

The first Judgment of the International Criminal Court (Prosecutor v. Lubanga): A comprehensive Analysis of the Legal Issues

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Abstract

On 14 March Trial Chamber I (hereinafter ‘the Chamber’) of the International Criminal Court (‘ICC’ or ‘the Court’) delivered the long awaited first judgment of the Court (‘the judgment’). This comment focuses exclusively on the legal issues dealt with in the judgment but pretends to do this comprehensively. It critically analyses the following five subject matters with the respective legal issues: definition and participation of victims; presentation and evaluation of evidence; nature of the armed conflict; war crime of recruitment and use of children under fifteen years (Article 8 (2)(e)(vii) ICC Statute); and, last but not least, co-perpetration as the relevant mode of responsibility, including the mental element (Article 25, 30). While this paper follows the order of the judgment for the reader’s convenience and to better represent the judgment’s argumentative sequence, the length and depth of the inquiry into each subject matter and the respective issues depend on their importance for the future case law of the Court and the persuasiveness of the Chamber’s own treatment of the issue. The paper concludes with some general remarks on aspects of drafting, presentation and referencing.

Key words

Lubanga, victims, evidence, armed conflict, child soldiers, individual criminal responsibility

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1. VICTIMS: DEFINITION, PARTICIPATION AND VICTIM WITNESSES

The Rome Statute's generous treatment of victims, empowering them to take active part in the proceedings (Article 68 (3))¹ and, thereby, recognizing them as persons and legal subjects in their own right, is not uncontested. The possible participation of thousands of victims enhances the complexity of the proceedings, causes delays and thus raises the principled question of whether (international) criminal proceedings are an appropriate forum for this empowerment exercise in the first place or the costs are rather too high.² Apart from that, victims participation in criminal procedure always generates a conflict with the right of the accused to an expeditious and fair trial.³ At least to this problem the ICC Statute does not turn a blind eye, but explicitly demands that victim participation must not be 'prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial' (Article 68 (3)). As a consequence, the Chambers always have to strike a balance between the rights of the defence and the interests of the victims.⁴

1.1. Definition of Victims

The participation of victims is predicated on the definition of those persons who should qualify as victims. The Chamber defines a victim in a somewhat broad way referring to soft law⁵ as 'someone who experienced personal harm, individually or collectively with others, directly

¹ All provisions without reference belong to the Rome Statute of the International Criminal Court (A/CONF.183/9, retrievable at www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm), last visited 21 March 2012, hereinafter 'Rome' or 'ICC Statute').

² See Judge van den Wyngaert's almost heretical, but absolutely appropriate comment at the 'Concluding Conference' of the 'International Criminal Procedure Expert Framework', The Hague, 27-28 October 2011; see also Christoph Safferling, 'The Role of the Victim in the Criminal Process - A Paradigm Shift in National German and International Law?', (2011) 11 *Int. Cr.L.Rev.* 183, at 215 (referring to alternative transitional justice mechanisms).

³ See only Safferling, *supra* note 2, at 213.

⁴ Cf. also Stefanie Bock, *Das Opfer vor dem Internationalen Strafgerichtshof* (Duncker & Humblot, Berlin, 2010), 464-5.

⁵ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, as adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

or indirectly, in a variety of different ways such as physical or mental injury, emotional suffering or economic loss’⁶. Accordingly, the Chamber does not only regard the recruited child soldiers⁷ but also their parents or relatives as victims of the alleged crimes⁸ (but not the victims of the child soldiers).⁹ Although the inclusion of such *indirect* victims significantly broadens the possible number of victims and, thus, participants in the proceedings, it is, as a matter of principle, the correct approach in light of the huge collateral impact of international crimes on third persons and their sometimes immense emotional and psychological suffering.¹⁰ However, clearly, such a broad approach requires a comprehensive strategy with a view to limit the number of indirect victims-participants in a reasonable way so as not to completely disrupt or indefinitely delay the proceedings.¹¹ Unfortunately, the Chamber makes no attempt to develop such a strategy.

According to Rule 85 of the Rules of Procedure and Evidence (hereinafter ‘RPE’)¹² – which should have been applied before any soft law being a primary source of the ICC Law (Article 21 (1)) – persons applying to participate as victims must have suffered harm as a result of the crimes charged, i.e., there must be a *causal connection* between the alleged crimes and the harmful results. As a consequence, the Prosecutor’s focus on recruitment and use of child soldiers, leaving out in particular sex crimes,¹³ entailed the exclusion of a great number of

⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T.Ch. I, 14 March 2012 (hereinafter ‘Judgment’), para. 14 ii).

⁷ The mere fact, that child soldiers might have committed war crimes themselves is not a sufficient reason to deny them the status of a victim, cf. thereto in more detail Bock, *supra* note 4, 447-8.

⁸ Judgment, *supra* note 6, para. 17.

⁹ *Prosecutor v. Thomas Lubanga Dyilo*, Redacted version of „Decision on ‘indirect victims’”, ICC-01/04-01/06-1813, T.Ch. I, 8 April 2009, para. 52.

¹⁰ In more detail Bock, *supra* note 3, 158-64 with further references.

¹¹ *Cf.*, for example, the approach by Bock, *supra* note 4, 446-7 who wants to take into account the personal relationship between the applicant and the direct victim as well as the extent of the (emotional or psychological) harm suffered by the indirect victim.

¹² Rules of Procedure and Evidence, ICC-ASP/1/3 (Part.II-A), retrievable at www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rules+of+Procedure+and+Evidence.htm, last visited 21 March 2012 (hereinafter ‘RPE’).

¹³ *Prosecutor v. Thomas Lubanga Dyilo*, Prosecutor’s Information on Further Investigations, ICC-01/04-01/06-170, P.-T.Ch. I, 28 June 2006, para. 7. On the failure to charge sex crimes *see also infra* note 156.

victims of those other crimes not included in the indictment.¹⁴ This is a good example of the discretionary powers of the Prosecutor and their perhaps unintended consequences.¹⁵

In concrete terms, when deciding on the application for participation,¹⁶ the Chamber examines on a *prima facie* basis whether an applicant qualifies as a victim pursuant to Rule 85 RPE.¹⁷ This lower standard of proof – as compared to the one of ‘beyond reasonable doubt’ – is due to the fact that at this stage of the proceedings it is not yet clear whether the alleged crimes have actually been committed by the accused.¹⁸ However, as soon as the Chamber realizes that its *prima facie* evaluation is incorrect, it withdraws the applicants’ right to participate.¹⁹ This procedure strikes a right balance between unduly restricting victims’ admission and the defence interest not to be confronted with ‘false’ victims. The practical application of this approach is, however, questionable. As Judge *Odio Benito* has shown in her dissent, the inconsistencies in the testimony of the relevant victims-witnesses²⁰ which caused the majority to exclude them from the proceedings do not necessarily mean that they actually lied about their victimization. After the respective hearing it was merely uncertain whether they were indeed victims of the crimes charged.²¹ In such cases, the Chamber should refrain from withdrawing the victim status since this might cause unnecessary psychological harm and lead to secondary traumatisations. For defence and fairness purposes it is normally sufficient to ex-

¹⁴ Judgment, *supra* note 6, para. 16.

¹⁵ *Crit.* Kai Ambos and Stefanie Bock, ‘Procedural Regimes’, in: Luc Reydamts *et al.* (eds.), *International Prosecutors* (OUP, Oxford, forthcoming 2012), 488, at 538.

¹⁶ In more detail on the complex application process Bock, *supra* note 3, 466-95; Brianne McGonigle Leyh, *Procedural Justice? – Victim Participation in International Criminal Proceedings* (Intersentia, Antwerpen *et al.*, 2011), 240-57.

¹⁷ Judgment, *supra* note 6, para. 15.

¹⁸ *Cf. already Situation in the Democratic Republic of the Congo*, Decision on the Application for Participation in the Proceedings of [...], ICC-01/04-101, P.-T.Ch. I, 17 January 2006, paras. 97-8; in more detail on the standard and burden of proof in the application proceedings, Bock, *supra* note 4, 444-6.

¹⁹ Judgment, *supra* note 6, paras. 484, 502.

²⁰ This dual status (victim as participating victim and witness at the same time) has always been controversial, see for a discussion Bock, *supra* note 4, 551-2; McGonigle Leyh, *supra* note 16, 312-14.

²¹ Separate and Dissenting Opinion of Judge Odio Benito, attached to the Judgment (hereinafter ‘Odio Benito Dissent’), paras. 22-35.

clude the relevant testimonies as far as they concern the determination of the accused's responsibility.²²

1.2. Modalities of Victim Participation

The procedural rights of victims are nowhere explicitly listed, Article 68 (3) leaves it to the discretion of the Chambers to determine the modalities of victim participation.²³ There are some important considerations of the Chamber which merit a closer analysis.

1.2.1. Legal Representation

According to Rule 90 (1) RPE, victims have the right to choose a legal representative. The Chamber divided the 129 victim participants into two groups which were each represented by a common legal representative.²⁴ While this approach appears reasonable with a view to the expeditiousness and fairness of the proceedings, one must not overlook that victims are persons with different interests duly to be taken into account when assigning them to certain groups.²⁵ In addition, the Chamber authorized the Office of Public Counsel for Victims ('OPCV')²⁶ to represent four more victims.²⁷ Although this possibility is explicitly provided for in Regulation 80 (2) of the Regulations of the Court, it is questionable whether it is wise to make use of this provision. The main task of the OPCV is to provide support and assistance to the legal representatives of victims and to victims themselves (Regulation 81). Given its very limited resources, the direct involvement of OPCV officials as party to the proceedings might

²² Odio Benito Dissent, *supra* note 21, para. 23.

²³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-2288, T.Ch. II, 22 January 2010, para. 46; see also Bock, *supra* note 3, 442 with further references.

²⁴ Judgment, *supra* note 6, paras. 14 ix), 20; *cf. also* the analysis of the relevant case law by McGonigle Leyh, *supra* note 16, 326-9.

²⁵ Bock, *supra* note 4, 497-8.

²⁶ In more detail on the role of the OPCV Paolina Massidda and Sarah Pellet, 'Role and Mandate of the Office of Public Counsel for Victims', in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Nijhoff, Leiden, 2009), 690; Bock, *supra* note 4, 501-4.

²⁷ Judgment, *supra* note 6, para. 20.

substantially reduce the Office's ability to exercise its victims' support function in an adequate manner.²⁸

1.2.2. Access to Filings

The Chamber confirms that victims have the right to access the case file (Rule 131 [2] RPE) but restricts this right, in principle, to public filings.²⁹ Although this approach is understandable with regard to the protection of sensitive information, it loses sight of the fact that victims have a personal interest in the outcome of the proceedings, i.e., they must not be compared with the, in principle, unconcerned public.³⁰ This difference is acknowledged by the Chamber itself if it grants the victims the right to receive 'those confidential filings which concern them (as identified by the parties), insofar as this does not breach any protective measures that are in place'.³¹ The problem with this approach is that it leaves the decision regarding what is of concern to the victims in the hands of the parties but it is questionable whether they are always in a position to correctly assess the victims' concerns. An alternative approach safeguarding the victim's procedural own standing would be to grant them general access to confidential filings (excluding *ex parte* ones)³² or to provide them with a full, non-redacted version of the case record which would enable them to identify themselves the filings which are of concern to them.³³

1.2.3. Tendering Evidence

²⁸ Bock, *supra* note 4, 502-3.

²⁹ Judgment, *supra* note 6, para 14 vi).

³⁰ Bock, *supra* note 4, 525.

³¹ Judgment, *supra* note 6, para 14 vi).

³² *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, P.-T.Ch. I, 13 May 2008, paras. 105-12; cf. thereto also Bock, *supra* note 4, 525-7, 536-7.

³³ Bock, *supra* note 4, 512-3.

The Chamber also grants the victims the right to request it to order the production of additional evidence and the right to tender evidence.³⁴ Thus, the Chamber acknowledges implicitly that victims have a personal interest in establishing the truth about their victimization.³⁵ In this regard, it is to be welcomed that the Chamber emphasizes its responsibility to guarantee that the active victims' involvement in evidence matters does not prejudice the rights of the accused.

On the other hand it is puzzling that the Chamber affirms that the victims have to comply 'with their disclosure obligations'.³⁶ Neither the ICC Statute nor the RPE impose any disclosure obligation on victims. On the contrary, if victims want to tender evidence, it is the Chamber's responsibility to adopt, on a case by case basis, all measures necessary to safeguard the rights of the accused³⁷ and in particular to ensure that the parties receive the relevant evidence sufficiently in advance to be able to prepare for trial.³⁸

1.2.4. Discrete written Application

In case of concrete interventions by victims, the Chamber decided on their appropriateness on the basis of a 'discrete written application' in which the victims wishing to participate shall 'set out ... the nature and the detail of the proposed intervention'.³⁹ Thus, apart from passing the general written application procedure (Rule 89 RPE) to be admitted as participant, a second application requirement is imposed on the victims with regard to each single interven-

³⁴ Judgment, *supra* note 6, para. 14 vii).

³⁵ As to the personal interest criterion in more detail *Prosecutor v. Katanga and Ngudjolo*, *supra* note 32, paras. 30-44; Bock, *supra* note 4, 448-52; Sergey Vasiliev, Article 68 (3) and personal interests of victims in the emerging practice of the ICC, in Stahn and Sluiter, *supra* note 26, 635. As to the more restrictive approach of the Prosecution cf. *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution's Document in Support of Appeal against Trial Chamber I's 18 January 2008 Decision on Victims' Participation, ICC-01/04-01/06-1219, Office of the Prosecutor ('OTP'), 10 March 2008, paras. 20-1.

³⁶ Judgment, *supra* note 6, para. 14 vii).

³⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victim's Participation of 18 January 2008, ICC-01/04-01/06-1432, A.Ch., 11 July 2008, para. 100.

³⁸ *Prosecutor v. Katanga and Ngudjolo*, *supra* note 23, para. 107; cf. also Bock, *supra* note 4, 540-1 with further references.

³⁹ Judgment, *supra* note 6, para. 14 v).

tion. This seems to be superfluous and places ‘too high a burden on victims’.⁴⁰ In addition, this *double application procedure* ignores the dynamics of the proceedings which might require immediate intervention. Moreover and most importantly, it unnecessarily complicates and lengthens the trial. This holds all the more true since prosecution and defence have the right to respond to the application (cf. Regulation 24 [1] Regulations of the Court). It serves all parties and participants if the Chamber solves any disagreements on the extent and appropriateness of victim participation immediately and – when appropriate – after a short oral discussion.⁴¹

1.3. Anonymous Victims

Many victims fear retaliation if their cooperation with the ICC becomes publicly known. Thus, it is not surprising that most of them do not want their identity to be disclosed to the defence. In the *Lubanga* case, out of the 129 victim participants 106 wanted to remain anonymous. The Chamber granted their request but limited their participation rights.⁴² This is a convincing compromise. On the one hand, it would seriously undermine the very rationale of Article 68 (3) if the victims were forced to decide between their personal security and their participation rights. On the other hand, the defence has a right not to be confronted with anonymous accusers and much less with an infinite number of them. An effective right to defence calls in particular for the disclosure of the participants’ identities if they want to introduce evidence.⁴³ In sum, the Chamber’s approach is a good example of how to strike an appropriate balance between the rights of defence and the interest of victims.

