

The *Lubanga* Case of the International Criminal Court: A Critical Analysis of the Trial Chamber's Findings on Issues of Active Use, Age, and Gravity

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Abstract

The author explores the International Criminal Court's (ICC) very first judgment in the case of *Lubanga*. He examines numerous contentious questions arising from the war crime of recruiting child soldiers, such as children's voluntariness of joining armed forces, the legal assessment of sexual slavery and 'active use', and the intricate task of proving the age of a child soldier. Notwithstanding certain blind spots, it is ultimately inferred that the ICC not only proved to be a functioning institution but also provided a ruling of precedential value, in respect of the issues of both child soldiering and general sentencing.

A. Introduction

On the 10th of July 2012, the International Criminal Court (ICC) sentenced the former Congolese militia leader Thomas Lubanga Dyilo to 14 years of imprisonment for war crimes,¹ after it had rendered its very first judgment earlier in March 2012.² Lubanga was one of many African warlords, who played a role in the seemingly endless conflicts in the eastern part of the Democratic Republic of Congo (DRC), which at times included numerous paramilitary groups and the national armies of Uganda, Rwanda, and the DRC.³ The defendant was one of the founders of the *Union des Patriotes Congolais* (UPC) and commander-in-chief of their military wing, the *Forces Patriotiques pour la Libération du Congo* (FPLC). The UPC's long-term objective was to gain political and military control over the Ituri district in the northeast of the DRC.⁴ The DRC had referred the situation to the ICC in March 2004 based

¹ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence, ICC-01/04-01/06 (Trial Chamber I), 10 July 2012, 38-39, para. 107 [Prosecutor v. Lubanga, Decision on Sentence].

² *Prosecutor v. Thomas Lubanga Dyilo*, Judgment, ICC-01/04-01/06 (Trial Chamber I), 14 March 2012 [Prosecutor v. Lubanga, Judgment].

³ For a summary of these hostilities which are generally referred to as the Second Congo War, see L. Arimatsu, 'The Democratic Republic of the Congo 1993-2010', in E. Wilmschurst (ed.), *International Law and the Classification of Conflicts* (2012), 146, 167-185.

⁴ The UPC/FPLC's principal opponents were the FRPI (*Force de résistance patriotique en Ituri*) led by Germain Katanga and the FNI (*Front des nationalistes et intégrationnistes*) led by Mathieu Ngudjolo Chui who both were tried for war crimes and crimes against humanity at the ICC. On 18 December 2012 Ngudjolo was acquitted of all charges and released from custody on 21 December 2012. See *Prosecutor v. Mathieu Ngudjolo Chui*, Judgment, ICC-01/04-02/12 (Trial Chamber II), 18 December 2012, 197 (dispositive part).

on Article 14 *Rome Statute of the International Criminal Court* (Rome Statute or ICC Statute).⁵ Lubanga was arrested in March 2005 and detained by state authorities in Kinshasa for a year before being transferred to The Hague. At the ICC the defendant was charged and eventually found guilty as a co-perpetrator of enlisting and conscripting children under the age of fifteen years⁶ into the FPLC and using them to participate actively in hostilities from September 2002 to August 2003.⁷ The Trial Chamber could elaborate on several problematic features of the 'new' war crime of child recruitment in the *Rome Statute*: Article 8 (2) (b) (xxvi) and Article 8 (2) (e) (vii). Unfortunately the Judges missed the chance to answer some disputed questions, which have been subject to discussion in legal scholarship.⁸ The Dissenting Opinion of Judge Odio Benito is especially not persuasive.

B. A Milestone in International Criminal Law?

To say, the long awaited first judgment of the ICC is a milestone in the progressive development of international criminal law, is probably expecting too much from too little. One of the reasons is the narrow scope of the charges brought to the Court by the prosecution, limiting the Trial Chambers jurisdiction to the crime of child soldiering. Nonetheless, the judgment and the sentencing decision contain several very remarkable findings on material and procedural law. Numerous obstacles had to be overcome in the ICC's first full trial.⁹ The

⁵ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3, 99 [Rome Statute].

⁶ On the wide-spread phenomenon of child soldiers see, e.g., M. A. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (2012), 26-60; R. Dallaire, *They Fight Like Soldiers, They Die Like Children* (2010), 104-151; S. von Schorlemer, *Kindersoldaten und bewaffneter Konflikt: Nukleus eines umfassenden Schutzregimes der Vereinten Nationen* (2009), 8-35.

⁷ *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 591, para. 1358.

⁸ M. E. Kurth, 'The Recruitment and Use of Child Soldiers: Some Reflections on the Prosecution of a New War Crime', in C. Stahn & L. van den Herik (eds), *Future Perspectives on International Criminal Justice* (2009), 475; M. Happold, 'Child Recruitment as a Crime Under the Rome Statute of the International Criminal Court', in J. Doria, H.-P. Gasser & M. C. Bassiouni (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Igor Blishchenko* (2009), 579; M. Cottier, 'Article 8', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed. (2008), 275, 466-475, para. 227-234.

⁹ For a rare insight into the practical difficulties the Chamber faced, see the account of Presiding Judge A. Fulford, 'The Reflections of a Trial Judge', 22 *Criminal Law Forum* (2011) 1-2, 215.

proceedings were halted twice by the Trial Chamber due to serious concerns in the way the Office of The Prosecutor (OTP) conducted its investigations and breached its disclosure obligations.¹⁰ These important issues of fair trial guarantees have already been subject of several commentaries and will not be discussed again here.¹¹ Instead, the author will focus his analysis on the *actus reus* of the charged crimes of recruiting and using child soldiers and the *mens rea*. The decisive factors for finding the appropriate sentence for this war crime will also be examined. The sentencing decision of July 2012 establishes some fundamental guidelines when it comes to aggravating and mitigating factors, which will be a point of reference for future cases at the ICC.

C. The War Crime of Recruiting Child Soldiers

For a successful litigation of a war crime in accordance with Article 8 *Rome Statute* the prosecution must establish beyond reasonable doubt that there was an armed conflict in existence at the time of the offence and there must be a nexus between the criminal conduct and this conflict.¹² While Article 8 (2) (e) (vii) *Rome Statute* covers the recruitment of child soldiers during non-

¹⁰ *Prosecutor v. Thomeas Lubanga Dyilo*, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, ICC-01/04-01/06 (Trial Chamber I), 13 June 2008, 41-42, paras 92-95; *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, ICC-01/04-01/06 (Trial Chamber I), 8 July 2010, 22-23, para. 31.

