THE PROSECUTOR V. THOMAS LUBANGA DYILO: PERSISTENT EVIDENTIARY CHALLENGES FACING THE INTERNATIONAL CRIMINAL COURT

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I. INTRODUCTION

On March 14, 2012, Thomas Lubanga Dyilo (“Lubanga”) became the first individual convicted by the International Criminal Court (“ICC”). Specifically, Lubanga was convicted of conscripting and enlisting boys and girls under the age of 15, and of using children under the age of 15 to participate actively in hostilities, between September 1, 2002 and August 13, 2003, in the Democratic Republic of the Congo (“DRC”). Lubanga was convicted under the Rome Statute (“Statute”) under both Article 8(2)(e)(vii) (conscripting and enlisting child soldiers) and Article 25(3)(a) (individual responsibility as a co-perpetrator). Lubanga was sentenced to fourteen years’ imprisonment.

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1 Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06, Judgment (Mar. 14, 2012) [hereinafter Trial Chamber Judgment].
2 The Special Court for Sierra Leone (“SCSL”), which was founded in 2002 to address crimes committed during the country’s civil war, prosecuted and convicted several individuals for the conscription and enlistment of child soldiers before Lubanga’s 2012 conviction at the ICC. See generally RESIDUAL SPECIAL COURT FOR SIERRA LEONE, http://www.rscsl.org/index.html (last visited Apr. 17, 2021).
3 “The International Criminal Court (ICC) investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression.” See About the ICC, ICC, https://www.icc-cpi.int/about (last visited Apr. 17, 2021).
4 The Trial Chamber shifts between the phrases “conscripting and enlisting” and “enlisting and conscripting.” The author will use the former phrase for consistency, except for direct quotes.
6 Trial Chamber Judgment, supra note 1, at ¶ 1355.
7 See generally Rome Statute, supra note 5.
8 Trial Chamber Judgment, supra note 1, ¶¶ 1358-64. Lubanga was charged in 2007 under both Art. 8(2)(b)(xxvi) (war crimes of an “international” character) and Art. 8(2)(e)(vii) (war crimes of a “non-international character”); however, he was only convicted of the latter, as it was determined that the situation was of non-international character. Id.
9 Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06-2901, Trial Chamber Decision on Sentence, ¶ 107-08 (July 10, 2012) [hereinafter Lubanga Decision on Sentence].
Lubanga became President of the Union des Patriotes Congolais (“UPC”) in September 2000 and became Commander-in-Chief of the UPC’s military wing, the Forces Patriotiques pour la Liberation de Congo (“FPLC”), when it was created in September 2002. Over the next eleven months, Lubanga and his co-perpetrators “worked together and each of them made an essential contribution to the common plan that resulted in the enlistment, conscription and use of children under the age of 15 to participate actively in hostilities.” Furthermore, Lubanga acted with the intent and knowledge required under Art. 25(3)(a) because he was aware of both “the factual circumstances that established the existence of the armed conflict” and “the nexus between those circumstances and his own conduct, which resulted in the enlistment, conscription and use of children under the age of 15 to participate actively in hostilities.”

Despite overwhelming evidence that Lubanga committed the alleged crimes, the investigation and prosecution were stymied by numerous evidentiary difficulties, and the process took more than six years to complete. Nor is the Lubanga situation a rare instance in which issues plagued ICC prosecutors. Rather, ICC prosecutors are often hampered by evidentiary challenges: specifically, they struggle to both obtain evidence from abroad in a timely fashion and to present admissible evidence at trial. Often witnesses and intermediaries are excluded based on what appear to be minor deficiencies or inconsistencies in their testimonies—despite the overwhelming predisposition for these witnesses to testify honestly.