2. PRESENTATION AND EVALUATION OF EVIDENCE

⁴⁰ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victims’ Participation, Separate and Dissenting Opinion of Judge René Blattmann, ICC-01/04-01/06-1119, T.Ch. I, 18 January 2008, para. 22.

⁴¹ Bock, *supra* note 4, 542-3, 533-4.

⁴² Judgment, *supra* note 6, paras. 14 xi), 18.

⁴³ In more detail and with further references Bock, *supra* note 4, 523-4, 536.

From the many procedural questions that arose during the Lubanga proceedings and have received scholarly attention⁴⁴ two problems that are dealt with by the Chamber deserve closer consideration, namely the role of a trial chamber in particular with regard to evidentiary matters and the problem of disclosure and confidentiality.

2.1. The Role of a Trial Chamber

The judgement demonstrates impressively how differently the role of a trial chamber can be interpreted. The Chamber makes the parties and participants ‘responsible for identifying’ the relevant evidence,⁴⁵ but reserves itself the right to intervene whenever it sees fit.⁴⁶ While this approach is legitimate in light of the Statute and the RPE,⁴⁷ it may not be totally appropriate from a practical perspective given the complexity and length of international criminal trials.⁴⁸

The classical divide known from the adversarial system between Prosecution case and Defence case⁴⁹ seems often too time consuming. The experience so far indicates that Judges of International Criminal Tribunals, despite the basic adversarial structure of the proceedings,

⁴⁴ See e.g. Kai Ambos, ‘Confidential Investigations (Art. 54(3)(e) ICC Statute) vs. Disclosure Obligations’, (2009) 12 *New Criminal Law Review* 543; Reinhold Gallmetzer, ‘The Trial Chamber’s Discretionary Power to Devise the Proceedings Before it and its Exercise in the Trial of Thomas Lubanga Dyilo’, in Stahn and Sluiter, *supra* note 26, 501-24; Alex Whiting, ‘Lead Evidence and Discovery Before the International Criminal Court: The Lubanga Case’, (2009) 14 *UCLA Journal of International Law and Foreign Affairs*, 207 *et seq.*; Annalisa Ciampi, ‘The International Criminal Court’, (2006) 5 *The Law and Practice of International Courts and Tribunals*, 325 *et seq.*; Sara Anoushirvani, ‘The Future of the International Criminal Court: The Long Road to Legitimacy Begins with the Trial of Thomas Lubanga Dyilo’, (2010) 22 *Pace International Law Rev.*, 213 ff.; Rachel Katzman, ‘The Non-Disclosure of Confidential Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defense System Affects the Accused’s Right to a Fair Trial’, (2009) 8 *Northwestern Journal of International Human Rights*, 77 *et seq.*; William A. Schabas and Carsten Stahn, ‘Introductory Note: Legal Aspects of the Lubanga Case’, (2008) 19 *Criminal Law Forum* (‘CLF’), 431-4.

⁴⁵ Judgment, *supra* note 6, para. 95; *see also* para. 96 (quoting a decision of 12 April 2011: ‘For the documents that have been admitted into evidence without having been introduced during the examination of a witness (viz. the bar table documents) ... the parties and participants are to identify the documents, or parts thereof, that are relied on, and to provide a sufficient explanation of relevance.’).

⁴⁶ See Hearing of 1 April 2011 that was cited in the Judgment, *supra* note 6, para. 95 (‘Now, it may be that the Bench will consider some of the evidence that you have not identified. That, of course, is a matter entirely for us if we choose to do so.’).

⁴⁷ See e.g. Article 64 (6)(b), (d), (8)(b) and (9)(a)); Rules 140, 141 RPE.

⁴⁸ See generally Gideon Boas, *The Milošević Trial: Lessons for the Conduct of Complex International Proceedings* (CUP, Cambridge, 2007), 131 *et seq.* It is worthwhile recalling in this context that the Chamber needed almost a year to prepare the opening of the trial (*cf. Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, ICC-01/04-01/06, T.Ch. I, 9 November 2007, para. 29 setting the commencement date for 31 March 2008).

⁴⁹ *Cf.* Kai Ambos, ‘International Criminal Procedure: “adversarial”, “inquisitorial” or mixed?’, (2003) 3 *Int.Cr.L.Rev.* 1, 4.

should take a more active, managerial role, more known to the practice in some civil law jurisdictions.⁵⁰ This does not mean, though, that the excessive length of a trial is always the result of the Judges' interpretation of their role as passive umpires. In the Lubanga proceedings, for example, Judge Jorda exercised his power in a broad fashion. In a hearing before Pre-Trial Chamber ('PTC') I on 27 November 2006 he alluded to the truth seeking role of his PTC and 'the objective of this confirmation hearing (...) to supplement the adversarial debate between the parties.'⁵¹ While this sounds strange to common law Judges,⁵² it is remarkable that they too may see the need to take a more active role. Thus, Judge Fulford quite bluntly refers to the Chamber's 'statutory authority to request any evidence that is necessary to determine the truth ...'⁵³. On the other hand, with a clear focus on expediency, he calls for brevity in filings.⁵⁴ Admittedly, English Judges are among the more active ones in Common Law systems, in any case with much more trial powers than – let's say – a U.S. Judge.⁵⁵

At any rate, while both the general structure of the proceedings and – most importantly – the role of the participants in the criminal process of England and Wales is predicated, in principle, on a rather passive judge (compared to a civil law judge),⁵⁶ the general structure of the ICC proceedings including the role of the participants presupposes a more active judge. The

⁵⁰ See Maximo Langer, 'The Rise of Managerial Judging in International Criminal Law', (2005) 53 *American Journal of Comparative Law*, 835, 840; Jens D. Ohlin, 'A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law', (2009) 14 *UCLA Journal of International Law and Foreign Affairs*, 77, 80; Robert Heinsch, 'How to Achieve Fair and Expeditious Trial Proceedings before the ICC: Is it Time for a More Judge-Dominated Approach?', in Stahn and Sluiter (eds.), *supra* note 26, 479, 487.

⁵¹ *Prosecutor v. Thomas Lubanga Dyilo*, P.-T.Ch. I Transcript, ICC-01/04-01/06-T-45-EN, 27.11.2006, p. 19 lines 7-10 (I note in passing that Judge Jorda made this point surely in his mother tongue French).

⁵² William A. Schabas, *An Introduction to the International Criminal Court* (CUP, Cambridge, 4th ed., 2011), 313.

⁵³ Decision on the admissibility of four documents, ICC-01/04-01/06-1399-Corr, 13 June 2008 (corrigendum issued on 20 January 2011), para. 24 (also quoted in Judgment, *supra* note 6, para. 107).

⁵⁴ At the conference 'The ICC's Emerging Practice: The Court at Five Years', The Hague, 4 October 2007 (where Fulford sat on Panel 4 on 'Fairness and expeditiousness of ICC proceedings'). See also Heinsch, *supra* note 50, 481.

⁵⁵ Gordon van Kessel, 'Adversary Accesses in the American Criminal Trial', (1992) 67 *Notre Dame Law Rev.*, 403; John R. Spencer, 'Introduction', in Mireille Delmas-Marty (ed.), *European Criminal Procedure* (CUP Cambridge, 2002), 1, 26; Sean Doran, 'The Necessarily Expanding Role of the Criminal Trial Judge', in Sean Doran and John Jackson (eds.), *The Judicial Role in Criminal Proceedings* (Hart, Oxford, 2000), 3, 6.

⁵⁶ Cf. Spencer, *supra* note 55, 25-6; Francis Pakes, *Comparative Criminal Justice* (Willan Publ., Cullompton, 2nd ed., 2010), 92; John H. Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition* (Stanford Univ. Press, Stanford, 3rd ed., 2007), 128; Jacqueline Hodgson, *French Criminal Justice* (Hart, Oxford, 2005), 72.

Judgment, however, does not seem to take this active role too seriously; it rather sees it, in the sense of the position regarding the collection of evidence mentioned above,⁵⁷ as a kind of fall back right which will be invoked only exceptionally. That a different perspective – active duty to find the truth *versus* rather passive right of intervention – may indeed change the outcome becomes plain if one reads Judge Odio Benito’s dissent. She criticises that the Chamber did not take into account certain (additional) video footage that would have shown that ‘the accused was involved, in activities that resulted ... in the recruitment of children below the age of 15 ...’⁵⁸. She further points out that the respective video sequence ‘demonstrates that the accused considered it appropriate to include children under the age of 15 when he spoke publicly about issues concerning the UPC, including recruitment.’⁵⁹ At first glance, this all seems of little relevance given that the Chamber was convinced anyway that Lubanga was ‘active in mobilisation and recruitment campaigns aimed at persuading Hema families to send their children to join the UPC/FPLC’.⁶⁰ The Chamber even relies on certain sequences of the video footage mentioned by Odio Benito.⁶¹ However, the difference lies in the detail: While the Chamber’s evidence only shows that Lubanga was using children under the age of 15 and/or was somehow involved in their recruitment and mobilisation, it does not show that he himself recruited and mobilised children.⁶² The gist of Odio Benito’s argument is that this could have been inferred from the video footage that was not admitted.⁶³ Thus, this additional evidence would at least have revealed a larger part of the truth.

2.2. Disclosure, Confidentiality and Witness Protection

⁵⁷ *Supra* note 45.

⁵⁸ Odio Benito Dissent, *supra* note 21, para. 43.

⁵⁹ Odio Benito Dissent, *supra* note 21, para. 41.

⁶⁰ Judgment, *supra* note 6, para. 1354.

⁶¹ See Judgment, *supra* note 6, paras. 713, 1255, 1256.

⁶² Judgment, *supra* note 6, para. 1234 (While the Chamber was ‘persuaded’ that ‘Lubanga was actively involved in the exercise of finding recruits’ it ‘cannot determine ... whether he was directly and personally involved in recruitment relating to individual children ...’).

⁶³ Yet, unfortunately, Odio Benito fails to explain clearly the difference the additional video footage would have made as compared with the findings of the Chamber.

With regard to the never-ending story of the *violation of disclosure obligations* in the Lubanga case, the judges address two forms of violations: incomplete and late disclosure.⁶⁴ Incomplete disclosure concerns in essence disclosure restrictions according to Art. 54(3)(e),⁶⁵ which I have analysed elsewhere.⁶⁶ Late disclosure was addressed in a number of other ways, e.g. following the disclosure of documents relevant to the questioning of a witness after his testimony had finished.⁶⁷ Another (third) form of disclosure violation dealt with extensively in the judgement is the disclosure of the identity of certain intermediaries.⁶⁸ The Judgment is a good opportunity to take a closer look at two general problems of the ICC disclosure regime and practice, usually ignored in the face of the more specific failures to disclose: on the one hand, the justification of non-disclosure by recourse to confidentiality and/or witness/victim protection grounds and, on the other, the lack of effective sanctions for non-disclosure.

2.2.1. Confidentiality and Witness Protection

As to confidentiality the Chamber had the difficult task to strike a right balance between the rights of the defence and those of witnesses and victims, either with regard to (*inter alia*) anonymous victims,⁶⁹ to a new ground of inadmissibility in the case of a party's failure to inform prospective witnesses of its intention to rely on their statements,⁷⁰ or to protective

⁶⁴ Judgment, *supra* note 6, para. 121.

⁶⁵ *Ibid.*

⁶⁶ Ambos, *supra* note 44, at 548-9.

⁶⁷ Judgment, *supra* note 6, para. 122.

⁶⁸ Judgment, *supra* note 6, paras. 178-477. The Chamber correctly uses insofar the term 'non-disclosure' instead of 'incomplete disclosure' (see *Prosecutor v. Thomas Lubanga Dyilo*, Annex A Decision on intermediaries, ICC-01/04-01/06-2434-AnxA-Red2, 31 May 2010). The disclosure of the identity of a witness or an informant is a category in its own right, to be distinguished from the disclosure of exculpatory material (see Rule 81(4) RPE; cf. Karim A. A. Khan and Rodney Dixon, *Archbold International Criminal Courts* (Sweet & Maxwell, London, 3rd ed., 2009), § 7 mn. 338, 369, § 8 mn. 240). While withholding the identity of certain persons amounts to not disclosing it at all, exculpatory material can, as occurred *in casu*, be disclosed in part, withholding certain material obtained on the condition of confidentiality. Thus, in this case it is more appropriate to speak of 'incomplete disclosure' (see with regard to exculpatory material John A. Epp, *Building on the Decade of Disclosure in Criminal Procedure* (Cavendish, London, 2001), 78). On another note, it is puzzling that the problem of involvement of intermediaries occupies almost 300 (!) paragraphs, while non-disclosure pursuant to Article 54(3)(e) is analysed in two paragraphs, including the case history.

⁶⁹ See already *supra* 1.3.

⁷⁰ See Kai Ambos, 'Commentary [on the Lubanga Confirmation Decision]', in André Klip and Göran Sluiter, *Annotated Leading Cases of International Criminal Tribunals, Vol. 23, The International Criminal Court 2005-2007* (Intersentia, Antwerpen et al., 2010), 736 (also published in Leonidas Kotsalis, Nestor Courakis, Christos

measures for witnesses due to security concerns.⁷¹ Most confidentiality issues came up because of security risks for witnesses or in the context of Article 54 (3)(e) with information providers invoking the respective assurances.⁷² In the words of the Chamber, '(c)onfidential information has been included to the greatest extent possible in this Judgment, whilst avoiding creating any security risks, and in some instances it has been necessary to cite the parties' submissions rather than the relevant transcript references.'⁷³ Redactions 'were reviewed by the Chamber and some were lifted during the course of the trial' until further disclosure was no more possible 'under the present circumstances.'⁷⁴ This approach is in line with the ICC case law that provides for three general principles in case of non-disclosure: (1) protective measures should only be granted after exhausting the possibility of employing less extreme measures (principle of necessity); (2) they must be strictly limited to the exigencies of the situation (principle of proportionality); and (3) they must not infringe the right of the defendant to a fair and impartial trial.⁷⁵

Clearly, every decision in favour of confidentiality infringes the rights of the accused and thus allegations of possible security risks for witnesses due to disclosure should not be made lightly, for example because of an alleged general risk of (prosecution) witnesses testifying against the accused. While it goes too far to call such allegations, in the words of a 1968 New York Court, 'built one-sidedly of untested folklore'⁷⁶ given the fact that there are indeed credible

Mylonopoulos (eds.), *Essays in honour of Argyrios Karras* (Ant. N. Sakkoulas, Athen, 2010), 979; here the former version is quoted).

⁷¹ Judgment, *supra* note 6, para. 115.

⁷² See generally Michele Caianiello, 'Disclosure before the ICC: The Emergence of a New Form of Policies Implementation System in International Criminal Justice?', (2010) 10 *Int.Cr.L.Rev.* 23, 31 *et seq.*

⁷³ Judgment, *supra* note 6, para. 116.

⁷⁴ Judgment, *supra* note 6, para. 117.

