction Decision, para. 683.
[676] Conviction Decision, para. 835.
[677] Document in Support of the Appeal, para. 291.
[678] Response to the Document in Support of the Appeal, para. 229.
[679] Conviction Decision, para. 835.

camp, three quarters of whom were children" ranging in age from thirteen to seventeen years.[680] The Trial Chamber indicated that, when the witness was questioned specifically about the number of 'children' who were aged fourteen or under, he responded that he did not know the exact number but it was less than 50 percent.[681] The Trial Chamber also relied on witness P-0016's testimony that recruits were deployed on the same basis regardless of whether they were 'children' or adults.[682]

374. When these elements are read together, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to rely on witness P-0016 to support its conclusion that individuals under the age of fifteen years were used by the UPC/FPLC as military guards during the period of the charges.

(iii) Conclusion

375. Mr Lubanga has failed to establish that the Trial Chamber's finding, based on the testimony of witnesses P-0024 and P-0016, that individuals under the age of fifteen years were used by the UPC/FPLC as military guards during the period of the charges was unreasonable. Accordingly, his arguments are rejected.

(c) Use of individuals under the age of fifteen years as bodyguards and escorts

376. Mr Lubanga argues that the Trial Chamber erred in finding that "commanders in the UPC/FPLC frequently used children under the age of 15 as bodyguards"[683] based on the evidence of witnesses P-0014, P-0017, D-0019, P-0038 and P-0041, as well as video footage, EVD-OTP-00572.[684] His arguments relating to video footage EVD-OTP-00572 have been addressed and rejected elsewhere in the present judgment[685] and will not be revisited. The remainder of Mr Lubanga's arguments relating to the testimony of the various witnesses will be addressed in turn below.

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[680] Conviction Decision, para. 804, referring to Transcript of 10 June 2009, ICC-01/04-01/06-T-189-CONF-ENG CT WT, page 15, line 4 to page 16, line 3, with public redacted version, ICC-01/04-01/06-T-189-Red2-ENG CT WT.
[681] Conviction Decision, para. 805, referring to Transcript of 10 June 2009, ICC-01/04-01/06-T-189-CONF-ENG CT WT, page 23, line 18 to page 25, line 15, with public redacted version, ICC-01/04-01/06-T-189-Red2-ENG CT WT.
[682] Conviction Decision, para. 825, referring to Transcript of 10 June 2009, ICC-01/04-01/06-T-189-CONF-ENG CT WT, page 60, lines 10-17, with public redacted version, ICC-01/04-01/06-T-189-Red2-ENG CT WT.
[683] Conviction Decision, para. 915.
[684] Document in Support of the Appeal, paras 293-303.
[685] *See supra* para. 216 *et seq. See also* Document in Support of the Appeal, paras 295-296.

(i) Witness P-0041

377. The Trial Chamber relied on witness P-0041, who served within the UPC executive in different positions to which he was appointed respectively in September 2002 and May 2003,[686] and who testified that, "when [the witness] was first appointed to his position in the UPC/FPLC, a commander assigned him approximately 12 bodyguards".[687] According to the Trial Chamber, the witness assessed these guards to be "between 13 or 14 to about 16 years of age" and indicated that, "in any event, none of the guards had reached the fourth year of primary school".[688]

378. Mr Lubanga argues that the manner in which the Trial Chamber recounted the witness' testimony does not faithfully reflect his statements.[689] Mr Lubanga contends that, in relation to the age of the bodyguards, the witness insisted that "he was not at all sure in this respect […], that one or two of the guards may have been aged 13 or 14 years, and others were aged 16 years […] [and] that none of the guards had 'reached the "third year of secondary school".[690]

379. The Prosecutor responds that the fact that the Trial Chamber overlooked the witness' correction with regard to his testimony has no impact on the witness' evidence, or on the Trial Chamber's conclusions, since a child who has not reached the fourth year of secondary school is still under the age of fifteen years.[691]

380. The Appeals Chamber notes that the English and French versions of the transcript of witness P-0041's testimony differ as to the number of children who were, according to the witness, aged about thirteen or fourteen. The English version mentions "two or three", while the French version refers to "one or two".[692] As the

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[686] Conviction Decision, para. 694.
[687] Conviction Decision, para. 846.
[688] Conviction Decision, para. 846.
[689] Document in Support of the Appeal, para. 298.
[690] Document in Support of the Appeal, para. 298. The French version of the same paragraph of the Document in Support of the Appeal refers to the term '*troisième secondaire*'.
[691] Response to the Document in Support of the Appeal, para. 233.
[692] The English Transcript of 12 February 2009, ICC-01/04-01/06-T-125-CONF-ENG CT, page 50, lines 16-21, with public redacted version ICC-01/04-01/06-T-125-Red3ENG CT WT, reads as follows: "Well, for the 12 guards, they ranged in age from -- I would like to say about two or three of them were aged about 13 or 14, but some were aged about 16. But in any case, none of the children posted to me as guards had attained the fourth year of primary school, I would say. Oh, sorry, fourth year of secondary school. But I can't give you the exact age, but I know they were still very young, all the 12 of them". The French Transcript of 12 February 2009, ICC-01/04-01/06-T-125-CONF-FRA CT, page 53, line 21 to page 54, line 1, with public redacted version ICC-01/04-01/06-T-125-Red3FRA CT WT, provides: "*Les 12 gardes, généralement c'est, c'est, l'âge variait. Il y a un ou deux qui étaient très*

witness testified in French, the Appeals Chamber considers the French transcript to be the most reliable version of the account given by the witness. However, the Trial Chamber did not rely on the precise number of individuals under the age of fifteen years as referred to in the transcripts. Therefore, the discrepancy between the transcripts was without consequence to this finding.

381. The Trial Chamber referred to the English version of the transcript, which quotes the witness as having testified that "none of the children posted to me as guards had attained the fourth year of primary school".[693] The English version of the transcript contains a clarification that, instead of primary school, the witness referred to secondary school.[694] The Trial Chamber erroneously did not take into account this clarification.

382. The Appeals Chamber finds that the Trial Chamber did not determine that all twelve individuals were below the age of fifteen years on the basis of the fact that they had not even reached the fourth year of 'primary' school, or otherwise make a finding that would supersede the witness' testimony that only one or two of the individuals were 13 or 14 years old. As Mr Lubanga did not substantiate an error in this finding, the Appeals Chamber dismisses Mr Lubanga's argument in this respect.

383. Mr Lubanga also argues that the evidence of witness P-0041 is "insufficient to establish that a significant number of children under the age of 15 years were used as bodyguards".[695]

384. The Appeals Chamber finds Mr Lubanga's argument to be misconceived. The Trial Chamber did not establish that a *significant number* of individuals under the age of fifteen years were used as bodyguards based only on the testimony of this witness.

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petits, qui avaien [sic] 13 ou 14, 13 à 14, je ne sais même pas, mais il en a d'autres qui étaient à l'âge de 16, mais tous étaient en dessous, en dessous... aucun de ces enfants qu'on m'avait affectés comme gardes n'avait atteint la troisième secondaire alors ils étaient encore des petits garçons, mais je ne saurais pas dire avec catégorique tel âge ou tel âge. Mais je sais qu'ils étaient encore, très très jeunes, les 12".

[693] Transcript of 12 February 2009, ICC-01/04-01/06-T-125-CONF-ENG CT, page 50, lines 19-20, with public redacted version ICC-01/04-01/06-T-125-Red3ENG CT WT; Conviction Decision, para. 846.

[694] As to the difference between school years cited in the English and French versions of the transcripts, the French secondary school system counts the classes in the reverse order. Therefore the '*troisième secondaire'* (meaning merely 'third secondary') is the same as the fourth year of secondary school in the English system.

[695] Document in Support of the Appeal, para. 297.

Rather, it based this finding on "the entirety of the evidence",[696] referring thereby to all evidence discussed in this section of the Conviction Decision that supports the findings that UPC/FPLC commanders had bodyguards. Therefore, the Appeals Chamber dismisses also this argument as not substantiating an error in the Trial Chamber's findings.

(ii) Witness P-0014

385. The Trial Chamber relied on the testimony of witness P-0014, a journalist, as to "a 14 year old child who worked as a bodyguard with the express permission of Thomas Lubanga".[697]

386. Mr Lubanga argues that it is impossible to tell from witness P-0014's testimony whether the information that he gave as to the age of the bodyguard came from his own personal assessment and whether Mr Lubanga was actually aware of the alleged age of that child when he permitted him to be used as a bodyguard.[698]

387. The Prosecutor responds that witness P-0014's testimony was specific enough to clearly indicate that Mr Lubanga accepted that a child who was fourteen years old worked as bodyguard.[699] The Prosecutor further argues that Mr Lubanga did not need to know the age of "every single child" allegedly used in hostilities for him to be held liable; "it suffices that he knew that children under 15 years of age were conscripted, enlisted and used to participate in hostilities".[700]

388. In the context of his explanation of the military training of members of the UPC national executive in early 2003, witness P-0014 testified that [REDACTED] had military uniforms and [REDACTED] boy, aged 14, [REDACTED], who was one of his bodyguards, had military uniforms in his home as well".[701] When the examination of the witness returned to the question of this boy, the witness stated that:

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[696] Conviction Decision, para. 857.
[697] Conviction Decision, para. 840.
[698] Document in Support of the Appeal, para. 299.
[699] Response to the Document in Support of the Appeal, para. 235.
[700] Response to the Document in Support of the Appeal, para. 235.
[701] Transcript of 3 June 2009, ICC-01/04-01/06-T-185-CONF-ENG CT, page 12, line 22 to page 13, line 2, with public redacted version, ICC-01/04-01/06-T-185-Red2-ENG CT WT.

> [REDACTED] So it was after, around September 2002, [REDACTED] he had asked Thomas Lubanga to allow him to have [REDACTED] as bodyguard instead of assigning someone else as his bodyguard that he didn't know.[702]

389. The Appeals Chamber notes that the Trial Chamber assessed the witness to be credible and reliable and that he "provided a precise account of the circumstances in which he saw particular individuals at various times and how he assessed their ages".[703] Given that the witness indicated that [REDACTED], the Appeals Chamber finds that it is clear from this testimony where the information he provided derived from. Therefore, the Appeals Chamber finds that Mr Lubanga does not substantiate an error in the Trial Chamber relying on witness P-0014 and dismisses the alleged error.

(iii) Witness P-0017

390. The Trial Chamber considered two aspects of witness P-0017's testimony in reaching its conclusion that "commanders in the UPC/FPLC frequently used children under the age of 15 as bodyguards".[704] First, the Trial Chamber noted that witness P-0017, a member of the UPC/FPLC,[705] testified that he saw two of Commander Bosco Ntaganda's bodyguards who were under the age of fifteen years.[706]

391. Mr Lubanga argues that the statements of witness P-0017 as regards these two bodyguards "cannot found any findings because, although he estimated that the children he claimed to have seen were under the age of 15 years, he admitted that he could not state their exact ages".[707] The Prosecutor responds that "there is no requirement that the precise age of each child be identified" and that witness P-0017 "testified that the children acting as bodyguards were under the age of 15".[708]

392. Second, the Trial Chamber observed that witness P-0017 testified that he had seen 'children' amongst the soldiers accompanying "the Chief of Staff, Floribert Kisembo, along with other members of the general staff, such as the G4 (known by the name Papa Romeo Charlie), the G5 Eric Mbabazi and various commanders and

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[702] Transcript of 3 June 2009, ICC-01/04-01/06-T-185-CONF-ENG CT, page 26, lines 19-24, with public redacted version, ICC-01/04-01/06-T-185-Red2-ENG CT WT.
[703] Conviction Decision, para. 707.
[704] Conviction Decision, para. 915; *see also* para. 857.
[705] Conviction Decision, para. 677.
[706] Conviction Decision, para. 841.
[707] Document in Support of the Appeal, para. 300.
[708] Response to the Document in Support of the Appeal, para. 237.

staff members" of the UPC/FPLC on the way to Mamedi in March 2003,[709] and that, on arrival in Mamedi, some of the 'young children' who acted as bodyguards for the commanders joined the troops.[710] The Trial Chamber also noted that witness D-0019, who was in Mamedi at the same time as witness P-0017, testified that some of the UPC/FPLC commanders' bodyguards may have been under the age of eighteen years but not necessarily under the age of fifteen years.[711] However, it concluded that the testimony of witness D-0019 was "insufficient to contradict the statements that commanders used bodyguards under the age of fifteen years".[712]

393. Mr Lubanga alleges that the Trial Chamber erred in the relative weight that it afforded the diverging evidence of witnesses D-0019 and P-0017.[713] Mr Lubanga contends that the Trial Chamber erroneously disregarded the evidence of witness D-0019, who was the only other witness to testify that he had personally experienced the events in Mamedi.[714] Mr Lubanga argues that "[n]o clear findings can thus be made from this contradictory evidence".[715]

394. Mr Lubanga contends elsewhere in the Document in Support of the Appeal that the Trial Chamber wrongly found that witness P-0017's evidence establishes that individuals who were part of the '*Kadogo* unit' were involved in military activities, whereas the witness had clearly stated that these individuals did not have any duties within the '*Kadogo* unit' and asserted that he "did not see them go on patrol, fetch water or carry out any of the other activities that we were asked to do".[716] This argument is relevant to the events in Mamedi and therefore discussed in this context.[717]

395. The Prosecutor highlights that the Trial Chamber based its conclusion that individuals under the age of fifteen years acted as bodyguards for UPC officials on the testimony of four other witnesses, besides witness P-0017, as well as video footage.[718]

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[709] Conviction Decision, para. 842.
[710] Conviction Decision, para. 843.
[711] Conviction Decision, para. 844.
[712] Conviction Decision, para. 844.
[713] Document in Support of the Appeal, para. 303.
[714] Document in Support of the Appeal, para. 303.
[715] Document in Support of the Appeal, para. 303.
[716] Document in Support of the Appeal, para. 313.
[717] *Supra* para. 342.
[718] Response to the Document in Support of the Appeal, para. 239.

The Prosecutor also emphasises that the Trial Chamber found that witness P-0017 "provided 'an honest and accurate account, particularly as regards the ages of the children he saw and their roles in connection with the armed forces'", whereas it treated the evidence of witness D-0019 with caution "because he was evasive, contradictory and showed partiality towards [Mr Lubanga]".[719] The Prosecutor argues that "it was on a solid basis that the [Trial] Chamber came to the entirely reasonable finding that children under 15 years of age act[ed] as bodyguards for UPC high officials".[720]

396. As to the two bodyguards of Mr Bosco Ntaganda, the Trial Chamber observed, in summarising witness P-0017's testimony that "[t]he witness thought that [Commander Bosco Ntaganda's] bodyguards included two child soldiers who were below 15 years of age".[721] This is based on witness P-0017's statement in relation to the age of these two bodyguards, "I can't say the exact age, but I think they were under 15".[722] Bearing in mind that the exact age of the persons is not at issue but rather the question of whether they were under the age of fifteen years,[723] the Appeals Chamber considers that the Trial Chamber's summary of this evidence is accurate. Therefore, the Appeals Chamber dismisses Mr Lubanga's alleged error raised in relation thereto.