There are many reasons for these evidentiary barriers. ICC cases often rely primarily on eyewitness testimony—which is notoriously unreliable—rather than on documentary or forensic evidence. This

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10 Trial Chamber Judgment, supra note 1, ¶¶ 81-86 (citing UPC Statute, UPC founding documents, and Thomas Lubanga’s curriculum vitae).
11 Id. ¶ 1271.
12 Id. ¶ 1357. Among Lubanga’s “essential contributions” to the crime of conscripting and enlisting child soldiers, Lubanga (1) gave orders to and supervised senior officers who directly recruited—both voluntarily and involuntarily—child soldiers, and he was briefed frequently by these officers; (2) visited child soldier camps and gave speeches; and (3) personally utilized bodyguards who were under the age of 15. Id. ¶¶ 1355-56.
14 See id. As will be explored in this Article, there are many reasons for this unreliability: for example, witness trauma affects memory and perception, and the passage of time distorts recollection. See Joyce W. Lacy & Craig E. L. Stark, The Neuroscience of Memory: Implications for the Courtroom, 14(9) NAT. REVS. NEUROSCI. 649, 649-58 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4183265/pdf/nihms-624859.pdf.
15 See Combs, supra note 13, at 11-14. Often, individuals involved in committing war crimes do not keep records. See id. at 12. The Nazis were an exception to this: they kept meticulous records. Id. at 11.
16 Since trials often occur many years after the crimes were committed, and due to the nature of the conflicts, it is challenging to acquire forensic evidence. See Nancy Amoury Combs, Grave Crimes and Weak Evidence: A Fact-Finding Evolution in International Criminal Law, 58 HARV. INT’L L. J. 55, 57 (2017) (“Most modern atrocities occur in places
reliance on eyewitness testimony raises questions about the credibility and reliability of witnesses, many of whom speak different languages, represent different cultures, are several years removed from the crimes, and may have been victims themselves. Furthermore, it may be difficult for ICC investigators to collect testimonial evidence from remote countries. Investigators put themselves at risk when they enter dangerous territory to conduct interviews with victims and witnesses.

Child soldier cases are especially challenging. Children are highly vulnerable to forgetting key events because of the trauma they suffered or because a significant amount of time has elapsed between the trauma and the trial. Also, prosecutors may struggle to prove that the children were under the age of 15 when the crimes occurred. In Lubanga, the co-perpetrators in the DRC did not keep records of their soldiers and prisoners, nor did the children possess birth certificates or other identification. The defense in Lubanga challenged the credibility and reliability of many witnesses and pieces of evidence: some of whom, and some of which, were ultimately excluded. In fact, at the conclusion of the trial, Lubanga challenged “the entire body of evidence presented at trial by the Prosecution.”

Despite significant challenges, after five years of ICC investigatory work, multiple years of Trial Chamber proceedings, meticulous determinations about witness, victim, and evidence credibility, and multiple appeals, Lubanga served a fourteen-year term of imprisonment for conscripting and enlisting children under 15 years of age to participate actively in hostilities. The Lubanga decision was not only gratifying for those who believe in justice for victims, but it also set a precedent for future cases that do not feature the widespread use of documentation or technology that can be so useful in proving a person’s whereabouts or other basic facts.”

17 The Trial Chamber in Lubanga was forced to confront allegations that some of the ICC intermediaries working with witnesses had actually coached the witnesses to lie. See Trial Chamber Judgment, supra note 1, ¶ 38. Some of these witnesses and intermediaries were ultimately excluded from the proceedings, whereas others were nevertheless deemed credible and reliable. See id. ¶¶ 38, 169, 1361-63.

18 Id. ¶¶ 151-67; see also COMBS, supra note 13, at 147.

19 Notably, “the victims who have been granted permission to participate in this trial are, in the main, alleged former child soldiers, although some are the parents or relatives of former child soldiers.” Trial Chamber Judgment, supra note 1, ¶ 17. Many were granted protective status, including anonymity. See id. ¶ 18.

20 Id. ¶¶ 151-67; see also COMBS, supra note 13, at 147.

21 See COMBS, supra note 13, at 15; see, e.g., Mark L. Howe, Memory Development: Implications for Adults Recalling Childhood Experiences in the Courtroom, 14 NAT. REV. NEUROSCI. 869 (2013).