⁷⁵ Cf. Bernhard Kuschnik, 'International Criminal Due Process in the Making: New Tendencies in the Law of Non-Disclosure in the Proceedings before the ICC', (2009) 9 *Int.Cr.L.Rev.* 157, 164.

⁷⁶ See *United States v. Irving Projansky et al.*, United States District Court S. D. New York, 44 *F.R.D.* 550, at 556 (22 May 1968).

reports that full disclosure may lead defendants' associates to kill prosecution witnesses,⁷⁷ one must not overlook that those are dreadful consequences of broad disclosure in a system where transcripts of witnesses' testimony are not admissible into evidence, unless this testimony is previously subjected to cross-examination before a judge.⁷⁸ Thus, clearly, the risk of intimidation of witnesses is far lower in a system where prior recorded (police) testimony is, in principle, admissible into evidence⁷⁹ since then the killing or otherwise attacking the witness would not necessarily prevent the testimony from being made available to the court. The ICC's regime regarding prior recorded testimony lies somewhere between those two extremes: the Chamber may admit it as documentary evidence when both parties have had the opportunity to question the witness during the taking of testimony (not necessarily before a judge) and use its discretion to freely assess all the evidence, including imposing further requirements such as the corroboration of the material in question.⁸⁰ Thus, from a structural point of view,⁸¹ risks of witness intimidation as known from strict adversarial system cannot, without further ado, be transferred mechanically into the ICC system.

Another problem of non-disclosure decisions based on confidentiality is much more straightforward: to assume that the accused will intimidate witnesses (or initiate their intimidation), once their identity is disclosed, converts the presumption of innocence into one of guilt.⁸²

⁷⁷ See David Kocieniewski, 'Scared Silent: In Witness Killing, Prosecutors Point to a Lawyer', *New York Times*, 21 December 2007 (detailing the murder of a key witness in a drug case), available at <www.nytimes.com/2007/12/21/nyregion/21witness.html?pagewanted=all> (last visited 21 March 2012).

⁷⁸ Jefferson L. Ingram, *Criminal Evidence* (Anderson, 10th ed., 2009), 477 ff.

⁷⁹ But note that the admissibility requirements are rather strict in those circumstances, see s. 251(2) of the German Code of Criminal Procedure (*Strafprozessordnung*). See also Gerson Trüg, *Lösungskonvergenzen trotz Systemdivergenzen im deutschen und US-amerikanischen Strafverfahren* (Mohr Siebeck, Tübingen, 2003), 360-1.

⁸⁰ Nancy A. Combs, 'Evidence', in William A. Schabas and Nadia Bernaz (eds.), *Routledge Handbook of International Criminal Law* (Routledge, London, 2011), 323, 327; Karin N. Calvo-Goller, *The Trial Proceedings of the International Criminal Court* (Nijhoff, Leiden, 2006), 272.

⁸¹ However, one must not lose sight of the fact that the capacities of a 'genocidal warlord' to arrange witness intimidation might be far greater than those of an alleged criminal in a domestic murder case, see Stephanos Bibas and William W. Burke-White, 'International Idealism Meets Domestic-Criminal-Procedure Realism', (2010) 53 *Duke Law Journal* 637, 697.

⁸² One could even go further and argue, from a national law enforcement perspective, that the protection of witnesses is a preventive measure and, thus, the competence of the police or another law enforcement agency, see

Thus, a non-disclosure decision should not only be carefully considered on a case-by-case basis,⁸³ but also justified in the most transparent and concrete way possible. The Chamber's nebulous recourse to 'present circumstances' under which 'no further disclosure is possible'⁸⁴ do not meet this standard and can hardly rebut the presumption of guilt inherent in every grant for non-disclosure.

2.2.2. Disclosure Sanctions

Given the lack of provisions for disclosure sanctions in the Statute and the RPE,⁸⁵ the Chamber could not do much more than take 'measures throughout the trial to mitigate any prejudice to the defence whenever these concerns were expressed.'⁸⁶ With regard to disclosure violations in connection with the identity of certain intermediaries⁸⁷ and Article 54(3)(e),⁸⁸ the Chamber imposed a stay of proceedings. As to late disclosure, the Chamber granted, *inter alia*, a recall of the witness.⁸⁹

Wolf-Rüdiger Schenke, *Polizei- und Ordnungsrecht* (Müller, Heidelberg, 7th ed., 2011), § 1 marginal number ('mn.') 9 ff. By contrast, the main function of an international criminal tribunal is to prosecute and punish past crimes, i.e. it acts in a repressive, backward-looking fashion (*see* Bodo Pieroth *et al.*, *Polizei- und Ordnungsrecht* (Beck, München, 6th ed., 2010), § 2 mn. 7). As a consequence, preventive protective measures of witness protection, e.g. by non-disclosure, are none of its business.

⁸³ *Prosecutor v. Thomas 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-01/04-01/06-1401, 13 June 2008, para. 89 ('a thorough assessment will need to be made by the Pre-Trial Chamber of the potential relevance of the information to the Defence on a case by case basis.'). *See also* Kuschnik, *supra* note 75, 165.

⁸⁴ *Supra* note 74 with main text.

⁸⁵ *See generally* Caianiello, *supra* note 72, at 36 *et seq.*

⁸⁶ Judgment, *supra* note 6, para. 120.

⁸⁷ *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-01/04-01/06-2517-RED, 8 July 2010.

⁸⁸ *Prosecutor v. Thomas 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-01/04-01/06-1401, 13 June 2008. *See also* Whiting, *supra* note 44, 207 *et seq.*; Katzman, *supra* note 44, 77 *et seq.*; Ambos, *supra* note 44, 543 *et seq.* – In addition, the Chamber informed the Prosecutor with regard to certain intermediaries of possible crimes under Article 70 by persuading, encouraging or assisting witnesses to give false evidence (Judgment, *supra* note 6, paras. 483, 1361).

⁸⁹ *Prosecutor v. Thomas Lubanga Dyilo*, T.Ch. Transcript, ICC-01/04-01/06-T-316, 11 October 2010, p. 9 lines 13-19, p. 11 lines 17-22; T.Ch. Transcript, ICC-01/04-01/06-T-326-ENG 17 November 2010, p. 9 line 3 – p. 4 line 5.

It is obvious from this series of different reactions to different violations that an effective sanctions regime would make the life of the Court easier. The absence of such a regime is a continuous incentive for both parties and participants to try to hide important evidence from the other side. As to the Prosecutor's investigation on the ground, the judgment explains the ensuing disclosure violations by the OTP with the 'degree of international and local pressure, once it was known that officials from the Court had arrived in the country.'⁹⁰ If one adds to this the fact that the international and national public, including and in particular the victims and the civil society organisations representing them, judge the ICC by its numbers of indictments and, still better, convictions it is little surprising that the Prosecution's main focus is on finding incriminating evidence. If national investigators have little appreciation for disclosure of exculpatory evidence in an ordinary murder case,⁹¹ how can one expect that investigators of an international criminal court act differently with regard to systematic and widespread mass murder? Thus, the consequence of a lack of an effective non-disclosure sanctions regime is that both parties simply 'try their luck' and either hide important evidence or make broad claims that the other side constantly violates its disclosure obligations. The Chamber touches on the sore point of the whole system implicitly in the following summarizing statement:

In its final submissions, the defence asserts that the prosecution failed to fulfil its obligations as regards disclosure and to investigate exculpatory circumstances, arguing that these suggested failures 'impair the reliability of the entire body of evidence presented at trial by the Prosecution' to such an extent that it cannot support findings 'beyond all reasonable doubt'. The prosecution argues that it met its disclosure and investigative obligations, and it is submitted that the proceedings have not been vitiated in the manner complained of.⁹²

⁹⁰ Judgment, *supra* note 6, para. 121.

⁹¹ See for UK disclosure law Hannah Quirk, 'The Significance of Culture in Criminal Procedure Reform: Why the Revised Disclosure Scheme Cannot Work', (2006) 10 *International Journal of Evidence and Proof* 42, 47, 53.

⁹² Judgment, *supra* note 6, para. 119 (fn. omitted).

Thus, in sum, it is quite obvious that disclosure violations imply delays, caused by the counter-measures to be taken by the Chamber.⁹³ These delays can only be avoided by structural reforms striving for a more transparent disclosure⁹⁴ and an effective sanctions regime.⁹⁵

3. NATURE OF THE ARMED CONFLICT

The nature of the armed conflict as an international, non-international or mixed one for the relevant time (early September 2002 to 13 August 2003)⁹⁶ was already controversial at the confirmation stage of the proceedings. While the Prosecution qualified the relevant conflict as a non-international one,⁹⁷ PTC I opted for a sequenced international/non-international solution, arguing that the conflict was international as long as the Ituri region was occupied by the Ugandan army (until 2 June 2003) but then changed to a non-international one (until end of

⁹³ In numerous instances the Trial Chamber had to deal with alleged disclosure violations, *see e.g. Prosecutor v. Dyilo*, ICC-01/04-01/06-1401, *supra* note 83; 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-01/04-01/06-2517-RED, 8 July 2010; Decision on the scope of the prosecution's disclosure obligations as regards defence witnesses, ICC-01/04-01/06-2624, 12 November 2010; Public Redacted Decision on the Prosecution's Requests for Non-Disclosure of Information in Witness-Related Documents, ICC-01/04-01/06-2597-RED, 3 December 2010 and Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings", ICC-01/04-01/06-2690-Red., 2 March 2011.

⁹⁴ Heinsch, *supra* note 50, 486, 488.

⁹⁵ Unfortunately, there are no ideal models available which could be transferred 'one-to-one' to the ICC. The rather general wording of Rule 68*bis* ICTY RPE ('The pre-trial Judge or the Trial Chamber may decide *proprio motu*, or at the request of either party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules.') does not serve as a good example. Similarly, the law of England and Wales only provides for sanctions of non-disclosure by the defence. In the US-Law, albeit much richer, disclosure sanctions applying to both parties have as yet only been provided by a couple of states (*see e.g. s. 1054.5(b) California Penal Code*). Most interestingly, however, Senator *Lisa Murkowski* (R-Ala.) has recently introduced the Fairness in Disclosure of Evidence Act 2012, which reads in § 3014(h)(1)(B): 'A remedy under this subsection may include (i) postponement or adjournment of the proceedings; (ii) exclusion or limitation of testimony or evidence; (iii) ordering a new trial; (iv) dismissal with or without prejudice; or (v) any other remedy determined appropriate by the court.'

⁹⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06, P.-T. Ch. I, 29 January 2007 ('Confirmation Decision'), paras. 156-7 (also quoted in the Judgment, para. 1 with fn. 2 and 3 but citing paras. 157-8). This temporal framework is, as part of the facts 'described in the charges', binding on the Chamber (Art. 74 (2) cl. 2).

⁹⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Submission of the Document Containing the Charges Pursuant to Article 61(3)(a) and of the List of Evidence Pursuant to Rule 121(3), , ICC-01/04-01/06, P.-T. Ch. I, 28 August 2006.

December 2003).⁹⁸ In the Judgment, the Chamber – invoking Regulation 55 of the Regulations of the Court⁹⁹ – changes this *legal* characterization of the PTC, qualifying the armed conflict as a non-international one through the whole relevant period.¹⁰⁰ The Chamber starts from the correct legal assumption, apparently overlooked by the PTC, that parallel conflicts of a different (legal) nature may take place at the same time in a single territory.¹⁰¹ In factual terms, this has been, according to the Chamber, the situation in Ituri and surrounding areas during the relevant period.¹⁰² In such a situation of mixed (simultaneous or parallel) armed conflicts it must be clarified to which conflict the accused's alleged criminal conduct belongs and how this conflict is to be qualified.¹⁰³ *In casu*, the key question was whether the very armed conflict in which Lubanga's armed group, the UPC/FPLC, took part,¹⁰⁴ has been internationalized because of the involvement of the DRC's neighbors Uganda and Rwanda,¹⁰⁵ i.e., whether the UPC/FPLC, among other armed groups, 'were used as agents or "proxies" for fighting between two or more states (namely Uganda, Rwanda, or the DRC).'¹⁰⁶ The Chamber answers this question in the negative, arguing, in essence, that neither the DRC nor

⁹⁸ Cf. Confirmation Decision, *supra* note 96, paras. 205-26, especially 220 (international conflict) vs. 227-37, especially 236 (non-international conflict). See for a discussion and further references Ambos, *supra* note 70, 737-9.

⁹⁹ According to this provision, based on the *iura novit curia* principle, 'the Chamber may change the *legal* characterization of facts ...' (emphasis added; cf. Kai Ambos and Dennis Miller, 'Structure and function of the confirmation procedure before the ICC from a comparative perspective' (2007) 7 *Int.Cr.L.Rev.* 335, 358-60). The Chamber instructed the parties accordingly (Judgment, *supra* note 6, para. 527) and they did not object to a possible legal re-characterization (para. 530).

¹⁰⁰ Judgment, *supra* note 6, paras. 523-67, especially 540, 542, 543, 551, 566-7.

¹⁰¹ Judgment, *supra* note 6, para. 540 with further references in fn. 1643 and 1644, in particular to Tadic Interlocutory Appeal Decision, paras. 72-7 and the ICJ's Nicaragua judgment, para. 219. This is also recognized in scholarly writings, see Gregoria Palomo Suárez, *Kindersoldaten und Völkerstrafrecht. Die Strafbarkeit der Rekrutierung und Verwendung von Kindersoldaten nach Völkerrecht* (Berliner Wiss.-Verl., Berlin, 2009), 128-9; Kai Ambos, 'Vorbemerkung zu §§ 8 ff. VStGB', in Wolfgang Joecks and Klaus Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch, volume 6/2. Nebenstrafrecht III/Völkerstrafgesetzbuch* (Beck, München, 2009) 620, mn. 33 and *id.*, *Nociones básicas del derecho internacional humanitario* (Tirant lo Blanch, Valencia, 2011), at 83 both with further references. See also Marko Milanovic and Vidan Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict', in Nigel White and Christian Henderson (eds.), *Research Handbook of International Conflict and Security Law* (forthcoming 2012), available at <ssrn.com/abstract=1988915> (arguing that 'the fact a conflict erupts in an occupied territory between the occupying state and a non-state actor does not mean that this prima facie NIAC becomes internationalized. [...] As with cases of mixed or parallel armed conflicts, IHL can allow for the possibility of the simultaneous existence of occupation and of a NIAC in occupied territory.').

¹⁰² Judgment, *supra* note 6, para. 543 ('number of simultaneous armed conflicts').

¹⁰³ Cf. Palomo Suárez, *supra* note 101, 129; Ambos, *supra* note 101.

¹⁰⁴ Judgment, *supra* note 6, para. 550 and *passim*.

¹⁰⁵ Judgment, *supra* note 6, para. 551.

¹⁰⁶ Judgment, *supra* note 6, para. 552.

