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Date: **7 February 2013**

THE APPEALS CHAMBER

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

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

Public Redacted Version

Corrigendum

Consolidated observations of the V02 team of Legal Representatives of Victims on the Defence and Prosecution appeals against the judgment and sentence pursuant to articles 74 and 76 of the Rome Statute

Source: V02 team of Legal Representatives of Victims

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

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CORRIGENDUM

Consolidated observations of the V02 team of Legal Representatives of Victims on the Defence and Prosecution appeals against the judgment and sentence pursuant to articles 74 and 76 of the Rome Statute

I – Procedural background

1. On 14 March 2012, Trial Chamber I issued its judgment pursuant to article 74 of the Rome Statute, thereby permanently closing trial proceedings on the responsibility of the Accused.¹
2. On 10 July 2012, Trial Chamber I issued its decision on sentence pursuant to article 76 of the Rome Statute, a corollary of the aforementioned decision of 14 March 2012.²
3. On 3 October 2012, the Office of the Prosecutor filed a notice of appeal against the decision on sentence.³
4. That same day, the Defence also filed two notices of appeal, one against the conviction⁴ and the other against the decision on sentence.⁵

¹ ICC-01/04-01/06-2842: *Judgment pursuant to Article 74 of the Statute*.

² ICC-01/04-01/06-2901: *Decision on Sentence pursuant to Article 76 of the Statute*.

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

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

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

5. On 26 November 2012, the Defence submitted an application for leave to present additional evidence on appeal.⁶
6. On 3 December 2012, the Defence submitted a brief in support of its appeal against the conviction⁷ and a brief in support of its appeal against the sentence.⁸
7. That same day, the Prosecution filed a brief in support of its appeal against the decision on sentence.⁹
8. On 13 December 2012 the Appeals Chamber issued a decision¹⁰ in relation to the pending appeals against the judgment ICC-01/04-01/06-2842 and the sentence ICC-01/04-01/06-2901, ordering the Legal Representatives to submit their consolidated observations in response to the appeal briefs of the Defence and the Office of the Prosecutor (ICC-01/04-01/06-2948-Conf; ICC-01/04-01/06-2949; ICC-01/04-01/06-2950) by 4 p.m. on 4 February 2013.
9. On 4 February 2013, the V02 team of Legal Representatives of Victims submitted an e-mail application to the Appeals Chamber, seeking a 72-hour extension of time.

⁶ ICC-01/04-01/06-2942-Conf-tENG: "Defence application to present additional evidence in the appeals against the *Judgment pursuant to Article 74 of the Statute* and the *Decision on sentence pursuant to Article 76 of the Statute*".

⁷ ICC-01/04-01/06-2948-tENG A6: "Mr Thomas Lubanga's appellate brief against the 14 March 2012 *Judgment pursuant to Article 74 of the Statute*".

⁸ ICC-01/04-01/06-2949-tENG A6: "Mr Thomas Lubanga's appellate brief against Trial Chamber I's 10 July 2012 *Decision on Sentence pursuant to Article 76 of the Statute*".

⁹ ICC-01/04-01/06-2949 A6: "Prosecution's Document in Support of Appeal against the *Decision on Sentence pursuant to Article 76 of the Statute* (ICC-01/04-01/06-2901)".

¹⁰ ICC-01/04-01/06-2951: *Decision on the participation of victims in the appeals against Trial Chamber I's conviction and sentencing decisions*.

10. On 5 February 2013, the V02 team of Legal Representatives of Victims complied with the Appeals Chamber's instructions by submitting an official written application repeating its request for a 72-hour extension of time.¹¹
11. That same day, the Appeals Chamber issued an order seeking the observations of the Defence and the Prosecution on the V02 team's application 2971.¹²
12. On 7 February 2013, the Appeals Chamber issued a decision granting the extension of time sought by the V02 team of Legal Representatives of Victims.¹³
13. The Legal Representatives of the V02 group of victims hereby submit the following consolidated observations for the judges' consideration and discretion:

II – Defence appeal against both decisions

A – Guilt of the Accused

14. The V02 group of victims endorses the grounds provided by the judges of Trial Chamber I and consequently requests the Appeals Chamber to uphold the conviction, since their interests are reliant on it.

A1 – Alleged violations of fair-trial rules

15. The Defence submits that such violations consist of a breach of the Accused's right to be informed of the charges brought against him, the Prosecution's

¹¹ ICC-01/04-01/06-2971: *"Demande de délai de grâce de l'équipe VO2 de représentants légaux de victimes, pour soumettre leurs observations consolidées conformément à la décision ICC 01/04 01/06-2951"*.

