

1 Appeals Chamber - Courtroom 1

2 Situation: Democratic Republic of the Congo

3 In the case of The Prosecutor v. Thomas Lubanga Dyilo -

4 ICC-01/04-01/06

5 Presiding Judge Erkki Kourula, Judge Sang-Hyun Song,

6 Judge Sanji Mmasenono Monageng, Judge Anita Ušacka and

7 Judge Ekaterina Trendafilova

8 Appeals Hearing

9 Monday, 1 December 2014

10 (The hearing starts in open session at 4.35 p.m.)

11 THE COURT USHER: All rise.

12 The International Criminal Court is now in session.

13 PRESIDING JUDGE KOURULA: Good afternoon. Please be seated.

14 Would the Court Officer -- once we have the pictures being taken. Thank you very

15 much.

16 Would the court officer please call the case? Thank you.

17 THE COURT OFFICER: Yes, Mr President. Good afternoon. Situation in the Democratic

18 Republic of the Congo in the case of The Prosecutor versus Thomas Lubanga Dyilo, case

19 reference ICC-01/04-01/06.

20 And for the record we are in open session.

21 PRESIDING JUDGE KOURULA: Thank you very much. May I ask the parties to introduce

22 themselves for the record starting with the Office of the Prosecutor.

23 MS BENSOUDA: Thank you, Mr President. Mr President, Honourable Judges, the Office

24 of the Prosecutor is represented today by Mr Fabricio Guariglia, director of Prosecutions;

25 Nicole Samson, senior trial lawyer; Manoj Sachdeva, trial lawyer; Carmen Garcia Ramos, case

1 manager; and myself, Fatou Bensouda, Prosecutor.

2 PRESIDING JUDGE KOURULA: Thank you very much.

3 Moving to the other side, the Defence of Mr Lubanga.

4 MS MABILLE: (Interpretation) Thank you, Mr President. The Defence is represented today
5 by Caroline Buteau, Jean-Marie Biju-Duval and Catherine Mabilille, myself.

6 PRESIDING JUDGE KOURULA: Merci.

7 And then to the Legal Representatives for Victims, I understand that you'll be representing
8 both groups today, Mr Walley.

9 MR WALLEY: (Interpretation) Thank you, Mr President. My name is Luc Walley. Yes,
10 indeed, I will be representing my team V01 and by proxy team V02, and I'm assisted by the two
11 case managers of the two teams, Madam Evelyne Ombeni and Madam Sylviane Glodjion.
12 Thank you.

13 PRESIDING JUDGE KOURULA: Thank you so much.

14 And introducing ourselves, to my right, there is Judge Song and then Judge Monageng and to
15 my left, Judge Ušacka and the next is Judge Trendafilova. My name is Erkki Kourula and I
16 am the Presiding Judge of this appeal.

17 Today the Appeals Chamber is delivering its judgment on the appeal by Mr Lubanga
18 against the decision of Trial Chamber I entitled "Judgment Pursuant to Article 74 of
19 the Statute," as well as its judgment on the appeals of the Prosecutor and Mr Lubanga
20 against the decision of Trial Chamber I entitled "Decision on Sentence Pursuant to
21 Article 76 of the Statute."

22 In today's summary, if I may, I will refer to these two impugned decisions as the
23 "Conviction Decision" and the "Sentencing Decision" respectively. I will refer to Mr
24 Thomas Lubanga Dyilo as Mr Lubanga.

25 And I will first summarise the Appeals Chamber's judgment on Mr Lubanga's appeal against

1 the Conviction Decision. Please note that only the written judgment is authoritative. It will
2 be notified to the parties shortly after this hearing.

3 On 14 March 2012, Trial Chamber I delivered the Conviction Decision convicting Mr
4 Lubanga pursuant to Articles 8(2)(e)(vii) and Article 25(3)(a), paragraph (3)(a) of the
5 Statute of having committed jointly with others the following crimes: "Conscripting
6 and enlisting children under the age of fifteen years into the UPC/FPLC and using
7 them to participate actively in hostilities" in Ituri, the Democratic Republic of the
8 Congo, between early September 2002 and 13 August 2003 in the context of a
9 non-international armed conflict.

10 On 3 October 2012, Mr Lubanga filed his notice of appeal.

11 On 3 December 2012, Mr Lubanga filed his document in support of the appeal against
12 the Conviction Decision.

13 On 4 February then the following year, the Prosecutor filed her response to the
14 document in support of the appeal.

15 Victims Groups I and II participated in the proceedings by way of written and oral
16 observations.

17 Mr Lubanga raises numerous arguments under three overarching headings that are
18 further divided into seven separate subcategories. The Appeals Chamber has
19 addressed Mr Lubanga's arguments according to the subcategories as seven grounds
20 of appeal.

21 In addition to these grounds - and I'll deal with them first - of appeal raised in Mr
22 Lubanga's document in support, he also filed three additional evidence requests.