Rwanda or Uganda exercised overall control¹⁰⁷ over the UPC/FPLC.¹⁰⁸ As to Uganda in particular, given its direct intervention in the conflict,¹⁰⁹ the Chamber considers that

this intervention would only have internationalised the conflict between the two states concerned (viz. the DRC and Uganda). Since the conflict to which the UPC/FPLC was a party was not “a difference arising between two states” but rather protracted violence carried out by multiple non-state armed groups, it remained a non-international conflict notwithstanding any concurrent international armed conflict between Uganda and the DRC.¹¹⁰

The fact that the Ugandan army occupied certain areas of Bunia, perhaps amounting to a military occupation converting the conflict into an international one,¹¹¹ is considered irrelevant by the Chamber since it does not concern the relevant conflict(s) between the UPC/FPLC and other armed groups:¹¹²

Focussing [sic!] solely on the parties and the conflict relevant to the charges in this case, the Ugandan military occupation of Bunia airport does not change the legal nature of the conflict between the UPC/FPLC, RCD-ML/APC and FRPI rebel groups since this conflict, as analysed above, did not result in two states opposing each other, whether directly or indirectly, during the time period relevant to the charges. In any event, the existence of a possible conflict that was “international in character” between the DRC and Uganda does not affect the legal characterisation of the UPC/FPLC’s concurrent non-international armed conflict with the APC and FRPI militias, which formed part of the internal armed conflict between the rebel groups.¹¹³

¹⁰⁷ The Chamber, as the PTC (paras. 210-11), prefers this test over the ICJ’s ‘effective control test’ (Judgment, *supra* note 6, para. 540); *cf.* Ambos, *supra* note 70, 737-8.

¹⁰⁸ Judgment, *supra* note 6, paras. 553, 561. For the same result Palomo Suárez, *supra* note 101, 129-130 (the Chamber refers to this study elsewhere, but apparently overlooked it here).

¹⁰⁹ Judgment, *supra* note 6, para. 563 (‘there is evidence of direct intervention on the part of Uganda’).

¹¹⁰ Judgment, *supra* note 6, para. 563.

¹¹¹ Judgment, *supra* note 6, para. 542 referring to fn. 34 of the Elements of Crimes (ICC-ASP/1/3(part II-B), retrievable at www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Elements+of+Crimes.htm), hereinafter ‘Elements’) to Art. 8 stipulating that the term ‘international armed conflict’ includes a ‘military occupation’; *see also* Confirmation Decision, *supra* note 96, para. 205. *Crit.* on the ‘occupation argument’ S. Weber, ‘International oder nicht-international? – Die Frage der Konfliktqualifikation in der Lubanga-Entscheidung des IStGH’, (2009) 22 *Humanitäres Völkerrecht-Informationsschriften* (‘HuV-I’) 75, 78-82 (arguing that there is a clear legal distinction between an international armed conflict and an occupation and that the latter is not a special case of the former but is subject to the legal regime of the Geneva Conventions; fn. 34 of the Elements should, therefore, not be applied and Art. 8 (2)(b) – international armed conflict – is not *per se* applicable to an occupation).

¹¹² Judgment, *supra* note 6, para. 564 referring to paras. 543-4 where the Chamber refers to the UPC/FPLC’s conflicts with other groups.

¹¹³ Judgment, *supra* note 6, para. 565.

While it is difficult, without being familiar with all the evidence and the situation on the ground, to judge the Chamber's factual assessment, its presentation of the factual findings¹¹⁴ gives rise to some doubts. While the Chamber rejects, as already stated above,¹¹⁵ any overall control of the DRC, Rwanda or Uganda over the UPC/FPLC, it nevertheless finds 'some evidence' that the DRC supported the APC¹¹⁶ (which fought against the UPC/FPLC)¹¹⁷ and that (initially) Uganda¹¹⁸ and (later also) Rwanda¹¹⁹ supported the UPC/FPLC. This is in line with Gérard Prunier's testimony that these three countries 'fought through "proxies"'.¹²⁰ In the light of these findings, I am not fully convinced by the Chamber's rejection of the PTC's conclusion that there was an international (or internationalized) conflict (at least) until the withdrawal of Ugandan armed forces;¹²¹ in fact, even after the withdrawal, the Ugandan involvement did not completely stop and much less the one of Rwanda.¹²²

4. WAR CRIME OF RECRUITMENT AND USE OF CHILDREN UNDER FIFTEEN YEARS (ART. 8 (2)(E)(VII))

The war crimes of recruiting and using children under fifteen years (Art. 8 (2)(b)(xxvi) and (e)(vii)) have so far not been particularly relevant in international criminal proceedings.¹²³ In

¹¹⁴ Judgment, *supra* note 6, paras. 543-67.

¹¹⁵ *Supra* note 108 and main text.

¹¹⁶ Judgment, *supra* note 6, para. 553.

¹¹⁷ Judgment, *supra* note 6, paras. 544, 561.

¹¹⁸ Judgment, *supra* note 6, paras. 554, 558. As to Uganda, however, this support seems to have stopped due to the UPC's alliance with Rwanda (Confirmation Decision, *supra* note 96, para. 221 in fine); also individual commanders of the Ugandan Armed Forces supported the FRPI which fought against the UPC/FPLC (Judgment, *supra* note 6, para. 559).

¹¹⁹ Judgment, *supra* note 6, para. 554; *see also* Confirmation Decision, *supra* note 96, paras. 221-5.

¹²⁰ Judgment, *supra* note 6, para. 560.

¹²¹ Confirmation Decision, *supra* note 96, para. 220; *conc. Ambos, supra* note 70, 738. Agreeing with the Chamber however in this regard Dapo Akande, 'ICC delivers its first judgment: The Lubanga case and classification of conflicts in situations of occupation' (March 16, 2012), available at *EJIL: Talk!*:<www.ejiltalk.org/icc-delivers-its-first-judgment-the-lubanga-case/>.

¹²² Phil Clark, a renowned expert on the Great Lakes region, said this to me in an email of 22 March 2012: 'Even after Uganda officially withdrew from Bunia in June 2003, some remnants of the Ugandan armed forces remained behind and continued assisting the UPC (mainly in Bunia but also elsewhere in Ituri). The Ugandan government also continued supporting the UPC from Kampala (with intelligence, finance, equipment etc.) thereafter, and it's a problematic interpretation of the nature of the DRC conflict to ignore the international use of proxy forces on Congolese soil.'

¹²³ For cases involving child soldiers at the ICTY and ICTR, *cf.* Jenny Kuper, 'Bridging the gap: Military Training and International Accountability Regarding Children', in Karin Arts and Vesselin Popovski (eds.), *Interna-*

the case at hand, as a consequence of the Chamber's move to a non-international armed conflict, the war crime of Article 8 (2) (b)(xxvi) is no longer applicable and thus the tricky issue whether paramilitary-like armed groups like the UPC can be equated to 'national armed forces', unconvincingly affirmed by the PTC,¹²⁴ is no longer relevant.¹²⁵ Indeed, the applicable war crime for the non-international armed conflict, Article 8 (2)(e)(vii), more broadly covers the recruitment ('conscripting or enlisting')¹²⁶ of children under fifteen 'into armed forces or groups', i.e., it clearly extends to any armed group within the meaning of international humanitarian law.

tional Criminal Accountability and the Rights of Children (Hague Academic Press, The Hague, 2006), 155, 157 *et seq.* Moreover, in particular the Special Court for Sierra Leone ('SCSL') dealt with related cases, *cf.* Alison Smith, 'Child recruitment and the Special Court for Sierra Leone' (2004) 2 *Journal Int. Crim. Just. ('JICJ')* 1141, 1148; Noah B. Novogrodski, 'Litigating Child Recruitment before the Special Court for Sierra Leone' (2005-2006) 7 *San Diego International Law Journal* 421; Janet McKnight, 'Child Soldiers in Africa: A Global Approach to Human Rights Protection, Enforcement and Post-Conflict Reintegration' (2010) 18 *African Journal of International and Comparative Law* 113, 122 *et seq.*; Sandesh Sivakumaran, 'War crimes before the Special Court for Sierra Leone' (2010) 8 *JICJ* 1009. *Generally on child soldiers in international law*: Timothy Webster, 'Babes with Arms: International Law and Child Soldiers' (2007) 39 *George Washington International Law Review* 227.

¹²⁴ Confirmation Decision, *supra* note 96, paras. 275-85; *crit.* Ambos, *supra* note 70, 740-2 (arguing that the PTC's broad interpretation conflicts with the *nullum crimen* principle, especially the rule against analogy). In favour of an (overly) broad interpretation of 'national armed forces' (unconcerned with the *nullum crimen* principle) 'as encompassing any type of armed group or force' Odio Benito Dissent, *supra* note 21, paras. 13-14.

¹²⁵ Judge Odio Benito's Dissent, *supra* note 21, (paras. 9-14) is not convincing in this regard. The fact that a particular legal issue has at one point in the proceedings been discussed does not make it a 'live issue' (para. 12) at trial and much less so, if the provision to which it refers to is no longer applicable before the competent Trial Chamber. I will return to Odio Benito's too great demands on international criminal justice in general and an international criminal tribunal in particular *infra* note 251 with main text.

¹²⁶ 'Recruitment' is the primary, superior term encompassing both 'conscripting' and 'enlistment'. It is used in the primary prohibitions of Art. 77 (2) of the *First Protocol Additional to the Geneva Conventions* (relating to the protection of victims of international armed conflicts, 8 June 1977, 1125 U.N.T.S. 3, ['AP I']) and of Art. 4 (3)(c) *Second Protocol Additional to the Geneva Conventions* (relating to the protection of victims of non-international armed conflicts, 8 June 1977, 1125 U.N.T.S. 609, ['AP II']); *see also* Art. 38 (2), (3) Convention on the Rights of the Child (20 November 1989, 1577 U.N.T.S. 3); *cf.* Confirmation Decision, *supra* note 96, paras. 242-6; Judgment, *supra* note 6, paras. 604, 607. During the negotiations leading to the Rome Conference the crime's definition changed repeatedly, but the term 'recruiting' was dominant until the Conference (*cf.* UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Draft Statute for the International Criminal Court*, U.N. Doc. A/CONF.183/2/Add.1, 14 April 1998 ('Draft Statute'), at 21). In Rome it was then replaced by 'conscripting or enlisting', *cf.* Herman v. Hebel and Darryl Robinson, 'Crimes within the Jurisdiction of the Court', in Roy S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results* (Kluwer Law International, The Hague, 1999), 79, 118 ('At the Conference, ... the word "recruiting" was replaced with "conscripting or enlisting". This was primarily done to meet the concerns of the United States. Whereas "recruiting" was understood to imply an active policy of the Government to have persons join the armed forces, the words "conscripting or enlisting" have a more passive connotation and relate primarily to the administrative act of putting the name of a person on a list.'). *See* for the negotiating history also Palomo Suárez, *supra* note 101, 110 ff. (history), and 119 (abandonment of term 'recruiting'); Michael Cottier, 'Article 8. War Crimes', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck et al., München et al., 2nd ed., 2008), Art. 8 mn. 227; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, Oxford, 2010), Art. 8 at 252 *et seq.*

Apart from that the offence contains *three alternative forms of conduct*, as expressed by the conduct verbs ‘conscripting’, ‘enlisting’ and ‘using’. The Chamber considers these three forms of conduct as three ‘separate offences’ but this confuses the concept of an offence (consisting of different objective and subjective elements, including verbs describing the required conduct) with the concept of a particular conduct as one element or (objective) requirement of any offence, of its *Tatbestand*.¹²⁷ In any case, more importantly, the alternative structure of the offence, unambiguously reflected in the disjunctive wording (‘or’),¹²⁸ makes crystal clear that the realization of one of these conducts suffices for the realization of the offence (provided, of course, that the victims are children under the age of fifteen); each conduct stands on its own, independent from the others. The Chamber therefore correctly rejects the defence contention that the ‘enlisting’ conduct requires a special purpose to use the enlisted child for active participation.¹²⁹ A further peculiar ‘dogmatic’ feature of the offence is its permanent or *continuous character* already acknowledged by the PTC and now confirmed by the Chamber.¹³⁰ This means that the offence continues to be committed as long as the child remains in the military group or does not reach the age of fifteen. As already discussed elsewhere,¹³¹ the problem with such offences, most notably with the enforced disappearance of persons (Article 7 (1) (i)), constitutes in their possible retroactive effect which certainly goes against the will of the drafters if not even against the wording of Articles 11, 22.

¹²⁷ For a correct terminological use Odio Benito Dissent, *supra* note 21, para. 6 (‘three criminal conducts’).

¹²⁸ It is unclear, therefore, why the Chamber considers the provision as ‘potentially ambiguous’ (*supra* note 6, para. 609).

¹²⁹ Judgment, *supra* note 6, para. 610.

¹³⁰ Confirmation Decision, *supra* note 96, para. 248; Judgment, *supra* note 6, paras. 618, 759.

¹³¹ Ambos, *supra* note 70, 739-40; on the enforced disappearance *see* Ambos, *Internationales Strafrecht* (Beck, München, 3rd ed., 2011), § 7 mn. 217 with Fn. 1013 and 1014; Kai Ambos and María L. Böhm, ‘La desaparición forzada de personas como tipo penal autónomo’, in Kai Ambos (ed.), *Desaparición forzada de personas. Análisis comparado e internacional* (GTZ, Bogotá, 2009), 195, 240-1, 250 (updated version available at www.unifr.ch/ddp1/derechopenal/?menu=noticias), last visited 21 March 2012.

There are two issues of interpretation which deserve closer attention. The first, perhaps less contentious one, refers to the definitions of ‘enlisting’ and ‘conscripting’ and the ensuing question of whether a child under 15 years may, at all, be able to act ‘voluntarily’, i.e., give ‘consent’, under the circumstances of an armed conflict. The second one concerns the correct interpretation of the third conduct of ‘using’ children ‘to participate actively in hostilities.’

4.1. ‘Enlisting’ vs. ‘Conscripting’ and the Problem of Consent

The definition of ‘enlisting’ as *voluntary* recruitment as opposed to ‘conscripting’ as a *compulsory* one is settled.¹³² With the enlisting-conduct, any – even non-compulsory (‘voluntary’) – recruitment may amount to a war crime,¹³³ i.e., the autonomous decision of a child (if possible at all) to join an armed group is part of the conduct definition and thus of the *actus reus* of the offence. If, in contrast, a child is recruited against his/her will the conscripting-alternative applies.¹³⁴ Thus, the interplay between (voluntary) enlistment and (compulsory) conscription prevents a punishability gap since any form of child recruitment (voluntary or not) is covered by the offence.¹³⁵ Against this background it is not surprising that the Chamber treats both conducts equally¹³⁶ and defers further deliberations on the voluntariness issue to the sentencing phase.¹³⁷ Unfortunately, this level of analysis referring to the existence of the objective elements of the offence (*actus reus*) is regularly mixed with the structurally different question of a possible consent of the child and its effects. *This* question leaves, in prin-

¹³² This is settled, *cf.* Confirmation Decision, *supra* note 96, para. 246; Judgment, *supra* note 6, para. 608; Ambos, *supra* note 70, 739.

¹³³ Cottier, *supra* note 126, 231 (‘the act [or omission] of not refusing voluntary enlistment’); Darryl Robinson, ‘War Crimes’, in Robert Cryer *et al.* (eds.), *An Introduction to International Criminal Law and Procedure* (CUP, Cambridge, 2nd ed., 2010), 310; Palomo Suárez, *supra* note 101, 140 (stating that the incorporation of ‘enlisting’ clarifies that any recruitment of a child fulfills the offence, regardless any voluntariness); Smith, *supra* note 123, at 1148. .