¹¹ M. Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (2012), 271-278; L. D. Johnson, 'The Lubanga Case and Cooperation Between the UN and the ICC: Disclosure Obligation v. Confidentiality Obligation', 10 *Journal of International Criminal Justice* (2012) 4, 887; K. Ambos, 'The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues', 12 *International Criminal Law Review* (2012) 2, 115, 124-128; B. Kuschnik, 'International Criminal Due Process in the Making: New Tendencies in the Law of Non-Disclosure in the Proceedings Before the ICC', 9 *International Criminal Law Review* (2009), 1, 157.

¹² W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), 202-209; Cottier, *supra* note 8, 290-295, paras 5 & 6; G. Boas, J. L. Bischoff & N. L. Reid, *International Criminal Law Practitioner Library*, Vol. II: Elements of Crimes Under International Law (2008), 232-243; M. Bothe, 'War Crimes', in A. Cassese, P. Gaeta & J. R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002), 379, 388-389.

international armed conflicts, Article 8 (2) (b) (xxvi) *Rome Statute* applies during international armed conflicts.¹³ The legal character of hostilities has been the object of extensive discussions in legal scholarship and the jurisprudence of international courts. The mixed nature of many contemporary armed conflicts in times of Failed States or at least States, which lose control over parts of their territory, poses a serious challenge for the proper application of principles of international humanitarian law. The DRC is and was a tricky ‘candidate’ in this regard and the rulings on the legal character of the hostilities in the eastern part of the country have varied significantly. The *Lubanga* case noticeably showed the fading relevance of the dichotomy international/non-international armed conflict in international law.¹⁴

I. The Nature of the Conflict in Ituri

First of all, there was a general consent that the FPLC was involved in an armed conflict in Ituri, the Hema-Lendu conflict, which included different opposing rebel groups.¹⁵ The contentious issue was if this conflict was international in nature due to fact that these rebel groups were used as proxies in conflicts, which at times involved Uganda, Rwanda, and the DRC. The Pre-Trial Chamber (PTC) of the ICC had initially qualified the conflict between July 2002 and June 2003 as an international armed conflict owing to the direct involvement of the Uganda People’s Defence Force (UPDF) as an occupying power in Ituri. After the UPDF’s withdrawal the PTC held that the conflict reverted to being of a non-international character until the end of 2003.¹⁶

¹³ While there is a tendency to treat both forms of conflict alike, the *Rome Statute* still codifies the so-called two box approach and not every war crime committed in the context of an international armed conflict is criminalized when committed in an inner-state setting.

¹⁴ See D. Akande, ‘Classification of Conflicts: Relevant Legal Concepts’, in E. Wilmschurst (ed.), *International Law and the Classification of Conflicts: Relevant Legal Conflicts* (2012), 33; G. de Beco, ‘War Crimes in International Versus Non-International Armed Conflicts: “New Wine in Old Wineskins”?’, 8 *International Criminal Law Review* (2008) 1-2, 319; E. Crawford, ‘Unequal Before the Law: The Case for the Elimination of the Distinction Between International and Non-International Armed Conflicts’, 20 *Leiden Journal of International Law* (2007) 2, 441.

¹⁵ *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 43-46, paras 71-80.

¹⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06 (Pre-Trial Chamber I), 29 January 2007, 70-82, paras 200-237 [*Prosecutor v. Lubanga*, Decision on the Confirmation of Charges].

The Trial Chamber in accordance with *Regulation 55 of the Court*¹⁷ changed this qualification as it ruled that the conflict was of a non-international nature during the time the alleged crimes took place.¹⁸ Though the ‘substantial’ involvement of the national armies of Rwanda and Uganda in Ituri at least for some time is undisputed,¹⁹ the Trial Chamber was of the opinion that neither Rwanda nor Uganda eventually exercised the necessary overall control over the FPLC.²⁰ The Chamber’s analysis rightly pre-assumes that parallel conflicts of different legal character can take place simultaneously in one region. The result was that the Trial Chamber did not have to decide here if the accused was liable under Article 8 (2) (b) (xxvi) *Rome Statute*, which is solely applicable to international armed conflicts.²¹ With this finding, the Trial Chamber eventually confirmed what the OTP had originally charged Lubanga with. Only the PTC had added the charge of child recruitment in an international armed conflict on its own initiative,²² which resulted in a dispute between the OTP and the PTC over the question of the competence to make such amendments in the charging document. This procedural question was left open as the PTC denied the OTP’s motion for leave to appeal.²³ Thus, the OTP and the defence had to argue national as well as non-international armed conflict when presenting their respective cases.

¹⁷ *Regulations of the Court*, 26 May 2004, Regulation 55, ICC-BD/01-03-11, 22: “In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.”

¹⁸ *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 239-260, paras. 523-567.

¹⁹ See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168, 279-283, para. 345; *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 16, 76, para. 220.

²⁰ *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 257-258, para. 561. This overall control test was established by the ICTY in the famous *Tadić* Case. See *Prosecutor v. Duško Tadić*, Judgment, IT-94-1-A, 15 July 1999, 58-59, para. 137.

²¹ There was never any serious doubt that these hostilities amounted to protracted armed violence of sufficient gravity and duration in accordance with Art. 8 (2) (f) *Rome Statute*.

²² *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 16, 71-82, paras 200-237.

²³ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, ICC-01/04-01/06 (Pre-Trial Chamber I), 24 May 2007, 21, para. 76.

