PARTLY DISSENTING OPINION OF JUDGE SANG-HYUN SONG

1. I agree with the majority of the Appeals Chamber that it is appropriate to reject Mr Lubanga's appeal. However, I respectfully disagree with the majority's determination that it is not necessary to decide the legal issue of whether article 8 (2) (e) (vii) of the Statute contains three separate offences or three separate conducts by which the same offence can be committed.[1] In my view, it is necessary for the Appeals Chamber to address this issue *proprio motu*.

2. I note that, in the Conviction Decision, the Trial Chamber held that "the three alternatives (*viz*. conscription, enlistment and use) are separate offences",[2] as opposed to different conducts of one crime, and that, as correctly stated by the majority, this determination is not raised as an error in this appeal.[3] Nevertheless, I consider that the Appeals Chamber should have addressed this issue. In my view, the Trial Chamber erred in making this finding and, on the basis of this erroneous finding, erred in finding Mr Lubanga guilty 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 […]" (emphasis added).[4]

3. For the reasons that follow, I consider that the Appeals Chamber should have vacated Mr Lubanga's three convictions and entered one conviction. In my view, article (8) (2) (e) (vii) of the Statute contains three separate *conducts* of one offence. This conclusion is supported by the examination of the provision's "ordinary meaning", together with the Elements of Crimes (I),[5] and is further supported by the object and purpose of the underlying international humanitarian law provisions (II), the relevant drafting history of the Statute (III), as well as the jurisprudence of the SCSL (IV).

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[1] Majority opinion, para. 38.
[2] Conviction Decision, para. 609.
[3] Majority opinion, para. 37.
[4] Conviction Decision, para. 1358.
[5] In accordance with article 31 of the Vienna Convention on the Law of Treaties, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Pursuant to article 31 (2) (b) of the Vienna Convention, any instrument related to the treaty may be used to interpret the treaty.

I. ORDINARY MEANING OF ARTICLE 8 (2) (E) (VII) OF THE STATUTE

4. As a first observation, I note that article 8 (2) (e) (vii) and the identical article 8 (2) (b) (xxvi) of the Statute group the terms 'conscripting', 'enlisting' and 'using them to participate actively in hostilities' together in the same paragraph. I further note that articles 8 (2) (b) (xxvi) and 8 (2) (e) (vii) of the Statute use the term 'or', whereas, for example, articles 8 (2) (b) (xxii) and 8 (2) (e) (vi) of the Statute uses the terminology "*[c]omitting* rape, sexual slavery, enforced prostitution, forced pregnancy […], enforced sterilization, and any other form of sexual violence" (emphasis added). In my view, this difference in terminology indicates that enlistment, conscription and use of children under the age of fifteen years under articles 8 (2) (b) (xxvi) and 8 (2) (e) (vii) of the Statute are different modalities by which one and the same offence can be committed, whereas articles 8 (2) (b) (xxii) and 8 (2) (e) (vi) of the Statute contain different crimes, namely rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence.

5. This conclusion is supported by the layout of the Elements of Crimes, which is an instrument to the Statute and thus relevant to the interpretation of the context of the treaty.[6] In this regard, I observe that the explanatory note on the title page of the Elements of Crimes states that, where "paragraphs of those articles of the Rome Statute list multiple crimes", "the elements of crimes appear in separate paragraphs which correspond to each of those crimes to facilitate the identification of the respective elements".[7] This is the case, for example, for the aforementioned articles 8 (2) (b) (xxii) and 8 (2) (e) (vi) of the Statute which criminalise "[c]omitting rape, sexual slavery, enforced prostitution, forced pregnancy […], enforced sterilization, and any other form of sexual violence […]". The elements of each of these separate offences are detailed in separate paragraphs in the Elements of Crimes.[8] The Elements of Crimes do not separate the three forms of conduct under articles 8 (2) (b) (xxvi) and 8 (2) (e) (vii) of the Statute.[9] *E contrario*, it can be concluded that the drafters of

[6] *See* article 9 of the Statute and article 31 (2) (b) of the Vienna Convention on the Law of Treaties.
[7] *See* Elements of Crimes, p.1.
[8] *See* Elements of Crimes, pp. 36-38.
[9] *See* Elements of Crimes, p. 39.

the Elements of Crimes did not consider them to be separate offences. This, I note, is also argued by the Legal Representatives of Victims V01.[10]

II. OBJECT AND PURPOSE OF THE PROVISIONS UNDERLYING ARTICLES 8 (2) (B) (XXVI) AND 8 (2) (E) (VII) OF THE STATUTE

6. Furthermore, I note that the provisions of international humanitarian law, upon which articles 8 (2) (b) (xxvi) and 8 (2) (e) (vii) of the Statute are based, have the same object and purpose, namely to keep children under the age of fifteen years away from harm associated with armed conflict.[11] It is therefore irrelevant whether children under the age of fifteen years voluntarily join an armed force or are forced to join them or used to participate actively in hostilities. In this context, it is worth recalling that people who become members of an armed force (combatants) generally lose the protection that civilians enjoy in times of war.[12] Therefore, the international community considered it important to prohibit states from incorporating children under a certain age into their armed forces.[13] Thus, in light of this object and purpose, I consider it unnecessary to make a finding that this provision contains three different offences.

III. THE DRAFTING HISTORY OF ARTICLES 8 (2) (B) (XXVI) AND 8 (2) (E) (VII) OF THE STATUTE

7. With regard to the drafting history of the articles 8 (2) (b) (xxvi) and 8 (2) (e) (vii) of the Statute, I note that the original proposed wording was "recruiting children

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[10] Observations of Legal Representatives of Victims V01, paras 39-43; *see also* W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), p. 253; K. Dörmann, *Elements of War Crimes under the Rome Statue of the International Criminal Court* (ICRC and Cambridge University Press, 2003), pp. 375-381.