397. Regarding whether there were individuals under the age of fifteen years acting as bodyguards in Mamedi, the Appeals Chamber is satisfied that witness P-0017 made a clear statement that there were individuals amongst the soldiers at Mamedi, who were under the age of fifteen years, who acted as bodyguards and were subsequently integrated into the troops.[724] In that regard, the Appeals Chamber also takes account of the Trial Chamber's finding that witness P-0017 was "a credible, consistent and reliable witness".[725]

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[719] Response to the Document in Support of the Appeal, para. 239.
[720] Response to the Document in Support of the Appeal, para. 239.
[721] Conviction Decision, para. 841.
[722] Transcript of 31 March 2009, ICC-01/04-01/06-T-158-CONF-ENG CT, page 18, line 17 to page 19, line 2, with public redacted version ICC-01/04-01/06-T-158-Red2-ENG CT WT.
[723] *Supra* para. 198.
[724] *See* Transcript of 31 March 2009, ICC-01/04-01/06-T-158-CONF-ENG CT, page 21, lines 12-15, page 22, line 3 to page 23, line 9, with public redacted version ICC-01/04-01/06-T-158-Red2-ENG CT WT.
[725] Conviction Decision, para. 682; *see also* para. 872.

398. In contrast, witness D-0019's statement was quite vague about the age of the individuals present at Mamedi. He affirmed that the individuals in question were under eighteen, but did not state that individuals under the age of fifteen years were used as bodyguards at Mamedi by the UPC/FPLC.[726] The Trial Chamber found that witness D-0019 was "an evasive and contradictory witness on the issues that particularly concerned Thomas Lubanga, and in some instances during his testimony he demonstrated partiality towards the accused".[727] In view of this, as well as his position within the UPC, the Trial Chamber indicated that it "exercised caution as regards certain aspects of his testimony".[728] Having this in mind, the Appeals Chamber finds that the Trial Chamber was not unreasonable in relying on witness P-0017 to support its conclusion that "commanders in the UPC/FPLC frequently used children under the age of 15 as bodyguards".[729] The Appeals Chamber rejects Mr Lubanga's argument in that regard.

399. As to witness P-0017's testimony on whether the duties of the individuals in the '*Kadogo* unit' that was formed in Mamedi and Maitulu included military duties, the Appeals Chamber notes that the Trial Chamber merely summarised the question posed to the witness during his testimony, whether "members of the kadogo unit undertook military duties".[730] Witness P-0017 stated that he was not sure that they undertook military tasks,[731] and emphasised that the purpose of grouping them together in the '*Kadogo* unit' was to protect them from the difficult conditions.[732] However, he also testified that some of them acted as "bodyguards for the Chief of Staff",[733] that some were ordered to loot[734] and that one of them died in a battle,

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[726] Transcript of 6 April 2011, ICC-01/04-01/06-T-345-CONF-ENG CT WT, page 5, line 2 to page 6, line 6, with public redacted version ICC-01/04-01/06-T-156-Red2-ENG CT WT.
[727] Conviction Decision, para. 730.
[728] Conviction Decision, para. 730.
[729] Conviction Decision, para. 915.
[730] *See* Conviction Decision, para. 876.
[731] Conviction Decision, para. 876.
[732] Transcript of 31 March 2009, ICC-01/04-01/06-T-158-CONF-ENG CT, page 22, lines 17-20, page 23, lines 10-23, page 24, lines 2-16, with public redacted version ICC-01/04-01/06-T-158-Red2-ENG CT WT.
[733] Conviction Decision, para. 871. *See also* Transcript of 31 March 2009, ICC-01/04-01/06-T-158-CONF-ENG CT, page 24, lines 9-13, with public redacted version ICC-01/04-01/06-T-158-Red2-ENG CT WT.
[734] Conviction Decision, para. 875. *See also* Transcript of 31 March 2009, ICC-01/04-01/06-T-158-CONF-ENG CT, page 28, line 22 to page 29, line 2, with public redacted version ICC-01/04-01/06-T-158-Red2-ENG CT WT.

having been disarmed for a period of about ten days and subsequently rearmed.[735] Accordingly, the Appeals Chamber is satisfied that the Trial Chamber's summary of P-0017's testimony accurately reflects his testimony. The Appeals Chamber therefore dismisses the alleged error.

(iv) Witness P-0038

400. The Trial Chamber relied on the testimony of witness P-0038, a former UPC soldier,[736] to the effect that "General Kisembo, Bosco Ntaganda and Chief Kahwa each had children under the age of 15 working as their bodyguards and escorts".[737]

401. Mr Lubanga argues that this was due to a mistranslation of the witness' "particularly ambiguous statement" that General Kisembo's bodyguards had picked up "children" to be "in his court" (according to the French version of the transcript), rather than "in his corps" (according to the English version of the transcript).[738] He further argues that no information has been provided by the witness with regard to Chief Kahwa's or Bosco Ntaganda's bodyguards.[739]

402. The Prosecutor submits that witness P-0038 was asked whether these three high-ranking officials had individuals under the age of fifteen years as bodyguards and responded in the affirmative.[740] The Prosecutor argues that, even if witness P-0038 was only referring to General Kisembo in his testimony, the finding of the Trial Chamber would remain undisturbed as it did not rely solely on witness P-0038 to establish that individuals under the age of fifteen years were used as bodyguards.[741]

403. The Appeals Chamber notes that witness P-0038 testified that 'children' ranging from thirteen to sixteen years of age were trained by the UPC in Mongbwalu and generally used as bodyguards and escorts responsible for ensuring the security of commanders.[742] In this context, the witness answered in the affirmative in response to a question as to whether General Kisembo, Bosco Ntaganda or Chief Kahwa had

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[735] Transcript of 31 March 2009, ICC-01/04-01/06-T-158-CONF-ENG CT, page 56, lines 21-24, with public redacted version ICC-01/04-01/06-T-158-Red2-ENG CT WT.
[736] Conviction Decision, para. 340.
[737] Conviction Decision, para. 852.
[738] Document in Support of the Appeal, para. 301.
[739] Document in Support of the Appeal, para. 301.
[740] Response to the Document in Support of the Appeal, para. 238.
[741] Response to the Document in Support of the Appeal, para. 238.
[742] Transcript of 12 March 2012, ICC-01/04-01/06-T-113-CONF-ENG CT, page 35, line 14 to page 37, line 18, with public redacted version, ICC-01/04-01/06-T-113-Red2-ENG CT WT.

individuals under the age of fifteen years as bodyguards and escorts, and then specified that General Kisembo had gathered the "children" to be "in his corps" or "dans sa cour".[743]

404. Given the context in which the statement was made and the circumstances that were being described by the witness, the Appeals Chamber finds that his statement as to the purpose for which General Kisembo's gathered "children" was clear and unambiguous. Furthermore, the fact that the witness elaborated on General Kisembo's use of individuals under the age of fifteen years, but did not provide any additional information with respect to Bosco Ntaganda or Chief Kahwa is not sufficient to establish an error in this regard.

405. Accordingly, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to rely on the evidence of witness P-0038 to support its conclusion that "commanders in the UPC/FPLC frequently used children under the age of 15 as bodyguards".[744] Therefore, the Appeals Chamber rejects Mr Lubanga's alleged error raised in that regard.

(v) Conclusion

406. The Appeals Chamber rejects Mr Lubanga's alleged errors relevant to the witnesses as well as video footage EVD-OTP-00572 on which the Trial Chamber relied to establish that "commanders in the UPC/FPLC frequently used children under the age of 15 as bodyguards".[745]

(d) Mr Lubanga's use of individuals under the age of fifteen years as bodyguards

407. Based on the testimony of witnesses P-0030, P-0055, P-0016 and P-0041, along with images from three video excerpts,[746] the Trial Chamber found that "children under the age of 15 acted as bodyguards or served within the presidential guard of Mr

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[743] Transcript of 12 March 2012, ICC-01/04-01/06-T-113-CONF-ENG CT, page 36, line 24 to page 37, line 5, with public redacted version, ICC-01/04-01/06-T-113-Red2-ENG CT WT; Transcript of 12 March 2012, ICC-01/04-01/06-T-113-CONF-FRA CT, page 36, lines 17-24, with public redacted version, ICC-01/04-01/06-T-113-Red2-FRA CT WT.
[744] Conviction Decision, para. 915.
[745] Conviction Decision, para. 915.
[746] EVD-OTP-00574 (01:49:02); EVD-OTP-00571 (02:47:15-02:47:19) and EVD-OTP-00574 (00:36:21). *See* Conviction Decision, para. 915.

Lubanga".[747] Mr Lubanga argues that the Trial Chamber erred in so holding, because none of this evidence supports this finding.[748]

408. Mr Lubanga's arguments regarding the Trial Chamber's reliance on the video excerpts have previously been addressed in this judgment.[749] Additionally, the Appeals Chamber has found inadmissible the additional evidence provided by witnesses D-0040 and D-0041 relevant to two of the three video excerpts relied upon by the Trial Chamber.[750] Mr Lubanga's remaining arguments will be addressed in turn below.

(i) Witness P-0030

409. The Trial Chamber noted that witness P-0030 testified that he frequently visited Mr Lubanga's residence in Bunia and "noticed bodyguards as young as nine or ten years old, wearing uniforms and bearing weapons, guarding the accused's residence".[751]

410. Mr Lubanga argues that the Trial Chamber erred in relying on witness P-0030's testimony that he had noticed children aged nine or ten years in Mr Lubanga's bodyguard on the basis that this evidence was corroborated by the video filmed on 24 February 2003.[752]

411. The Appeals Chamber finds that Mr Lubanga's arguments misrepresent the Trial Chamber's analysis. The Trial Chamber did not, as alleged by Mr Lubanga, find that the testimony of witness P-0030 about the bodyguards he saw at Mr Lubanga's residence was corroborated by the video filmed on 24 February 2003. The testimony relied upon by the Trial Chamber and contested by Mr Lubanga relates solely to the witness' personal observations of Mr Lubanga's bodyguards during his frequent visits to the UPC/FPLC headquarters. Witness P-0030 did not express any view as to the age of the individual appearing in the excerpt relied upon by the Trial Chamber, except to indicate that the soldiers who were outside of the UPC/FPLC headquarters

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[747] Conviction Decision, para. 915.
[748] Document in Support of the Appeal, para. 304.
[749] *See supra* para. 216 *et seq*.
[750] *See supra* paras 74-81, relating to EVD-OTP-00574 (01:49:02) and EVD-OTP-00571 (02:47:15 – 02:47:19).
[751] Conviction Decision, para. 858.
[752] Document in Support of the Appeal, para. 307, referring to EVD-OTP-00574 (01:49:02).

were "young, like this one that we can see on the screen".[753] Furthermore, the Appeals Chamber notes that the Trial Chamber stated that it "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".[754]

412. In view of the foregoing, the Appeals Chamber finds that Mr Lubanga has failed to identify any error in the Trial Chamber's reliance on the testimony of witness P-0030 to support its conclusion that individuals under the age of fifteen years acted as bodyguards or served within the presidential guard of Mr Lubanga. Therefore, Mr Lubanga's arguments are dismissed.

(ii) Witnesses P-0041 and P-0055

413. The Trial Chamber relied upon witness P-0041's testimony that Mr Lubanga's bodyguards "comprised a mixture of adults and young people"[755] and witness P-0055's testimony that the President's escort included adults and 'children', including two particular 'PMFs',[756] and that the 'kadogos' who accompanied the President wore uniforms and carried arms.[757]

414. Mr Lubanga submits that the Trial Chamber erred by relying upon witness P-0041's testimony as to 'young persons', and witness P-0055's testimony as to 'children' or 'PMFs' for its finding that there were individuals under the age of fifteen years among Mr Lubanga's bodyguards.[758]

415. The Prosecutor contends that Mr Lubanga selectively quotes the transcript and misrepresents the evidence; the two witnesses testified that the young individuals acting as bodyguards ranged from thirteen to sixteen years of age.[759]

416. The Appeals Chamber notes that witnesses P-0041 and P-0055 specified in other contexts that young individuals serving as bodyguards and kadogos within the

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[753] Transcript of 17 February 2009, ICC-01/04-01/06-T-129-CONF-ENG CT, page 57, lines 21-23, with public redacted version ICC-01/04-01/06-T-129-Red3-ENG CT WT.
[754] Conviction Decision, para. 718.
[755] Conviction Decision, para. 865.
[756] *See* Conviction Decision, para. 639 that links this term to "female military staff or '*personnel militaire féminin*'".
[757] Conviction Decision, paras 863, 915.
[758] Document in Support of the Appeal, para. 308.
[759] Response to the Document in Support of the Appeal, para. 245.

UPC ranged in age from about thirteen or fourteen to twenty-two.[760] However, when questioned about the ages of Mr Lubanga's bodyguards, neither witness testified that some of those particular 'children' or 'kadogos' were under the age of fifteen years.[761] The Appeals Chamber notes that the Trial Chamber itself explicitly noted that neither witness P-0041 nor P-0055 gave the age range of Mr Lubanga's personal bodyguards in the section of the Conviction Decision dealing with Mr Lubanga's individual contribution.[762]

417. In view of the foregoing, the Appeals Chamber finds that it was not reasonable 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' among Mr Lubanga's bodyguards to support its conclusion that some of the individuals concerned were under the age of fifteen years. The material effect of this error will be addressed in the conclusion of this section.

(iii) Witness P-0016

418. The Trial Chamber relied on witness P-0016's testimony that the youngest of the 'children' in the 'Presidential Protection Unit' could have been fourteen and his subsequent statement that no more than four of these individuals were thirteen or fourteen years of age to support its conclusion regarding Mr Lubanga's bodyguards.[763]

419. Mr Lubanga argues that "at the urging of the Prosecution and for no apparent reason", witness P-0016 changed his age estimate of the youngest bodyguard, and that, contrary to the findings of the Trial Chamber, the witness did not explain how he

[760] Transcript of 12 February 2009, ICC-01/04-01/06-T-125-CONF-ENG CT, page 54, line 15 to page 56, line 25, with public redacted version, ICC-01/04-01/06-T-125-Red3-ENG CT WT; Transcript of 14 May 2009, ICC-01/04-01/06-T-174-CONF-ENG CT, page 39, line 10 to page 41, line 15, with public redacted version, ICC-01/04-01/06-174-Red3-ENG CT WT.
[761] Transcript of 12 February 2009, ICC-01/04-01/06-T-125-CONF-ENG CT, page 55, line 21 to page 56, line 5, with public redacted version, ICC-01/04-01/06-T-125-Red3-ENG CT WT; Transcript of 19 May 2009, ICC-01/04-01/06-T-176-CONF-ENG CT, page 48, lines 5-24, with public redacted version, ICC-01/04-01/06-T-176-Red2-ENG CT WT.
[762] Conviction Decision, para. 1248.
[763] Conviction Decision, para. 864; *see also* paras 1258-1259, 1262.

arrived at that assessment.[764] Mr Lubanga submits that this uncorroborated evidence is not sufficiently reliable to ground the Trial Chamber's findings.[765]

420. The Prosecutor submits that Mr Lubanga's argument that witness P-0016 changed his evidence upon the insistence of the Prosecutor is a bare assertion.[766] She contends that Mr Lubanga has failed to identify an error that would impact on the Trial Chamber's overall conclusion that individuals under the age of fifteen years were used as bodyguards.[767]

421. The Appeals Chamber notes that witness P-0016 initially testified that not many individuals in the Presidential Protection Unit were under the age of fifteen years and that the youngest "could have been 14".[768] When the witness was questioned again on the age of this group, he indicated that the youngest were thirteen and fourteen, but that there were no more than four individuals of this age.[769] The Appeals Chamber finds that this statement was consistent with and merely clarified the witness' earlier testimony.