23 On 26 November 2012, Mr Lubanga filed a request to present additional evidence in
24 his appeals against the Conviction Decision and the Sentencing Decision. The first
25 additional evidence request included a request that the Appeals Chamber hear the

1 testimony of two witnesses, whom I will refer as witnesses referred to as Witnesses
2 D-0040 and D-0041.

3 On the 23 December 2013, Mr Lubanga filed a second request to present additional
4 evidence in his appeals against the Conviction Decision and the Sentencing Decision.

5 In his second additional evidence, Mr Lubanga also sought leave to add a new
6 ground of appeal, which was granted by the Appeals Chamber on 14 January 2014.

7 On 19 and 20 May of this year, the Appeals Chamber held an oral hearing at which it
8 heard the testimony of Witnesses D-0040 and D-0041 as well as further submissions of
9 the parties and participants on the issues arising in the appeal.

10 On 23 May this year Mr Lubanga filed his third additional evidence request seeking
11 the admission of documents referred to during the testimony of Witnesses D-0040 and
12 D-0041.

13 As this is the preliminary issue, the Appeals Chamber will first address, as I explained,
14 the admissibility of the additional evidence contained in Mr Lubanga's three requests.

15 The criteria applicable to the admissibility of additional evidence on appeal are
16 provided in the Court's legal texts and derive from the nature and purpose of
17 appellate proceedings which are corrective in nature.

18 In addition, the Trial Chamber is better positioned than the Appeals Chamber to
19 assess a piece of evidence in light of all the other evidence presented at trial.

20 Accordingly, evidence should, with only limited exceptions, be presented at trial.

21 With these considerations in mind, the Appeals Chamber finds that the additional
22 evidence on appeal is admissible if:

23 (a) the Appeals Chamber is convinced of the reasons why such evidence was not
24 presented at trial, including whether it could have been presented with the exercise of
25 due diligence; and.

1 (b) it is demonstrated that the additional evidence, had it been presented before the
2 Trial Chamber, could have led the Trial Chamber to enter a different verdict, in whole
3 or in part.

4 Furthermore, the Appeals Chamber considers that additional evidence may be
5 admitted on appeal for purposes of demonstrating that the proceedings appealed
6 from were unfair and thereby rendered the decision pursuant to Article 74 unreliable.

7 In applying these criterion to Mr Lubanga's three additional evidence requests, the
8 Appeals Chamber finds that all of the proposed additional evidence is inadmissible
9 because it was either available at trial, would have been available with the exercise of
10 due diligence, or is inadmissible because the Appeals Chamber does not find that the
11 additional evidence, had it been presented during the trial, could have led the Trial
12 Chamber to enter a different verdict, in whole or in part.

13 Regarding Witnesses D-0040 and D-0041 specifically, the Appeals Chamber finds that
14 Mr Lubanga could have presented this evidence at trial and is therefore not
15 persuaded by his arguments as to why he failed to do so.

16 I shall now turn to Mr Lubanga's first ground of appeal, which relates to whether the
17 charges for which he was convicted were sufficiently detailed.

18 Mr Lubanga submits that the charges for which he was convicted were insufficiently
19 detailed with respect to the dates and places pertaining to the instances of enlistment,
20 conscription or participation in hostilities, as well as with respect to the identity of
21 victims.

22 He argues that because he was not informed in sufficient detail of the charges for
23 which he was convicted, his ability to prepare his defence was prejudiced.

24 The Appeals Chamber considers that information relative to the charges in the
25 present case was provided in the document containing the charges and in the

1 Decision on the Confirmation of Charges, as well as in the Amended Document

2 Containing the Charges and the Summary of Evidence.

3 In his submissions, however, Mr Lubanga only cursorily refers to the Decision on the
4 Confirmation of Charges and does not refer to the Amended Document Containing
5 the Charges or the Summary of Evidence.

6 The Appeals Chamber finds that Mr Lubanga should have substantiated his
7 submissions by reference to the latter documents.

8 The Appeals Chamber also notes that when alleging prejudice, Mr Lubanga does not
9 demonstrate that his ability to defend himself was materially impaired by reference to
10 the evidence presented at trial and relied upon in the Conviction Decision.

11 The Appeals Chamber therefore finds that Mr Lubanga has failed to substantiate his
12 argument that the charges were insufficiently detailed with respect to the dates and
13 places pertaining to instances of enlistment, conscription or participation in hostilities,
14 and also with respect to the identity of victims. Furthermore, Mr Lubanga has failed
15 to substantiate the prejudice he suffered because of the allegedly missing details.

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

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

20 The Appeals Chamber notes that many of the allegations under this ground were
21 addressed by the Trial Chamber in its decision of 23 February 2011 concerning Mr
22 Lubanga's request for a permanent stay of proceedings. In that decision, the Trial
23 Chamber found that, taken at their highest, none of the alleged violations rendered
24 the trial unfair and denied the request for a permanent stay of proceedings.