II. Can a Child Join Armed Forces Voluntarily?

The Judges spent much effort on delimiting the different modes of conduct. Under Article 8 (2) (e) (vii) *Rome Statute* the defendant is guilty of a war crime when he enlists or conscripts children under the age of fifteen years into armed forces or groups. Enlistment and conscription encompasses any method of enrollment by formal or informal means. The Trial Chamber confirmed the PTC's finding²⁴ that enlistment entails accepting and enrolling individuals who volunteer to join the armed forces while conscription implies some form of compulsion.²⁵ Though the defence of consent was never explicitly raised by Lubanga's counsel, the Trial Chamber discussed the matter and concluded that children under the age of fifteen are eventually unable to give genuine and informed consent.²⁶ The Judges thereby relied on testimony by an expert witness who stated that children have inadequate knowledge and understanding of the short- and long-term consequences of their actions and therefore lack the capacity to determine their best interests in this particular context.²⁷ The Judges eventually ruled that the *Rome Statute* criminalizes any form of enrollment of children under fifteen years of age by whatever means due to the fact that this category of victims does not possess the intellectual capacity to give genuine consent.²⁸ Had the founders of the *Rome Statute* installed a 18-year threshold for potential victims of this war crime, as had been advocated by some States and many NGOs,²⁹ excluding the defence of consent would have been much more difficult. One can hardly doubt that a 17-year old child is very well capable of making a reasoned choice when joining armed forces. After all, many States allow the recruitment of minors into their military forces at that age.³⁰ Be that as it may, *de lege lata* there exists no special form of recruiting minors that does not violate Article 8 (2) (b) (xxvi) or Article 8 (2) (e) (vii) *Rome Statute*.³¹

²⁴ *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 16, 85 para. 246.

²⁵ *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 278-279, para. 608.

²⁶ *Ibid.*, 281-282, para. 617.

²⁷ See E. Schauer & T. Elbert, 'The Psychological Impact of Child Soldiering', in E. Martz (ed.), *Trauma Rehabilitation After War and Conflict* (2010), 311.

²⁸ *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 282, para 618.

²⁹ See G. Palomo Suárez, *Kindersoldaten und Völkerstrafrecht* (2009), 117.

³⁰ See A. Sheppard, 'Child Soldiers: Is the Optional Protocol Evidence of an Emerging "Straight 18" Consensus?', 8 *The International Journal of Children's Rights* (2000) 1, 37, 48.

³¹ The traditional initiation of children into a special society in Africa can constitute a war crime if it can be proven that this process is the first part of training for the children

III. National Armed Forces and Groups

Having excluded the charge of recruitment in an international armed conflict, the Trial Chamber did not have to rule on the extent of the difficult notion of ‘national armed forces’. Its wording suggests that it refers exclusively to the armed forces of a State.³² The PTC had ruled that for the purpose of international armed conflict, this term may extend to those entities which are not States, as long as they have certain characteristics of a government.³³ Judge Odio Benito in her Dissenting Opinion annexed to the judgment pointed out that the concept of national armed forces was still “a live issue” because the defence had always argued the conflict under consideration was an international one and the problem would probably come up again in the appeals phase.³⁴ She stressed that such clarifications were necessary for the progressive development of international law.³⁵ Odio Benito then pointed at the object and purpose of the *Rome Statute*, which aims to protect children from the horrors of warfare as best as possible. Thus, according to her, the nature of the organization of an armed group cannot limit the applicability of Article 8 (2) (e) (vii) *Rome Statute*.³⁶ The majority merely needed to confirm that the children were recruited into any armed force or group. The term ‘armed forces’ is to be understood as not only including the regular armed forces of a State but any kind of more or less strictly organized group of people carrying weapons under responsible command with the capability to carry out military operations.³⁷ Accordingly, the term ‘armed

to become fighters in an armed conflict. See *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Judgment, SCSL-04-14-T, 2 August 2007, 286-287, paras 968-971. Justice Itoe, in his Separate Opinion, argued against this finding on the grounds that such a customary ritual cannot amount to the enrollment into armed forces *per se*. See Separate and Partially Dissenting Opinion of Justice Itoe, *Prosecutor v. Moinina Fofana and Allieu Kondewa*, *supra* this note, A-1, A-7-A9, paras 30-35.

³² For a discussion of this problem, see R. Graf, ‘The International Criminal Court and Child Soldiers: An Appraisal of the Lubanga Judgment’, 10 *Journal of International Criminal Justice* (2012) 4, 945, 957-958; Palomo Suárez, *supra* note 29, 151-161; Cottier, *supra* note 8, 473-474, para. 232.

³³ *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 16, 95-98, paras 272-285.

³⁴ Separate and Dissenting Opinion of Judge Odio Benito, *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 5, para. 12.

³⁵ *Ibid.*, 3, para. 7.

³⁶ *Ibid.*, 5, para. 13.

³⁷ See K. Ipsen, ‘Combatants and Non-Combatants’, in D. Fleck (ed.), *International Humanitarian Law* (2008), 79, 83-84.

forces' can include different types of paramilitary entities. The Chamber did not have any reason to doubt that this was true for the FPLC.³⁸

IV. Sexual Slavery and 'Active Use'

The Trial Chamber then elaborated on the third mode of conduct: the active use of child soldiers.³⁹ The OTP could prove beyond reasonable doubt that child soldiers were deployed on the battlefield at different times during the Hema-Lendu conflict.⁴⁰ More problematic were other forms of 'use'. Is the use of children as guards of military objects, bodyguards for commanders, couriers, spies etc. covered by this notion? The PTC had qualified certain activities not directly linked to combat as covered by Article 8 (2) (b) (xxvi), Article 8 (2) (e) (vii) *Rome Statute*, respectively. These include scouting, spying, sabotage, or the use of children at checkpoints, as couriers, bodyguards for commanders, or guards of military objects.⁴¹ Only if the activities were totally unrelated to the hostilities they should not be covered by the *actus reus*.⁴² In the judgment concerning the former president of Liberia, Charles Taylor, the Special Court for Sierra Leone (SCSL) also considered the guarding of mines by children to be an activity in this sense. Not so much because the successful mining of natural resources raised revenues to support the war effort ('blood diamonds') but rather because these mines were at constant risk of being attacked by the enemy and put minors in direct danger of hostilities.⁴³

The majority of the Trial Chamber in the *Lubanga* case did not provide a comprehensive legal definition on what the notion of 'active use' encompasses but rather made a case-by-case analysis of the specific evidence presented. It held that many of the activities under consideration, such as children acting as bodyguards for commanders of the FPLC or guarding military facilities in the Ituri district, could eventually be qualified as active use in the sense of Article 8 (2) (e) (vii) *Rome Statute*.⁴⁴ The domestic housework done by many girl soldiers was seemingly not considered to be dangerous enough to fall under the notion

³⁸ *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 249-250, 253 & 397, paras 543, 550 & 910.

³⁹ *Ibid.*, 363-399, paras 820-916.

⁴⁰ *Ibid.*, 364-368, paras 821-834.

⁴¹ *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 16, 90-91, paras 261-263.