¹³⁴ *See also* Confirmation Decision, *supra* note 96, paras. 246-7; SCSL, *Prosecutor v. Fofana and Kondewa*, Appeals Judgment, SCSL-04-14-A, 28 May 2008, para. 140.

¹³⁵ *Similarly*, SCSL, *Prosecutor v. Fofana and Kondewa*, Appeals Judgment, SCSL-04-14-A, 28 May 2008, para. 140; *cf. also* Robinson, *supra* note 133, 310.

¹³⁶ Judgment, *supra* note 6, para. 618 (‘[...] the offences [sic!] of conscripting and enlisting are committed at the moment a child under the age of 15 is enrolled into or joins an armed force or group, with or without compulsion.’; *see also* para. 759 where the Chamber treats both conducts equally).

¹³⁷ Judgment, *supra* note 6, para. 617.

ciple, the *actus reus* unaffected unless the respective conduct or offence definition implies a violation of the autonomy of the potential victim, that is, in the case of offences whose essence consists in the protection of personal autonomy and free will. Take for example the offences against liberty of any kind (freedom of movement, sexual autonomy etc.). They require *by definition* that the relevant conduct goes against the (free) will of the potential victim. Consequently, if the victim agrees to this conduct (for example the owner of a flat in the tenth floor agrees that his door will be locked from outside so that he cannot leave or the woman agrees to sexual intercourse) a definitional element of the *actus reus* (lack of agreement or ‘consent’) is absent and thus the offence is not fulfilled. In other words, an agreement or consent of the victim in this kind of offences negates an element required by the definition of the offence.¹³⁸ In the more process-oriented common law systems this absence of a definitional element of the relevant offence gives rise to a failure of proof defence which, consequently, can be raised if the prosecution has failed to show an element of the relevant offence.¹³⁹ In contrast, in all other offences an agreement or consent operates, at best, at the second level of the offence structure (after the definitional *actus reus* level) as a general defence (defence proper), i.e., a ground excluding criminal responsibility.¹⁴⁰

If one applies this distinction to the conscription and enlistment conducts the former would, in principle, allow for a failure of proof defence (the lack of consent – ‘compulsory’ recruitment – is part of the conduct definition) while the latter at best for a general defence. But here a

¹³⁸ Paul H. Robinson, *Criminal Law Defenses*, i, (West Publ. Co., St. Paul, 1984), 72. In Germany, the dominant view still distinguishes in this sense between ‘Einverständnis’ (comparable to ‘failure of proof’) and ‘Einwilligung’ (general defence), cf. Hans-Heinrich Jescheck and Thomas Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil* (Duncker & Humblot, Berlin, 5th ed., 1996), 371 ff.; *contrary* Claus Roxin, *Strafrecht Allgemeiner Teil. Vol. I* (Beck, München, 4th ed., 2006,) § 13 mn. 11.

¹³⁹ Robinson, *supra* note 138, at 72; Law Reform Commission, *Report on Defences in Criminal Law* (2009), at 13; Robert Cryer, ‘Defences’, in Cryer *et al.*, *supra* note 133, at 403; Carlos Gómez-Jara Díez and Luis E. Chiesa, ‘Spain’, in Kevin J. Heller and Markus D. Dubber (eds.), *The Handbook of Comparative Criminal Law* (Stanford Law Books, Stanford, 2011), 507.

¹⁴⁰ Here then the problem arises whether a consent (which always implies the right to dispose exclusively about the legal goods or interest protected) can be possible at all, if the respective offences, like as a rule the ICL core crimes, also protect collective interests (security, peace etc.) belonging to a the world community as such; for a discussion see Kai Ambos, ‘Defences in international criminal law’, in Bartram S. Brown (ed.), *Research Handbook on International Criminal Law* (Elgar, Cheltenham, 2011), 299, 328.

consistency problem arises: If enlistment is ‘voluntary’, it requires as part of its definition the consent of the child; absent such consent only the conscription-conduct can apply. If, however, the child consented to the recruitment and the enlistment-conduct would be applicable this same consent would also operate as a defence to the enlistment. In other words, as enlistment is predicated on free will (consent), it is logically impossible that, as held by both the PTC and the Chamber, ‘a child’s consent does not provide a valid defence to enlistment’.¹⁴¹ Logically, this statement would only be correct if ‘enlistment’ would be replaced by ‘conscription’ for only under this conduct the recruitment is carried out against the will of the child and, consequently, a (subsequent) consent can be excluded. To be sure, one may with good reason take the view that a child is normally not able to give genuine and informed consent in the circumstances of an armed conflict. Indeed, this is the view of the Chamber if it states, relying on two expert witnesses,¹⁴² that ‘it will frequently be the case that girls and boys under the age of 15 will be unable to give genuine and informed consent when enlisting in an armed group or force.’¹⁴³ However, one has to distinguish as to the consequences of this ‘non-consent view’ between the two conducts: it only makes sense with regard to ‘conscripting’, not with regard to ‘enlisting’ given that it implies a decision based on free will (‘voluntary’), that is, on consent. Thus, the term ‘enlisting’ in the Chamber’s statement must be replaced by ‘conscripting’.

In any case, what the Chamber really wants to say is that any valid consent of a child regarding the joining of an armed group is impossible under the circumstances of an armed conflict. But is this true? Is it really impossible to think of a situation where a child ‘voluntarily’ joins an armed group? Think of a child that desperately needs the pay he may receive for the mili-

¹⁴¹ Judgment, *supra* note 6, paras. 616 and 617, following Confirmation Decision, *supra* note 96, para. 248. *In the same vein* Schabas, *supra* note 126, 254 (consent as an invalid defence, because enlistment is a voluntary act).

¹⁴² Judgment, *supra* note 6, paras. 610-12.

¹⁴³ Judgment, *supra* note 6, para. 613.

tary service for some health treatment of a family member. Clearly, the question in these cases is what ‘voluntarily’ means but the fact that a term has philosophical underpinnings and is complex does not allow us to beg the question. Also, one wonders why the drafters introduced two terms with different meanings (instead of using ‘recruitment’ in the first place).¹⁴⁴ Did they not want to thereby make the point that there could be cases where a child under fifteen gives a genuine and informed consent to his recruitment?

4. 2. ‘Using’ Children ‘to participate actively in Hostilities’

The plausible interpretations of the ‘active participation’ requirement range from a very restrictive reading limiting the participation to exclusively combat-related activities¹⁴⁵ to a broader reading, including any supporting activity or role.¹⁴⁶ This position is also shared by the Chamber.¹⁴⁷ What is clear from this and indeed quite uncontroversial is that, on the one hand, activities clearly unrelated to the hostilities, for example delivering food¹⁴⁸ or working as domestic staff, are excluded¹⁴⁹ and, on the other hand, a ‘direct’ participation ‘in hostilities’, as required by Article 77 (2) AP I¹⁵⁰, is not necessary.¹⁵¹ Yet, the latter follows not so

¹⁴⁴ According to *v. Hebel and Robinson*, *supra* note 126, 118 the term ‘recruitment’ was the preferred term until the Rome conference where it was changed, because of the above mentioned (*supra* note 126) US concerns.

¹⁴⁵ Judgment, *supra* note 6, paras. 583-7 (Defence: ‘direct participation’ related to ‘acts of war’, excluding for example bodyguards).

¹⁴⁶ In favour of including supporting activities with slight differences Draft Statute, *supra* note 126, 21 with fn. 12 (‘The words “using” and “participate” have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. ... use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.’); SCSL, *Prosecutor v. Brima, Kamara and Kamu*, Trial Judgment, SCSL-04-16-T, T.Ch. II, 20 June 2007, para. 737 (‘Any labour or support that gives effect to, or helps maintain, operations in a conflict ...’); Judgment, *supra* note 6, paras. 576-8 (Prosecution: ‘broad interpretation of [...] direct support’).

¹⁴⁷ Judgment, *supra* note 6, paras. 621-8 (at 624-6 essentially referring to the SCSL).

¹⁴⁸ Classifying the transportation of food as ‘delicate’: Noëlle Quéniévet, ‘Girl Soldiers and Participation in Hostilities’ (2008) 16 *African Journal of International and Comparative Law* 219, 233.

¹⁴⁹ Draft Statute, *supra* note 126, 21 with fn. 12 (‘It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer’s married accommodation.’); conc. Confirmation Decision, *supra* note 96, para. 262; Judgment, *supra* note 6, paras. 575 (Prosecution), 621, 623 (Chamber, quoting Preparatory Committee and PTC).

¹⁵⁰ Art. 77 (2) AP I reads:

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

‘clearly’, as suggested by the Chamber,¹⁵² from the apparent difference between the terms ‘active’ and ‘direct’ but rather from the fact that Article 4 (3)(c) AP II refers to any participation (direct or indirect)¹⁵³ and, more importantly, from the broad protective purpose of the criminalization of the recruitment of child soldiers. Given that the respective offences aim to protect children under fifteen years, as a particularly vulnerable group, from the inherent risks arising out of armed conflicts, including those originating in their own groups,¹⁵⁴ in principle all (direct or indirect) activities which expose the respective children to this particular ‘armed conflict risk’ should be covered by the active participation requirement¹⁵⁵ – of course respecting the *nullum crimen* principle.¹⁵⁶ In this sense, it is convincing, if the Chamber focuses on the *risks to which children are exposed* as members of armed groups:

All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an “in-

¹⁵¹ Referring to evidentiary questions in this regard: Quénivet, *supra* note 148, 234.

¹⁵² Judgment, *supra* note 6, para. 627.

¹⁵³ See already Ambos, *supra* note 70, 740.

¹⁵⁴ Cf. Robinson, *supra* note 133, 309 (‘Primary purpose is to protect all children’); Palomo Suárez, *supra* note 101, 168 (focusing on specific dangers); Cottier, *supra* note 126, Art. 8 at 228 (‘protect children against their own authorities’).

¹⁵⁵ Similarly Palomo Suárez, *supra* note 101, 121-2; Sabine v. Schorlemer, *Kindersoldaten und bewaffneter Konflikt. Nukleus eines umfassenden Schutzregimes der Vereinten Nationen* (Lang, Frankfurt a.M., 2009), 315.

¹⁵⁶ This means, for example, that reading ‘sexual violence’ into the using-conduct (Odio Benito Dissent, *supra* note 21, paras. 15-21) violates the strict construction requirement and amounts to a prohibited analogy (Article 22 (2)). In addition, ‘sexual violence’ only alludes to a criminal phenomenon which may well have been relevant in the factual situation on the ground (*see e.g.* Judgment, *supra* note 6, paras. 890-6) but the actual offences are covered, as acknowledged by Odio Benito herself, by ‘distinct and separate crimes’ (Article 7 (1)(g) and Article 8 (2) (b) (xxii), (e)(vi)). Yet, these have not been charged by the Prosecution (Judgment, paras. 16, 630; *see also supra* note 13) and could, therefore, not be object of the trial (Article 74 (2); Judgment, paras. 36, 630). Further, Odio Benito does not provide any supporting authorities for her position and she does not even mention the *nullum crimen* principle. Thus, this part of her dissent appears rather as a policy speech for certain constituencies in the NGO community than a strict judicial analysis and it revives unpleasant memories of the ‘neopunitivism’ debate in Latin America (*cf.* Daniel Pastor, ‘La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos’, [2005] 1 *Nueva Doctrina Penal* 73; Ezequiel Malarino, ‘Activismo judicial, punitivización y nacionalización. Tendencias antidemocráticas y antiliberales de la Corte Interamericana de Derechos Humanos’, in Kai Ambos and Ezequiel Malarino (eds.), *Sistema interamericano de protección de los derechos humanos y derecho penal internacional – Tomo I* [Fundación Konrad Adenauer, Montevideo, 2011] 25). It is important to note, with regard to the prosecutorial strategy, that the Prosecution, instead of requesting an amendment of the charges (Judgment, para. 629), tried to squeeze the sex crimes into the using-conduct of Article 8 (2)(e)(vii), calling, supported by the victims representatives, for a broad interpretation (Judgment, *supra* note 6, paras. 575, 577, 589, 598). Regrettably, the Prosecutor and his deputy (the Prosecutor elect Fatou Bensouda) omitted to mention the procedural side of the gender issue in their press conference the day after the judgment where they criticized the majority decision (available at <www.youtube.com/watch?v=eoj_qCwHePk>, last visited 21 March 2012). The issue may be dealt with again at the sentencing and reparations stage (Judgment, *supra* note 6, para. 631).

direct” role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target.¹⁵⁷

5. MODE OF RESPONSIBILITY (CO-PERPETRATION), INCLUDING THE MENTAL ELEMENT (ART. 25, 30)

The Chamber finds Lubanga guilty as a co-perpetrator (Article 25 (3)(a) 2nd alternative) of the recruitment and using of children pursuant to Article 8 (2)(e)(vii).¹⁵⁸ Its evaluation of the facts presented culminates in the following overall conclusion:

The accused and his co-perpetrators agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. This resulted, in the ordinary course of events, in the conscription and enlistment of boys and girls under the age of 15, and their use to participate actively in hostilities.¹⁵⁹

The Chamber confirms the PTC’s confirmation decision;¹⁶⁰ the majority of the Chamber (Judges Odio Benito and Blattmann), Judge Fulford dissenting,¹⁶¹ also follows the PTC in its interpretation of co-perpetration on the basis of the control of/over the act theory (*Ta-therrschaftslehre*).¹⁶² As I have discussed the PTC’s view already elsewhere¹⁶³ and have said

¹⁵⁷ Judgment, *supra* note 6, para. 628 (fn. omitted).

¹⁵⁸ Judgment, *supra* note 6, para. 1358.

¹⁵⁹ Judgment, *supra* note 6, para. 1351. The Chamber further concludes that during the relevant time (early September 2002 to 13 August 2003) ‘a significant number of high-ranking members of the UPC/FPLC [Lubanga’s organization] and other personnel conducted a large-scale recruitment exercise directed at young people, including children under the age of 15, whether voluntarily or by coercion’ (para. 1354). This was ‘the result of the implementation of the common plan to build an army’ (para. 1355). The children were used ‘to participate actively in hostilities, including during battles. They were also used, during the relevant period, as soldiers and as bodyguards for senior officials, including the accused.’ (*ibid.*). Lubanga exercised as president of the UPC/FPLC ‘an overall coordinating role’, was ‘closely involved’ in recruitment decisions and ‘personally used children [...] amongst his bodyguards’, i.e., he made ‘essential’ contributions to the common plan (para. 1356). He ‘acted with the intent and knowledge necessary’ within the meaning of Article 30 (para. 1357).

¹⁶⁰ Confirmation Decision, *supra* note 96, paras. 317-348 (criminal responsibility, in particular co-perpetration) and paras. 349-67 (subjective requirements); for a discussion *see* Ambos, *supra* note 70, 744-8.

¹⁶¹ Separate Opinion of Judge Adrian Fulford, attached to the Judgment, *supra* note 6 (hereinafter ‘Fulford Dissent’).