¹² ICC-01/04-01/06-2974: *Order relevant to the request for an extension of time filed by the Legal Representatives of Victims V02.*

¹³ ICC-01/04 01/06-2975: *Decision on the request for an extension of time filed by the Legal Representatives of Victims V02.*

breach of its statutory obligations and, lastly, prejudice to the integrity of the trial.

16. The V02 group of victims defers to the Appeals Chamber's discretion and hence considers that it is for the Prosecution to respond to the Defence's allegations of violations of fair-trial rules.

A2 – Crimes of enlisting, conscripting and using children under the age of 15 years

a.2.1. Presence of child soldiers under the age of 15 years within the FLPC

17. Throughout the trial, video evidence presented by the Office of the Prosecutor showed that child soldiers under the age of 15 years were present in the FLPC, as the Chamber quite rightly noted in its judgment.¹⁴
18. Under article 69(3) of the Rome Statute, "[t]he parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth."
19. The evidence presented included videos of enlistment, witness statements, identity documents of child soldiers, certificates of said children's

¹⁴ For example, EVD-OTP-00570 (see Judgment ICC-01/04 01/06-2842, para. 699) concerning Witness P-0010 who testified to her age at trial (T-144-Red-ENG, page 15, line 5); see ICC-01/04 01/06-2842, (para. 255, footnotes 709-714 and para. 257); see in particular para. 268 of Judgment ICC-01/04 01/06-2842 *in fine*: "However, the video material and her comments on it, as set out above, remain essentially unaffected by these criticisms"; see also paras. 481, 644, 711, and 712-718 on the assessment of P-0030's testimony; see video EVD-OTP-00570, and para. 1337 of the Judgment.

demobilisation from armed groups, certificates issued by the PNDDR¹⁵ and demobilisation cards provided to child soldiers by DDR programmes.¹⁶

20. The Rome Statute does not specify which type of evidence victims or any other party must tender in a case, nor does it establish any order of precedence. Hence, it is not appropriate for the Defence to create a hierarchy of evidence; assisting the Court in its determination of the truth is the imperative.
21. It is precisely this right to the truth which motivated Witness a/270/07 to state during his evidence on 12 January 2010 before Trial Chamber I that the main reason for his testimony was to inform the international community about what really happened in [Redacted].¹⁷
22. Contrary to the Defence for Thomas Lubanga's contention,¹⁸ Witness a/270/07's testimony was in no way political in nature, especially since he testified as the former [Redacted].
23. It is worth noting that Witness a/270/07 was also a human rights activist in [Redacted], DRC, and founder of the NGO [Redacted]. The name [Redacted] appears on the applications for participation of Victims a/270/07, a/225/06 and a/229/06; on those forms, it is stated that Witness a/270/07 is [Redacted].¹⁹

¹⁵ PNDDR: *Programme National de Désarmement, Démobilisation et Réinsertion* [National Programme of Disarmament, Demobilisation and Reintegration].

¹⁶ See also DDRRR: *Désarmement, Démobilisation, Rapatriement, Réinstallation et Réintégration* [Disarmament, Demobilisation, Repatriation, Reinstallation and Reintegration].

¹⁷ ICC-01/04-01/06-T-225-Red-FRA, p. 37, lines 17-25, and p. 38, lines 1-10.

¹⁸ ICC-01/04-01/06-2948, para. 88.

¹⁹ For information about [Redacted], see the following reports of the Registry pursuant to Trial Chamber I's Decision ICC-01/04-01/06-2586-Conf-Exp of 14 October 2010: ICC-01/04-01/06-2646-Conf-Exp (first report of the Registry, dated 26 November 2010, which details all individuals and NGOs to which Decision ICC-01/04-01/06-2586 pertains) and ICC-01/04-01/06-2668-Conf-Exp+ Anxs (second report of the Registry).

a. 2.2. Dismissal of the entire body of evidence concerning the individual cases

24. The individual statements of 15 child-soldier witnesses cannot be considered to be the only fundamental evidence in the instant case, barring the Chamber from taking into account other evidence presented throughout the trial.
25. A distinction between primary evidence and subsidiary evidence is not supported by article 69(4) of the Rome Statute.
26. The Defence is of the view that in the statements of witnesses which constituted the “primary evidence” in support of the charges and in other evidence there remains no specific and verifiable example of military recruitment of children under the age of 15 years into the ranks of the UPC during the material time which could establish the identity, date of birth, or the date and conditions recruitment of a single child soldier.
27. It is worth noting that the Defence failed to pursue its investigation any further by verifying with the organisations working on the demobilisation of child soldiers whether (or not) their identities, dates of birth, and demobilisation dates were consistent with the information provided on their voting cards or in their oral statements.
28. The witness statements do not in and of themselves constitute primary evidence in support of the charges, especially since these are statements made several years after the fact. Furthermore, it is also necessary to take into account the witnesses’ level of education and consider them relative to other evidence in order to support the judges’ convictions as to the ages of the children observed in the FLPC armed group.