22 Trial Chamber Judgment, supra note 1, ¶¶ 169-77.

23 Id.

24 Id. ¶¶ 37-41.

25 Id. ¶¶ 119-23.

ICC child soldier cases and offered solutions to handle the unique evidentiary challenges that such cases present.

Since the Lubanga decision, the ICC has successfully prosecuted two other individuals for conscripting and enlisting child soldiers—Bosco Ntaganda27 from the DRC and Dominic Ongwen28 from Uganda.29 However, three successful child soldier prosecutions in the nearly two decades since the ICC was founded is not nearly enough, and many warlords across the world continue to act with impunity. The dearth of child soldier prosecutions and convictions at the ICC is a pressing issue that must be addressed.

This Article explores some of the evidentiary challenges that ICC prosecutors encountered in Lubanga: specifically, the difficulty of relying on eyewitness testimony in the face of barriers to presenting credible, admissible testimonial evidence. ICC prosecutions slow when witnesses cannot convey reliable information.30 This slowdown results from factors including, but not limited to, cultural differences, linguistic and communications barriers, and memory lapses.

This Article not only offers a thorough explanation of the Lubanga judgment, but it also analyzes case law from the Special Court for Sierra Leone (“SCSL”) and critiques the Lubanga decision in light of persistent challenges facing the ICC regarding child soldier cases.31 Furthermore, the Article provides a critique of ICC evidentiary proceedings, and it offers some much-needed solutions for effective change going forward. Ultimately, this Article argues that the ICC must learn from the evidentiary challenges that arose in Lubanga in order to properly prosecute future child soldier cases.

II. THE PROSECUTOR V. THOMAS LUBANGA DYILO: PROCEDURAL HISTORY

This section describes the important aspects of the procedural history in Lubanga. First, it explores the preliminary investigation and the

27 Prosecutor v. Ntaganda, ICC-01/04-02/06-2359, Judgment (July 8, 2019).
30 The investigative team in Lubanga “was subject to significant pressure, including from within the OTP as well as the Court more generally, because it was felt necessary to make progress.” Trial Chamber Judgment, supra note 1, ¶ 134.
31 As of February 2020, the ICC has pursued charges against five other individuals for similar crimes. Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on the International Day against the Use of Child Soldiers: “Children are especially vulnerable. We Must Act to Protect Them.” ICC (Feb. 12, 2020), https://www.icc-cpi.int/Pages/item.aspx?name=200212-otp-statement-child-soldiers.
charges initiated against Lubanga. Next, it illustrates the crucial aspects of the Trial Chamber’s evaluation of the evidence and the elements of Article 8 crimes. Finally, this section describes Lubanga’s conviction and sentencing, the appeals, and the separate opinions issued in the case.

A. Initiation, Investigation, and Evidence Collection

The UPC was created on September 15, 2000, with Lubanga as both a founding member and its first President. The UPC’s military wing, the FPLC, of which Lubanga was Commander-in-Chief, was founded in September 2002, at which time the FPLC seized power in Ituri. Between September 2002 and August 2003, the FPLC was engaged in an internal armed conflict with multiple groups, including the Armée Populaire Congolaise and the Force de Resistance Patriotique en Ituri. During this time, the FPLC’s senior leadership recruited children under the age of 15 on both a voluntary and an involuntary basis. The FPLC led “mobile[ization] and recruitment campaigns” intended to persuade local families to send their children to join the fight, and it conducted “large-scale recruitment exercise[s] directed at young people…”

On March 3, 2004, the Government of the DRC referred the Ituri situation to the ICC Office of the Prosecutor (“OTP”). On June 21, 2004, the OTP announced that it would commence an investigation into alleged war crimes committed in Ituri beginning in July 2002. The investigative team working under the OTP immediately faced challenges in gathering accurate evidence in a timely fashion, yet they felt pressure to make progress quickly. While the investigators worked with United Nations representatives in the field, the investigators did not always feel supported. Humanitarian groups in the DRC provided reports and documentation from the region; however, because some humanitarian groups appeared to have a common agenda—to encourage the prosecution of Lubanga and other