¹⁶² Judgment, *supra* note 6, paras. 976-1018 (*see also* paras. 918-33 where the Chamber presents the PTC’s view in a systematic fashion).

¹⁶³ Ambos, *supra* note 70, 744-8.

more than enough on the interpretation of Article 25 (3) and the underlying theories in general,¹⁶⁴ I will not rehearse the arguments of the Chamber here but immediately take issue with those considerations which I find particularly problematic and/or relevant for the future case law, taking into account, of course, the interesting considerations of Judge Fulford. I will deal, on the one hand, with the objective requirements of co-perpetration and the underlying structural and theoretical questions with regard to the system of Article 25 (3); on the other hand, I will discuss the mental element of co-perpetration.

5.1. Objective Requirements of Co-Perpetration, Control over the Act and the System of Article 25 (3)

As to the *nature of the common plan* it is controversial whether the plan itself must be ‘intrinsically criminal’¹⁶⁵ or if it must only include an ‘element of criminality’.¹⁶⁶ The Chamber adopts the latter view, basically following the PTC, although requiring ‘a critical element of criminality’ ‘as a minimum’, i.e., the implementation of the plan must embody ‘a sufficient risk that, if events follow the ordinary course, a crime will be committed.’¹⁶⁷ The Chamber invokes a ‘combined reading of Articles 25 (3)(a) and 30’¹⁶⁸ in support of its finding but it is pretty unclear what it exactly means by that. On the one hand, the Chamber pretends ‘to establish the statutory scope’ of the plan requirement by mirroring it in the mental element. On the other hand, the mentioned combined reading is said to lead ‘to the conclusion that committing the crime in question does not need to be the overarching goal of the co-perpetrators.’¹⁶⁹ While I would agree that the plan, given its mixed objective-subjective struc-

¹⁶⁴ See in English Kai Ambos, ‘Article 25. Individual criminal responsibility’, in Triffterer, *supra* note 126, 743 et seq.

¹⁶⁵ This was the Defence position, see Judgment, *supra* note 6, paras. 955, 983.

¹⁶⁶ Confirmation Decision, *supra* note 96, para. 344. See also *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, ICC-01/04-01/10-465, 16 Dec. 2011, para. 291 (with regard to Article 25 (3)(d)); *Prosecutor v. Muthaura, Kenyatta and Ali*, Decision on the confirmation of charges, ICC-01/09-02/11, P.-T.Ch. II, 23 January 2012, para. 399 and *Prosecutor v. Ruto, Kosgey and Sang*, Decision on the confirmation of charges, ICC-01/09-01/11, P.-T.Ch. II, 23 January 2012, para. 301.

¹⁶⁷ Judgment, *supra* note 6, para. 984; also para. 987.

¹⁶⁸ Judgment, *supra* note 6, para. 985.

¹⁶⁹ *Ibid.*

ture, must always be interpreted focusing on the original will of the co-perpetrators, their joint decision to commit the crime,¹⁷⁰ I fail to see how this recourse to the mental side (the ‘combined reading’) can demonstrate that a plan always contains a superior goal going beyond the simple commission of the crime. I am not even convinced that a mere ‘critical element of criminality’ suffices for a plan of co-perpetrators. After all, we are not dealing here with any plan (for example to pay a visit to London next weekend) but with a plan which forms the basis of a joint commission of a crime and, as a consequence, of the mutual attribution of the respective contributions of the co-perpetrators.¹⁷¹ Such a plan cannot be predominantly non-criminal but must at least – that would be my ‘minimum’ – contain a more or less concrete crime to be committed, otherwise there is nothing (agreed) what could be mutually attributed.¹⁷² Perhaps one may read the same view in the Chamber’s – not very straightforward – statement that ‘the mental requirement that the common plan included the commission of a crime [sic!] will be satisfied if the co-perpetrators knew that, in the ordinary course of events, implementing the plan will lead to that result.’¹⁷³ In any case, I think this point should be clarified in the future case law of the Court.

¹⁷⁰ Cf. Kai Ambos, ‘Critical issues in the Bemba confirmation decision’ (2009) 22 *LJIL* 715, 721.

¹⁷¹ On the crucial element of the mutual attribution in co-perpetration *see infra* note 189 with main text.

¹⁷² National criminal law theory takes it for granted that the plan must contain (more or less) concrete offences, *see for the German Law*: Claus Roxin, *Strafrecht. Allgemeiner Teil. Volume II* (Beck, München, 2003), § 25 mn. 196; *in a similar vein* Bernd Schünemann, ‘§ 25 Täterschaft’, in Heinrich W. Laufhütte et al. (eds.), *Leipziger Kommentar zum Strafgesetzbuch. Volume I* (de Gruyter, Berlin, 12th ed., 2007), § 25 mn. 176; Wolfgang Joecks, ‘§ 25 Täterschaft’, in Wolfgang Joecks and Klaus Mießbach (eds.), *Münchener Kommentar zum Strafgesetzbuch. Volume I* (Beck, München, 2nd ed., 2011), § 25 mn. 237; *see for the English law*: Andrew P. Simester, John R. Spencer, G. R. Sullivan and Graham Virgo, *Simester and Sullivan’s Criminal Law – Theory and Doctrine* (Hart, Oxford, 4th ed., 2010), at 234 (‘There must be [...] an agreement, or reciprocal understanding, between S and P to pursue crime A’; David Ormerod, *Smith and Hogan’s Criminal Law* (OUP, Oxford, 13th ed., 2011), 218 (‘... in the case of joint enterprise *based on joint principalship*, ... it is necessary for there to be an agreement to commit crime X and for a shared common purpose to commit crime X’); Richard Card, *Card, Cross and Jones Criminal Law* (OUP, Oxford, 19th ed., 2010), at 783 (‘A joint criminal venture exists where two (or more) people engage together with the common purpose that an offence be committed.’) (italics in original, underlining added).

¹⁷³ Judgment, *supra* note 6, para. 986 (underlining added).

As to the *nature of the contribution* the Chamber confirms the general view of the case law that it must be *essential*.¹⁷⁴ That would not be worth mentioning if the Chamber had not tried to offer a more principled reasoning for this position. In essence, the *majority* argues with the *hierarchical structure of the modes of participation* contained in paragraph 3 of Article 25 which gives the forms of perpetration in subparagraph (a), in terms of the level of responsibility of the perpetrators and the blame to be imposed upon them, prevalence over the other forms of (secondary) participation (subparagraphs (b) to (d)).¹⁷⁵ Lowering the contribution threshold would therefore ‘deprive the notion of principal liability of its capacity to express the blameworthiness of those persons who are the most responsible for the most serious crimes of international concern.’¹⁷⁶ The majority finds concrete support for the implicit value based difference between the different forms of participation in particular in the contribution requirement of subpara. (a) as compared to (c)¹⁷⁷ and (d),¹⁷⁸ in the limitation of the attempt liability according to subpara. (f) to those persons who ‘commit’ (i.e. the perpetrators within the meaning of subpara. (a))¹⁷⁹ and in the (factual) dependence of secondary participation from perpetration (primary participation) as expressed in the reference to an attempted crime in subparagraphs (b) and (c).¹⁸⁰

¹⁷⁴ Judgment, *supra* note 6, paras. 999, 1006 (with detailed references in fn. 2705).

¹⁷⁵ Judgment, *supra* note 6, para. 999.

¹⁷⁶ *Ibid.*

¹⁷⁷ Judgment, *supra* note 6, para. 997 (‘If accessories must have had “a substantial effect on the commission of the crime” to be held liable, then co-perpetrators must have had, pursuant to a systematic reading of this provision, more than a substantial effect.’, fn. omitted).

¹⁷⁸ Judgment, *supra* note 6, para. 996 (‘... systematic reading of these provisions leads to the conclusion that the contribution of the co-perpetrator who “commits” a crime is necessarily of greater significance than that of an individual who “contributes in any other way to the commission” of a crime.’).

¹⁷⁹ Judgment, *supra* note 6, para. 998 (‘Only those individuals who attempt “to commit” a crime, as opposed to those who participate in a crime committed by someone else, can be held liable under that provision.’).

¹⁸⁰ Judgment, *supra* note 6, para. 998 (‘The same conclusion is supported by the plain language of Articles 25(3)(b) and (c), which require for secondary liability that the perpetrator at least attempt to commit the crime. As such, secondary liability is dependent on whether the perpetrator acts.’). The same is true for subparagraph (d) referring to ‘the commission or attempted commission of such a crime ...’.

Judge Fulford takes a radically different view claiming that the different forms of participation in Article 25 (3) are neither clearly distinguishable¹⁸¹ nor does there exist any hierarchy between them.¹⁸² He also doubts that ‘rigorous distinctions’ are of any help to the Court, in particular because they have no impact on sentencing.¹⁸³ As to the qualifier ‘essential’ Fulford argues that it finds no support in the wording of subparagraph (a), in particular there is no special causation requirement.¹⁸⁴ Thus, it suffices ‘that the individual contributed to the crime by committing it with another or others’,¹⁸⁵ that the contribution is directly or indirectly linked to the crime.¹⁸⁶ This also ‘avoids a hypothetical investigation as to how events might have unfolded without the accused’s involvement.’¹⁸⁷

Before taking sides in this controversy it is worthwhile pointing out that there is agreement within the Chamber¹⁸⁸ and generally in the case law and doctrine¹⁸⁹ that the coordinated or collective commission by co-perpetrators, pursuant to the common plan or agreement, entails a *mutual attribution* of the respective contributions. As a consequence, a co-perpetrator need *not personally and directly participate* in the execution of the crime, in particular he need *not be physically present* at the scene of the crime; rather, the physical contribution(s) of the other co-perpetrator(s) may be imputed to him.¹⁹⁰ Yet, here again exists a principled difference in the approach of the majority and Judge Fulford. While the former’s argument and interpreta-

¹⁸¹ Fulford Dissent, *supra* note 161, para. 7 (‘... often be indistinguishable in their application vis-à-vis a particular situation, and by creating a clear degree of crossover between the various modes of liability, Article 25(3) covers all eventualities. ... not intended to be mutually exclusive.’).

¹⁸² Fulford Dissent, *supra* note 161, para. 8 (referring in particular to subparagraphs (a) 3rd alternative [‘through another person’] vs. (b) and subparagraphs (c) to (d)).

¹⁸³ Fulford Dissent, *supra* note 161, para. 9.

¹⁸⁴ Fulford Dissent, *supra* note 161, para. 15.

¹⁸⁵ *Ibid.*

¹⁸⁶ Fulford Dissent, *supra* note 161, para. 16, letter c (‘A contribution to the crime, which may be direct or indirect, provided either way there is a causal link between the individual’s contribution and the crime’).

¹⁸⁷ Fulford Dissent, *supra* note 161, para. 17.

¹⁸⁸ Judgment, *supra* note 6, para. 994 and Fulford Dissent, *supra* note 161, para. 16.

¹⁸⁹ Cf. Ambos, *supra* note 164, mn. 8 and 9a; Ambos, *supra* note 70, 744-6 (discussing the PTC decision), both with further references.

¹⁹⁰ For the same result Judgment, *supra* note 6, paras. 1003-5 and Fulford Dissent, *supra* note 161, paras. 12, 15. Contrary (‘personal and direct participation’) the Defence position (Judgment, *supra* note 6, paras. 949, 1002).

tion of co-perpetration rest on the *control over the act theory*,¹⁹¹ Fulford plainly rejects this theory¹⁹² and takes his interpretation from the simple wording of Article 25 (3)(a).¹⁹³ Thus, in fact, the disagreement between the majority and Fulford goes well beyond the mere interpretation of a definitional element of a mode of responsibility ('contribution') but concerns a *matter of principle*, namely, *how much legal theory* International Criminal Law (here the law of criminal responsibility) can reasonably take or, framed from a more theory-friendly perspective, how much does it need. Fulford, apparently, adopts a very pragmatic and, from a practitioner's perspective, at first sight reasonable approach, which essentially interprets the applicable law on the basis of its plain wording taking recourse to (any) legal theory only as a last resort.¹⁹⁴ Indeed, Fulford does not dismiss the control over the act theory on the basis of a substantive discussion of its merits and shortcomings¹⁹⁵ (as in fact does an important view in the literature)¹⁹⁶ but, taken his considerations at face value, because of its German origins and the ensuing lack of support in the Statute.¹⁹⁷ Both arguments are flawed, though. The former for the pretty self-evident reason, certainly also shared by Fulford, that the validity of a moral or theoretical claim is independent from its geographical origin or authorship for it depends

¹⁹¹ Judgment, *supra* note 6, paras. 1003-5. The PTC more precisely relied on the theory of the 'functional control over the act' (*funktionelle Tatherrschaft*), see Confirmation Decision, *supra* note 96, paras. 330-4, 342; Ambos, *supra* note 70, 745.

¹⁹² Fulford Dissent, *supra* note 161, paras. 10-12.

¹⁹³ Fulford Dissent, *supra* note 161, paras. 12 ('plain reading of Article 25(3)(a)'), 13 ('Court's approach to this issue should be rooted in the plain text of the Statute'), 16.

¹⁹⁴ See, by way of example, the quotes *supra* note 193.

¹⁹⁵ There is some minor substantial debate in fn. 20 (Fulford Dissent, *supra* note 161, para. 10) where Fulford pretends to discover a deviation of the PTC from Roxin's theory. Yet, first of all, Fulford only quotes here a few pages (280-5) of Claus Roxin's *Täterschaft und Tatherrschaft*, a book of a total of 820 pp. (in its 8th. ed. 2006; Fulford quotes the 6th. ed. 1994), and these pages do only refer to the 'functional control over the act' theory, i.e., the theory which forms the basis of Roxin's concept of co-perpetration (*Mittäterschaft*) and is itself based on the 'control over the act' theory which Fulford in fact rejects. Second, Fulford overlooks that the 'frustration standard' applied (*inter alia*) by the PTC is nothing more than a consequence of that 'functional control over the act' theory, adopted by the PTC (*supra* note 191), and as such indeed a key criterion of Roxin's concept of *Mittäterschaft* (see only Roxin, *supra* note 172, § 25 mn. 188). Third, as to the application or not of the *dolus eventualis* standard Fulford ignores that Roxin applies only – as the Chamber and Fulford rightly do, too (*cf. infra* notes 229 *et seq.* and main text) – the general *mens rea* standard of the German *Strafgesetzbuch* (§ 16) – as the Chamber and Fulford Article 30 – but that wording and interpretation of these two provisions differ (at p. 285 of *Täterschaft*, quoted by Fulford, Roxin only starts to discuss the 'gemeinsamen Tatentschluß' [joint decision regarding the act] but not the mental element in general).

¹⁹⁶ See *infra* note 209.