25 On appeal, Mr Lubanga does not challenge the approach or findings in the Stay of

1 Proceedings Decision. The Appeals Chamber will therefore not address any of his
2 submissions that were decided upon in that decision.

3 Mr Lubanga argues that the Prosecutor violated her statutory duties to:

4 (i) fully investigate exonerating evidence and ascertain the reliability of or verify
5 incriminating evidence;

6 (ii) disclose exculpatory evidence and evidence affecting the credibility of incriminating
7 evidence;

8 (iii) remain independent; and

9 (iv) respect Mr Lubanga's right to fairness and impartiality.

10 The Appeals Chamber dismisses or rejects all of Mr Lubanga's arguments under this
11 ground of appeal for failing to substantiate his arguments, misrepresenting the Trial
12 Chamber's holdings and the trial record, and because the Appeals Chamber finds no
13 errors in the steps taken by the Trial Chamber in order to ensure the fairness of the
14 proceedings.

15 Accordingly, the Appeals Chamber dismisses Mr Lubanga's second ground of appeal.

16 Under Mr Lubanga's third ground of appeal, he argues that the Trial Chamber failed
17 to make any finding on the Prosecutor's presentation of false evidence and the impact
18 that this had on the integrity of proceedings. He submits that "the exceptional
19 gravity of such a situation amounts to an abuse of process."

20 The Appeals Chamber observes that under this ground of appeal, Mr Lubanga in
21 essence raises the same arguments as those in the preceding ground of appeal. To
22 the extent that the arguments are repetitive, the Appeals Chamber will not address
23 them again.

24 Mr Lubanga also appears to argue that the Prosecutor purposefully presented false
25 evidence to the Trial Chamber and that the Trial Chamber should have acquitted him

1 because the Prosecutor's conduct damaged the integrity of the trial.

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

6 Accordingly, the Appeals Chamber dismisses Mr Lubanga's third ground of appeal.

7 Under the fourth ground of appeal, Mr Lubanga argues that the Trial Chamber made
8 legal and factual errors by relying, for the purpose of establishing the age element of
9 the crimes, on its own assessments of video excerpts and on non-expert witness
10 testimony.

11 The Appeals Chamber rejects all of Mr Lubanga's legal arguments under this ground
12 of appeal.

13 With respect to the Trial Chamber's overall approach to establishing the age element based on
14 its own assessment of video excerpts depicting individuals allegedly under the age of fifteen
15 years, the Appeals Chamber considers that the question of whether such evidence can
16 establish the element of age is a question of fact.

17 The Appeals Chamber considers that one factor relevant to its review of whether a
18 Trial Chamber's factual finding was reasonable is whether the Trial Chamber
19 appropriately exercised caution when assessing the age of an individual on the basis
20 of video images.

21 Based on the Trial Chamber's cautious approach on the video excerpts, the Appeals
22 Chamber does not find that this overall approach was unreasonable.

23 Mr Lubanga also challenges the Trial Chamber's reliance on non-expert witnesses'
24 assessment of individuals based on their physical appearance to establish the age of
25 those individuals.

1 The Appeals Chamber considers that the Trial Chamber exercised caution in assessing
2 the evidence of non-expert witnesses. It also carefully evaluated each witness'
3 capability to assess age and took into account factors such as their experience in
4 dealing with demobilised children, their knowledge of the conditions in the area and
5 the level of contact that they had with the individuals whose age they were assessing.
6 Accordingly, the Appeals Chamber finds that the Trial Chamber's reliance on this
7 evidence was not unreasonable.

8 Mr Lubanga also challenges the Trial Chamber's assessment of specific video excerpts
9 and the reasonableness of its reliance in the specific witnesses who assessed the age of
10 individuals based on their physical appearance as well as a piece of documentary
11 evidence. The Appeals Chamber dismisses or rejects all of these arguments for
12 reasons further explained in the judgment on the appeal.

13 Under the fifth ground of appeal, Mr Lubanga challenges his conviction for having
14 conscripted individuals under the age of fifteen years into the UPC/FPLC.

15 First, Mr Lubanga argues that the Trial Chamber relied solely on evidence regarding
16 recruitment and mobilisation campaigns and evidence demonstrating only the
17 presence of individuals below the age of fifteen years within the UPC/FPLC. Mr
18 Lubanga argues that this evidence does not contain the element of compulsion, which
19 is required for the crime of conscription.

20 The Appeals Chamber finds that the recruitment campaigns contained instances of
21 conscription by way of force or threat of force. Mr Lubanga did not challenge these
22 instances. Therefore, the Appeals Chamber does not need to consider Mr Lubanga's
23 arguments relevant to whether the daily living conditions in Ituri at the time or the
24 pressure exerted on communities establish the element of compulsion that
25 distinguishes conscription from enlistment.