[11] *See*, referring to these underlying international humanitarian law provisions, Conviction Decision, para. 605:"These provisions recognise the fact that 'children are particularly vulnerable [and] require privileged treatment in comparison with the rest of the civilian population'. The principal objective underlying these prohibitions historically is to protect children under the age of 15 from the risks that are associated with armed conflict, and first and foremost they are directed at securing their physical and psychological well-being. This includes not only protection from violence and fatal or non-fatal injuries during fighting, but also the potentially serious trauma that can accompany recruitment (including separating children from their families, interrupting or disrupting their schooling and exposing them to an environment of violence and fear)" (footnotes omitted).

[12] *See* generally N. J. Udombana, "War is not a child's play! International law and the prohibition of children's involvement in armed conflicts", 20 *Temple International and Comparative Law Journal* (2006), p. 57 at 74-78; *see also* J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, (ICRC and Cambridge University Press, 2009), pp. 3-8.

[13] *See* on the history of the legal provision, M. Happold, *Child soldiers in international law*, (Manchester University Press, 2005), pp. 54-70.

under the age of fifteen years into armed forces or using them to participate actively in hostilities" (footnotes omitted).[14] Throughout the various plenary meetings, delegates welcomed the criminalisation of involvement of children in armed conflict.[15] The delegation for Canada clarified that the calls were not aimed at prosecuting the minors themselves, but that "[t]he Court should have a mandate to prosecute those who *recruited* children under the age of 15 into armies"[16] and many delegations were of the opinion that "the primary responsibility then lay with the adults who made *use* of those children" (emphasis added).[17] I note that the delegates referred to the verbs 'recruit' and 'use' interchangeably. More importantly, however, I note that, as explained by commentators, 'recruiting' was split into the constituent parts of 'conscription' and 'enlistment' primarily to appease the concerns of the delegation from the USA that "[w]hereas 'recruiting' was understood to imply an active policy of the [g]overnment to have persons join the armed forces, the words 'conscripting or enlisting' have a more passive connotation and relate primarily to the administrative act of putting the name of a person on a list".[18]

8. What arises from the aforementioned, in my view, is that the drafters' focus was clearly on delineating the modalities of conduct of one and the same crime, as opposed to setting out different offences.[19] Indeed, the discussion related to splitting 'recruitment' into two separate conducts, i.e. enlistment and conscription, contains no reference to identifying 'crimes'.

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[14] *See* 1998 Report of the Preparatory Committee on the Establishment of an International Criminal Court, p. 21.
[15] *See e.g.* Summary Record of the 2nd Plenary Meeting, para. 30: "[the delegation of Trinidad and Tobago] supported proposals seeking to ensure that violence against women and children and the use of children in armed conflicts were punishable"; Portugal, Summary Record of the 4th Plenary Meeting, para. 28; Belgium, Summary Record of the 6th Plenary Meeting, para. 2; Luxembourg, Summary Record of the 6th Plenary Meeting, para. 69; Libya, Summary Record of the 6th Plenary Meeting, para. 82; Denmark, Summary Record of the 8th Plenary Meeting, para. 3.
[16] Canada, Summary Record of the 2nd Plenary Meeting, para. 65.
[17] *See e.g.* Côte d'Ivoire, Summary Record of the 2nd Meeting, para. 22.
[18] R. S. K. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, (Kluwer Law International, 1999), p. 118. *See also* W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), p 253 and M. Cottier, "Articles 8 War Crimes para. 2 (b) (xxvi)", 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), p. 472 at para. 231.
[19] *See also* M. Bothe, "War Crimes" in A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford University Press, 2002), p. 379 at p. 416.

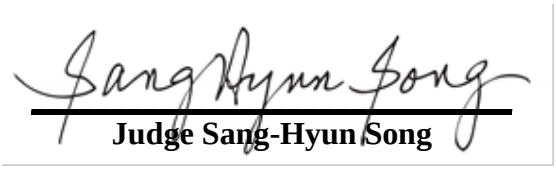
IV. JURISPRUDENCE OF THE SCSL

9. As a final point, I note that the jurisprudence of the SCSL generally refers to the analogous provision under its Statute[20] as one single crime, with three different ways of committing it. In the *AFRC* Trial Judgment, it was stated that "[t]he *actus reus* of the crime can be satisfied by 'conscripting' or 'enlisting' children under the age of 15, or by 'using' them to participate actively in the hostilities", suggesting the concept of one crime committed in different ways.[21] Similarly, in the *CDF* Appeal Judgment, the SCSL Appeals Chamber stated that

> the crime of recruitment by way of conscripting or enlisting children under the age of 15 years into an armed force or group and/or using them to participate actively in hostilities constitutes a crime under customary international law entailing individual criminal responsibility and that "[t]hese modes of recruiting children are distinct from each other and liability for one form does not necessarily preclude liability for the other. [Footnotes omitted.][22]

V. CONCLUSION

10. Based on the foregoing, I find that the Trial Chamber erred in holding that article 8 (2) (e) (vii) of the Statute contains the three separate offences of conscription, enlistment and use to actively participate in hostilities, as well as in convicting Mr Lubanga of these three separate offences. As already stated, Mr Lubanga should have been convicted of having committed one crime.



Judge Sang-Hyun Song

Dated this 1st day of December 2014

At The Hague, The Netherlands

[20] Article 4 (c) of the SCSL Statute is modelled after article 8 (2) (e) (vii) of the Statute.
[21] *AFRC* Trial Judgment, para. 733.
[22] *CDF* Appeal Judgment, para. 139.