¹⁹⁷ Fulford Dissent, *supra* note 161, para. 10-12.

on substantive normative and practical considerations¹⁹⁸ which, as just said, are unfortunately not addressed by Fulford. As a consequence, and this brings us to his second, related argument, a theory is not geographically or culturally limited, its reach simply depends on its persuasiveness.¹⁹⁹ If it is persuasive enough it may take hold in various jurisdictions (as indeed the control over the act theory did)²⁰⁰ and it may then also amount to a general principle of law within the meaning of Article 21 (1)(c). In any case, taking a closer look at the gist of Fulford's argument, it becomes clear that his rejection of this theory is based on an extremely positivist, 'plain reading' of the Statute which makes any theory, as a means of statutory interpretation, superfluous. But Fulford puts too much trust in the 'plain' meaning of the legal text. Law is not a natural science which can be approached in an entirely empirical-naturalistic manner. Legal statutes are riddled with highly normative terms and for this reason alone are theoretical inquiries necessary to find the most plausible and reasonable meaning.²⁰¹ More concretely speaking, Fulford considers the control over the act theory (as arguably of any other theory) as irrelevant because he dismisses the two reasons adduced by the PTC in favour of the theory, i.e., 'the perceived necessity to establish a clear dividing line between the various forms of liability under Article 25 (3)(a)-(d)',²⁰² and the establishment of principal

¹⁹⁸ Cf. Matthias Mahlmann, *Rechtsphilosophie und Rechtstheorie* (Nomos, Baden-Baden, 2010), at 318.

¹⁹⁹ Indeed, nobody would seriously claim, for example, that Einstein's theory of relativity applies only in Switzerland since it was mainly the fruit of Einstein's Swiss years.

²⁰⁰ See on its influence outside Germany for example Bernd Schünemann, 'Schrumpfende Basis, wuchernder Überbau? - Zum Schicksal der Tatherrschaftsdoktrin nach 50 Jahren', in Manfred Heinrich et al. (eds.), *Strafrecht als Scientia Universalis. Festschrift für Claus Roxin zum 80. Geburtstag* (De Gruyter, Berlin, 2011) 799, at 799-800; on the widespread influence of the *Organisationsherrschaftslehre*, in particular in the Spanish- and Portuguese-speaking world see Francisco Muñoz-Conde and Héctor Olásolo, 'The Application of the Notion of Indirect Perpetration through Organized Structures of Power in Latin America and Spain' (2011) 9 *JICJ* 113-135.

²⁰¹ This methodological point has recently been made by the Special Tribunal for Lebanon in its seminal Appeals decision on the (international) crime of terrorism, most regrettably Judge Antonio Cassese's last decision (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I/AC/R176bis, 16 February 2011, paras. 19-21, 29-30, 37; see for a discussion with further references Kai Ambos, 'Judicial creativity at the Special tribunal for Lebanon: Is there a crime of terrorism under international law?' (2011) 24 *LJIL* 655, at 657-9). About the scholarly authority as a 'residual third source' of law, see recently George P. Fletcher, 'New Court, Old Dogmatik', (2011) 9 *JICJ* 179, at 180 and (in greater detail) id., 'Truth in Codification', (1998) 31 *University of California Davis Law Rev.* 745, at 746, 750.

²⁰² Fulford dissent, *supra* note 161, para. 6.

liability also for those individuals who are absent from the scene of the crime.²⁰³ I think, however, that in both cases the PTC and the majority of the Chamber are right.

As to the *hierarchical structure of Article 25 (3)* Fulford ignores the conscious decision of the drafters to abandon the pure unitarian concept of perpetration, as used in the Ad-Hoc Tribunals, in favour of a more differentiated system which, at least terminologically, pretends to distinguish between different forms of participation already at the level of allocation of responsibility (level of imputation).²⁰⁴ This differentiation entails the – not only ‘perceived’, but very real – necessity to develop some theoretical guidelines to delimitate the different forms of participation of Article 25 (3). The fact that these forms of participation may overlap²⁰⁵ is the very reason that in legal systems with differentiated models of participation – and even in those with a unitarian concept as for example in Judge Fulford’s own (English) jurisdiction²⁰⁶ – scholars try to develop theories of delimitation to avoid such an overlap to the greatest extent possible. In other words, the principled decision of the Statute in favour of a differentiated system makes some theoretical groundwork indispensable. It is important to note in this context that the permanent struggle for the improvement of existing theories or the development of alternative ones is driven by the intimate conviction that the differentiation between forms of perpetration already at the level of imputation and the ensuing choice of the ‘right’ title of imputation contributes to a more just and fairer criminal justice system, i.e., it is not, as

²⁰³ Fulford dissent, *supra* note 161, para. 12.

²⁰⁴ Cf. Ambos, *supra* note 164, mn. 2. For this reason it is unclear why Markus D. Dubber, ‘Criminalizing Complicity: A Comparative Analysis’ (2007) 5 *JICJ* 977, at 1000 argues, without further reasoning, that ‘the American approach [on complicity] would appear to be a better fit’ to Article 25 (3).

²⁰⁵ Fulford, as quoted in *supra* note 181. I note in passing that Fulford (*supra* note 161, para. 8) only compares subparagraphs (a) vs. (b) and (c) vs. (d) – certainly the closest forms of participation – but the Chamber focuses on subparagraphs (a) as compared to (c) and (d), see *supra* notes 177 and 178.

²⁰⁶ In English criminal law, the academic literature has for a long time discussed different forms of participation distinguishing, in particular, between principal and secondary/accessorial/derivative responsibility, see e.g. Glanville Williams, *Criminal Law. The General Part* (Stevens, London, 1953), 175-237 (principal vs. and accessorial liability); Ormerod, *supra* note 172, 184-245 (principal offender vs. secondary participation); Andrew Ashworth, *Principles of Criminal Law* (OUP, Oxford, 6th ed., 2009), 403-36 (principals vs. accessories); Card, *supra* note 172, at 765-814 (perpetrators vs. accomplices); Simester et al., *supra* note 172, 203-62 (at 205 explaining ‘modes of participation’); see also William Wilson, *Central issues in criminal theory* (Hart, Oxford, 2002), 195-223 (secondary participation).

suggested by Fulford,²⁰⁷ merely outcome-oriented focusing on the resulting sentences. Indeed, if this were the case, the differentiation would hardly make any sense in the ICC system where the ‘degree of participation’ is only one among various ‘relevant factors’ for the determination of the sentence.²⁰⁸ All this, of course, does not mean that the control over the act theory is the only or last word on the matter. In fact, this theory has been widely criticized in its country of origin and alternative theories have been developed.²⁰⁹ Thus, the way forward within the statutory framework of the ICC is an informed debate about these (alternative) theories instead of a full-fledged rejection of the so far only existing theory. In fact, Fulford’s approach implies the abandonment of the differentiated Rome system and the return to a pure unitarian system. While this can certainly, *de lege ferenda*, be proposed in academic writings (as recently demonstrated by Stewart),²¹⁰ such a move does not belong to the domain of the Judges of the Court but has ultimately to be decided by the States parties.

The advantage of having the control over the act theory (or maybe another theory) instead of merely relying on the ‘plain reading’ of the Statute is also demonstrated by its second justification offered by the PTC, namely that it convincingly explains that physical presence at the

²⁰⁷ Fulford Dissent, *supra* note 161, paras. 9, 11. I note in passing that Fulford’s account of the German system (at para. 11 with fn. 21) is mistaken insofar that only in the case of mere ‘aiding’ to the crime (‘Beihilfe’, § 27 Strafgesetzbuch; English translation by Michael Bohlander available at <www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGBengl_000P27>, last visited 21 March 2012) a mitigation of punishment is provided for *per* the form of participation, i.e., the sentencing range is not generally, as suggested by Fulford, determined by the mode of participation. The reason is that German criminal law, as explained in the text, applies the differentiation already at the level of imputation for reasons of principle.

²⁰⁸ See Rule 145 (1) (c) RPE.

²⁰⁹ See for example recently Hans Vest, *Völkerrechtsverbrecher Verfolgen* (Stämpfli, Bern, 2011), 351, 359 preferring the concept of *Tatmacht* (power over the act) instead of *Tatherrschaft* (control over the act); see also the references in Kai Ambos, ‘The Fujimori Judgment: A President’s Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus’, (2011) 9 *JICJ* 137, 147-8 with fn. 59, 60 (with a focus on control over the act by virtue of an organization); Schünemann, *supra* note 200, at 802 sees a fading influence of the theory in Germany; crit. on the *Organisationsherrschaftslehre* recently Thomas Weigend, ‘Perpetration through an Organization: The Unexpected Career of a German Legal Concept’, (2011) 9 *JICJ* 91, at 100-1.

²¹⁰ James G. Stewart, ‘The End of ‘Modes of Liability’ for International Crimes’, (2012) 25 *Leiden J. Int’l L.* 165 (arguing, however, on the basis of some incorrect and imprecise assumptions [most importantly the “Hitler-as-accomplice” assumption, at 167, which runs through the whole paper], taking the Austrian system as his model of a unitarian system [at 205; apparently, despite fn. 194, not fully grasping its functional unitarian orientation similar to Article 25] and, most importantly, neither providing an analysis of Article 25 [apparently assuming that it is based on the differentiated system] nor further elaborating on his [alternative] ‘theory’).

scene of the crime is not required.²¹¹ For Fulford this follows without further ado from the statutory text for ‘the verb “commits” requires a contribution’ and it is nowhere said in the Statute that this ‘contribution must involve direct, physical participation at the execution stage of the crime’²¹² This is certainly a plausible interpretation but the plain statutory text, as is typically the case with texts of criminal law statutes, does not positively inform about the meaning of the term ‘commits’ in the context of subparagraph (a), let alone about the nature of the contribution. In fact, the term ‘contribution’ does not even appear in the text (only in subparagraph (d)) and its recognition as an element of joint commission (co-perpetration) is itself the product of a theoretical exercise, i.e., it is based on theories of interpretation going beyond the plain meaning of the text. Thus, in light of the ‘plainness’ of the statutory text, it is little surprising that Fulford’s interpretation falls short of explaining why the absent individual’s contribution shall suffice to hold him responsible as a co-perpetrator. In order to produce this explanation a theory is necessary and indeed the control over the act theory provides a convincing or at least plausible explanation.²¹³ It focuses on a normative concept of control which offers different explanations of how control can be exercised even in absence of a potential co-perpetrator, for example by him directing the execution of the crime from distance with technical means or by him maintaining control as master of the criminal plan which is meticulously executed. In other words, the physical absence of a co-perpetrator can be com-

²¹¹ See already *supra* note 190.

²¹² Fulford dissent, *supra* note 161, para. 15.

²¹³ This is the reason why the non-presence requirement is practically uncontroversial in Germany (Jescheck and Weigend, *supra* note 138, 680; Roxin, *supra* note 172, § 25 mn. 200; Schönemann, *supra* note 172, § 25 mn. 184), but not so in England. There, it is normally required that two co-principals must ‘together ... satisfy the definition of the substantive offence’, ‘each of them by his own act’ contribute ‘to the causation of the conduct element of the offence, if all their acts together fulfill all the conduct elements ...’ (Ashworth, *supra* note 206, 404) or ‘each with the relevant mens rea does distinct acts which together constitute the sufficient act for the actus reus of an offence’ (Card, *supra* note 206, 766). Thus, the question is whether the respective fulfillment of the definitional elements of the offence requires presence. According to Card, *op.cit.*, that seems, at least, to be required by the law of Australia.

pensated by his superior psychological or intellectual contribution which may even be previous to the actual commission of the crime.²¹⁴

The (correct) view that Article 25 (3) provides for a hierarchical system of modes of participation and in particular that a perpetrator within the meaning of subparagraph (a) carries a special responsibility and blame²¹⁵ proves, as a corollary, that a *contribution* of such a perpetrator must be *greater* than a contribution of a secondary participant pursuant to subparagraphs (b) to (d). This is certainly less evident with regard to subparagraph (b) – here Fulford has a point²¹⁶ – especially with regard to ‘ordering’ which, in my view, belongs structurally and systematically to subparagraph (a),²¹⁷ but it is certainly true with regard to the classical forms of accessorial participation of subparagraphs (c) and (d). As a consequence, one must find a qualifier which unambiguously expresses the greater weight of the contribution of a perpetrator as compared to a secondary participant (accessory); more concretely speaking, the contribution must be more than ‘substantial’ since this qualifier has already been used by the Ad Hoc Tribunals for the contribution of the aider and abettor (assistant, accessory).²¹⁸ I cannot think of a better qualifier than ‘essential’ which, of course, will have to be further refined by the case law. In any case, Fulford’s formula, merely requiring a contribution ‘to the crime’, a ‘causal link between the individual’s contribution and the crime’²¹⁹ is overly broad (it easily extends to accessorial liability) and, in addition, little precise. Such broad formulations are difficult to reconcile with the otherwise strict fairness standard rightfully upheld by Judge

²¹⁴ This is controversial in national theory though, see Roxin, *supra* note 172, mn. 198-218; Jescheck and Weigend, *supra* note 138, 680; Günter Stratenwerth and Lothar Kuhlen, *Strafrecht Allgemeiner Teil I* (Vahlen, München, 6th ed., 2011), § 12 nn. 90-4.

²¹⁵ See *supra* note 175 and main text.

²¹⁶ Fulford Dissent, *supra* note 161, para. 8 and already *supra* note 205. Fulford, *ibid.*, also has a point when he questions a substantial difference between subparagraphs (c) and (d) (see on this issue my forthcoming Article 25 commentary, mn. 25, in Triffterer’s new edition with regard to the new significance standard introduced by the Mbarushimana Confirmation Decision, *supra* note 166, para. 283), but this is beside the point with regard to the here relevant comparison between subparagraph (a) vis-à-vis (b) to (d).

²¹⁷ Ambos, *supra* note 164, mn. 14.

²¹⁸ Ambos, *supra* note 164, mn. 17; Judgment, *supra* note 6, para. 997.

²¹⁹ See quotes in *supra* notes 185 and 186 with main text.

Fulford, especially in the Lubanga proceedings.²²⁰ Last but not least, Fulford is not consistent with regard to the *causality* requirement: on the one hand, he rejects it with regard to the essential standard²²¹ but, on the other, he demands it as (just quoted) a general causal link between the contribution and the crime.²²² The latter position is evidently correct (causality is a basic, unwritten requirement of any result crime),²²³ but Fulford mistakenly reads causality in the essential standard overlooking that it is yet another consequence of the hierarchical structure of Article 25 (3) and the ensuing need to grade the different modes of participation.

5.2. The subjective Side

The controversial (third) subjective requirement ‘*awareness as to the factual circumstances of the joint control*’, introduced by the Lubanga PTC,²²⁴ adopted by the Bemba PTC,²²⁵ but implicitly dismissed by the Katanga/Chui PTC,²²⁶ is quoted by the Chamber²²⁷ but ultimately not applied. The Chamber proposes the following standard:

- (i) the accused and at least one other perpetrator meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities or they were aware that in implementing their common plan this consequence “will occur in the ordinary course of events”; and
- (ii) the accused was aware that he provided an essential contribution to the implementation of the common plan.²²⁸

With this proposal the Chamber, including Judge Fulford,²²⁹ only applies Article 30 to the mode of co-perpetration²³⁰ and the relevant war crime of Article 8 (2)(e)(vii). Thus, it aban-

²²⁰ Apart from his strict approach to Article 54 (3)(e) and the ensuing disclosure issue (*supra* note 88 and *passim*) Judge Fulford also invokes in the trial phase reasons of fairness for not applying his different standard to the accused (Fulford Dissent, *supra* note 161, paras. 2, 19-21).