422. Mr Lubanga also argues that, contrary to the Trial Chamber's findings, the witness did not explain how he assessed the ages of these individuals.[770] The Appeals Chamber finds that this submission does not accurately reflect the Trial Chamber's findings. The Trial Chamber found that although witness P-0016 "did not specify how he came to the conclusion that the youngest members of the [Presidential Protection Unit] were 13 or 14, and notwithstanding the Chamber's recognition that differentiating between the ages of children can be difficult, on the basis of his detailed evidence the Chamber is satisfied that he was in a position to make a precise evaluation in this regard".[771] In reaching this determination, the Trial Chamber considered it important that the witness was in the vicinity of the Presidential Protection Unit on a daily basis and that he gave a persuasive explanation of how he

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[764] Document in Support of the Appeal, para. 309.
[765] Document in Support of the Appeal, para. 309.
[766] Response to the Document in Support of the Appeal, para. 246.
[767] Response to the Document in Support of the Appeal, para. 246.
[768] Transcript of 10 June 2009, ICC-01/04-01/06-T-189-CONF-ENG CT, page 30, line 22 to page 31, line 4, page 31, lines 17-19, with public redacted version, ICC-01/04-01/06-T-189-Red2-ENG CT WT.
[769] Transcript of 10 June 2009, ICC-01/04-01/06-T-189-CONF-ENG CT, page 35, line 22 to page 36, line 2, with public redacted version, ICC-01/04-01/06-T-189-Red2-ENG CT WT.
[770] Document in Support of the Appeal, para. 246.
[771] Conviction Decision, para. 864.

generally assessed the ages of children, based on their behaviour and the games that they played.[772]

423. The Appeals Chamber finds that Mr Lubanga has failed to identify an error in the Trial Chamber's reliance on the testimony of witness P-0016 to support its conclusion that children under the age of fifteen years were used "as bodyguards or served within the presidential guard of Mr Lubanga".[773] Therefore, the Appeals Chamber dismisses the alleged error.

(iv) Witnesses D-0011 and D-0019

424. The Trial Chamber disregarded witness D-0019's testimony that he never saw individuals under the age of eighteen within the Presidential Protection Unit, despite the fact that he had visited Mr Lubanga's office regularly between September 2002 and 6 March 2003.[774] The Trial Chamber also disregarded similar testimony from witness D-0011 who stated that "between September 2002 and March 2003 and again from May 2003 until Mr Lubanga's departure from Kinshasa, he was at Mr Lubanga's side on a daily basis and he did not, on any occasion, see minors in [his] bodyguard".[775]

425. Mr Lubanga alleges that the Trial Chamber erred in disregarding, without justification, the testimony of these witnesses, when their statements were corroborated by (i) witness D-0037, who testified that there were no individuals under the age of fifteen years in the UPC/FPLC,[776] and (ii) exonerating information in a statement from one of Mr Lubanga's former bodyguards, which was rejected without justification by the Trial Chamber.[777]

426. The Prosecutor submits that the Trial Chamber provided adequate and detailed reasoning in support of its decision to rely on witnesses D-0037, D-0011 and D-

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[772] Conviction Decision, paras 864, 687.
[773] *See* Conviction Decision, para. 915; *see also* paras 869, 1262.
[774] Conviction Decision, para. 866.
[775] Conviction Decision, para. 867.
[776] Document in Support of the Appeal, para. 310.
[777] Document in Support of the Appeal, para. 310, referring to EVD-D01-00773. *See also* Document in Support of the Appeal, paras 70-75. According to Mr Lubanga, in the notes of an interview with one of Mr Lubanga's former bodyguards, the person stated that he had not seen any children under the age of fifteen years in the UPC, much less in the Presidential Protection Unit and that Mr Lubanga was opposed to the recruitment of children.

0019's evidence only with respect to certain matters.[778] The Prosecutor argues that the Trial Chamber also explained that it deemed the out-of-court witness statement not to be credible because it was "contradicted by a wealth of evidence that has been accepted by the Chamber".[779]

427. The Appeals Chamber notes that Mr Lubanga raised identical arguments regarding the testimony of witnesses D-0011 and D-0019 and the statement of Mr Lubanga's former bodyguard in the Defence Closing Submissions.[780] These arguments were addressed by the Trial Chamber in the Conviction Decision.

428. According to the Trial Chamber, witness D-0019 was an early member of the UPC who served as the national secretary for internal and customary affairs and deputy national secretary.[781] The Trial Chamber found that the witness was "an evasive and contradictory witness on the issues that particularly concerned Thomas Lubanga and in some instances during his testimony he demonstrated partiality towards the accused".[782]

429. The Trial Chamber established that witness D-0011 was Mr Lubanga's 'expert consultant' and later 'private secretary' until around September 2004.[783] The Trial Chamber took "into account the close professional relationship between this witness and the accused" and considered that the witness "was frequently evasive in his testimony".[784] The Trial Chamber indicated that it had only relied on this witness' account when it was "supported by other credible evidence".[785]

430. The Trial Chamber considered the testimony of these two witnesses together with the statement of Mr Lubanga's former bodyguard and concluded that they lacked credibility given the wealth of contrary evidence from witnesses that were deemed to be consistent, credible and reliable on the presence of individuals under the age of

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[778] Response to the Document in Support of the Appeal, paras 248-249.
[779] Response to the Document in Support of the Appeal, para. 247, referring to the Conviction Decision, para. 1261.
[780] Defence Closing Submissions, paras 847-848.
[781] Conviction Decision, para.728.
[782] Conviction Decision, para. 730.
[783] Conviction Decision, paras 719 -720.
[784] Conviction Decision, para. 724.
[785] Conviction Decision, para. 724.

fifteen years in Mr Lubanga's bodyguard.[786] The Appeals Chamber considers that Mr Lubanga has failed to identify any error in the Trial Chamber's assessment of these witnesses' testimony and the statement.

431. With regard to the general testimony of witness D-0037 that there were no individuals under the age of fifteen years in the UPC/FPLC,[787] the Appeals Chamber notes that there is no indication that this witness had any specific knowledge pertaining to Mr Lubanga's bodyguards. Accordingly, the Trial Chamber did not err in declining to take this general statement into account for the purposes of its assessment of the evidence pertaining to the specific matter of the age of Mr Lubanga's bodyguards.

432. Accordingly, the Appeals Chamber finds that it Mr Lubanga did not establish an error in the Trial Chamber's decision to disregard the testimony of D-0037, D-0011, D-0019 and the out-of-court statement of Mr Lubanga's bodyguard. Accordingly, Mr Lubanga's arguments are dismissed.

(v) Conclusion

433. Based on the testimony of witnesses P-0030, P-0055, P-0016 and P-0041, along with images from three video excerpts, the Trial Chamber found that "children under the age of 15 acted as bodyguards or served within the presidential guard of Mr Lubanga".[788] The Appeals Chamber has determined that the Trial Chamber's findings relevant to witnesses P-0055 and P-0041 were unreasonable. Nevertheless, it finds that the Trial Chamber's overall conclusion that individuals under the age of fifteen years acted as bodyguards or served within the presidential guard of Mr Lubanga is not materially affected by this error as it is supported by the evidence of witnesses P-0030 and P-0016 and the video extracts relied upon by the Trial Chamber.

D. Alleged errors in the objective and subjective elements of the form of individual criminal responsibility

434. The Appeals Chamber recalls that the Trial Chamber found Mr Lubanga "[g]uilty of the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the

[786] Conviction Decision, paras 866-869, 1260-1261.
[787] Transcript of 13 April 2011, ICC-01/04-01/06-T-349-ENG ET WT, page 61, lines 4-14.
[788] Conviction Decision, para. 915.

meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the Statute from early September 2002 to 13 August 2003".[789] The Trial Chamber noted that Mr Lubanga was charged as a co-perpetrator pursuant to the second alternative of article 25 (3) (a) of the Statute ("commits such a crime, […] jointly with another […] person") and stated that it would limit its consideration to this form of liability.[790] The Trial Chamber found that this form of individual criminal liability comprised the following elements, which had to be established by the Prosecutor:

> (i) there was an agreement or common plan between the accused and at least one other co-perpetrator that, once implemented, will result in the commission of the relevant crime in the ordinary course of events;
>
> (ii) the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime;
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> (iii) the accused meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities or he was aware that by implementing the common plan these consequences "will occur in the ordinary course of events";
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> (iv) the accused was aware that he provided an essential contribution to the implementation of the common plan; and
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> (v) the accused was aware of the factual circumstances that established the existence of an armed conflict and the link between these circumstances and his conduct.[791]

435. In the "Overall Conclusions"[792] section of the Conviction Decision that addresses Mr Lubanga's individual criminal responsibility, the Trial Chamber made several factual findings corresponding to the legal elements set out above. It found that Mr Lubanga and his co-perpetrators (including Floribert Kisembo, Bosco Ntaganda, Chief Kahwa, and commanders Tchaligonza, Bagonza and Kasangaki)[793] "agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri".[794] This resulted "in the ordinary course of events"[795] in the conscription and enlistment of boys and girls under the age of fifteen years, and their use to participate actively in hostilities,

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[789] Conviction Decision, para. 1358.
[790] *See* Conviction Decision, para. 978.
[791] Conviction Decision, para. 1018.
[792] *See* Conviction Decision, paras 1351-1357.
[793] Conviction Decision, para. 1352.
[794] Conviction Decision, para. 1351; *see also* paras 1126-1136.
[795] Conviction Decision, para. 1351; *see also* paras 1136, 1347.

including during battles and as soldiers and bodyguards for senior officials, including Mr Lubanga.[796]

436. The Trial Chamber found that Mr Lubanga's contribution was essential to the common plan that resulted in the commission of the crimes.[797] This contribution consisted of his function of being the commander-in-chief of the army and the political leader; his overall coordinating role; the fact that he was informed "on a substantive and continuous basis" of the operations of the UPC/FPLC; that he was involved in planning military operations and had a critical role in providing logistical support; and that he was closely involved in making decisions on recruitment policy and actively supported recruitment initiatives.[798] The Trial Chamber specifically noted the speech Mr Lubanga gave at the Rwampara camp where "he encouraged children, including those under the age of 15 years, to join the army and to provide security for the populace", as well as the fact that Mr Lubanga "personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC members of staff who were below the age of 15".[799]

437. Finally, the Trial Chamber found that Mr Lubanga had the requisite level of intent and knowledge.[800] It held that "Thomas Lubanga was fully aware that children under the age of 15 had been, and continued to be, enlisted and conscripted by the UPC/FPLC and used to participate actively in hostilities during the timeframe of the charges", which "occurred, in the ordinary course of events, as a result of the implementation of the common plan – to ensure that the UPC/FPLC had an army strong enough to achieve its political and military aims".[801]

438. Mr Lubanga alleges several errors in relation to the Trial Chamber's findings regarding his individual criminal responsibility, including three main errors of law in relation to his conviction as a co-perpetrator. Notably, he alleges that the Trial Chamber erred in finding that:

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[796] Conviction Decision, paras 1351, 1355; *see also* paras 1134, 1135.
[797] Conviction Decision, para. 1356.
[798] Conviction Decision, para. 1356; *see also* paras 1137-1223.
[799] Conviction Decision, para. 1356; *see also* paras 1224-1272 (Rwampara camp speech, paras 1242-1246; bodyguards, paras 1247-1262).
[800] Conviction Decision, para. 1357.
[801] Conviction Decision, para. 1347; *see also* para. 1348.

a. "[T]he agreement on a common plan leads to co-perpetration if its implementation embodies a sufficient risk that, in the ordinary course of events, a crime will be committed" (footnote omitted);[802]

b. "'*[A]wareness that a consequence will occur in the ordinary course of events*' means that the participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence will occur in the future. This prognosis involves consideration of the concepts of 'possibility' and 'probability', which are inherent to the notions of 'risk' and 'danger'"[803] (emphasis added, footnote omitted); and

c. "[R]esponsibility under article 25(3)(a) does not require personal and direct participation in the crime itself and […] merely exercising, 'jointly with others, control over the crime' [is] sufficient to establish the 'essential contribution' required" (footnote omitted).[804]

439. The Prosecutor argues that Mr Lubanga has not met the burden of substantiating the alleged legal errors.[805] In that regard, the Appeals Chamber notes that the Prosecutor's references in footnote 526 of the Response to the Document in Support of the Appeal are misleading because they mainly relate to jurisprudence of the ICTY and the ICTR on alleged *factual* errors. As established above and contrary to the Prosecutor's assertion, an appellant may repeat submissions made before the Trial Chamber.[806] Therefore, the Appeals Chamber finds that Mr Lubanga has sufficiently substantiated the alleged legal errors.

440. The Appeals Chamber notes that Mr Lubanga also raises in relation to each of the above-mentioned alleged legal errors a number of other errors under the heading "factual errors". Some of these allegations are not sufficiently substantiated.[807] Notably, in instances where Mr Lubanga merely repeats factual submissions made at

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[802] Document in Support of the Appeal, para. 327; further explained in paras 328-331.
[803] Document in Support of the Appeal, para. 380; further explained in paras 381-385.
[804] Document in Support of the Appeal, para. 332; further explained in paras 333-338.
[805] Response to the Document in Support of the Appeal, paras 259, 264, referring to *Gotovina and Markač* Appeal Judgment, para. 14; *Mrkšić and Šljivančanin* Appeal Judgment, para. 16; and *Bagosora and Nsengiyumva* Appeal Judgment, para. 19.
[806] *See supra* para. 31.
[807] *See supra* para. 33.

the close of the trial without explaining why the factual findings of the Trial Chamber are unreasonable, the Appeals Chamber has not considered these arguments further.[808] To the extent that the alleged 'factual errors' are sufficiently substantiated, the Appeals Chamber will address them immediately after addressing the relevant alleged legal error.

1. Alleged errors relevant to the common plan

(a) Alleged error in establishing a "risk" requirement

441. In relation to the Trial Chamber's legal findings regarding the common plan, Mr Lubanga argues that the Trial Chamber erred because it applied the "concept of 'sufficient risk' to establish the 'critical element of criminality' of the common plan necessary for co-perpetration".[809] He argues that this is not in line with article 30 (2) of the Statute because it imports the concept of *dolus eventualis*, a concept that, in his opinion, was "not adopted by the drafters of the Statute" (footnote omitted).[810] The Appeals Chamber notes that Mr Lubanga makes the same argument with respect to the Trial Chamber's findings on the mental element, in relation to which the Trial Chamber also referred to the notion of 'risk'.[811] The analysis below equally applies to the error alleged by Mr Lubanga in that regard.

442. The Appeals Chamber recalls that the majority of the Trial Chamber[812] made the following finding as to what has to be proved in relation to the common plan as an element of co-perpetration liability under article 25 (3) (a) of the Statute:

> In the view of the Majority of the Chamber, the prosecution is not required to prove that the plan was specifically directed at committing the crime in question (the conscription, enlistment or use of children), nor does the plan need to have been intrinsically criminal as suggested by the defence. However, it is necessary, as a minimum, for the prosecution to establish the common plan included a critical element of criminality, namely that, its implementation embodied *a sufficient risk* that, if events follow the ordinary course, a crime will be committed. [Emphasis added.][813]

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[808] *See* Document in Support of the Appeal, paras 339, 353-354.
[809] Document in Support of the Appeal, para. 329.
[810] Document in Support of the Appeal, para. 328.
[811] *See infra* para. 500.
[812] Judge Fulford adopted a different approach to co-perpetration as a whole; *see* Separate Opinion of Judge Fulford, paras 8-12, 15-18.
[813] Conviction Decision, para. 984.