1 Second, Mr Lubanga argues that the distinction between the crime of enlistment and
2 that of conscription is that "the act of conscription entails the child's incorporation into
3 the armed group against his or her will." The Appeal Chambers rejects this
4 argument because of the act -- because that the act is against the conscripted
5 individual's will is not a required element of the crime of conscription.

6 Finally, Mr Lubanga argues that the Trial Chamber erred in holding that the separate
7 crimes of conscription and enlistment could be dealt with together. The Appeals
8 Chamber considers that, although it is problematic that the overall conclusions of the
9 Trial Chamber do not clearly identify which facts establish the distinguishing element
10 of compulsion, the Trial Chamber's decision to deal with these two crimes together
11 does not amount to a legal error because the Trial Chamber's findings relevant to the
12 element of compulsion were discernable and reviewable for both Mr Lubanga and the
13 Appeals Chamber.

14 Moving to ground six. Mr Lubanga raises legal and factual errors in relation to the
15 Trial Chamber's finding that he was guilty of having used, jointly with others,
16 children under the age of fifteen years to participate actively in hostilities.

17 The legal errors turn around the definition applied by the Trial Chamber in
18 determining what constitutes "use to participate actively in hostilities."

19 The Appeals Chamber rejects Mr Lubanga's alleged error that only direct
20 participation in hostilities, as understood in international humanitarian law, is
21 covered by the phrase "to participate actively in hostilities." The purpose of Article
22 8(2)(e)(vii) of the Statute is different from that of the principle of distinction between
23 combatants and civilians in international humanitarian law.

24 However, the Appeals Chamber finds that the Trial Chamber erred in interpreting
25 which indirect activities of a child would fall within the scope of Article 8(2)(e)(vii) of

1 the Statute. It finds that there is no support for establishing as a distinguishing
2 criterion whether a child would due to his or her activities be exposed to real danger
3 as a potential target. Rather, it is necessary to analyse the link between the activity
4 for which the child is used and the combat in which the armed force or group of the
5 perpetrator is engaged.

6 Nevertheless, this error is without consequence in the circumstances of the present
7 case, because the Trial Chamber found that individuals either participated in combat
8 or were guards or bodyguards in a conflict zone. There was therefore a sufficient
9 link to the combat.

10 As to the number of factual errors raised by Mr Lubanga in relation to the Trial
11 Chamber's findings that individuals under the age of fifteen years were used to
12 participate actively in hostilities, the Appeals Chamber either dismisses the
13 arguments as not substantiated or rejects them because the Trial Chamber's findings
14 are not unreasonable or finds that the errors have no material effect for reasons
15 further explained in the judgment.

16 Finally, ground 7. The Trial Chamber found Mr Lubanga guilty of having
17 committed the crimes of conscripting or enlisting children under the age of fifteen
18 years and of using them to participate actively in hostilities as a co-perpetrator
19 pursuant to Article 25(3) of the Statute. The Trial Chamber found that Mr Lubanga
20 together with others "agreed to, and participated in, a common plan to build an army
21 for the purpose of establishing and maintaining political and military control over
22 Ituri." This resulted, in an ordinary course of events, in the conscription and
23 enlistment of boys and girls under the age of fifteen years and their use to participate
24 actively in hostilities.

25 Mr Lubanga alleges legal and several factual errors in the Trial Chamber's findings of

1 his individual criminal responsibility.

2 First, he alleges that the Trial Chamber erred in finding that the agreement on a
3 common plan leads to co-perpetration if its implementation embodies a sufficient risk
4 that in the ordinary course of events a crime will be committed. He raises the same
5 argument with respect to the Trial Chamber's findings on the mental element, in
6 relation to which the Trial Chamber also referred to the notion of "risk."

7 The Appeals Chamber rejects both alleged legal errors. It recalls that these findings
8 are based on the Trial Chamber's interpretation of Article 30 of the Statute and in
9 particular on the phrase, I quote, "will occur in the ordinary course of events" unquote.
10 According to the Appeals Chamber, this means that it must be virtually certain that in
11 the ordinary course of events a consequence will occur.

12 The Appeals Chamber considers that the Trial Chamber's reference to the notion of "risk" is
13 confusing and should have been avoided when interpreting Article 30(2) of the Statute.
14 Nevertheless, the Appeals Chamber does not consider that the Trial Chamber's approach
15 broadened the scope of Article 30 of the Statute. In its legal conclusions, the Trial Chamber
16 emphasised that the consequence "will occur in the ordinary course of events."