²²¹ Fulford Dissent, *supra* note 161, para. 15.

²²² Fulford Dissent, *supra* note 161, para. 16.

²²³ Cf. George P. Fletcher, *Basic Concepts of Criminal Law* (OUP, Oxford, 1998), 59-73.

²²⁴ Confirmation Decision, *supra* note 96, para. 366.

²²⁵ Decision on the Confirmation of Charges, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, P-T. Ch. II, 15 June 2009 (‘Bemba Confirmation Decision’), para. 351.

²²⁶ Decision on the Confirmation of Charges, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, P-T. Ch. I, 30 September 2008, paras. 534–5.

²²⁷ Judgment, *supra* note 6, para. 1008.

²²⁸ Judgment, *supra* note 6, para. 1013.

²²⁹ Fulford Dissent, *supra* note 161, para. 17 letter d. (‘Intent and knowledge as defined in Article 30 [...]’).

mons at least the above mentioned awareness requirement. I agree with this approach in general and in particular with regard to the controversial awareness requirement. For, as I have argued elsewhere,²³¹ this requirement demands too much from the co-perpetrator who (contrary to the indirect perpetrator) only exercises control over the crime jointly with the other co-perpetrator(s), i.e., there exists only a horizontal (as opposed to a vertical) form of control. However, as to the general application of Article 30, in principle to be welcomed, it is unclear from the Chamber's standard which parts of this provision are exactly applied. Article 30 distinguishes between different objects of reference (conduct, consequence and circumstance) and defines the mental element accordingly.²³² Thus, the Chamber should have more clearly said which objects of reference it had in mind. From the plain text of the proposal it only clearly follows from the term 'consequence' in the *second part of section (i)* that this part must refer to Article 30(2)(b) 2nd alternative. It is not clear though whether the *first part of this section* ('meant to conscript ...') constitutes an application of Article 30(2)(a) or (b) 1st alternative. Given that it refers to the conduct of Article 8 (2)(e)(vii) my first guess would be that it refers to Article 30(2)(a) but this interpretation conflicts with the disjunctive 'or' which only appears in Article 30(2)(b). Put it differently, an alternative reading of section (i), as implied by the 'or', makes an application of Article 30(2)(a) impossible since subparagraphs (a) and (b) are cumulative requirements for the respective objects of reference. Another alternative standard ('or') is offered by Article 30 (3) but it refers, respectively, to a circumstance or consequence, i.e., it cannot be applied to conduct. It is also unclear to what part of Article 30 *section (ii)* refers given that it uses an awareness standard which is only applicable to a con-

²³⁰ See also Judgment, *supra* note 6, para. 1357 ('Lubanga acted with the intent and knowledge [...] required by Article 30'); see already *supra* note 159.

²³¹ Ambos, *supra* note 170, 719-20.

²³² See the seminal treatment of the issue by Roger S. Clark, 'The mental element in international criminal law: The Rome Statute of the International Criminal Court and the elements of offences', (2001) 12 *CLF* 291, *espec.* 305-7; see also Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (Duncker & Humblot, Berlin, 2nd ed., 2004), 762-72; *id.*, *La parte general del derecho penal internacional* (Fundación Konrad-Adenauer/Temis, Montevideo/Bogotá, 2nd ed., 2006), 389-99. For a concrete application to the crimes see Kai Ambos, 'Some Preliminary Reflections on the *Mens Rea* Requirements of the Crimes of the ICC Statute and of the Elements of Crimes', in Lai C. Vohrah *et al.* (eds.), *Man's Inhumanity to Man. Essays in Honour of Antonio Cassese* (Kluwer Law International, The Hague, 2003), 11.

sequence (Article 30(2)(b) 2nd alternative) or circumstance (Article 30(3) 1st alternative). But does the co-perpetrator's contribution to the common plan not belong to the conduct-description of co-perpetration? It is certainly neither a consequence (result, outcome)²³³ nor a circumstance (relevant facts pertaining to the definition of a criminal offence,²³⁴ like for example the age of a child soldier, to be dealt with in a moment).

The Chamber correctly excludes *dolus eventualis*²³⁵ following the Bemba PTC.²³⁶ It adds weight to this position by not only relying on the *travaux* (as the Bemba PTC did) but also by inferring it from the wording of Article 30(2)(b) which requires 'will occur' instead of only 'may occur'.²³⁷ For the Chamber this awareness standard²³⁸ is, in my words,²³⁹ based on a risk-based prognosis of the respective participant, i.e., on the possibility or probability that his conduct may lead to a certain harmful result 'in the ordinary course of events': 'At the time the co-perpetrators agree on a common plan and throughout its implementation, they must know the existence of a risk that the consequence will occur.'²⁴⁰ The risk to be anticipated 'must be no less than awareness' with regard to the occurrence of the harmful consequence, i.e., a 'low risk will not be sufficient.'²⁴¹ Judge Fulford, here again, considers this (theoretical) inquiry into the meaning of the awareness standard as 'unhelpful' since 'the words are plain and readily understandable, and it is potentially confusing to reformulate or to interpret this

²³³ Cf. Clark, *supra* note 232, 306.

²³⁴ See e.g., Glanville Williams, *Textbook of Criminal Law* (Stevens, London, 2nd edition, 1983), 115.

²³⁵ Judgment, *supra* note 6, para. 1011.

²³⁶ Bemba Confirmation Decision, *supra* note 225, paras. 364-9.

²³⁷ Judgment, *supra* note 6, para. 1011. I note in passing that I made this argument already in (1999) 10 *CLF* 1, at 21–2, i.e. it took quite a long time until the Court became aware of it (the Chamber quotes the useful 2010 study of the War Crimes Research Office of American University in fn. 2723 which however itself relies on other authors, see p. 70 with fn. 227).

²³⁸ Article 30 (2)(b) 2nd alternative: 'person [...] is aware that it [the consequence] will occur in the ordinary course of events'. The Chamber's quote at para. 1012 (*supra* note 6) is imprecise.

²³⁹ The Chamber's drafting is awkward though: 'means that the participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence will occur in the future' (Judgment, *supra* note 6, para. 1012). Also, if 'risk' is defined with recourse to 'danger', the latter is not a different standard as suggested by the Chamber ('inherent to the notions of "risk" and "danger"').

²⁴⁰ Judgment, *supra* note 6, para. 1012.

²⁴¹ *Ibid.*

test using other words.’²⁴² Again, I disagree with Fulford. Admittedly, the first part of the Chamber’s explanation of the standard is not very straightforward and thus may give rise to confusion²⁴³ but, in principle, the explanation of abstract legal standards is necessary and helpful if done properly (the reader may him- or herself judge whether my rephrasing of the Chamber’s explanation does assist them in better understanding the relevant standard). Again, Fulford puts too much trust in the ‘plain’ meaning of the legal text.²⁴⁴

Last but not least, the Chamber addresses the issue of the applicable knowledge standard with regard to the *age requirement* (child under fifteen years) of Article 8 (2)(e)(vii).²⁴⁵ Given that, as just mentioned above, the age of the victim is a circumstance within the meaning of Article 30 (3) 1st alternative, the accused must act with awareness, i.e., he must positively know the age of the victim. However, the Elements of Crimes to Article 8 (2)(e)(vii) also allow for a lesser ‘should have known’ standard²⁴⁶ and thus the questions arise whether, first, the Elements may alter at all an offence definition of the Statute and, if so, secondly, what ‘should have known’ in this context means. The Chamber leaves these questions open since the Parties (including the Prosecution)²⁴⁷ asked for the application of the higher standard anyway. Thus, in the Chamber’s view, ‘it is unnecessary to approach the case on any other basis, and it would be inappropriate to rule on these substantive issues in the abstract.’²⁴⁸ I am not persuaded by this view. First of all, under the procedural regime of the Rome Statute, as explained above (2.1.), a Chamber is not bound by the applications of the parties. While a Chamber *may* leave the responsibility of the presentation of evidence in the hands of the par-

²⁴² Fulford Dissent, *supra* note 161, para. 15.

²⁴³ See *supra* note 239.

²⁴⁴ See *already supra* note 201 with main text.

²⁴⁵ Judgment, *supra* note 6, paras. 1014-5.

²⁴⁶ Elements, *supra* note 111.

²⁴⁷ Judgment, *supra* note 6, paras. 942-4.

²⁴⁸ Judgment, *supra* note 6, para. 1015. Fulford Dissent, *supra* note 161, para. 16 (letter d.) also wants to apply the knowledge standard for reasons of fairness. *In casu*, the Chamber concludes that Lubanga was ‘fully aware’ of the age of the children (Judgment, *supra* note 6, paras. 1347-8).

ties, as indeed this Chamber has done,²⁴⁹ it is not obliged to do so since the Court's procedure is not a purely adversarial one. Indeed, a Chamber has broad powers in evidentiary matters²⁵⁰ and it can of course decide questions of law whenever it considers appropriate. Admittedly, there are practical limits and I would certainly not go so far as Judge Odio Benito, asking the Chamber to decide all other relevant legal issues 'independently of the evaluation of the evidence' and of the concrete charges, in particular with a view to the interests of victims,²⁵¹ since this will in the long term overburden a criminal court which, after all, is neither a Human Rights Court or a Truth Commission. Yet, I think that the Chamber should have ruled on the issue at hand for the simple reason that the PTC has decided on it to the detriment of the accused invoking the 'should have known' standard of the Elements and arguing that this constitutes an admissible deviation from Article 30 in the sense of its 'unless otherwise provided' default rule.²⁵² Thus, the question to be decided is whether a deviation from the Article 30 standard by a source outside the Rome Statute, in particular the Elements, is at all possible. The PTC affirmed this question without further ado, i.e., it begged the question (as now the Chamber does) of how Art. 9 (3), classifying the Elements as a subsidiary source of law inferior to the Statute,²⁵³ and Article 21 (1) (a), which puts Statute, Elements and Rules on an equal footing, can be reconciled.²⁵⁴ Given that the Al-Bashir PTC has proposed an 'irreconcilable contradiction' test according to which the Statute only prevails over the Elements or Rules if there is an 'irreconcilable contradiction' between the respective norms²⁵⁵ – in my view a position hardly compatible with the 'consistency' requirement of Article 9 (3) – the Chamber should have grasped the chance to clarify this burning issue.

6. FINAL REMARKS

²⁴⁹ See *supra* note 45 with main text.

²⁵⁰ See *supra* note 47 and Judgment, *supra* note 6, para. 95 with fn. 224 as quoted *supra* note 46.

²⁵¹ Odio Benito Dissent, *supra* note 21, paras. 6-8(6).

²⁵² Confirmation Decision, *supra* note 96, paras. 356-9.

²⁵³ Cf. Ambos, *supra* note 131, § 6 mn. 30 with further references.

²⁵⁴ *Crit. Ambos*, *supra* note 70, 747.

²⁵⁵ *Prosecutor v. Al-Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Al Bashir, 4 March 2009, ICC-02/05-01/09, paras. 127-8.

Apart from the substantive legal issues treated above the judgment also displays some other features which deserve some brief comments. First of all it is striking, that the Chamber heavily relies in large parts on the PTC's confirmation decision, from extensively quoting from it to fully adopting the PTC's view. This shows that the work done at the confirmation stage is not in vain and that the confirmation decision does not only serve an important filter function²⁵⁶ but also contributes to the final judgment with regard to the charges it confirms. A second comment refers to drafting and referencing by the Chamber. As to the former it has already been criticized above that the drafting is sometimes confusing,²⁵⁷ in other parts it appears as somewhat unsystematic, little profound and as to the application of the law to the facts not entirely plausible. As discussed above (III.), I was in particular not convinced by the Chamber's treatment of the law of armed conflict²⁵⁸ and its factual assessment rejecting, in my view too lightly, the existence of an international/internationalized conflict. Admittedly, though, the open way in which the Chamber presents and lays out controversial evidence so that the outside reader gets a feeling of the complexity of the decision-making-process *within* the Chamber regarding a particular point may be one of the greatest merits of the judgment. Let me make this point clearer: Everybody who has worked or works as a judge knows by own experience that the combination of evidence and facts rarely produces a clear-cut picture of what has really happened. Thus, judges always are riddled with doubts. It is the merit of the Chamber to have shared this insecurity with the reader, instead of, as Courts, especially important ones, normally do, having tried to conceal it. The Judgment thereby contributes to the utmost transparency²⁵⁹ and insofar at least may serve as a model for future judgments.

²⁵⁶ Cf. Ambos and Miller, *supra* note 99, 347-8.

²⁵⁷ See e.g., *supra* note 239.

²⁵⁸ Judgment, *supra* note 6, paras. 523-42. The discussion is little systematic and profound, in particular with regard to the crucial issue of the impact of an occupation on the nature of the armed conflict and a possible internationalization by involvement of Uganda and Rwanda.

²⁵⁹ See also with regard to the inclusion of confidential information 'to the greatest extent possible' *supra* note 73 with main text.

Unfortunately, a similar justification or explanation cannot be given for the poor referencing standard of the Chamber. While a judgment is not an academic exercise it must comply with certain minimum standards in referencing and quoting authorities. For example, one basic rule, continuously violated by the Chamber, is that collective works (in particular Otto Triffterer's ICC commentary) are quoted with the author responsible for the respective section or paper and not just the general editor(s).²⁶⁰ Another rule is that the relevant pages of articles referenced must be indicated.²⁶¹ Last but not least, one should quote academic works in their original language.²⁶² I note in passing that these standards have to be complied with in the notorious 'Book of Authorities' to be provided by the parties in ICTY proceedings. From the ICTY the Chamber could also learn to attach a list of important abbreviations to its judgment. To avoid misunderstandings: To meet certain standards of drafting and referencing is not an end in itself. Accuracy in these formal matters, this is clearly shown in academic work and writing,²⁶³ normally corresponds to accuracy in matters of substance. The reverse is equally true: formal inaccuracy may reflect inaccuracy in substance. In order to dispel the slightest doubts in this respect the Chambers should work more accurately.

²⁶⁰ As the Chamber does, for example with regard to the Triffterer commentary and the Lee ICC collection (*see e.g.*, fn. 1628, 1635). To be fair, however, one must also say that in fn. 1646 it correctly quotes Jelena Pejić as author in a collection edited by Elisabeth Wilmshurst.

²⁶¹ The Chamber does, for example, not even quote the initial pages of the papers of James Stewart and W. Michael Reisman and James Silk in fn. 1640. In addition, it mistakenly converts Hans Peter Gasser's second name in 'Pieter' (although this may be a simple spelling error).

²⁶² One problem that the Court certainly has not is a lack of language capacities. Apart from having interpreters, it has legal officers from a series of different countries and jurisdictions with different language skills. As can be seen from its case law – and this is to be welcomed – the Court has no problem to quote from sources written in the languages of the major legal systems. Thus, I wonder why it quotes my work on the general part of International Criminal Law in its Spanish translation instead of the German original (fn. 2706), quoting elsewhere in the Judgment a variety of German sources.

²⁶³ Where, as may be mentioned in passing, in addition to the standards listed above, the failure to cite certain sources where a certain idea originates from may amount to plagiarism.