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32 Trial Chamber Judgment, supra note 1, ¶ 81, 46/593 nn.195-96 (citing the UPC Statute, as well as UPC founding documents, and “Thomas Lubanga’s curriculum vitae [which] indicates that he was the UPC President since 2000.”).
33 Id. ¶¶ 25-28.
34 See id. ¶¶ 81-91, 1126-28.
35 See id. ¶¶ 759-818, 1266-70.
36 Id. ¶ 1354.
38 Id.
39 See generally Trial Chamber Judgment, supra note 1, ¶¶ 129-77.
40 Id. ¶ 135. Specifically, “there were contradictions and inconsistencies in the approach of the UN that created real problems for the OTP’s investigators, and when assistance was sought the UN sometimes declined or imposed excessive constraints.” Id. ¶ 135.
potential war criminals—the documents they produced were “more akin to general journalism than a legal investigation.”

One major issue affecting investigators’ ability to collect evidence was security. Armed militias were hostile to the ICC investigators’ presence in Bunia. Armed groups blocked the routes between Bunia and other towns, and the sound of gunfire was commonplace during the investigators’ missions. Because “any foreigner . . . was assumed to be from the ICC,” investigators tried to hide the fact that they were conducting investigations. Investigators were frequently at risk of attacks or abduction. Witnesses were also placed at risk for working with investigators. For security purposes, the ICC developed a “very specific and rigorous policy for investigators and witnesses—which slowed down the work of the OTP—because the priority was their security.” In order to avoid tipping off hostile political and military leaders in the region, investigators did not typically contact the families of witnesses—or did they visit the schools that the children allegedly attended or try to acquire school records—despite the fact that these decisions slowed the investigative process.

Investigators began interviewing witnesses in Bunia in 2005. Investigators were responsible for traveling to various locations, identifying witnesses, and collecting statements. These statements were provided to analysts, who determined whether the individuals should become testifying witnesses. Once witnesses were identified, they worked with intermediaries who lived in the region in order to develop their testimony.

Due to security concerns, difficulty determining the ages of potential witnesses, and challenges working with intermediaries in the field, the investigation took two years to complete. Following the
investigation, on January 13, 2006, the Prosecutor applied for an arrest warrant for Lubanga.\textsuperscript{57} On March 17, 2006, the DRC surrendered Lubanga, and he was transferred from the DRC to the ICC Detention Centre at The Hague.\textsuperscript{58} On March 20, 2006, Lubanga made his initial court appearance.\textsuperscript{59}

**B. Charges Against Lubanga**

Following multiple pretrial conferences,\textsuperscript{60} the Pretrial Chamber issued its Decision on the Confirmation of Charges\textsuperscript{61} on January 29, 2007.\textsuperscript{62} It confirmed that there was sufficient evidence to establish substantial grounds to believe that both:

Thomas Lubanga Dyilo is responsible, as co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 25(iii)(a) of the Statute from early September 2002 to 2 June 2003,\textsuperscript{63}

and,

\textsuperscript{57} ICC Case Information Sheet, \textit{supra} note 37.

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} One important ruling by the Pretrial Chamber regarded “witness-proofing,” the practice of preparing witnesses before trial. Ruben Karemaker et al., \textit{Witness Proofing in International Criminal Tribunals}, 21 \textit{LEIDEN J. INT’L L.} 683, 687-89 (2008) (citing Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06-679, Decision on the Practices of Witness Familiarisation and Witness Proofing (Nov. 8, 2006)). The Pretrial Chamber determined that only representatives from the Victim and Witnesses Unit, rather than the Prosecution, could prepare witnesses. \textit{See id.} The term “witness proofing” was formally established by the Trial Chamber the following year. \textit{See Prosecutor v. Lubanga Dyilo, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049} (Nov. 30, 2007).

\textsuperscript{61} Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06-803, Decision on the Confirmation of Charges, ¶ 1 (Jan. 29, 2007).