⁴² *Ibid.*, 91, para. 262.

⁴³ *Prosecutor v. Charles Taylor*, Judgment, SCSL-03-01-T, 18 May 2012, 517, para. 1459.

⁴⁴ *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 399, para. 915.

of ‘active use’. This could only be the case when the support provided put her in a position of a potential military target.⁴⁵ This ‘exposure test’ on a case-by-case basis is supported by the jurisprudence of the SCSL⁴⁶ and in legal scholarship.⁴⁷ It is submitted here that such an approach is probably the best solution as it gives the ICC the necessary flexibility when ruling on a specific case.

During the trial several witnesses testified that sexual abuse of child soldiers took place on a regular basis.⁴⁸ Especially girl soldiers were held as sex slaves by different commanders, which called them their ‘wives’. The majority of the Trial Chamber considered these acts to be irrelevant in connection to the charge of child soldiering. The situation would have been different if the OTP had also charged Lubanga with rape, sexual slavery, etc. in accordance with Article 8 (2) (e) (vi) *Rome Statute*, which it did not. The Judges rightly did not see themselves competent to close this gap on their own initiative because Article 74 (2) *Rome Statute* does not allow the Trial Chamber to rule beyond what is brought before the Court by the OTP. In her dissent Judge Odio Benito disagreed with these findings. She finds the ICC under an obligation to produce a general definition of the crime of child soldiering and not limit itself to the scope of the charges brought before it.⁴⁹ This duty, according to her, can be derived from Article 21 (3) *Rome Statute*, which obliges the ICC to apply the relevant sources of law (the *ICC Statute*, the *Elements of Crimes*,⁵⁰ the *Rules of Procedure and Evidence*,⁵¹ etc.) in accordance with internationally recognized human rights.⁵² Her treatment of Article 21 (3) *Rome Statute* is unprecedented. The exact scope and effect of this norm has been under discussion and some scholars have already warned of

⁴⁵ *Ibid.*, 385, para. 882.

⁴⁶ See *Prosecutor v. Issa Hassan Sesay, Morris Kallon & Augustine Gbao*, Judgment, SCSL-04-15-T, 2 March 2009, 511-512, paras 1720-1721 [*Prosecutor v. Sesay, Kallon & Gbao*, Judgment]; *Prosecutor v. Alex Tamba Brima and Others*, Judgment, SCSL-04-16-T, 20 June 2007, 228, paras 736-737.

⁴⁷ Graf, *supra* note 32, 965; T. R. Liefänder, ‘The Lubanga Judgment of the ICC: More Than Just the First Step?’, 1 *Cambridge Journal of International and Comparative Law* (2012) 1, 191, 202-203; G. Waschefort, ‘Justice for Child Soldiers?: The RUF Trial of the Special Court for Sierra Leone’, 1 *Journal of International Humanitarian Legal Studies* (2010) 1, 189, 199-201; von Schorlemer, *supra* note 6, 315-316.

⁴⁸ *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 388-390, paras 890-895.

⁴⁹ Separate and Dissenting Opinion of Judge Odio Benito, *Prosecutor v. Lubanga*, Judgment, *supra* notes 2 & 34, 2-3, para. 6.

⁵⁰ ICC, *Elements of Crime*, ICC-PIDS-LT-03-002/11_Eng (2011).

⁵¹ ICC, *Rules of Procedure and Evidence*, ICC-PIDS-LT-02-002/13_Eng (2013).

⁵² Separate and Dissenting Opinion of Judge Odio Benito, *Prosecutor v. Lubanga*, Judgment, *supra* notes 2 & 34, 2-3, para. 6.

its possible misuse.⁵³ What Article 21 (3) *Rome Statute* eventually aims to make sure is that the application or interpretation of the mentioned sources of law by the Court produces results, which are compatible with international human rights.⁵⁴ Thus, the result of the Court's ruling has to stand the test. Article 21 (3) *Rome Statute* can in no way oblige the Court to rule on a specific matter or define a legal concept because it might be desirable and could serve the future protection of somebody's human rights. Nonetheless, a more comprehensive definition of the *actus reus* of Article 8 (2) (e) (vii) *Rome Statute* would have been welcomed, especially given the problem of delimiting active participation as used in the *Rome Statute* and direct participation as used in the *Additional Protocols*⁵⁵ of the *Geneva Conventions*.⁵⁶ But the Chamber was definitely under no obligation to do so in the abstract. Odio Benito's subsequent attempt to define the scope of 'active use' in a broader way needs to be criticized as well. In her opinion, the protection of children from the horrors of warfare cannot limit itself to activities, which directly expose the child soldiers to the dangers of combat but also to any harm the child might suffer from the group that recruited the child illegally. Judge Odio Benito stated:

“Sexual violence committed against children in the armed groups causes irreparable harm and is a direct and inherent consequence to their involvement with the armed group. Sexual violence is an

⁵³ D. Sheppard, 'The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21(3) of the Rome Statute', 10 *International Criminal Law Review* (2010) 1, 43, 46-48; G. Sluiter, 'Human Rights Protection in the ICC Pre-Trial Phase', in G. Sluiter & C. Stahn (eds), *The Emerging Practice of the International Criminal Court* (2009) [Sluiter & Stahn, *Emerging Practice of the ICC*], 459, 466-467.

⁵⁴ Schabas, *supra* note 12, 398-400; G. Bitti, 'Article 21 of the Statute of the ICC and the Treatment of Sources of Law in the Jurisprudence of the ICC', in Sluiter & Stahn, *Emerging Practice of the ICC*, *supra* note 53, 285, 303; A. Pellet, 'Applicable Law', in A. Cassese, P. Gaeta & J. R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (2002), 1051, 1079-1082.

⁵⁵ *Protocol Additional I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, Art. 77 (2), 1125 UNTS 3, 39; *Protocol Additional II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, Art. 4 (3) (c), 1125 UNTS 609, 612.