17 The Trial Chamber therefore adhered to the terms of Article 30 of the Statute and it
18 also found that in the specific circumstances of Ituri at that time, the common plan of
19 building an effective army in order to ensure the UPC/FPLC's political and military
20 control over Ituri directly led to the recruitment of individuals below the age of fifteen
21 years. Therefore, the common plan included noncriminal goals, in addition to
22 criminal ones. Accordingly, the Trial Chamber's requirement of a critical element of
23 criminality of the common plan means, in the context of the present case and the
24 specific allegations against Mr Lubanga, that it was virtually certain that the
25 implementation of the common plan led to the commission of the crimes at issue.

1 Secondly, Mr Lubanga argues that the Trial Chamber erred in finding that a
2 co-perpetrator does not need to personally and directly participate in the commission
3 of the crime.

4 The Appeals Chamber rejects this alleged error.

5 The Trial Chamber found, based on the control of the crime theory, that the
6 co-perpetrator must make an essential contribution and does not need to personally
7 and directly commit the crime.

8 The Appeals Chamber confirms this approach of the Trial Chamber on the basis of its
9 interpretation of Article 25(3) of the Statute. It considers that, in circumstances
10 where the plurality of persons was involved in the commission of crimes under the
11 Statute, the question of whether an accused committed a crime can't only be answered
12 by reference to whether he or she directly carried out the incriminating conduct.

13 What is required is a normative assessment of the role of the accused person in the specific
14 circumstances of the case. The most appropriate tool for conducting such an assessment is
15 an evaluation of whether the accused had control over the crime by virtue of his or her
16 essential contribution to it and the resulting power to frustrate its commission, even if that
17 essential contribution was not made at the execution stage of the crime. Accordingly, the
18 Appeals Chamber is not convinced by Mr Lubanga's argument.

19 Mr Lubanga also seeks to challenge the Trial Chamber's factual findings in applying
20 the established legal standard. The Appeals Chamber finds some of the arguments
21 as unsubstantiated and rejects the remaining errors finding that the Trial Chamber's
22 assessment of the facts was not unreasonable.

23 Thus the Appeals Chamber, by majority, Judge Song partly dissenting, Judge Ušacka
24 dissenting, confirms the Conviction Decision and rejects the appeal.

25 Judge Song and Judge Ušacka will now briefly summarise their opinions.

1 I give you the floor first, Judge Song.

2 JUDGE SONG: Thank you, Mr Presiding Judge.

3 I agree with the majority of the Appeals Chamber that it is appropriate to reject Mr Lubanga's
4 appeal. However, I respectfully disagree with the majority's determination that it is not
5 necessary to decide the legal issue of whether Article 8(2)(e)(vii) of the Statute contains three
6 separate offences or three separate conducts by which the same offence can be committed.

7 In my view, Article 8(2)(e)(vii) of the Statute contains three separate conducts of one
8 and the same offence. This conclusion is supported by the examination of the
9 provision's ordinary meaning, together with the elements of crimes and is further
10 supported by the object and purpose of the underlying international humanitarian
11 law provisions, the relevant drafting history of the Rome Statute, as well as the
12 jurisprudence of the Special Court for Sierra Leone.

13 Therefore, Mr Lubanga should have been convicted of having committed one crime.

14 Entering a conviction for one crime instead of for three crimes is of sufficient
15 importance for the Appeals Chamber to have proprio motu addressed this issue.

16 This concludes the summary of my opinion on the Conviction Decision.

17 Thank you.

18 PRESIDING JUDGE KOURULA: Thank you, Judge Song.

19 I'll give the floor to Judge Ušacka.

20 JUDGE UŠACKA: Thank you, Presiding Judge.

21 I respectfully disagree with the decision of my colleagues to confirm the Conviction Decision,
22 which I would have reversed, firstly on the grounds that the charges of which Mr Lubanga
23 was ultimately convicted were not sufficiently detailed; and, secondly, because it was not
24 established beyond reasonable doubt that children in the UPC/FPLC were under the age of
25 fifteen.

1 Regarding the charges, I consider that nine individual cases constituted the material
2 facts underlying the crimes charged which the Prosecutor had to establish through
3 the evidence at trial. The remainder of the allegations regarding a pattern of crime
4 did not contain reference to a single identified victim, while the dates and locations
5 were framed in unacceptably broad terms. These unspecific factual allegations could
6 not have been considered to be operational, without the nine child soldiers that
7 constituted the vertebral column of the case.

8 For five and a half years, the trial proceeded on the basis that the nine individual cases were
9 the material facts underlying the charges. It was these charges that Mr Lubanga defended
10 himself against, yet he was ultimately convinced of the unspecific charges of a pattern of
11 crime.

12 The right to be informed of the charges is a necessary precondition of fair trial and
13 fairness can never be achieved if the accused is deprived of this right. In this case,
14 the abstract nature of the remaining charges allowed vague assertions that children
15 were enlisted or conscripted in the UPC/FPLC or used in hostilities to be presented as
16 evidence. The lack of concrete information in the evidence presented meant that Mr
17 Lubanga was deprived of a meaningful opportunity to challenge the evidence at trial.
18 Ultimately, even the factual conclusions of the Trial Chamber suffered from the same
19 level of imprecision.