\textsuperscript{63} Trial Chamber Judgment, \textit{supra} note 1, ¶ 1 (quoting Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, at 156/157 (Jan. 29, 2007)). Art. 8(2)(b) refers to war crimes of an “international character.” \textit{See} Rome Statute, \textit{supra} note 5, at art. 8(2)(b).
Thomas Lubanga Dyilo is responsible, as co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of article 8(2)(e)(vii) of the Statute from 2 June to 13 August 2003.\textsuperscript{64}

The first Trial Chamber status conference was held on September 4, 2007.\textsuperscript{65} On June 13, 2008, the Trial Chamber stayed the proceedings because the Prosecutor failed to disclose potentially exculpatory evidence to the Defense.\textsuperscript{66} The stay of proceedings was lifted on November 18, 2008.\textsuperscript{67}

The trial commenced on January 26, 2009.\textsuperscript{68} However, the Trial Chamber issued a second stay of proceedings on July 8, 2010 due to the Prosecution’s non-compliance with a disclosure order regarding the name of one of the Intermediaries.\textsuperscript{69} The trial recommenced in October 2010.\textsuperscript{70}

\section*{C. Evaluation of Evidence}

Sixty-seven witnesses testified over the course of 204 days of hearings.\textsuperscript{71} Thirty-six witnesses—\textsuperscript{72} including three experts—testified for the Prosecution.\textsuperscript{73} Twenty-four witnesses testified for the Defense.\textsuperscript{74} The Trial Chamber called four additional experts.\textsuperscript{75} Overall, 1373 items of evidence were submitted—368 from the Prosecution, 992 from the Defense, and 13 from the legal representatives for the witnesses.\textsuperscript{76} Both the Prosecution and the Defense introduced oral, written, and audio-visual testimony at trial.\textsuperscript{77} This included oral testimony from witnesses who appeared either in person or via video link, two sworn depositions, and multiple written statements.\textsuperscript{78}

\begin{itemize}
\item \textsuperscript{64} Trial Chamber Judgment, supra note 1, ¶ 1 (quoting Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, at 157/157 (Jan. 29, 2007)). Art. 8(2)(e) refers to war crimes “not of an international character.” See Rome Statute, supra note 5, at art. 8(2)(e).
\item \textsuperscript{65} Trial Chamber Judgment, supra note 1, ¶ 10.
\item \textsuperscript{66} Id.
\item \textsuperscript{67} Id.
\item \textsuperscript{68} Id. ¶ 10.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Trial Chamber Judgment, supra note 1, ¶ 10.
\item \textsuperscript{71} Id. ¶ 11.
\item \textsuperscript{72} Three victims were also called as witnesses. Id.
\item \textsuperscript{73} Id.
\item \textsuperscript{74} Id. ¶ 11.
\item \textsuperscript{75} Trial Chamber Judgment, supra note 1, ¶ 11. These experts were Ms. Elisabeth Schauer, Mr. Roberto Garreton, Ms. Radhika Coomaraswamy, and Professor Kambayi Bwatshia. Id. at 14/593 n.29. One expert was a psychologist: she provided “expert testimony on the impact of a child having been a soldier and the effect of trauma on memory.” Id. ¶ 105.
\item \textsuperscript{76} Id. ¶ 11. Furthermore, the Chamber delivered 275 written decisions and orders, as well as 347 oral decisions, over the lifetime of the case. Id.
\item \textsuperscript{77} Id. ¶ 93.
\item \textsuperscript{78} Id.
\end{itemize}
In addition, “documents and other materials such as transcripts of interviews, videos, the records from a variety of organizations, letters, photographs, and maps were either introduced during the oral evidence of witnesses or by counsel.” The Trial Chamber admitted that it could not review all of the evidence in a timely fashion. Therefore, the parties were instructed to flag evidence they considered “to have relevance and importance” and to provide short explanations of the key points made in relation to the evidence. Four main issues arose from the Trial Chamber’s evaluation of the evidence in Lubanga: the evidentiary standard, challenges to the credibility of intermediaries, difficulties determining witnesses’ ages and credibility, and testimonial deficiencies.

i. Evidentiary Standards

First, the Trial Chamber fully considered the standard for evaluating evidence presented by both the Prosecution and the Defense. In order to evaluate oral testimony, the Trial Chamber:

[c]onsidered the entirety of the witness’s account; the manner in which he or she gave evidence; the plausibility of the testimony; and the extent to which it was consistent, including as regards other evidence in the case. The Chamber has assessed whether the witness’s evidence conflicted with prior statements he or she has made, insofar as the relevant portion of the prior statement is in evidence. In each instance the Chamber has evaluated the extent and seriousness of the inconsistency and its impact on the overall reliability of the witness.