⁵⁶ For a discussion of this aspect, see Cottier, *supra* note 8, 470-471, para. 229; M. Happold, 'Prosecutor v. Thomas Lubanga, Decision of Pre-Trial Chamber I of the International Criminal Court, 29 January 2007', 56 *International and Comparative Law Quarterly* (2007) 3, 713, 719-721.

intrinsic element of the criminal conduct of “use to participate actively in the hostilities”. Girls who are used as sex slaves or “wives” of commanders or other members of the armed group provide essential support to the armed groups.”⁵⁷

Her understanding of the concept of ‘active use’ is surprising, to say the least. How can the rape of a member of the own armed forces be read as the use to participate actively in hostilities? This analysis goes clearly beyond the ordinary meaning of the wording. Such a ‘generous’ interpretation of the material elements of a specific crime is a breach of Article 22 (2) *Rome Statute* (*nullum crimen sine lege*) because it overextends the meaning of ‘active use’. Article 22 (2) *Rome Statute* explicitly states that in case of ambiguity, the definition of a crime shall be interpreted in favor of the person being prosecuted (*in dubio pro reo*). Above all, the ICC is a criminal court and it has to respect basic principles of criminal law, which were unmistakably laid down in Articles 22 to 33 of its statute. The ICC would not be a court of law if it would convict the accused for certain crimes only because it might seem indispensable to protect a specific group of victims as best as possible. Odio Benito’s style of reasoning is not a mere interpretation of the law but rather leads to the making of new law. She could have tried to argue that sexual violence committed against child soldiers is an excessive form of active use under customary international law. But would she be able to find supporting material or cases for such a claim? She would not as her findings simply lack proper judicial reasoning.⁵⁸ Fortunately, the majority of the Trial Chamber did not follow Odio Benito’s line of argument.

V. Proving the Age of a Child Soldier

A very practical and decisive issue when it comes to the prosecution of recruiting/using child soldiers is the question of age. The trial of *Lubanga* showed how difficult it is to confirm that the soldiers under consideration are below the 15-year threshold.⁵⁹

⁵⁷ Separate and Dissenting Opinion of Judge Odio Benito, *Prosecutor v. Lubanga*, Judgment, *supra* notes 2 & 34, 7-8, para. 20.

⁵⁸ Also rejecting her findings: Ambos, *supra* note 11, 137; Graf, *supra* note 32, 966.

⁵⁹ In the RUF case before the SCSL the Trial Chamber identified the problem and held: “While the Chamber heard testimony from child fighters who were able to identify their ages at the times of relevant events, we note that several such witnesses estimated the age of other child fighters based on comparisons between their own size and that of the other children. The Chamber also heard evidence from many other witnesses who observed

The civil administration in the DRC functioned only to a very limited extent at the relevant time. Therefore, civil status documents confirming the age of child soldiers, which were recruited by the FPLC, were extremely hard to obtain by the prosecution. The investigators eventually refrained from contacting village chiefs or former schoolteachers to verify the age of specific victims because it was deemed to be too dangerous for the children and their families.⁶⁰ Instead, the OTP decided to turn to medical examinations to prove the age of children under consideration. The medical specialists⁶¹ later testified in Court that based on X-ray images, some recruits may have been as young as ten or eleven years old at the time they were allegedly FPLC fighters. Others, however, probably were not as young, said the experts, pointing out that the poor quality of the X-ray images created a margin of error. The age determination techniques involved studying the bones of the left wrist and hand because the development of these body parts indicates the person's age. The method is effective for age determination in males less than 20 years old and females less than 17 years old. Beyond those ages these bones are normally fully developed. The two main clinical methods for forensic age estimation are the *Greulich and Pyle* (G&P) method⁶² and the *Tanner and Whitehouse* (T&W) method⁶³ and have been standard practice in national criminal proceedings. There are a few differences between the two methods. In the case of *Lubanga* the two medical experts relied

children who appeared to be under the age of 15 engaged in various war-related activities. The Chamber is cognisant that these estimations of age were generally made on the basis of a child's appearance or height, rather than on objective proof of age. Given the inherent uncertainties in such estimations, the Chamber has exercised caution in determining the ages of children associated with the rebel factions in its findings. We nonetheless note that during the DDR process it was established through the use of verification of age methods such as the physical inspection of teeth that many of the children who had fought with the RUF and AFRC forces were under 15 at that time, which was towards the end of the Indictment period." See *Prosecutor v. Sesay, Kallon & Gbao*, Judgment, *supra* note 46, 487, paras 1627-1628.

⁶⁰ See *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 83-87, paras 170-175.

⁶¹ The medical experts were Dr. Caroline Rey-Salmon, a pediatrician and Dr. Catherine Adamsbaum, a radiologist, both from Paris, France.

⁶² See S. Mora *et al.*, 'Skeletal Age Determinations in Children of European and African Descent: Applicability of the Greulich and Pyle Standards', 50 *Pediatric Research* (2001) 5, 624.

⁶³ See S. Schmidt *et al.*, 'Applicability of the Skeletal Age Determination Method of Tanner and Whitehouse for Forensic Age Diagnostics', 122 *International Journal of Legal Medicine* (2008) 4, 309.

on the G&P method plus teeth examinations of the third molar.⁶⁴ According to them, the two combined would give a reliable conclusion concerning the age of the patient.⁶⁵ The experts admitted that poor nutrition and disease factors could distort results. The Trial Chamber handled this evidence with care when it ruled:

“These examinations were not meant to determine a person’s age with precision; furthermore, the model is based on European and American populations rather than those from Sub-Saharan Africa, and the methodology has not been updated for 50 years. Therefore, it is suggested this approach will only provide an approximate answer, particularly given it is not an exact science. The Chamber accepts that this material needs to be treated with care, not least because analysis of this kind, based on X-rays, was principally developed to measure biological rather than chronological age.”⁶⁶

Accordingly the Judges considered an abundance of additional factors when trying to pinpoint the age of a child soldier. During the trial it became clear that the term ‘kadogos’ was used within the FPLC to refer to child soldiers of a very young age but not necessarily below the age of 15 years.⁶⁷ Often witnesses stated the children under consideration were visibly under fifteen years of age by comparing them to other juveniles, describing their general behaviour or their state of physical development. In one case, some children were said to have weighed less than their weapons and could barely carry the AK-47s they were given.⁶⁸ One former member of the FPLC testified that some of the young boys would cry for their mothers when they were hungry and would play children’s games during the day while they had their weapons next to them.⁶⁹

⁶⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of 12 May 2009, ICC-01/04-01/06-T-172-ENG, 13-16.

⁶⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of 13 May 2009, ICC-01/04-01/06-T-173-ENG, 27-28.

⁶⁶ *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 399, para. 176.

⁶⁷ *Ibid.*, 381-384, paras 870-877.