443. After establishing that "committing the crime in question does not need to be the overarching goal of the co-perpetrators",[814] the Trial Chamber explained, with reference to article 30 of the Statute, what it meant by "sufficient risk":

> Hence, in the view of the Majority, the mental requirement that the common plan included the commission of a crime will be satisfied if the co-perpetrators knew that, in the ordinary course of events, implementing the plan will lead to that result. "Knowledge", defined as awareness by the co-perpetrators that a consequence will occur (in the future), necessarily means that the co-perpetrators *are aware of the risk that the consequence, prospectively, will occur*. [Emphasis added, footnotes omitted.][815]

444. It is this finding that Mr Lubanga challenges. The Prosecutor argues that the Trial Chamber, when referring to the risk criterion, did not import the concept of *dolus eventualis*, but correctly applied article 30 of the Statute.[816] She recalls that the Trial Chamber addressed the mental element and article 30 of the Statute in more detail elsewhere in the Conviction Decision and recalls that the Trial Chamber held in that regard:[817]

> 1012. In the view of the Majority of the Chamber, the "awareness that a consequence will occur in the ordinary course of events" means that the participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence will occur in the future. This prognosis involves consideration of the concepts of "possibility" and "probability", which are inherent to the notions of "risk" and "danger". Risk is defined as "danger, (exposure to) the possibility of loss, injury or other adverse circumstance". The co-perpetrators only "know" the consequences of their conduct once they have occurred. *At the time the co-perpetrators agree on a common plan and throughout its implementation, they must know the existence of a risk that the consequence will occur. As to the degree of risk, and pursuant to the wording of Article 30, it must be no less than awareness on the part of the co-perpetrator that the consequence "will occur in the ordinary course of events". A low risk will not be sufficient.*
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> 1013. The Chamber is of the view that the prosecution must establish, as regards the mental element, that: (i) the accused and at least one other perpetrator meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities or they were aware that in implementing their common plan this consequence "will occur in the ordinary course of events"; and (ii) the accused

[814] Conviction Decision, para. 985.
[815] Conviction Decision, para. 986.
[816] Response to the Document in Support of the Appeal, paras 260, 261.
[817] *See* Response to the Document in Support of the Appeal, para. 261.

> was aware that he provided an essential contribution to the implementation of the common plan. [Footnotes omitted, emphasis added.][818]

445. At the outset, the Appeals Chamber considers that, in order to establish that an accused person committed a crime under the jurisdiction of the Court "jointly with another […] person", it has to be established that two or more individuals worked together in the commission of the crime. This requires an agreement between these perpetrators, which led to the commission of one or more crimes under the jurisdiction of the Court. It is this very agreement – express or implied, previously arranged or materialising extemporaneously – that ties the co-perpetrators together and that justifies the reciprocal imputation of their respective acts.[819] This agreement may take the form of a 'common plan'.[820]

446. As to the question of whether the common plan must be "designed to further a criminal purpose",[821] the Appeals Chamber considers that it is not required that the common plan between individuals was specifically directed at the commission of a crime. The Appeals Chamber recalls that the Trial Chamber held that it was sufficient for the common plan to involve "a critical element of criminality"[822] and that the Trial Chamber sought to define such an element of criminality by reference to article 30 of the Statute. In the view of the Appeals Chamber, it was as such correct to consider article 30 of the Statute because that provision describes the relevant mental element and may therefore also serve as a yardstick for determining whether two or more individuals agreed to commit a crime. Article 30 of the Statute states:

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[818] Conviction Decision, paras 1012-1013.
[819] *See* *Tadić* Appeal Judgment, para. 227, adopted throughout the jurisprudence of the *ad hoc* tribunals. *See* R. Dixon and K. Khan, *Archbold International Criminal Courts: Practice, Procedure & Evidence* (Sweet & Maxwell, 4th ed., 2013), margin number 10-60. *See also* A. Eser "Individual Criminal Responsibility" in A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (Oxford University Press, 2002), p 790; K. Ambos, *Treatise on International Criminal Law*, Vol. I (Oxford University Press, 1st ed., 2013), page 149; G. Werle and F. Jessberger, *Principles of International Criminal Law* (Oxford University Press, 3rd ed., 2014), margin number 539; M. Cupido, "Pluralism in Theories of Liability – Joint Criminal Enterprise versus Joint Perpetration", in E. van Sliedregt, S. Vasiliev (eds.), *Pluralism in International Criminal Law* (Oxford University Press, 1st ed., 2014), page 128 at page 133.
[820] *See* *Tadić* Appeal Judgment, para. 227, *Katanga* Trial Judgment, para. 1626; *Gbagbo* Decision on the Confirmation of Charges, para. 230; *Bemba* Decision on the Confirmation of Charges, para. 350; *Katanga and Ngudjolo* Decision on the Confirmation of Charges, paras 522-523.
[821] Document in Support of the Appeal, para. 330.
[822] Conviction Decision, para. 984.

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
>
> 2. For the purposes of this article, a person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;
>
> (b) In relation to a consequence, that *person means to cause that consequence or is aware that it will occur in the ordinary course of events*.
>
> 3. For the purposes of this article, 'knowledge' means *awareness that a circumstance exists or a consequence will occur in the ordinary course of events*. 'Know' and 'knowingly' shall be construed accordingly. [Emphasis added.][823]

447. At issue here is the second alternative of both article 30 (2) (b) and (3) of the Statute. The Appeals Chamber notes that these provisions do not refer to the notion of "risk", but employ the term of occurrence of a consequence "in the ordinary course of events". The Appeals Chamber considers that the words "[a consequence] will occur" refer to future events.[824] The verb 'occur' is used with the modal verb 'will', and not with 'may' or 'could'.[825] Therefore, this phrase conveys, as does the French version, certainty about the future occurrence.[826] However, absolute certainty about a future occurrence can never exist; therefore the Appeals Chamber considers that the standard for the foreseeability of events is *virtual* certainty.[827] That absolute certainty is not

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[823] The French version of article 30 (2) and (3) reads: "*Il y a intention au sens du présent article lorsque: a) Relativement à un comportement, une personne entend adopter ce comportement; b) Relativement à une conséquence, une personne entend causer cette conséquence ou est consciente que celle-ci adviendra dans le cours normal des événements. 3. Il y a connaissance, au sens du présent article, lorsqu'une personne est consciente qu'une circonstance existe ou qu'une conséquence adviendra dans le cours normal des événements. « Connaître » et « en connaissance de cause » s'interprètent en conséquence*".

[824] *See* Oxford English Dictionary, 2nd meaning: "Of an event, incident, etc.: to happen, come about, take place, esp. without being arranged or expected".

[825] G. Werle and F. Jessberger, *Principles of International Criminal Law* (Oxford University Press, 3rd ed., 2014), margin numbers 475-476, footnote 89. *See also* Conviction Decision, para. 1011, *Bemba* Decision on the Confirmation of Charges, paras 362-363.

[826] The relevant part of the French version reads: "*ou est consciente que celle-ci adviendra dans le cours normal des événements*".

[827] *See* in the same vein, *Bemba* Decision on the Confirmation of Charges, para. 362, United Kingdom, Court of Appeal, *R v. Nedrick*, 15 August 1986, [1986] l WLR, pages 1025-1028; confirmed by United Kingdom, House of Lords, *R v. Woollin*, 22 July 1998, [1998] 3 WLR., pages 392 G-H-393 A; I. Kugler, "The Definition of Oblique Intention", 68 *The Journal of Criminal Law* (2004), page 79 at pages 79-83; G. Williams, "Oblique Intention", 46 *Cambridge Law Journal* (1987), page 417 at page 422; A. Eser, "Mental Element-Mistake of Fact and Mistake of Law" in A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (Oxford University Press, 2002), page 914 at pages 914-916; J. D. Van der Vyver, "The International Criminal Court and the Concept of Mens Rea in International Criminal Law", 12 *University of Miami International & Comparative Law Review* (2004), page 57 at pages 63, 66 (referred to as "*dolus indirectus*").

required is reinforced by the inclusion in article 30 (2) (b) and (3) of the Statute of the phrase "in the ordinary course of events".[828]

448. The Appeals Chamber recalls that the Trial Chamber held that

> it is necessary, as a minimum, for the prosecution to establish [that] the common plan included a critical element of criminality, namely that its implementation embodied a sufficient risk that, if events follow the ordinary course, a crime will be committed.[829]

449. The Appeals Chamber considers that the term 'risk' is usually used in the context of '*dolus eventualis*' or 'advertent recklessness', as known in some domestic jurisdictions,[830] a concept that the Trial Chamber specifically excluded from application.[831] The Appeals Chamber considers that it does not help in creating more clarity that the Trial Chamber, in the section on the mental element, explains that this "involves consideration of the concepts of 'possibility' and 'probability', which are inherent to the notions of 'risk' and 'danger'".[832] The Appeals Chamber finds that the use of this phrase is confusing and reference to 'risk' should have been avoided when interpreting article 30 (2) of the Statute.

450. Nevertheless, in the result, the Appeals Chamber does not consider that the Trial Chamber's approach broadened the scope of article 30 (2) and (3) of the Statute, despite the Trial Chamber's use of the term 'risk'. The Appeals Chamber notes that the Trial Chamber appears to have referred to the term 'risk' in this context because the common plan was implemented over a long period of time.[833] Thus, at the time of its conception, the co-perpetrators anticipated future events (as will often be the case when a broad plan is conceived). The Trial Chamber, in defining the requisite level of 'risk', specified at paragraph 1012 of the Conviction Decision that this entailed an

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[828] *See* United Kingdom Law Commission, *Criminal Law Legislating the Criminal Code Offences Against The Person and General Principles*, LAW COM. No. 218, November 1993, para. 7.9; *Moloney* Appeal Judgment, page 929.
[829] Conviction Decision, para. 984.
[830] G. Werle and F. Jessberger, *Principles of International Criminal Law* (Oxford University Press, 3rd ed., 2014), margin numbers 475-476. *See also* *Tadić* Appeal Judgment, para. 220; *Brđanin and Talić* Amended Indictment Decision, para. 29; *Stakić* Trial Judgment, para. 587; Decision on the Confirmation of Charges, paras 351-355; *Katanga and Ngudjolo* Decision on the Confirmation of Charges, paras 529-531; H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes*, (Hart Publishing, 2009), pages 73-77.
[831] Conviction Decision, para. 1011. *See also* *Bemba* Decision on the Confirmation of Charges, paras 360-369; *Ruto et al.* Decision on the Confirmation of Charges, paras 335-336.
[832] Conviction Decision, para. 1012.
[833] Conviction Decision, para. 1351 *et seq*.

"awareness on the part of the co-perpetrators that the consequence will occur in the 'ordinary course of events'" and distinguished this from a "low risk". In addition, the Trial Chamber found, in line with article 30 of the Statute, that the Prosecutor needs to establish that, as a consequence of the common plan, the crimes "will occur in the ordinary course of events".[834] Therefore, Appeals Chamber finds that the Trial Chamber, in its legal conclusions, did not deviate from the requirements of article 30 (2) (b) and (3) of the Statute.

451. The Appeals Chamber recalls in this context that, according to the Trial Chamber, Mr Lubanga and the co-perpetrators agreed "to build an effective army in order to ensure the UPC/FPLC's political and military control over Ituri".[835] The Trial Chamber found that, in the circumstances prevailing in Ituri at the time (of which the co-perpetrators were aware), the implementation of this plan led to the recruitment and use to participate actively in hostilities of individuals who were both above and under the age of fifteen years, the latter being a crime falling within the scope of the Statute. Thus, the implementation of the plan, which itself may have included non-criminal goals, in addition to criminal ones, resulted in the commission of crimes under article 8 (2) (e) (vii) of the Statute. Accordingly, the Trial Chamber's requirement of a "critical element of criminality" of the common plan means, in the context of the present case and the specific allegations against Mr Lubanga, that it was virtually certain that the implementation of the common plan led to the commission of the crimes at issue.

452. In conclusion, the Appeals Chamber rejects Mr Lubanga's argument.

(b) Alleged error in finding that the common plan would result in the commission of the crime

453. Under the heading "factual errors", Mr Lubanga alleges another error in the Trial Chamber's conclusions. He argues that no reasonable trier of fact could have found that the common plan to build an effective army would have as its "'virtually certain consequences' 'the conscription, enlistment and use of children under the age of 15 to participate actively in hostilities […] in the ordinary course of events'".[836] Mr

[834] Conviction Decision, para. 1018.
[835] Conviction Decision, para. 1136.
[836] Document in Support of the Appeal, para. 341.

Lubanga refers in this respect to the Defence Closing Submissions.[837] The Prosecutor submits that Mr Lubanga is wrong in asserting that direct intent of the second degree requires "virtual certainty" that a consequence will occur.[838]

454. Mr Lubanga relies on two arguments in this respect: (i) that the Trial Chamber did not note any specific circumstance that would show that the recruitment operations under the 'common plan' could not have failed to result in the commission of the crimes charged;[839] and (ii) that the evidence shows that as part of the common plan, Mr Lubanga and some of his alleged co-perpetrators gave orders to obstruct or end the charged crimes.[840] Mr Lubanga's latter arguments are analysed elsewhere in this judgment.[841] With respect to the first argument, the Prosecutor contends that, even applying the standard of a "virtually certain consequence", the Trial Chamber would have found that conscription, enlistment and use of children under the age of fifteen years to actively participate in hostilities was a virtually certain or almost inevitable consequence of the implementation of the common plan.[842]

455. The Appeals Chamber finds that Mr Lubanga's submissions are not sufficiently substantiated by reference to the Conviction Decision's concluding paragraph 1136. It recalls that mere reference to the Defence Closing Submissions cannot demonstrate a factual error in the Conviction Decision.[843] Nevertheless, in addressing the substance of the argument, the Appeals Chamber notes that the Trial Chamber devoted over 112 paragraphs to the "common plan" and articulated (i) the situation in Ituri prior to the period relevant to the present charges, in particular, the recruitment and training of children under the age of fifteen years that was ongoing under the coordination of the co-perpetrators at that time; (ii) the conception and implementation of the common plan; (iii) the actual "result" of the implementation of the common plan in terms of the recruitment and use of children under the age of fifteen years; and (iv) the awareness of the co-perpetrators that this result would occur and was in fact

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[837] Document in Support of the Appeal, para. 343, referring to Defence Closing Submissions, paras 767-770, 867-889.
[838] Response to the Document in Support of the Appeal, para. 277.
[839] Document in Support of the Appeal, paras 342-343.
[840] Document in Support of the Appeal, paras 344-345.
[841] *See infra* paras IX.D.3(c)(i)-525.
[842] Response to the Document in Support of the Appeal, para. 277.
[843] *See supra*, para. 33.

occurring.[844] On this basis, the Trial Chamber concluded that the common plan to which Mr Lubanga and his co-perpetrators agreed "resulted in the conscription, enlistment and use of children under the age of 15 to participate actively in hostilities, a consequence which occurred in the ordinary course of events".[845] Accordingly, the Appeals Chamber finds that the Trial Chamber, contrary to Mr Lubanga's allegation, sufficiently addressed the underlying evidence and finds that the Trial Chamber's conclusion was not unreasonable.