20 In my view the evidence relied upon by Trial Chamber to convict Lubanga was not
21 sufficient to reach the threshold of beyond a reasonable doubt. Although the Trial
22 Chamber noted the applicable standard in one line of Conviction Decision, it
23 appeared thereafter to have, in practise, applied a lower standard. In my view, this
24 raises concerns that the Trial Chamber was motivated more by the desire to create a
25 record of events rather than to determine the guilt of individual to the standard

1 applicable in criminal proceedings.

2 I consider that the evidence in this case was, in particular, not sufficient to establish
3 that at least some of children in the UPC/FPLC were under age of fifteen.

4 Estimating the age of individual based solely on his or her physical appearance is
5 very complex and prone to error, even when scientific methods are used.

6 For this reason, the Trial Chamber indicated that in adopting a cautious approach
7 when assessing the evidence in relating to age determination. For its purposes, it
8 relied exclusively (i) age estimates given by lay witnesses, (ii) its own estimate of the
9 age of individuals appearing in videos, and (iii) an internal UPC/FPLC letter dated 12
10 February 2003 referring to the demobilisation of children between the ages of ten and
11 fifteen or sixteen.

12 As regards to the witnesses, the Trial Chamber relied on lay witnesses' estimates of
13 the age of unknown and unidentified individuals. Often the witnesses did not offer
14 any explanation of how they knew that the child in question was under fifteen, and
15 frequently the witnesses referred to children that were relatively close to the age of
16 fifteen. The Trial Chamber also relied extensively on the testimony of Witness
17 P-0046, who worked in the MONUC demobilisation programme and whose
18 knowledge of the children she encountered was entirely based on what the children
19 themselves had told her. In my view, the Trial Chamber's unquestioning acceptance
20 of this evidence did not display the requisite degree of caution.

21 Regarding the video evidence, the Trial Chamber stated that it only relied on video
22 excerpts that depicted children who were manifestly under the age of fifteen. Yet,
23 the children appearing in video excerpts relied upon by Trial Chamber appear, in my
24 view, to be close to age of fifteen to allow a determination beyond reasonable doubt
25 that they were below that age. They are frequently only partly visible and their sizes

1 are unclear in the absence of any objective comparator. The Trial Chamber
2 disregarded these problems and simply found that the images spoke for themselves.
3 The video excerpt of the boy playing with insect is, in my view, by far the strongest in
4 terms of quality of the lighting, the clarity of the image and the close range of relevant
5 individual. Yet the person depicted was located by Mr Lubanga's Defence team and
6 called to give evidence before the Appeal Chamber as Witness D-0040. In his
7 testimony, Witness D-0040 stated that he was age between 19 and 20 years at time
8 that the video was filmed.

9 Mr Lubanga also called another individual who appeared on one of the video excerpts relied
10 upon by Trial Chamber. This individual was Witness D-0041, who testified that he was
11 between the age of seventeen and eighteen at the time that the video was filmed.

12 I disagree with the decision of Majority of Appeals Chamber not to admit this
13 additional evidence. In my view, in light of the overall weakness of the evidence
14 establishing that some children were under the age of fifteen, the submitted
15 additional evidence in relation to Witnesses D-0040 and D-0041 clearly has the
16 potential to demonstrate that the approach of the Trial Chamber was flawed and
17 thereby have an impact on conviction.

18 Finally, I disagree with the Trial Chamber's conclusion that the letter of 12
19 February 2003 corroborates other evidence that the children under fifteen were part of
20 the UPC/FPLC at the time. The letter refers only to the training of officers on
21 demobilisation and not to the presence of children in the UPC/FPLC. The letter has a
22 much wider scope than the UPC/FPLC given that the process referred to in the letter
23 deals with child soldiers as concern in the entire region. Accordingly, I do not
24 consider that this item of documentary evidence assists in establishing the age
25 element of crimes.

1 Therefore, I consider that a requisite element of crimes has not been established
2 beyond a reasonable doubt. It is my hope that future prosecutions of these crimes at
3 the Court will adduce direct and more convincing evidence and preserve the fairness
4 of proceedings. Fairness lies in the heart of criminal proceedings and the
5 fundamental rights of accused should not be sacrificed in favour of putting historical
6 events on the record.

7 In view of these considerations, I would have found that it was not reasonable for the
8 Trial Chamber to convict Mr Lubanga of the crimes conscripting and enlisting
9 children under the age fifteen years into UPC/FPLC and of using them to participate
10 actively in hostilities from 1 September 2002 to 13 August 2003 within the meaning of
11 Article 8(2)(e)(vii) and Article 25(3)(a) of the Statute.