⁶⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of 3 February 2009, ICC-01/04-01/T-114-Red2-ENG, 37.

⁶⁹ *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of 25 March 2009, ICC-01/04-01/T-154-Red2-ENG, 41.

Others would make toys for themselves after training or play marbles.⁷⁰ Another witness, a political advisor for the UPC at the time, told the Court that he used to be a teacher and had been in daily contact with children of this age group. Thus, his estimates were found to be particularly reliable and he testified about child soldiers being clearly younger than 10 years.⁷¹ Of course, due to the subjective nature of these assessments their value is limited and the defence tried to rebut the reliability of every single witness. Here the defence could have gained substantial ground especially after some former child soldiers, who took the stand in the courtroom, where caught lying about their age and their deployment in the ranks of the FPLC.⁷²

But the Judges were eventually able to make up their own minds about the actual appearance of young soldiers when video-footage from the time the charged crimes allegedly took place was introduced as evidence. The Chamber held:

“Mr Lubanga is also filmed returning to his residence after an event at the Hellenique Hotel on the same day (23 January 2003), travelling in a vehicle accompanied by members of the presidential guard. Two young individuals in camouflage clothing, who are clearly under the age of 15, are to be seen sitting with armed men wearing military clothing. *The size and general appearance of these two young individuals, when compared with other children and the men who are with them in the vehicle, leads to the conclusion that they are under the age of 15.*”⁷³

In this case, the quasi-standard of proof could be reduced to the famous slogan: “I know it when I see it!”⁷⁴ Such a rule is obviously not foreseen in any *Rules of Procedure and Evidence* and might not be an appropriate basis for

⁷⁰ *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of 10 June 2009, ICC-01/04-01/06-T-189-Red2-ENG, 17.

⁷¹ *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of 27 May 2009, ICC-01/04-01/06-T-179-Red-ENG, 87.

⁷² For example, witness D-0004 never served in the military and was probably coerced into testifying against Lubanga. See *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 178-179, paras 391-392.

⁷³ *Ibid.*, para. 862 (emphasis added).

⁷⁴ This phrase was used by U.S. Supreme Court Justice Potter Stewart in his Concurring Opinion to describe his threshold test for pornography in the case *Nico Jacobellis v. Ohio*, 22 June 1964 (1964), U.S. Supreme Court, 378 U.S. 184, 197.

a judicial decision *per se* but anybody who has presented such evidence in a courtroom knows about the power of pictures. This and similar video-footage was the ‘smoking gun’ because it more or less brought the crime scene to the courtroom. It was probably the best piece of evidence the OTP was able to produce.

After the introduction of this video, the issue was settled and the Trial Chamber was convinced that numerous children below the age of 15 years were recruited and used by the UPC/FPLC.⁷⁵ Hence, in the end – even if probably expected otherwise – the medical examinations did not deliver the decisive answer to the age question. While in national criminal proceedings the aforementioned methods have established somewhat of a reliable standard the context of international trials has shown once again that one cannot simply adopt national methods. It remains to be seen if in future trials the OTP will turn to medical examinations again.

VI. Lubanga’s Intent and Knowledge

Did the defendant also mean to conscript, enlist, or use children under the age of 15 to participate actively in hostilities and was he aware that by implementing the common plan these consequences would occur ‘in the ordinary course of events’? The mental element of Article 8 (2) (e) (vii) *Rome Statute* requires the defendant to have known or should have known that the person recruited into the armed forces or used was under the age of fifteen years.⁷⁶ The defence argued that a policy requiring age verification was implemented by the UPC/FPLC, thereby considerably reducing the risk that children under the age of 15 would be enlisted. Lubanga’s lawyers also tried to prove, that he was opposed to the recruitment of children by pointing at documents from the relevant time signed by their client in which he had ordered his subordinates to demobilize children under the age of 18 years. The Judges were not persuaded. Even if orders of demobilization of soldiers below the age of 18 years might have been given on behalf of the accused, the Chamber was not only convinced that they were eventually not fully implemented but these orders clearly showed that Lubanga knew that the recruitment of children was prohibited and that children remained amongst the ranks of the UPC/FPLC in spite of the prohibition.⁷⁷ The Chamber concluded:

⁷⁵ *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 378, para. 916.

⁷⁶ The perpetrator does not have to know that his individual crime was part of a plan or policy or large-scale commission in the sense of Art. 8 (1) *Rome Statute*.

⁷⁷ *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 584-585, para. 1346.

“The defence has been imprecise as to whether the demobilisation order of 21 October 2002 and the decree of 1 June 2003 lead to the conclusion that the resulting crimes did not occur in the ordinary course of events, or whether it is only suggesting that the accused did not have the “intention” to commit the crimes. However, 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 who were involved with children’s rights tend to undermine the suggestion that demobilisation, as ordered by the President, was meant to be implemented. Instead, Thomas Lubanga used child soldiers below the age of 15 as his bodyguards within the PPU and he gave speeches and attended rallies where conscripted and enlisted children below the age of 15 were present. Mr Lubanga was aware that children under the age of 15 were within the personal escorts of other commanders. Moreover, the accused visited UPC/FPLC camps, and particularly at the Rwampara camp he gave a morale-boosting speech to recruits who included young children who were clearly below the age of 15. As already set out, the Chamber concludes that this video, filmed on 12 February 2003, contains compelling evidence as to Thomas Lubanga’s awareness of, and his attitude towards, the enduring presence of children under the age of 15 in the UPC.”⁷⁸

Under these circumstances there was no room left to raise the defence of mistake of law.⁷⁹ The defendant was obviously fully aware of the fact that the recruitment of minors was unlawful at the time. Otherwise he would not have given the aforementioned orders. Lubanga’s defence had argued in the pre-trial phase that the crime of recruiting child soldiers was so new, the defendant did not know about it and thus could not be held responsible for doing something he thought was legal. The PTC considered this argument to be irrelevant here, because there was enough evidence, which showed that the defendant was fully aware of the prohibition.⁸⁰

⁷⁸ *Ibid.*, 585-586, para. 1348.

⁷⁹ *Rome Statute*, Art. 32 (2), *supra* note 5, 108.

⁸⁰ See *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 16, 107-108, paras 313-316.