2. Alleged errors relevant to the perpetrator's required "contribution"

(a) Alleged error in not requiring "direct" participation

456. Mr Lubanga argues in essence that the Trial Chamber erred in finding that a co-perpetrator does not need to personally and directly participate in the commission of the crime,[846] an interpretation that contravenes, in his view, articles 21 and 22 of the Statute and the principle of legality.[847] Mr Lubanga specifically challenges the finding of the Trial Chamber that the accused can be absent from the scene of the crime, as long as he has the power to decide whether and how the offence will be carried out.[848] In Mr Lubanga's view, this is akin to liability for ordering the commission of a crime or superior responsibility (article 25 (3) (b) and 28 of the Statute, respectively), and therefore cannot establish liability for the commission of a crime under article 25 (3) (a) of the Statute.[849] He argues that, due to this error, the Trial Chamber considered Mr Lubanga's leadership position and his knowledge of the crimes as constituent elements of his "essential contribution".[850] Mr Lubanga avers that this error vitiates the Conviction Decision.[851]

457. The Prosecutor submits that neither article 25 (3) of the Statute and the emerging jurisprudence of the Court, nor the jurisprudence of the ICTY and ICTR require that the accused person must have committed the crime personally and

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[844] Conviction Decision, para. 1024 *et seq.*
[845] Conviction Decision, para. 1136.
[846] Document in Support of the Appeal, para. 332.
[847] Document in Support of the Appeal, para. 333.
[848] Document in Support of the Appeal, para. 334.
[849] Document in Support of the Appeal, paras 334-336.
[850] Document in Support of the Appeal, para. 335.
[851] Document in Support of the Appeal, para. 337.

directly in order to establish "commission" liability.[852] The Prosecutor defends the positions of the Trial and Pre-Trial Chambers,[853] emphasising that "consideration will be given to the actions of all co-perpetrators and not just the Appellant's actions taken alone".[854] The Prosecutor argues that the "control of the crime theory" should not be questioned in the abstract.[855] She recalls that the Trial Chamber assessed not only his leadership role within the UPC/FPLC, but also his "personal involvement as it related to the crimes charged" (footnote omitted).[856] In her submission, both aspects were relevant to the finding that Mr Lubanga's contribution to the common plan was "essential".[857]

458. The Appeals Chamber is not persuaded by Mr Lubanga's arguments under this alleged error. For the reasons that follow, it finds that article 25 (3) (a) of the Statute does not establish that co-perpetrators need to carry out the crime personally and directly.

459. Article 25 (2) and (3) of the Statute provides as follows:

> 2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
>
> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> (a) *Commits such a crime*, whether as an individual, *jointly with another* or through another person, regardless of whether that other person is criminally responsible;[858]
>
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

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[852] Response to the Document in Support of the Appeal, paras 264-265, referring, *inter alia*, to *Tadić* Appeal Judgment, para. 192.
[853] Response to the Document in Support of the Appeal, paras 266-270.
[854] Response to the Document in Support of the Appeal, para. 266.
[855] Response to the Document in Support of the Appeal, paras 268-270.
[856] Response to the Document in Support of the Appeal, paras 271-272.
[857] Response to the Document in Support of the Appeal, para. 272.
[858] The French version reads: "*a) Elle commet un tel crime, que ce soit individuellement, conjointement avec une autre personne ou par l'intermédiare d'une autre personne, que cette autre personne soit ou non pénalement responsable*".

> (c) For the purposes of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime;
>
> (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
>
> (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose. [Emphasis added.]

460. In the view of the Appeals Chamber, the issue at hand must be resolved by interpreting the phrase "[c]ommits such a crime […] jointly with another […] person", within the limits set by article 22 of the Statute. The Appeals Chamber notes that the text of article 25 (3) (a) of the Statute does not expressly stipulate that a crime is committed jointly with others only if the co-perpetrators directly and personally carry out the incriminated conduct in question.

461. At the outset, the Appeals Chamber notes that article 25 (2) of the Statute, which establishes the principle of individual criminal responsibility, also uses the term "commit" a crime. However, this provision refers generally to individual criminal responsibility for the crimes under the jurisdiction of the Court and therefore cannot assist in defining the term "[c]ommit" in paragraph 3 (a) of the provision.[859] Accordingly, article 25 (2) of the Statute need not be considered any further.

462. What is, however, of relevance to the proper interpretation of the term "[c]ommits such a crime […] jointly with another […] person" is its interplay with other forms of criminal liability set out in article 25 (3) of the Statute. In that regard,

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[859] *See* with respect to the meaning of the term 'commit' in the different language versions, K. Ambos, *Treatise on International Criminal Law* (Oxford University Press, 1st ed., 2013), Vol. I, pages 148-149.

the Appeals Chamber observes that, under this provision, an individual can be held criminally responsible for either *committing* a crime (sub-paragraph a)) or for *contributing* to the commission of a crime by another person or persons in one of the ways described in sub-paragraphs b) to d).[860] This indicates that the Statute differentiates between two principal forms of liability, namely liability as a perpetrator and liability as an accessory.[861] In the view of the Appeals Chamber, this distinction is not merely terminological; making this distinction is important because, generally speaking and all other things being equal, a person who is found to commit a crime him- or herself bears more blameworthiness than a person who contributes to the crime of another person or persons.[862] Accordingly, it contributes to a proper labelling of the accused person's criminal responsibility.

463. It follows that, in circumstances where a plurality of individuals are involved in the commission of a crime, it becomes necessary to determine on what basis an individual's role is assessed to amount to that of a perpetrator or that of an accessory. In the view of the Appeals Chamber, and as noted above, the starting point for this analysis must be the interaction between the various forms of individual criminal responsibility set out in article 25 (3) of the Statute and their distinctive characteristics.

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[860] In that respect, it is submitted that sub-paragraph e) does not need to lead to the commission of genocide and that paragraph f) is about a specific form of commission, i.e. the attempt.

[861] E. Van Sliedregt, *Individual criminal responsibility in international law* (Oxford University Press, 2012), pages 37, 66-67; K. Ambos, *Treatise on International Criminal Law*, Vol. I (Oxford University Press, 1st ed., 2013), pages 146-147; G. Werle and B. Burghardt, "Establishing Degree of Responsibility. Modes of Participation in Article 25 of the ICC Statute" in E. van Sliedregt, S. Vasiliev (eds.), *Pluralism in International Criminal Law* (Oxford University Press, 1st ed., 2014), page 301 at pages 302-303; J. D. Ohlin, "Organizational Criminality", in E. van Sliedregt, S. Vasiliev (eds.), *Pluralism in International Criminal Law* (Oxford University Press, 1st ed., 2014), page 107 at pages 107-116. *See also* *Katanga* Trial Judgment, paras 1383-1389. *See* against the differentiation between the two modes of participation and/or in favour of a unitarian model: J. Stewart, "The End of 'Modes of Liability' for International Crimes", 25 *Leiden Journal of International Law* (2012), page 165. *See also* J. G. Stewart, "Ten Reasons for Adopting a Universal Concept of Participation in Atrocity", in E. van Sliedregt, S. Vasiliev (eds.), *Pluralism in International Criminal Law* (Oxford University Press, 1st ed., 2014), page 320 at pages 320-341; L. N. Sadat and J. M. Jolly, "Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot", 27 *Leiden Journal of International Law* (2014), page 755 at page 782; M. D. Dubber, "Criminalizing Complicity. A Comparative Analysis", 5 *Journal of International Criminal Justice* (2007), page 977 at pages 1000-1001.

[862] *See also* K. Ambos, *Treatise on International Criminal Law*, Vol. I (Oxford University Press, 1st ed., 2013), pages 146-147. For a differing view *see* Separate Opinion of Judge Fulford, paras 8-9; *Ngudjolo* Concurring Opinion of Judge Van den Wyngaert, paras 22-27; *Katanga* Trial Judgment, para. 1386; J. D. Ohlin *et al.*, "Assessing the Control-Theory", 26 *Leiden Journal of International Law* (2013), page 725 at pages 743-746; L. N. Sadat and J. M. Jolly, "Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot", 27 *Leiden Journal of International Law* (2014), page755 at pages 782-783.

464. In this regard, the Appeals Chamber notes that article 25 (3) (a) of the Statute provides expressly for three forms of commission liability: a perpetrator may commit a crime "as an individual", "jointly with another […] person", or "through another person".[863]

465. The Appeals Chamber finds that the third form of commission liability assists in the interpretation of the second form of liability, which is at issue in the case at hand. The third form of commission liability is based on the notion that a person can commit a crime 'through another person'. The underlying assumption is that the accused makes use of another person, who actually carries out the incriminated conduct, by virtue of the accused's control over that person, and the latter's conduct is therefore imputed on the former.[864] Accordingly, commission of a crime 'through' another person is a form of criminal responsibility that requires a normative assessment of the relationship between the person actually carrying out the incriminated conduct and the person in the background, as well as of the latter person's relationship to the crime. In that regard, it is noteworthy that article 25 (3) (a) of the Statute provides for commission liability 'through another person' not only in circumstances where that person is not him- or herself criminally liable and therefore serves as a will-less tool in the hand of the individual in the background. Rather, a person can *commit* a crime also through individuals who are themselves fully criminally responsible for that crime.[865] In such a scenario, the person in the background is considered to bear the same or even more blameworthiness than the person actually executing the incriminated conduct.[866] This indicates more generally that the Statute assumes that a person who did not him- or herself carry out the incriminated conduct can, depending on the circumstances, nevertheless be a perpetrator. The Appeals Chamber notes that such an approach to commission

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[863] Views have also been expressed in the Court's jurisprudence that article 25 (3) (a) of the Statute provides for a fourth form of commission liability, whereby a perpetrator may commit a crime jointly with another person, where that other person commits the crime "through [yet] another person": *Katanga and Ngudjolo* Decision on the Confirmation of Charges, paras 490-493. *See also* *Ruto et al.* Decision on the Confirmation of Charges, paras 289-290. *See*, for a different view on this matter: *Ngudjolo* Concurring Opinion of Judge Van den Wyngaert, paras 63-64.

[864] F. Jessberger and J. Geneuss, "On the Application of a Theory of Indirect Perpetration in *Al Bashir*. German Doctrine at The Hague?", 6 *Journal of International Criminal Justice* (2008), pages 854-855.

[865] Also referred to as "perpetrator behind the perpetrator", *see* A. Eser "Individual Criminal Responsibility" in A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (Oxford University Press, 2002), page 790 at page 795.

[866] *See* E. Van Sliedregt, *Individual criminal responsibility in international law* (Oxford University Press, 2012), pages 71-73.

liability is supported by academic commentators[867] and was also applied, for example, by Trial Chamber II in the *Katanga* Trial Judgment. In that Trial Chamber's opinion, it would be contrary to article 25 (3) (a) to adopt an approach according to which only the physical carrying out of elements of the crime would lead to commission liability.[868]

466. The finding that, in order to incur liability as a perpetrator, it is not indispensable that the accused personally carried out the incriminated conduct also has repercussions on co-perpetration liability, which is at issue in the case at hand. In the context of co-perpetration, it follows from the above that it is not required that a person actually carry out directly and personally the incriminated conduct in order to be a co-perpetrator. Rather, in order to determine whether a person is a co-perpetrator, a normative assessment of that person's role is required. In the paragraphs that follow, the Appeals Chamber will address how this assessment should be carried out.

467. The Appeals Chamber recalls that co-perpetration is not the only form of liability recognised by article 25 (3) of the Statute that involves a plurality of individuals. Accordingly, it becomes necessary to distinguish committing a crime "jointly with others" from other forms of liability, notably those laid down in sub-paragraph b) (ordering, soliciting or inducing a crime), sub-paragraph c) (aiding, abetting or otherwise assisting in the commission of the crime) and sub-paragraph d) (in any other way contributing to the commission of a crime by a group of persons acting with a common purpose). The Trial Chamber noted in this regard that the contribution of a co-perpetrator must be of greater significance than that of individuals held responsible under article 25 (3) (c) and (d) of the Statute.[869] Furthermore, the Trial Chamber recalled that acts that are merely a contribution to the commission of the crime are dependent on "whether the perpetrator acts" and are therefore only accessory to the principal act of "committing the crime".[870] This led the

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[867] E. Van Sliedregt, *Individual criminal responsibility in international law* (Oxford University Press, 2012), pages 86; 88; H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes*, (Hart Publishing, 2009), page 119.
[868] *Katanga* Trial Judgment, para. 1391.
[869] Conviction Decision, paras 996-997.
[870] Conviction Decision, para. 998.

Trial Chamber to conclude that the "notion of principal liability […] requires a greater contribution than accessory liability".[871]

468. The Appeals Chamber notes that, in so concluding, the Trial Chamber chose an objective criterion to distinguish commission liability from accessorial liability, as opposed to, for instance, a distinction based on the accused person's mental relationship to the crime in question. In the view of the Appeals Chamber, it is indeed appropriate to distinguish between liability as a perpetrator and as an accessory primarily based on the objective criterion of the accused person's extent of contribution to the crime. This is because the blameworthiness of the person is directly dependent on the extent to which the person actually contributed to the crime in question.

469. In this context, the Appeals Chamber notes that the Pre-Trial and Trial Chambers have relied on the 'control over the crime' theory in order to distinguish those who are considered to have 'committed' the crimes from those who have contributed to crimes of others.[872] They found that a co-perpetrator is one who makes, within the framework of a common plan, an essential contribution with the resulting power to frustrate the commission of the crime.[873] The essential contribution can be made not only at the execution stage of the crime, but also, depending on the circumstances, at its planning or preparation stage, including when the common plan is conceived. At the core of this approach is the assumption that a co-perpetrator may compensate for his or her lack of contribution at the execution stage of the crime if, by virtue of his or her essential contribution, the person nevertheless had control over the crime.[874] The Appeals Chamber considers that this is a convincing and adequate

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[871] Conviction Decision, para. 998.
[872] Decision on the Confirmation of Charges, para. 338; *Katanga and Ngudjolo* Decision on the Confirmation of Charges para. 484; *Katanga* Trial Judgment, para. 1394. *See also* T. Weigend, "Perpetration through an Organization: The Unexpected Career of a German Legal Concept", 9 *Journal of International Criminal Justice* (2011), page 91 at pages 92-93; G. Werle, "Individual Criminal Responsibility in Article 25 ICC Statute", 5 *Journal of International Criminal Justice* (2007), page 953 at pages 962-963; S. Manacorda *et al.*, "Indirect Perpetration Versus Joint Criminal Enterprise", 9(1) *Journal of International Criminal Justice* (2011), page 159 at pages 163-165.
[873] *See also* Decision on the Confirmation of Charges, para. 346 *et seq.*; Conviction Decision, para. 989 *et seq*.
[874] *See* K. Ambos, *Treatise on International Criminal Law* (Oxford University Press, 1st ed., 2013), Vol. I, page 153; R. Maurach *et al*., *Strafrecht Allgemeiner Teil*, *Teilband 2* (C.F. Müller, 8th ed., 2014), paragraph 49, margin numbers 40-43.

approach to distinguish co-perpetration from accessorial liability because it assesses the role of the person in question *vis-à-vis* the crime.

470. As regards the argument that this approach was first developed in domestic legal doctrine,[875] which is, as such, not applicable at the Court,[876] the Appeals Chamber would like to clarify that it is not proposing to apply a particular legal doctrine or theory as a source of law. Rather, it is interpreting and applying article 25 (3) (a) of the Statute. In so doing, the Appeals Chamber considers it appropriate to seek guidance from approaches developed in other jurisdictions in order to reach a coherent and persuasive interpretation of the Court's legal texts. This Court is not administrating justice in a vacuum, but, in applying the law, needs to be aware of and can relate to concepts and ideas found in domestic jurisdictions.