a.2.3. The remaining evidence is insufficiently specific for a “reasonable” finding

29. The Defence refuses to comprehend that the crimes for which the Appellant was convicted can also be proven by evidence other than witness testimony, such as voting cards, civil status records, documents attesting to child soldiers’ reunification with their families, and DDR demobilisation certificates.²⁰
30. Several witnesses stated that they had seen child soldiers amongst the FLPC troops. The demobilisation decree signed by the Appellant²¹ demonstrates that child soldiers were present in the FLPC.
31. Trial Chamber I noted in video footage included in the evidence under examination the presence of a group of child soldiers under the age of 15 years amongst many others and took this into account in its judgment.

a.2.4. Conscription of children under the age of 15 years

32. The Legal Representatives of Victims are of the view that the Chamber committed no error of law by holding that the crimes of conscription and enlistment may be dealt with together as two types of conduct pertaining to one and the same crime.
33. In actual fact, the conducts of enlistment and the conscription of children under the age of 15 years both constitute the same offence.
34. Child soldiers under the age of 15 years are incapable of giving legitimate consent which takes account of all potential dangers and risks, even where they enlist voluntarily, whereas conscription implies a form of mandatory recruitment.

²⁰ See Decision ICC-01/04-01/06-2501-Red and Decision ICC-01/04-01/06-2948-Red, para. 153.

²¹ DRC-OTP-0151-0299, EVD-OTP-0005 and EVD-OTP-00728. See also the demobilisation letter of 12 February 2003: EVD-OTP-00518 (see Judgment ICC-01/04-01/06-2842, paras. 719-744).

35. By convicting the Accused under the three forms of the crime set forth in article 8(2)(e)(vii), the Chamber rightly held that the crime had been committed under all three forms and that the Appellant was responsible.

a.2.5. Participation of children under the age of 15 years in hostilities

36. The Defence criticises the Chamber for having held that participation in hostilities is established where “the support provided by the child to the combatants exposed him or her to real danger as a potential target” whereas, in its view, the concept of risk has no basis in the international law of armed conflict.
37. Using children, who are by nature civilians, to participate in military combat divests them of the protection they are afforded under article 3 of the Geneva Convention and makes them military targets exposed to all kinds of danger.
38. The prohibition on the use of children in a role in which they become participants in hostilities applies not only to their recruitment as members of an armed group, but also to any potential use of children, provided that their activities divest them of their status as protected persons.

A3 – Individual criminal responsibility

39. The Defence criticises the Trial Chamber for having found the Accused to be individually criminally responsible and maintains that it thereby committed serious errors of fact and law.

a.3.1. Errors of law

40. The Defence contends that the Chamber committed an error of law by holding that criminal intent had been established on the part of the Accused whereas this was not the case having regard to article 30(2)(b) of the Statute.
41. The V02 group of victims submits that there is no shadow of a doubt that the Accused participated in the establishment of the FPLC as a political and military movement within which children under the age of 15 years were enlisted and conscripted for the purposes of being used in hostilities.
42. Consequently, Trial Chamber I was quite right to hold that this mental element had been established on the part of the Accused.

a.3.2. Errors of fact

43. The Defence criticises the Chamber for holding that certain material elements had been established on the part of the Accused and alleges that this was certainly not the case, and that were such elements to have been established, the Accused did not commit them either directly or indirectly.
44. The V02 group of victims submits that apart from the fact that the Accused had knowledge of this common plan, he knew that its implementation would carry sufficient risk in the likely course of events.
45. Hence the Chamber rightly established this material element on the part of the Appellant.

B – Sentence

46. The V02 group of victims considers it unnecessary to present their views and concerns in relation to the sentence.
47. Consequently, the V02 group of victims defers to the discretion of the Appeals Chamber.
48. **In light of all of the above, the V02 group of victims respectfully requests the Appeals Chamber to take into account the foregoing observations.**

Dated this 7 February 2013

At Kinshasa, Democratic Republic of the Congo
and Tours, France

[signed]

Carine Bapita Buyangandu

[signed]

Paul Kabongo Tshibangu

[signed]

Joseph Keta Orwinyo

Legal Representatives of Victims