More promising might have been the issue of mistake of fact.⁸¹ Lubanga could have argued the children in his forces appeared to be older than 15 years to him. But the deviation of the general standard of intent and knowledge of Article 30 *Rome Statute* in relation to child soldiering as set out in the *Elements of Crimes* ('should have known') almost makes it impossible to successfully raise this defence. While several scholars have discussed if such a digression of the general standard set out in the Statute through the *Elements of Crimes* is possible at all,⁸² the PTC has found such a deviation to be permissible.⁸³ The 'should have known'-standard can be qualified as a form of negligence and defined as a gross deviation from the standard of care that a reasonable person would observe in the situation.⁸⁴ Anytime the defendant's false assessment of the age of his soldiers was the result of negligence his defence will be without merit. Thus, the defendant will have to make specific enquiries into the age of the potential soldier whenever his or her physical appearance gives rise to reasonable doubt about his or her eligibility to join armed forces.⁸⁵ This would have afforded some very credible and convincing evidence. The large number of children, which were clearly and visibly below the 15-year threshold and in close contact with the defendant while acting as his bodyguards in the presidential guard for a considerable amount of time, did simply not enable the defence to rebut Lubanga's negligent conduct. Here the aforementioned video-evidence was crucial again. He obviously knew he was using minors for activities, which would entail his criminal responsibility. Accordingly, the Trial Chamber did not further elaborate on the problem of negligence but found *dolus directus*. It did not have to rule on the applicability of the 'should have known'-standard here and sidestepped an important and controversial issue of this war crime.

D. The Gravity Test of Article 78 (1) *Rome Statute*

The Trial Chamber held separate hearings on the matter of sentencing and reparations. When trying to find an appropriate sentence for recruiting and using child soldiers the Judges, first of all, had to consider the factor of gravity,

⁸¹ *Rome Statute*, Art. 32 (1), *supra* note 5, 108.

⁸² Schabas, *supra* note 12, 474-475; K. J. Heller, 'Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute: A Critical Analysis', 6 *Journal of International Criminal Justice* (2008) 3, 419, 435-436.

⁸³ *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 16, 122, para. 359.

⁸⁴ A. Cassese *et al.*, *Cassese's International Criminal Law*, 3rd ed. (2013), 53-54.

⁸⁵ Waschefort, *supra* note 47, 202; Cottier, *supra* note 8, 475, para. 234.

as mentioned in Article 78 (1) *Rome Statute*. Now obviously, all crimes under the jurisdiction of the ICC are ‘most serious crimes’. And the Chamber reiterated that this is undoubtedly also the case for Article 8 (2) (e) (vii) *Rome Statute*.⁸⁶ Now such an abstract finding does not say anything about the personal culpability of the convicted person. The essence of the gravity test is rather a thorough examination of the specific circumstances of the conduct which Lubanga was found guilty of. The general guidelines for this test are laid down in Rule 145 of the *Rules of Procedure and Evidence* of the ICC which does not entail an exhaustive list.⁸⁷ When it comes to child soldiers the following specific indicators should be taken into account: (1) the overall number of children under 15 years of age in the armed groups, (2) the time frame in which their recruitment/use took place, (3) the amount of especially young soldiers, and (4) the specific treatment of the children while being deployed as soldiers (harsh punishment, brain-washing, drug abuse, misuse for extremely hazardous actions, etc.).

I. Mitigating and Aggravating Factors

A report by the Trust Fund for Victims suggested that a total number of 2,900 children under the age of 15 were enlisted by the UPC/FPLC.⁸⁸ The Chamber did not confirm that number and instead ruled that the recruitment was widespread and a significant number of children were used.⁸⁹ By contrast to the situation in Sierra Leone, where whole units of the opposing parties were

⁸⁶ *Prosecutor v. Lubanga*, Decision on Sentence, *supra* note 1, 15, para. 37.

⁸⁷ *Rules of Procedure and Evidence*, Rule 145, *supra* note 51, 55: “[...] (c) In addition to the factors mentioned in article 78, paragraph 1, give consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person. 2. In addition to the factors mentioned above, the Court shall take into account, as appropriate: (a) Mitigating circumstances such as: (i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress; (ii) The convicted person’s conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court; (b) As aggravating circumstances: (i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature; (ii) Abuse of power or official capacity.”

⁸⁸ *Prosecutor v. Lubanga*, Decision on Sentence, *supra* note 1, 19, para. 46.

⁸⁹ *Ibid.*, 20, paras 49-50.

exclusively formed by minors,⁹⁰ the soldiers of the FPLC were mostly adults. It was not an army of children. Also there was no evidence that a considerable number of those minors were extremely young, though the Judges stated repeatedly that some of the recruits shown on video were “clearly under the age of 15 years”. It was never questioned that the recruitment and use took place during the whole timeframe of the charges (September 2002 until August 2003). Only the future case law of the ICC will show if 12 months is an average or a short period for such crime of a continuing nature. The true reasons for the termination of the criminal conduct will be the decisive factor in this regard. In the normal course of events this will only take place after the underlying hostilities have ended and the perpetrators have reached their military goals. While the conflict in Ituri was still going on, Lubanga issued orders to demobilize child soldiers, but eventually these were never fully implemented and only after he failed in his military campaign and was arrested by the state authorities of the DRC did his criminal conduct end. His overall motive to bring peace to the region and the necessity to form an army including minors in order to do so, can hardly be seriously considered to be of mitigating value.⁹¹ Child soldiers were also subject to punishment. But such disciplinary actions were not found to be abusive and foremost not part of a general policy which was implemented by the defendant.⁹² The Chamber, unlike the OTP, rejected crimes of sexual violence, which certainly had taken place in the FPLC, to be an aggravating factor for Lubanga because the link between the defendant and sexual violence in the context of the charges was not proven.⁹³ The defendant was not found to have ordered or encouraged sexual violence against ‘his’ child soldiers at any time. In sum, the Judges did not find any aggravating factors of the aforementioned kind. Outside the analysis of the specific criminal conduct the Judges discussed possible factors concerning the individual circumstances of the convicted person. The fact that

⁹⁰ The RUF command, for example, referred to some of their units as ‘Small Boys Units’ or ‘Small Girls Units’. See *Prosecutor v. Sesay, Kallon and Gbao*, *supra* note 46, 518, para. 1745. The child soldier phenomenon in Sierra Leone and its surrounding States was much graver than in the eastern part of the DRC. But a comparison is hard to make because the conflicts between the RUF, the AFRC and the CDR were much more widespread and lasted many years.