471. In the view of the Appeals Chamber, drawing on ideas developed in domestic jurisdictions and applying a normative approach to co-perpetration does not result in a breach of article 22 of the Statute or the principle of *in dubio pro reo*.[877] In that respect, the Appeals Chamber notes that a normative approach to co-perpetration is well known in international criminal law. Notably, the notion of joint criminal enterprise developed by the *ad hoc* tribunals also uses normative criteria to distinguish co-perpetrators from accessories,[878] although it puts the emphasis on a subjective criterion and not on an objective one.[879]

472. Nevertheless, the Appeals Chamber does not consider that it is legally bound to follow the particular approach of the *ad hoc* tribunals. As set out above, at issue is the interpretation of the terms "commits […] jointly with another". The Appeals Chamber

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[875] In relation to the "control over the crime theory" in Germany *see* C. Roxin, *Täterschaft und Tatherrschaft* (De Gruyter Rechtswissenschaften Verlags-GmbH, 8th ed., Berlin 2006), pages 60-82. *See* Decision on the Confirmation of Charges, para. 30, for references to reliance on this approach in other domestic jurisdictions.

[876] *See* *Ngudjolo* Concurring Opinion of Judge Van den Wyngaert, para. 21; L. N. Sadat and J. M. Jolly, "Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot", 27 *Leiden Journal of International Law* (2014), page 755 at pages 784-785.

[877] *See*, for a different view, *Ngudjolo* Concurring Opinion of Judge Van den Wyngaert, paras 18-20; *see* L. N. Sadat, J. M. Jolly, "Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot", 27 *Leiden Journal of International Law* (2014), page 755 at page 784.

[878] *Brđanin* Appeal Judgment, para. 414; *Kraišnijk* Appeals Judgment, paras 225-226; *Martić* Appeal Judgment, para. 68, referring to *Martić* Trial Judgment, para. 438; *Gotovina* Trial Judgment, para. 1953.

[879] *See* H. Olasolo "The criminal responsibility of senior political and military leaders as principals to international crimes" (Oxford 2009), page 154; J. D. Ohlin *et al.*, "Assessing the Control-Theory", 26 *Leiden Journal of International Law* (2013), page 725 at page 741.

recalls that article 25 (3) of the Statute has a different structure than the relevant provisions of the ICTY and ICTR Statutes and that approaches to the interpretation and application of the latter therefore cannot easily be transposed to the former.[880] The Appeals Chamber finds that the approach adopted by the Trial Chamber better fits the distinction between acts that are considered to be a form of commission and those that are accessory thereto in the context of article 25 (3) of the Statute than the criteria developed by the *ad hoc* tribunals, because the Trial Chamber's approach applies objective criteria to determine whether a person is a perpetrator rather than an accessory and does not rely primarily on subjective criteria.

473. In sum, the Appeals Chamber considers that, in circumstances where a plurality of persons was involved in the commission of crimes under the Statute, the question of whether an accused 'committed' a crime – and therefore not only contributed to the crime committed by someone else – cannot only be answered by reference to how close the accused was to the actual crime and whether he or she directly carried out the incriminated conduct. Rather, what is required is a normative assessment of the role of the accused person in the specific circumstances of the case. The Appeals Chamber considers that the most appropriate tool for conducting such an assessment is an evaluation of whether the accused had control over the crime, by virtue of his or her essential contribution to it and the resulting power to frustrate its commission, even if that essential contribution was not made at the execution stage of the crime. Accordingly, the Appeals Chamber is not convinced by Mr Lubanga's argument that the Trial Chamber erred in its interpretation of article 25 (3) (a) of the Statute and rejects this ground of appeal.

(b) Alleged errors in the Trial Chamber's findings regarding Mr Lubanga's role in the UPC

474. Mr Lubanga submits that the Trial Chamber committed a factual error in grounding its findings regarding his "essential contribution" on irrelevant

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[880] *See* *Ngudjolo* Concurring Opinion of Judge Van den Wyngaert, paras 9-10; S. Manacorda and C. Meloni, "Indirect Perpetration Versus Joint Criminal Enterprise", 9(1) *Journal of International Criminal Justice* (2011), page159 at page 167-168; F. Jessberger and J. Geneuss, "On the Application of a Theory of Indirect Perpetration in *Al Bashir*. German Doctrine at The Hague?", 6 *Journal of International Criminal Justice* (2008), page 853 at page 865.

considerations, namely his leadership and coordinating role within the UPC and his provision of logistical support and supplies.[881]

475. These arguments are premised on Mr Lubanga's argument that, as a matter of law, the "essential contribution" under article 25 (3) (a) must equate to "positive, personal and direct participation in the commission of the crimes charged".[882] The Appeals Chamber has addressed this argument above and found that article 25 (3) (a) does not establish such requirement. Accordingly, Mr Lubanga's arguments as to the irrelevance of his leadership and coordinating role and provision of logistical support and supplies will not be considered further.

476. Second, Mr Lubanga submits that the Trial Chamber erred in "finding that [he] played an essential part in decision-making affecting the army and military operations" (footnote omitted).[883] Mr Lubanga argues that this purportedly erroneous finding stems from the Trial Chamber's reliance on the "inaccurate statements of Witness P-0014" and its dismissal of direct evidence presented by [REDACTED] the UPC/FPLC [REDACTED], including witnesses P-0055 and P-0016.[884]

477. The Prosecutor submits that Mr Lubanga merely disagrees with the Trial Chamber's assessment of the evidence, without explaining why it was erroneous,[885] and that his arguments are based on a misrepresentation and selective reading of the evidence.[886] She underlines that the Trial Chamber's conclusions as to Mr Lubanga's participation in military decisions took into consideration the entirety of the relevant evidence and went far beyond the testimony of witness P-0014.[887] The Prosecutor argues that Mr Lubanga does not identify an error in the Trial Chamber's conclusion as to his effective control over military matters but simply repeats his closing submissions, which were adequately addressed by the Trial Chamber.[888]

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[881] Document in Support of the Appeal, paras 346-349.
[882] Document in Support of the Appeal, para. 347.
[883] Document in Support of the Appeal, para. 350.
[884] Document in Support of the Appeal, paras 351-352.
[885] Response to the Document in Support of the Appeal, para. 281.
[886] Response to the Document in Support of the Appeal, para. 282.
[887] Response to the Document in Support of the Appeal, para. 282 referring to Conviction Decision, paras 1142-1169.
[888] Response to the Document in Support of the Appeal, para. 281 referring to Conviction Decision, paras 1002-1006, 1139, 1221-1222 and Defence Closing Submissions, paras 66-67, 73.

478. In the view of the Appeals Chamber, Mr Lubanga's arguments misrepresent both the conclusions and the evidentiary analysis of the Trial Chamber, as the Trial Chamber did not find that Mr Lubanga "played an essential part in decision-making affecting the army and military operations" (footnote omitted), as alleged by Mr Lubanga.[889] Instead, the Trial Chamber found that Mr Lubanga was "involved" in planning military operations,[890] specifically that he held meetings of a formal and informal nature with military personnel at his residence and that he made decisions on operations.[891] Noting the disputed and contradictory evidence as regards the extent of Mr Lubanga's day-to-day control over military affairs, the Trial Chamber held that "whether or not he was involved in every detail of the military decisions within the UPC/FPLC is not determinative of the essential character of the role performed by the accused in accordance with the common plan".[892] It stated:

> Military leaders dealing with forces on this scale will not be involved in all aspects of the decision-making process. The evidence demonstrates that there was a hierarchy within the army and a functioning structure that would have enabled an appropriate degree of delegation, certainly as regards routine operational decisions. This conclusion does not diminish the extent to which the accused was aware of what was happening within the armed forces or his overall responsibility for, or involvement in, their activities.[893]

479. The Appeals Chamber also notes that Mr Lubanga's involvement in the planning of military operations was but one of several factors concerning his actions and role, which, considered together, led the Trial Chamber to conclude that Mr Lubanga made an essential contribution.[894] Accordingly, his decision-making in military matters was not considered in isolation.

480. The Appeals Chamber also does not find merit in Mr Lubanga's argument that the Trial Chamber wrongly relied on the evidence of witness P-0014 in order to reach its conclusions on his role in decision-making.[895] Regarding this witness' testimony, Mr Lubanga submits that the Trial Chamber wrongly afforded credence to the witness' statements because the witness was not a member of the UPC, was rarely in

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[889] Document in Support of the Appeal, para. 350.
[890] Conviction Decision, para. 1270.
[891] Conviction Decision, para. 1217.
[892] Conviction Decision, para. 1215.
[893] Conviction Decision, para. 1219.
[894] Conviction Decision, para. 1271.
[895] Document in Support of the Appeal, para. 351.

Ituri during the period of the charges and whose information, for the most part "came from scattered sources and not his own personal experience" (footnote omitted).[896] The Appeals Chamber notes that the same arguments were raised at trial and addressed by the Trial Chamber in the Conviction Decision.[897] Mr Lubanga fails to identify an error in either the Trial Chamber's reasoning in support of its general conclusion that witness P-0014 was credible and reliable, or in its reliance on witness P-0014's testimony to support its conclusion that Mr Lubanga was involved in planning military operations. In the latter regard, the Appeals Chamber notes that the witness' testimony as to Mr Lubanga's role in decision making on military operations was, contrary to the submissions of Mr Lubanga, composed of both direct and hearsay evidence.[898]

481. As to Mr Lubanga's submission that the Trial Chamber dismissed conflicting direct evidence presented by [REDACTED] of the "FPLC [REDACTED]",[899] the Appeals Chamber notes that the Trial Chamber took full account of the conflicting testimony of a number of witnesses. It considered witness P-0016's statement that Mr Lubanga was not involved in planning military operations because he was not a soldier and concluded that this aspect of witness P-0016's testimony was "at least in part, inconsistent and […] difficult to follow".[900] The Trial Chamber further found that this evidence "was improbable when compared with other witnesses on this issue, whose evidence the Chamber ha[d] accepted".[901] It also considered evidence from witnesses P-0012 and P-0038 that, although on 5 March 2003 Mr Lubanga "had indicated that he did not want the FPLC to attack the UPDF forces, his view had not prevailed" (footnote omitted).[902] The Trial Chamber concluded that it was impossible to determine on the basis of this evidence whether Mr Lubanga was overruled or persuaded by his staff that the battle should take place.[903] The Trial Chamber found

[896] Document in Support of the Appeal, para. 351.
[897] *See* Defence Closing Submissions, paras 562-569; Conviction Decision, paras 699,702, 706.
[898] Conviction Decision, paras 1145-1146, 1154.
[899] Document in Support of the Appeal, para. 352.
[900] Conviction Decision, para. 1150.
[901] Conviction Decision, para. 1150.
[902] Conviction Decision, para. 1157.
[903] Conviction Decision, para. 1158.

that the testimony of these witnesses showed that Mr Lubanga was "centrally involved in these discussions and was consulted on relevant military decisions".[904]

482. The Trial Chamber also considered the testimony of a number of witnesses, in addition to witness P-0014, in reaching its conclusion that Mr Lubanga was involved in planning military operations. They included witness P-0055, who was appointed a high-ranking official within the UPC/FPLC in 2002 and who, contrary to Mr Lubanga's assertions,[905] testified as to Mr Lubanga's involvement in planning military operations,[906] and witness P-0017, a member of the UPC between 2002 and 2003 and the leader of one of the UPC sections in 2003, who testified regarding his brigade commander's visit to Mr Lubanga, which resulted in military orders being given.[907] The Trial Chamber also noted a decree appointing a new UPC executive on 11 December 2002, according to which Mr Lubanga retained the defence and security portfolios for himself.[908]

483. Accordingly, the Appeals Chamber considers that Mr Lubanga has not identified an error in the Trial Chamber's assessment of the evidence, including that of witness P-0016, for its finding that he was involved in planning military operations.

484. Third, Mr Lubanga argues that the Trial Chamber erred in finding that he "exercised effective control, within a hierarchical structure, over the entirety of the organisation of which he was the president" (footnote omitted).[909] The Appeals Chamber will not consider this alleged error because Mr Lubanga does not substantiate this allegation by reference to the Conviction Decision, but merely to his Closing Submissions.[910]

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[904] Conviction Decision, para. 1158.
[905] Document in Support of the Appeal, para. 352.
[906] Conviction Decision, paras 670, 1151, referring to ICC-01/04-01/06-T-175-CONF-ENG, page 10, lines 1-13, 24 to page 11, line 8, with public redacted version, ICC-01/04-01/06-T-175-Red3-ENG; ICC-01/04-01/06-T-178-CONF-ENG, page 29, line 2 to page 31, line 19, with public redacted version, ICC-01/04-01/06-T-178-Red3-ENG.
[907] Conviction Decision, paras 677, 1152, referring to ICC-01/04-01/06-T-158-CONF-ENG, page 14, line 3 to page 17, line 1, with public redacted version, ICC-01/04-01/06-T-158-Red2-ENG.
[908] Conviction Decision, para. 1147.
[909] Document in Support of the Appeal, para. 353.
[910] *See supra* para. 33.

(c) Alleged errors in the Trial Chamber's findings regarding Mr Lubanga's essential contribution

(i) Background

485. Mr Lubanga submits that the Trial Chamber committed a number of factual errors in analysing his "individual contribution" to the commission of the crimes charged.[911]

486. First, Mr Lubanga argues that the Trial Chamber erred in grounding its finding that he was personally involved in the recruitment process on the statements of witnesses P-0055, P-0046 and D-0011.[912] He contends that "no trier of fact could reasonably rely on this evidence to conclude that [he] was personally involved in the exercise of recruitment and thereby made an 'essential contribution' to the crimes charged".[913] In response, the Prosecutor submits that the Trial Chamber did not rely on the evidence of witnesses P-0055 and P-0046 to determine that Mr Lubanga was "personally and directly involved in the recruitment of child soldiers".[914] Rather, this evidence was relied upon to conclude that Mr Lubanga was actively involved in the exercise of finding recruits, "*without reference to their ages*" (emphasis added, footnote omitted).[915]

487. Second, Mr Lubanga submits that the Trial Chamber made a "manifest misappraisal analogous to an error of fact by finding that [his] visits to the training camps, whether or not they were accompanied by speeches, constitute an 'essential contribution' to the commission of the crimes charged" (footnotes omitted).[916] Mr Lubanga notes that the Trial Chamber described his visits and speeches to recruits and the civilian population "as encouragement or exhortations rather than as positive recruitment activities" and argues that "such acts only fall within the ambit of article 25(3)(b) and do not correspond to the concept of 'commission' under article 25(3)(a)" (emphasis omitted, footnote omitted).[917] He submits that, "if established, these visits and speeches could have had only a negligible effect *a posteriori* on the enlistment of

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[911] Document in Support of the Appeal, para. 356.
[912] Document in Support of the Appeal, paras 357- 370.
[913] Document in Support of the Appeal, para. 369.
[914] Response to the Document in Support of the Appeal, para. 286.
[915] Response to the Document in Support of the Appeal, para. 286, referring to Conviction Decision, paras 1226, 1231, 1234.
[916] Document in Support of the Appeal, para. 371, referring to Conviction Decision, paras 1236-1246, 1266.
[917] Document in Support of the Appeal, para. 373, referring to Conviction Decision, paras 1266, 1270.

recruits; they can in no wise [*sic*] constitute an 'essential contribution' to the crime, that is, a contribution absent which the crime could not have been committed" (footnote omitted).[918] The Prosecutor responds that the Trial Chamber did not find that this contribution, taken alone, would have resulted in the commission of the crime charged,[919] but rather looked at the totality of the evidence related to Mr Lubanga's actions to determine whether he made an essential contribution to the crimes.[920]