12 I, therefore, also disagree with the conclusions of the Majority with respect to
13 sentencing.

14 PRESIDING JUDGE KOURULA: Thank you, Judge Ušacka.

15 I will now turn to the summary of the Judgment on the Sentencing Decision.

16 On 10 July 2012, having received written submissions from the parties and
17 participants and having heard them as well as evidence related to sentencing, the
18 Trial Chamber sentenced Mr Lubanga: first, for conscripting children under the age of
19 fifteen to thirteen years of imprisonment; secondly, for enlisting children under the
20 age of fifteen to twelve years of imprisonment and for using children under the age of
21 fifteen to participate actively in hostilities to fourteen years of imprisonment. On the
22 basis of these individual sentences and pursuant to Article 78(3) of the Statute, the
23 Trial Chamber imposed a joint sentence of fourteen years of imprisonment.
24 On 3 October 2012, the Prosecutor and Mr Lubanga filed their respective notices of
25 appeal and on 3 December 2012, the same year, they filed their respective documents

1 in support of their appeals against the Sentencing Decision.

2 Starting with the standard of proof and the standard of review, the Appeals Chamber
3 considers that Article 78 of the Statute and Rule 145(1) of the Rules of Procedure and
4 Evidence indicate that, in order to determine a sentence, the Trial Chamber, based on
5 its intimate knowledge of the case, will have to balance all factors it considers relevant.

6 Therefore, the Trial Chamber's determination involves an exercise of discretion with
7 the aim to impose a proportionate sentence that reflects the culpability of the
8 convicted person. Nevertheless, the Appeals Chamber stipulates that Rule 145(1)(c)
9 of the Rules of Procedure and Evidence requires, "in addition to the factors

10 mentioned" in Article 78(1) of the Statute, that the Trial Chamber give consideration
11 to a non-exhaustive list of additional factors contained in this legal provision.

12 As to the standard of review, the Appeals Chamber's primary task is to review
13 whether the Trial Chamber made any errors in sentencing the convicted person. The
14 Appeals Chamber's role is not to determine on its own which sentence is appropriate,
15 unless -- as stipulated in Articles 83(3) of the Statute -- it has found that the sentence
16 imposed by the Trial Chamber is disproportionate to the crime. Only then can the
17 Appeals Chamber amend the sentence and enter a new, appropriate sentence.

18 The Appeals Chamber determines that its review of a Trial Chamber's exercise of its
19 discretion in determining the sentence must be deferential. It will only intervene,
20 first, if the Trial Chamber's exercise of discretion is based on an erroneous
21 interpretation of the law; secondly, the discretion was exercised based on an incorrect
22 conclusion of a fact; and thirdly, as a result of the Trial Chamber's weighing and
23 balancing of the relevant factors, the imposed sentence is so unreasonable as to
24 constitute an abuse of discretion. Furthermore, the Appeals Chamber considers that
25 the material effect of any such an error is only established if the Trial Chamber's

1 exercise of discretion led to a disproportionate sentence.

2 Turning first to the appeal of the Prosecutor. The Prosecutor raises three grounds of
3 appeal and requests the Appeals Chamber to increase the sentence.

4 First, she alleges that the sentence is manifestly disproportionate due to the Trial
5 Chamber's failure to adequately consider all the relevant factors and impose a
6 sentence that was commensurate to the gravity of the crimes for which Mr Lubanga
7 was convicted. Having reviewed the evidence to which the Prosecutor points as
8 well as the sentence imposed on Mr Lubanga, the Appeals Chamber finds that the
9 Trial Chamber's exercise of its discretion was not unreasonable. It properly weighed
10 and balanced all the relevant factors in imposing a sentence that reflects Mr Lubanga's
11 culpability, as required by Rule 145(1)(a) of the Rules of Procedure and Evidence.

12 Furthermore, the Appeals Chamber dismisses as unsubstantiated the Prosecutor's
13 argument that the sentence imposed was disproportionate to sentences imposed by
14 other international tribunals.

15 Second, the Prosecutor alleges that the Trial Chamber failed to consider Mr Lubanga's
16 abuse of authority and trust as an aggravating factor. The Appeals Chamber notes
17 that the Prosecutor had requested the Trial Chamber to consider Mr Lubanga's abuse
18 of authority as an aggravating factor. The Trial Chamber was therefore cognisant of
19 this request but decided to take Mr Lubanga's position as President and
20 commander-in-chief of the UPC into account to establish the degree of his
21 participation in the crimes for which he was convicted. The Appeals Chamber can
22 find no error in the Trial Chamber's approach.

23 Thirdly, the Prosecutor raises an error of law in applying the wrong test for
24 aggravating factors or, in the alternative, error of fact in reaching unreasonable
25 findings based on the evidence. The Appeals Chamber finds that the Prosecutor

1 mischaracterises the Prosecutor's test and dismisses this argument. And as to the
2 factual errors alleged by the Prosecutor with regard to the assessment of facts
3 supporting cruel treatment of and sexual violence, the Appeals Chamber finds that it
4 was not unreasonable for the Trial Chamber to conclude that the link between Mr
5 Lubanga and the alleged aggravating factors in the context of the charges has not
6 been established beyond reasonable doubt.