⁹¹ *Prosecutor v. Lubanga*, Decision on Sentence, *supra* note 1, 32-33, para. 87. The SCSL had also rightly rejected a possible fighting for a just cause to be a mitigating factor. See *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Judgment, SCSL-04-14-A, 28 May 2008, 169-170 & 173, paras 523 & 534.

⁹² *Prosecutor v. Lubanga*, Decision on Sentence, *supra* note 1, 23-24, para. 59.

⁹³ *Ibid.*, 28, paras 74-75.

Lubanga had no prior conviction could hardly be a mitigating factor. When it comes to core crimes, nobody can seriously expect to receive a lesser penalty because this was his first war crime. Instead, it found the full cooperation of the defendant with the Court during the entire proceedings to be a mitigating circumstance.⁹⁴ It did not, consider his senior position within the UPC/FPLC do be aggravating, though such factors had been taken into consideration by the ICTY in cases where defendants held extremely influential posts.⁹⁵ In sum, one can conclude that the Court characterized the conduct under consideration to be somewhat of an average gravity, though it did not expressly say so.

II. Some General Sentencing Rules

The OTP argued that the starting point for any crime under the *Rome Statute* had to be 80 percent of the statutory maximum of 30 years of imprisonment and requested a 30-year joint sentence for Lubanga.⁹⁶ Such a sentencing rule is nowhere to be found in the *Rome Statute* or its *Rules of Procedure and Evidence*. It would drastically restrict the Chamber in its search for the appropriate penalty with the result of very little breathing space (6 years) for very varying degrees of culpability. In addition, the prosecutor's result is the maximum possible sentence in accordance with Article 77 (1) (a) of the *Rome Statute*. So when the crime of child soldiering deserves the maximum sentence, where do we go from here? Is life imprisonment for every future conviction for crimes against humanity, which by some authors is being regarded as being more severe than war crimes,⁹⁷ the only left avenue then?⁹⁸ And what is appropriate in case of genocide? The answers are obvious and the Judges discarded the OTP's approach.⁹⁹ Instead, they treated each charged conduct separately and found 13 years for conscripting child soldiers, 12 years for enlisting child soldiers and 15 years of imprisonment for using child soldiers actively in hostilities to be

⁹⁴ *Ibid.*, 34, para. 91.

⁹⁵ *Prosecutor v. Biljana Plavšić*, Judgment, IT-00-39 & 40/1, 27 February 2003, 19, para. 57; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Judgment, IT-02-60-A, 9 May 2007, 128, para. 324.

⁹⁶ *Prosecutor v. Lubanga*, Decision on Sentence, *supra* note 1, 34-35, paras 92 & 95.

⁹⁷ See Schabas, *supra* note 12, 41.

⁹⁸ Not even Judge Odio Benito called for such drastic measures. She requested a joint sentence of 15 years in her Dissenting Opinion. See Dissenting Opinion of Judge Odio Benito, *Prosecutor v. Lubanga*, Decision on Sentence, *supra* note 1, 52, para. 27.

⁹⁹ *Prosecutor v. Lubanga*, Decision on Sentence, *supra* note 1, 35, para. 93.

the appropriate sentences.¹⁰⁰ The joint sentence was 14 years.¹⁰¹ These separate findings establish some sort of hierarchy within the war crime of Article 8 (2) (e) (vii) of the *Rome Statute* in terms of gravity. The result being that active use is definitely the harshest form of this crime. This is only logical because 'active use' directly exposes the children to the dangers of armed conflict while the conduct of conscription and enlistment is more of a preparatory stage leading to their use.¹⁰² Giving enlistment less weight than conscription eventually corresponds with the Trial Chamber's earlier statement in the judgment, that enlistment has a voluntary element while conscription supposedly implies some form of compulsion.¹⁰³ In the end, the Chamber deducted the time Lubanga spent in detention in The Hague but refused to do so when considering his time spent in detention in the DRC before being transferred to the Court.¹⁰⁴ Such prior detention only qualifies for a deduction if it was served because of conduct underlying the crimes for which the defendant was tried for at the ICC, Article 78 (2) of the *Rome Statute*. The Chamber did not find sufficient evidence to ascertain that Lubanga was detained in Kinshasa because of crimes of child recruitment. Given the dire financial situation of the defendant the Chamber did not impose an additional fine to benefit the Trust Fund for Victims.¹⁰⁵

E. Conclusion

Despite much criticism, the ICC showed that it is a functioning institution. Even if not all contentious issues were sufficiently resolved by the Trial Chamber, the precedential value of its rulings on the material elements of the war crime of child soldiering is evident. Judge Odio Benito's reasoning was rightly rejected by the majority of the Chamber. Also the sentencing decision establishes some important first guidelines for interpreting Article 78 of the *Rome Statute*. The defence and the OTP appealed the judgment. The prosecutor argued in its brief that a 14-year sentence fails to give sufficient weight to the gravity of the

¹⁰⁰ *Ibid.*, 36, para. 98.

¹⁰¹ *Ibid.*, 37 & 38-39, paras 99 & 107.

¹⁰² Odio Benito finds all three modes of conduct to be of equal gravity. See Dissenting Opinion of Judge Odio Benito, *Prosecutor v. Lubanga*, Decision on Sentence, *supra* notes 1 & 98, 51-52, paras 24-26. The Chief Prosecutor had argued in his opening statement on 26 January 2009 that no distinction as to gravity arises between these three modes of conduct.

¹⁰³ *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 278-279, para. 608.

¹⁰⁴ *Prosecutor v. Lubanga*, Decision on Sentence, *supra* note 1, 37, paras 100-102.

¹⁰⁵ *Ibid.*, 38, paras 105-106.

crimes against children and the extent of the damage caused to victims and their families.¹⁰⁶ Lubanga's counsel based their appeal on several grounds. One of their arguments being that the Trial Chamber erroneously concluded the recruitment of children into the FPLC was widespread.¹⁰⁷ Now the Appeals Chamber will have the chance to rule on these controversial issues.

¹⁰⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution's Document in Support of Appeal against the "Decision on sentence pursuant to Article 76 of the Statute", ICC-01/04-01/06-2950, 3 December 2012, 46, paras 94-95.

¹⁰⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Mr Thomas Lubanga's Appellate Brief against Trial Chamber I's 10 July 2012 Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06, 3 December 2012, 5-9, paras 12-25.