(ii) Determination by the Appeals Chamber

488. The Appeals Chamber finds that Mr Lubanga's first set of submissions does not accurately reflect the conclusions of the Trial Chamber, which addressed the question of whether Mr Lubanga's role and activities amounted cumulatively to an essential contribution, as required for co-perpetration.[921] The Trial Chamber did not rely on any one of these activities in isolation to establish that Mr Lubanga made such an essential contribution. In analysing the significance of the speech given by Mr Lubanga at the Rwampara training camp, the Trial Chamber emphasised the cumulative nature of its assessment in the following terms:

> The essential nature of his contribution to the common plan is not established by the discrete and undisputed fact that he visited the Rwampara camp, but instead it is founded on the entirety of the evidence relating to the contribution he made as the highest-ranking official within the UPC.[922]

489. The Trial Chamber's conclusion that the implementation of the common plan would not have been possible without Mr Lubanga's contribution was based on its findings as to his "role […] within the UPC/FPLC and the hierarchical relationship with the other co-perpetrators, viewed in combination with the activities he carried out personally in support of the common plan, as demonstrated by the rallies and visits to recruits and troops […]".[923] The Trial Chamber took into consideration: (i) his ability "to shape the policies of the UPC/FPLC and to direct the activities of his

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[918] Document in Support of the Appeal, para. 373, referring to Decision on the Confirmation of Charges, para. 347, cited in the Conviction Decision, para. 989.
[919] Response to the Document in Support of the Appeal, paras 266, 287.
[920] Response to the Document in Support of the Appeal, para. 287, referring to Conviction Decision, para. 1267.
[921] *See supra* para. 473.
[922] Conviction Decision, para. 1267, referring to Defence Response to Prosecution's Reply, paras 46-47.
[923] Conviction Decision, para. 1270.

alleged co-perpetrators" "by virtue of his position as President and Commander-in-Chief from September 2002 onwards"; (ii) the established reporting structures, the lines of communication within the UPC/FPLC, and the meetings and close contact between Mr Lubanga and at least some of the alleged co-perpetrators, supporting the conclusion that he was kept fully informed throughout the relevant period and issued instructions relating to the implementation of the common plan; (iii) the personal assistance he provided in the military affairs of the UPC/FPLC in terms of planning military operations and providing logistical support by ensuring weapons, ammunition, food, uniforms and military rations and other supplies were available for the troops; (iv) the fact that he and other commanders were protected by guards, some of whom were under the age of fifteen years.[924]

490. This finding confirms that the Trial Chamber considered all elements cumulatively and that the "activities he carried out personally" are only one of many factors considered in coming to the conclusion that Mr Lubanga made an essential contribution to the recruitment and use of children under the age of fifteen years.

491. In alleging specific errors with respect to the Trial Chamber's evaluation of the testimonies of witnesses P-0055, P-0046 and D-0011, Mr Lubanga argues that the Trial Chamber found that he was personally involved in recruitment activities.[925] However, the Trial Chamber's overall conclusion, as just set out, does not contain such a finding. To the contrary, the Trial Chamber concluded that "[t]he fact that other co-perpetrators, such as Floribert Kisembo and Bosco Ntaganda, were more involved with the day-to-day recruitment and training of soldiers, including those under the age of 15, does not undermine the conclusion that Mr Lubanga's role was essential to the implementation of the common plan" (footnote omitted).[926]

492. The Trial Chamber, however, did make findings with respect to Mr Lubanga's involvement in acts of recruitment. It ultimately found that he "was well-informed on military matters and […] endorsed the recruitment initiatives".[927] It based its conclusion in this regard on (i) witness P-0055's testimony that Mr Lubanga had stated that "he frequently tried to convince the population to provide food and make

[924] Conviction Decision, para. 1270.
[925] Document in Support of the Appeal, paras 357- 370.
[926] Conviction Decision, para. 1270.
[927] Conviction Decision, para. 1266.

young people available to join, and to train with, the UPC army"; (ii) evidence of his visits to the training camps where he encouraged the recruits, including children under the age of fifteen years; (iii) evidence that he "made speeches at public rallies, in order to motivate the population to support the war effort"; and (iv) evidence that he gave orders on military affairs (footnotes omitted).[928]

493. As regards the evidence of witness P-0055, Mr Lubanga argues that the witness merely stated that he had heard Mr Lubanga say that "*they* were often trying to convince people to make youngsters available and to provide food, but they didn't want to" (emphasis added, footnote omitted).[929] He contends that this statement does not show that he was personally involved in recruitment.[930] He further submits that, even if it were established that he "had been involved in encouraging the civilian population to support the armed forces intended to defend them, this cannot be equated to personal involvement in the recruitment operations themselves".[931]

494. As indicated above, the Trial Chamber relied on the statement of witness P-0055 only for the purposes of establishing that Mr Lubanga endorsed the recruitment initiatives.[932] For the Trial Chamber, the central factor was Mr Lubanga's support for the "continued recruitment, training and deployment of soldiers of all ages".[933] The Appeals Chamber can find no error in the weight and significance the Trial Chamber attached to this evidence.

495. As regards Mr Lubanga's argument that the Trial Chamber relied on the account of witness P-0046 "concerning the child abducted in Mongbwalu",[934] the Trial Chamber evaluated the testimony of that witness and concluded that "[it] ha[d] not relied on this evidence to establish that Mr Lubanga personally recruited children under the age of 15".[935] The Appeals Chamber notes that at paragraph 1234 of the Conviction Decision, the Trial Chamber stated:

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[928] Conviction Decision, para. 1266.
[929] Document in Support of the Appeal, para. 360.
[930] Document in Support of the Appeal, para. 361.
[931] Document in Support of the Appeal, para. 361.
[932] Conviction Decision, para. 1266.
[933] Conviction Decision, para. 1269.
[934] Document in Support of the Appeal, para. 362.
[935] Conviction Decision, para. 1231.

> Based on the evidence of P-0055 and the account of P-0046 concerning the child abducted in Mongbwalu, the Chamber is persuaded [that] Thomas Lubanga was actively involved in the exercise of finding recruits. The Chamber cannot determine, however, whether [Mr Lubanga] was directly and personally involved in recruitment relating to individual children below the age of 15. [Footnote omitted.][936]

496. Thus, the Trial Chamber made a finding that he was "actively involved in the exercise of finding recruits", but not that he was responsible for the child abducted in Mongbwalu. Accordingly, the Appeals Chamber dismisses Mr Lubanga's argument in this regard.

497. As to Mr Lubanga's argument in relation to witness D-0011, the Appeals Chamber recalls that the above-cited paragraph of the Conviction Decision continued as follows:

> That said, it is sure that Thomas Lubanga was informed about these activities, for example as a result of his meetings with the G5 responsible for recruitment. The evidence establishes that he not only condoned the recruitment policy, but he also played an active part in its implementation, and he approved the recruitment of children below the age of 15. The statement of his personal secretary, D-0011 that in February 2003 the accused would have had an interest in mobilising troops, rather than demobilising them, supports the conclusion that the accused was informed about, and actively influenced, the decision on recruitment.[937]

498. The Appeals Chamber notes that witness D-0011's testimony was used to further support a finding that was made on the basis of other evidence, namely that of witnesses P-0055 and P-0046. The Appeals Chamber does not consider it unreasonable for the Trial Chamber to have relied on D-0011's testimony in this way in these circumstances.

499. In view of the foregoing, the Appeals Chamber considers that Mr Lubanga has failed to identify any error in the Trial Chamber's reasoning or conclusion that he made an essential contribution as required by co-perpetration.[938] Accordingly, his arguments must be rejected.

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[936] Conviction Decision, para. 1234.
[937] Conviction Decision, para. 1234.
[938] *See supra* para. 473.

3. Alleged errors in relation to the mental element

(a) Introduction

500. Mr Lubanga alleges one legal and several factual errors in relation to the Trial Chamber's findings on Mr Lubanga's mental element. The alleged legal error relates to the Trial Chamber's reference to the notion of "risk"[939] and raises, in essence, the same issues as the alleged legal error in relation to the common plan. The Appeals Chamber has discussed and rejected Mr Lubanga's arguments in respect of the latter elsewhere in this judgment.[940] For the same reasons, the alleged legal error is also rejected to the extent that it relates to the mental element.

501. Mr Lubanga alleges under the heading "errors of fact" several additional errors in the Trial Chamber's findings regarding the mental element in relation to each of the crimes for which he was convicted – enlistment, conscription and use to participate actively in hostilities.[941] The Appeals Chamber notes that these alleged errors, in many respects, are similar to the "factual errors" Mr Lubanga has raised in relation to the common plan,[942] except that they focus on the mental element.

502. Below, the various alleged errors as to whether Mr Lubanga had the required mental element for the enlistment, conscription and use of individuals under the age of fifteen years are discussed. The alleged errors relevant to the crime of enlistment are divided in two parts. Mr Lubanga alleges, on the one hand, that he was not aware of the enlistment of individuals under the age of fifteen years,[943] and on the other hand that he had the genuine intent to prohibit their enlistment and arrange for their demobilisation.[944] The errors are addressed in this order.

(b) Alleged errors in the findings relevant to Mr Lubanga's awareness of the enlistment of individuals under the age of fifteen years

503. Mr Lubanga argues that, even if individuals under the age of fifteen years were recruited, there was no evidence to establish that he was "personally aware" of their

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[939] Document in Support of the Appeal, paras 380-385.
[940] *See supra*, paras 441-452.
[941] Document in Support of the Appeal, paras 386-418.
[942] *See supra* para. 441 *et seq.*
[943] Document in Support of the Appeal, paras 388-395.
[944] Document in Support of the Appeal, paras 396-411.

presence.[945] He reiterates that age evaluation based on the physical appearance of individuals is unreliable and submits that the Trial Chamber should have concluded that there was a reasonable doubt as to whether he was aware of the presence of children under the age of fifteen years.[946]

504. With respect to Mr Lubanga's arguments relevant to age assessment based on physical appearance, the Appeals Chamber has already addressed these submissions and found them unpersuasive.[947] Therefore, it will not consider this alleged error any further.

505. Mr Lubanga argues that it cannot be "held that the act of creating an armed force and using it in an armed conflict will of itself have the 'virtually certain consequence' of the enlistment of children under the age of 15 years; this proposition requires the demonstration of specific circumstances".[948] The Appeals Chamber notes that it has addressed and dismissed this and similar arguments in the context of Mr Lubanga's arguments in relation to the "common plan".[949] Therefore, there is no need to address this argument any further.

506. Mr Lubanga avers in addition that the Trial Chamber "did not rely on any evidence establishing the existence of specific circumstances *known to [him]* as a result of which, 'in the ordinary course of events', the military recruitment operations carried out would necessarily lead to the enlistment of children under the age of 15 years" (emphasis added).[950] The Prosecutor submits that the Trial Chamber's conclusion that Mr Lubanga knew that children under the age of fifteen years were being enlisted and would be enlisted as a result of implementation of the common plan was based on numerous factual findings and a significant amount of evidence.[951]

507. The Appeals Chamber considers that, as argued by the Prosecutor, the Trial Chamber's findings relevant to Mr Lubanga's knowledge that the common plan led, in the ordinary course of events, to the enlistment of individuals under the age of

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[945] Document in Support of the Appeal, para. 389.
[946] Document in Support of the Appeal, para. 389.
[947] *See supra* paras 194-248.
[948] Document in Support of the Appeal, para. 391.
[949] *See supra* paras 450-451.
[950] Document in Support of the Appeal, para. 392.
[951] Response to the Document in Support of the Appeal, para. 301.

fifteen years are based on a combination of several findings set out in paragraphs 1277 and 1278 of the Conviction Decision. The Appeals Chamber finds that, beyond disagreeing with the Trial Chamber, Mr Lubanga does not substantiate why these findings were erroneous.

508. Mr Lubanga contends more specifically that, even if proven, his involvement in "persuading the population to make 'young people' available to the army" and his "close relations with the military leaders involved in the enlistment and training of recruits", do not show that "he personally encouraged the enlistment of children under the age of 15 years" (footnote omitted).[952] The Appeals Chamber considers that this argument is premised on a misunderstanding of the Conviction Decision. The Trial Chamber did not rely on the factual findings in question to support the conclusion that Mr Lubanga "personally encouraged" the enlistment of such children, nor was it necessary for it to make such a finding. The findings to which Mr Lubanga refers were merely two of several factors used to support the conclusion that Mr Lubanga was aware that children under the age of fifteen years were being recruited and used by the UPC/FPLC.

509. In addition, Mr Lubanga points to evidence of measures taken to combat the enlistment of children under the age of fifteen years and argues that the enlistment of such children "could only have resulted from specific, deliberate actions committed in violation of the orders issued by [him]".[953] His more detailed submissions in that regard are discussed in the next section, dealing with demobilisation measures.

510. Finally, the Appeals Chamber notes that one of the factual findings on which the Trial Chamber relied was that Mr Lubanga frequently tried to convince the population to provide food and to make youngsters available in order to join, and to train with, the army of the UPC/FPLC.[954] The Appeals Chamber notes Mr Lubanga's arguments raised elsewhere[955] that, contrary to the findings of the Trial Chamber, witness P-0055 actually quoted Mr Lubanga as having said that *they* were trying to convince the population to provide food and to make youngsters available, not that *Mr Lubanga* was trying to do so. However, for the purpose of establishing Mr Lubanga's

[952] Document in Support of the Appeal, para. 393.
[953] Document in Support of the Appeal, paras 394-395.
[954] Conviction Decision, para. 1277.
[955] Document in Support of the Appeal, para. 360.

knowledge of the recruitment and use of children under the age of fifteen years, the Appeals Chamber considers it irrelevant, given the context in which the words were uttered, whether Mr Lubanga was referring to the UPC/FPLC generally or to himself personally.

511. As Mr Lubanga has failed to identify any error in the reasoning of the Trial Chamber in this regard, his arguments are rejected.

(c) Alleged error relevant to Mr Lubanga's genuine intention to prohibit the enlistment of minors and arrange for their demobilisation

(i) Background

512. It appears that Mr Lubanga issued the first demobilisation order on 21 October 2002 (EVD-OTP-00696), that Mr Kisembo issued a further order on 30 October 2002 (EVD-D01-01096) and that Mr Lubanga issued a final order on 1 June 2003 (EVD-OTP-00728). Mr Lubanga argues that these orders were further supported by a request for a report on the demobilisation of children that he apparently issued on 27 January 2003 (EVD-OTP-00697), a report referring to the instructions of 21 October 2002 and 27 January 2003 drawn up on 16 February 2003 (EVD-D01-01097) and a letter dated 12 February 2003 from the UPC/FPLC's national secretary for education, referring to a demobilisation programme for children (EVD-OTP-00518).[956]

513. Mr Lubanga submits that the Trial Chamber erred in finding that evidence of ordered and implemented measures to prohibit the enlistment of minors and to arrange their demobilisation did not establish his "genuine intention to obstruct or end the crimes charged".[957] He advances several arguments in support of this submission.