7 Moving to the appeal of Mr Lubanga. He raises four grounds of appeal and requests
8 that the Appeals Chamber set aside the Sentencing Decision or, in the alternative,
9 reduce the sentence imposed by the Trial Chamber.

10 First, he raises errors of law and fact by the Trial Chamber in its assessment of the
11 large-scale and widespread nature of the crimes for which he was convicted in
12 relation to the gravity of the crimes. Mr Lubanga alleges that the Trial Chamber, in
13 relying on the widespread character of the crimes also included non-criminal acts,
14 namely, the recruitment of individuals of and over the age of fifteen years. The
15 Appeals Chamber rejects this argument and finds that the Trial Chamber relied on
16 findings in the Conviction Decision that establish the widespread character of the
17 crimes by reference to individuals under the age of fifteen years. With respect to the
18 alleged factual errors, the Appeals Chamber decides not to readdress errors already
19 decided upon in the judgment against the Conviction Decision.

20 Second, Mr Lubanga raises errors of law and fact arguing that the Trial Chamber did
21 not take into account violations of Mr Lubanga's fundamental rights in determining
22 the sentence. The Appeals Chamber notes that neither the Appeals Chamber in the
23 judgment against the Conviction Decision, nor the Trial Chamber in the Stay of
24 Proceedings Decision or Conviction Decision found that a serious violation of Mr
25 Lubanga's fundamental rights had occurred, justifying a reduction of sentence. In

1 the Appeals Chamber's view, the Trial Chamber addressed these allegations during
2 the trial proceedings.

3 Furthermore, the Appeals Chamber finds that Mr Lubanga mischaracterises the Trial
4 Chamber's decision in that it didn't find that the Stay of Proceedings Decision affected
5 his rights to have the sentence reduced as a form of remedy.

6 Finally, as to the alleged factual errors, the Appeals Chamber finds that Mr Lubanga
7 does not substantiate how the Trial Chamber's consideration of Mr Lubanga's
8 cooperation in light of the Prosecutor's actions during the trial as a mitigating factor
9 was unreasonable.

10 The Appeals Chamber dismisses as not substantiated the alleged third ground of
11 appeal that the Trial Chamber failed to deduct the period of Mr Lubanga spent in
12 detention in the DRC from 13 August 2003 until 16 March 2006.

13 Finally, the Appeals Chamber dismisses Mr Lubanga's fourth alleged error in the
14 Trial Chamber's finding that it could consider evidence that exceeded the facts and
15 circumstances set out in the Decision on the Confirmation of Charges for purposes of
16 sentencing. The Appeals Chamber finds that Mr Lubanga did not properly raise this
17 ground of appeal.

18 Thus, in considering that none of the alleged grounds of appeal was successful, the
19 Appeals Chamber by majority, Judge Song partly dissenting, Judge Ušacka dissenting,
20 confirms the Sentencing Decision and rejects the appeals.

21 As I stated, Judge Ušacka disagrees for the reasons expressed in her dissent to the
22 judgment on the Conviction Decision as summarised just a while ago.

23 And Judge Song shall now briefly summarise his opinion.

24 Judge Song.

25 JUDGE SONG: Thank you, Mr Presiding Judge.

1 In light of my view that the Trial Chamber erred in holding that Article 8(2)(e)(vii) of
2 the Statute contains the three separate offences of conscription, enlistment and use to
3 actively participate in hostilities, as well as in convicting Mr Lubanga of these three
4 separate offences, I find that the Trial Chamber also erred in entering three separate
5 sentences. Instead, it should have entered one sentence.

6 While I otherwise agree with the reasoning of the majority, I disagree with one single
7 point in the majority's reasoning, that is that "it is not necessary in the context of the
8 present appeal to determine which of the possible approaches to the interaction
9 between the factors of Article 78(1) of the Statute and those of Rule 145(1)(c) of the
10 Rules of Procedure and Evidence is correct." In my view, to ensure a consistent
11 sentencing practice, the Appeals Chamber should have provided further guidance on
12 how a Trial Chamber should take these factors into account when determining
13 sentence. These factors are set out in my opinion.

14 Thank you, Mr Presiding Judge.

15 PRESIDING JUDGE KOURULA: Thank you. Thank you, Judge Song.

16 This concludes the summary of the judgments. It only remains for me to thank the
17 parties and participants, the interpreters and the court reporters. I also would like to
18 thank the Registry staff for having facilitated this hearing.

19 Thank you all. This session is now closed.

20 THE COURT USHER: All rise.

21 (The hearing ends in open session at 5.44 p.m.)