514. Mr Lubanga argues that the "proposition that these prohibition and demobilisation measures were imposed in response to pressure from MONUC and NGOs is irrelevant; whether or not it is founded, it is insufficient to deny the genuineness of the measures".[958] Mr Lubanga further contends that only two of the nine documents testifying to the prohibition or demobilisation of minors were made public when they were prepared; the others remained confidential until adduced at

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[956] Document in Support of the Appeal, *see e.g.* para. 399.
[957] Document in Support of the Appeal, para. 396.
[958] Document in Support of the Appeal, para. 398.

trial.[959] Mr Lubanga asserts that these confidential documents "can only be explained by his genuine desire to ensure that this demobilisation was implemented".[960]

515. In addition, Mr Lubanga argues that the Trial Chamber's finding that the effective implementation of the demobilisation orders had not been demonstrated does not accurately reflect the evidence.[961] In this regard he refers to (i) the evidence of witnesses D-0011, D-0019 and D-0007, who described the demobilisation programme in detail; (ii) the evidence of witnesses P-0046, P-0024, P-0041 and P-0031, who acknowledged that demobilisation measures had indeed been undertaken; and (iii) documentary evidence confirming the effective demobilisation of minors.[962] Mr Lubanga further contends that the Trial Chamber wrongly neglected essential evidence demonstrating the absence of any criminal intent, as it drew no positive conclusions from the report prepared on 16 June 2003 by witness D-0037 and the report of the meeting of 25 February 2003.[963] In his submission, both of these documents unequivocally demonstrate his desire to demobilise minors.[964]

516. Finally, Mr Lubanga argues that the continued enlistment of children under the age of fifteen years, the UPC/FPLC's lack of cooperation with demobilisation NGOs and threats directed at human rights workers involved in children's rights are insufficient to deny his genuine intent to demobilise.[965] He submits that the Trial Chamber erred in assessing his intention on the basis of the behaviour of others, without establishing that they were acting under his orders.[966] He also argues that the prevailing circumstances and conditions in which he operated explain why measures he ordered were not fully implemented or consciously disregarded, referring in that regard to the statements of witnesses P-0055, D-0011 and D-0019 that describe the circumstances under which enlistment took place.[967] Mr Lubanga submits that his visit to the Rwampara training camp cannot support the conclusion that he approved

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[959] Document in Support of the Appeal, para. 399.
[960] Document in Support of the Appeal, para. 399.
[961] Document in Support of the Appeal, para. 401.
[962] Document in Support of the Appeal, para. 401, referring to EVD-D01-1096 (demobilisation order dated 30 October 2002), EVD-D01-1097 (letter dated 16 February 2003) and EVD-D01-1098 (minutes of a meeting held on 16 June 2003), page DRC-D01-0003-5902.
[963] Document in Support of the Appeal, para. 400.
[964] Document in Support of the Appeal, para. 400.
[965] Document in Support of the Appeal, para. 404.
[966] Document in Support of the Appeal, para. 405.
[967] Document in Support of the Appeal, paras 406-407.

of the enlistment of children under the age of fifteen years.[968] He argues that (i) it has not been established beyond reasonable doubt that children under the age of fifteen years were present among the recruits during that visit; and (ii) his speech contained no praise or approval of the military commanders present.[969]

517. The Prosecutor responds that Mr Lubanga's arguments were thoroughly reviewed and rejected in the Conviction Decision.[970] She submits that Mr Lubanga merely disagrees with the Trial Chamber's conclusions and seeks to re-argue the same matters, without indicating any error in the Trial Chamber's findings.[971] In addition, the Prosecutor argues that the Trial Chamber's "findings in relation to demobilisation and [Mr Lubanga's] knowledge and intent are both reasonable and grounded in a large and solid evidentiary basis" (footnote omitted).[972]

(ii) Determination by the Appeals Chamber

518. The Appeals Chamber finds that Mr Lubanga's first two arguments are partly based on a misconception of the Conviction Decision. The Trial Chamber discussed the question of the confidentiality or publicity of demobilisation orders primarily with regard to the orders of 21 and 30 October 2002 (EVD-OTP-00696 and EVD-D01-01096) and the order of 1 June 2003 (EVD-OTP-00728). It found that these were made public at the time via the media.[973] It did not make a finding that any of the other documents were made public or that the decision to make these documents public shows that they were a "sham". Similarly, although the Trial Chamber gave extensive consideration to the pressure exerted by MONUC and NGOs on the UPC/FPLC with respect to demobilisation, it did not find, on this basis alone, that the demobilisation measures were insincere or deliberately ineffective. The Appeals Chamber, therefore, finds that Mr Lubanga's arguments neither relate to a relevant finding of the Trial Chamber nor do they show any error in its reasoning.

519. The Appeals Chamber is also not persuaded by Mr Lubanga's argument that the evidentiary analysis of the Trial Chamber was erroneous. In this regard, the Appeals

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[968] Document in Support of the Appeal, para. 409.
[969] Document in Support of the Appeal, paras 410-411.
[970] Response to the Document in Support of the Appeal, para. 305 referring to Conviction Decision, paras 1280-1348.
[971] Response to the Document in Support of the Appeal, para. 305.
[972] Response to the Document in Support of the Appeal, para. 306.
[973] Conviction Decision, paras 1303, 1315, 1320.

Chamber notes that, contrary to Mr Lubanga's submissions, in its analysis as to whether the demobilisation orders were implemented, the Trial Chamber addressed the demobilisation order of 30 October 2002, the letter of 16 February 2003, and the report prepared on 16 June 2003 by witness D-0037.[974] In reaching its conclusion that the effective implementation of the demobilisation orders had not been demonstrated, the Trial Chamber also assessed the testimony of witnesses D-0011, D-0019 and P-0041 who described the UPC/FPLC's demobilisation initiatives,[975] as well as that of witnesses P-0024 and P-0046, who described their respective organisations' experiences of dealing with the UPC/FPLC on the issue of demobilisation of individuals under the age of eighteen years.[976] The Appeals Chamber notes that the Trial Chamber did not exclude that a number of such individuals were demobilised during this time, but found that "whether or not the demobilisation orders were implemented for some of the children under the age of 15, others were simultaneously recruited, re-recruited and used by the FPLC throughout the timeframe of the charges".[977] The Appeals Chamber further notes in this regard that Mr Lubanga himself acknowledges that one of the documents in question states that in June 2003 there were still a "few child soldiers seen around town".[978] Further, while the Trial Chamber did not refer to the report of the meeting of 25 February 2003, it explained that it did not discuss this evidence because it referred to the position of the self-defence forces, which it had found to be independent of the UPC/FPLC.[979] Mr Lubanga does not explain why the approach of the Trial Chamber to this evidence was erroneous or why the documents to which he refers should have been given more weight than the evidence on which the Trial Chamber ultimately relied.

520. Furthermore, the Appeals Chamber notes that the Trial Chamber found that the account of witnesses D-0011 and D-0019 regarding Mr Lubanga's "approach to child soldiers, particularly within the UPC/FPLC" generally lacked credibility.[980] It rejected witness D-0019's evaluation of the nature and the underlying purpose of the demobilisation orders, "given the wealth of evidence demonstrating that recruitment

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[974] Conviction Decision, paras 1295, 1331.
[975] Conviction Decision, paras 1293-1294, 1296-1299, 1304, 1313-1314, 1331-1332.
[976] Conviction Decision, paras 1284, 1287, 1325-1327.
[977] Conviction Decision, para. 1346.
[978] Document in Support of the Appeal, para. 401, footnote 477.
[979] Conviction Decision, para. 1345.
[980] Conviction Decision, para. 1282. *See also* paras 724, 730, 1232, 1299.

continued unabated" despite these orders.[981] The Trial Chamber further found that "[g]iven D-0011's general lack of credibility on the recruitment and use of child soldiers […], the Chamber has disregarded his testimony on the implementation of the demobilisation decree".[982] Mr Lubanga does not substantiate an error in respect of the Trial Chamber's findings regarding the credibility of these witnesses, but argues, by reference to ICTR jurisprudence, that it is "insufficient to disregard" these statements "without setting out the exact factors intrinsically affecting their credibility".[983] The Appeals Chamber notes that the Trial Chamber discussed the credibility of these specific witnesses in a separate section of the Conviction Decision.[984] The Appeals Chamber therefore finds that Mr Lubanga should have substantiated his argument by reference to the Trial Chamber's findings on the credibility of these witnesses.

521. Mr Lubanga argues that the testimony of witness P-0031 that 68 children were demobilised in June 2003 is not reflected in the Trial Chamber's finding that the effective implementation of the demobilisation orders had not been demonstrated.[985] However, the Appeals Chamber notes that the witness went on to say that this demobilisation was staged and that the same children were subsequently enrolled into the UPC again.[986] Considering, in addition, that the Trial Chamber decided to treat the testimony of witness P-0031, an intermediary of the Prosecutor, with particular care,[987] the Appeals Chamber finds no error in the Trial Chamber's approach to his testimony.

522. In the context of this argument, Mr Lubanga also asserts that "the Trial Chamber itself recognised that the demobilisation orders issued by [him] had been followed" and that it could not then find that the demobilisation measures were not effectively implemented without contradicting itself.[988] The Appeals Chamber notes that this statement was made in the section of the Conviction Decision relating to the essential role played by Mr Lubanga in the UPC/FPLC, but was not relied upon for

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[981] Conviction Decision, para. 1299.
[982] Conviction Decision, para. 1332. *See also* paras 744-747.
[983] Document in Support of the Appeal, para. 402, by reference to the *Muvunyi* Appeal Judgment, paras 146-147.
[984] Conviction Decision, paras 728-730 (witness D-0019), 719-724 (witness D-0011).
[985] Document in Support of the Appeal, footnote 476.
[986] Transcript of 26 June 2009, ICC-01/04-01/06-T-200-CONF-ENG, page 34, line 10 to page 37, line 13, with public redacted version, ICC-01/04-01/06-T-200-Red2-ENG.
[987] Conviction Decision, para. 477.
[988] Document in Support of the Appeal, para. 403.

the purposes of the overall conclusions of that section.[989] The Trial Chamber subsequently indicated that "the effective implementation of the [demobilisation orders] has not been demonstrated, even on a *prima facie* basis",[990] and concluded that they were either not followed or only to a limited extent.[991] The Trial Chamber also found in its later discussion of these orders that "[w]ithin a functioning military hierarchy, it is necessary that orders are complied with", but that the circumstances of this case "tend to undermine the suggestion that demobilisation, as ordered by [Mr Lubanga], was meant to be implemented".[992] It is apparent from the foregoing that the Trial Chamber considered that the demobilisation orders were not genuinely intended and accordingly, following these orders would not result in their implementation. Therefore, the Appeals Chamber is satisfied that there is no material contradiction between the Trial Chamber's findings in these two sections.

523. Regarding Mr Lubanga's argument that the Trial Chamber erred in assessing his intention on the basis of the behaviour of others, the Appeals Chamber notes that the Trial Chamber did not base itself only on the fact that recruitment continued throughout this period, the lack of cooperation on the part of the UPC/FPLC with the NGOs working within the field of demobilisation, and the threats directed at human rights workers.[993] It also noted that Mr Lubanga: (i) used children under the age of fifteen years in the Presidential Protection Unit; (ii) was aware that children under the age of fifteen years were in the personal escorts of other commanders; and (iii) gave speeches and attended rallies where enlisted and conscripted children under the age of fifteen years were present.[994] In this regard, the Trial Chamber referred to the video excerpt filmed on 12 February 2003 of Mr Lubanga giving a morale boosting speech to recruits at the Rwampara camp, some of whom were clearly under the age of fifteen years.[995]

524. As previously set out in the present judgment, the Appeals Chamber does not find an error in the Trial Chamber's assessment of the ages of the individuals

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[989] Conviction Decision, para. 1218.
[990] Conviction Decision, para. 1321.
[991] Conviction Decision, paras 1346-1348.
[992] Conviction Decision, para. 1348.
[993] Conviction Decision, paras 1346, 1348.
[994] Conviction Decision, para. 1348.
[995] Conviction Decision, para. 1348.

appearing on this video excerpt.[996] While the speech at the Rwampara camp did not contain praise or approval of the military commanders present, it encouraged those present who had joined the UPC/FPLC to do what was requested of them as soldiers and the Appeals Chamber can find no error in the Trial Chamber's conclusion that this video excerpt, as well as the other factors considered by the Trial Chamber, "contain[…] compelling evidence as to [Mr] Lubanga's awareness of, and his attitude towards, the enduring presence of children under the age of 15 in the UCP".[997]

(iii) Conclusion

525. In conclusion, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to reject Mr Lubanga's argument that his demobilisation efforts demonstrate that he did not have the requisite mental element. Accordingly, Mr Lubanga's arguments are rejected.

(d) Alleged error in the finding that Mr Lubanga had the required mental element for the crime of conscription

526. Mr Lubanga alleges that there is no evidence showing that Mr Lubanga was aware that the crime of conscription was committed or that he encouraged or approved this crime.[998] He also argues that the Trial Chamber did not specify "which evidence or considerations" it relied upon to come to the conclusion that the crime of conscription would have been, in the ordinary course of events, the consequence of implementing the common plan.[999]

527. The Appeals Chamber notes that paragraphs 1277 and 1278 of the Conviction Decision, which contain the factual findings relevant to Mr Lubanga's mental element, focus on the recruitment strategy of the UPC/FPLC and do not explicitly incorporate any of the incidents in which actual force or threat of force was used to recruit individuals under the age of fifteen years. Nevertheless, the Appeals Chamber considers that the Trial Chamber's findings at paragraphs 1277 and 1278 of the Conviction Decision show that it was convinced that Mr Lubanga was aware of the circumstances prevailing in Ituri in the period of the charges and, for instance, "was in contact with the senior UPC staff, many of whom were significantly involved in

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[996] *See supra* paras 216-223.
[997] *See* Conviction Decision, para. 1348.
[998] Document in Support of the Appeal, para. 413.
[999] Document in Support of the Appeal, paras 414-417.

conscripting, enlisting, using and training of child soldiers".[1000] This also relates to certain findings in the Conviction Decision relevant to the recruitments carried out, such as those referred to above in paragraphs 289 to 291. On that basis, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to conclude that Mr Lubanga had "intent and knowledge with respect to the crimes with which he [was] charged".[1001] Accordingly, Mr Lubanga's arguments are rejected.

4. Alleged error in the finding in relation to the mental element for the crime of using individuals under the age of fifteen years to actively participate in armed hostilities

528. Mr Lubanga submits that the same arguments as those made in relation to his mental element for the crimes of enlistment and conscription apply to the crime of using individuals under the age of fifteen years to participate actively in hostilities.[1002] The Appeals Chamber notes that it has rejected all these alleged factual errors and therefore, absent any additional arguments, Mr Lubanga's submissions are rejected.

[1000] Conviction Decision, para. 1277.
[1001] Conviction Decision, para. 1279.
[1002] Document in Support of the Appeal, para. 418.

X. APPROPRIATE RELIEF

529. In conclusion, the Appeals Chamber does not find, as provided for in article 83 (2) of the Statute that "the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence was materially affected by an error of fact or law or procedural error". Accordingly, in the present case it is appropriate to reject the appeal against the Conviction Decision and to confirm Mr Lubanga's conviction of having committed jointly with others the crimes of conscripting and enlisting children under the age of fifteen years into the UPC/FPLC and using them to participate actively in hostilities in Ituri, Democratic Republic of the Congo, between early September 2002 and 13 August 2003, in the context of a non-international armed conflict.

Judge Sang-Hyun Song appends a partly dissenting opinion to this judgment. Judge Anita Ušacka appends a dissenting opinion to this judgment.

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

Judge Erkki Kourula
Presiding Judge

Dated this 1st day of December 2014
At The Hague, The Netherlands