The Trial Chamber made reasonable allowances for instances of “imprecision, implausibility or inconsistency,” recognizing that memory fades over time (the events occurred between 2002 and 2003) and that witnesses who were under 15 years of age at the time of the events, or who suffered trauma, may “have had particular difficulty in providing a coherent, complete and logical account.”

Finally, the Trial Chamber “[c]onsidered the individual circumstances of each witness, including his or her relationship to the accused, age, vulnerability, any involvement in the events under consideration, the risk of self-incrimination, possible prejudice for or against the accused and motives for telling the truth or providing false testimony.”

79 Id.
80 Id.
81 Id.
82 Id. ¶ 102.
83 Id. ¶ 103.
84 Id. ¶ 106.
The Trial Chamber evaluated non-oral evidence on a case-by-case basis, based on “the nature and circumstances of the particular evidence,” because the “Rome Statute provides the Chamber with a considerable degree of flexibility.” For documents, the Trial Chamber considered the document’s author (if known), his or her role in the events, and the document’s chain of custody. The Trial Chamber evaluated expert witnesses based on competence in the field of expertise, methodologies used for data analysis, and the “general reliability” of the evidence. The Trial Chamber also addressed the issues of “interpretation and translation.” Because testimony was presented in many different languages, the Trial Chamber conceded that this problem needed to be addressed on several occasions, even though no complaints about this issue were raised in the parties’ final submissions. Furthermore, the Trial Chamber considered the challenge of interpreting certain words, including locations and individuals’ names. The Trial Chamber utilized “protective measures” to protect witnesses’ identities and to ensure their safety.

ii. Intermediaries

While the Defense challenged the credibility of many of the Prosecution’s intermediaries and the witnesses with whom they came in contact, the Trial Chamber indicated that these individuals could be credible, but that the Trial Chamber needed to be persuaded beyond a reasonable doubt. Specifically, with many of the witnesses who came into contact with the intermediaries, the Chamber has recognized that they may well have given a truthful account as to elements of their past, including their involvement with the military, whilst at the same time—at least potentially—lying about particular crucial details, such as their identity, age, the dates of their military training and service, or the groups

85 Trial Chamber Judgment, supra note 1, ¶¶ 107-08.
86 Id. ¶ 109.
87 Id. ¶ 112.
88 Id. ¶ 113.
89 Id.
90 Trial Chamber Judgment, supra note 1, ¶ 114.
91 Id. ¶¶ 115-17.
92 See generally Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06-2434, Redacted Decision on Intermediaries (May 31, 2010).
93 Intermediaries worked with witnesses in the field, where they “assisted in identifying witnesses and they facilitated contact between the witnesses and the investigators. They helped with health problems, issues relating to threats and any lack of understanding on relevant issues.” Trial Chamber Judgment, supra note 1, ¶ 190. In addition, they “assisted by contributing to the evaluation of the security situation.” Id. ¶ 193.
94 Id. ¶ 178.
95 Id. ¶ 180.
they were involved with. As regards this aspect of the case, the Chamber needs to be persuaded beyond a reasonable doubt that the alleged former child soldiers have given an accurate account on the issues that are relevant to this trial (viz. whether they were below 15 at the time they were conscripted, enlisted or used to participate actively in hostilities and the circumstances of their alleged involvement with the UPC).96

Neither the Prosecution nor the Defense intermediaries were provided with substantive information about the case.97 They were unpaid, although their travel expenses were reimbursed.98 Furthermore, neither the Prosecution nor the Defense witnesses were paid to answer questions, but their travel, lodging, and meal expenses were generally reimbursed.99

The Trial Chamber assessed the credibility of four intermediaries who the Defense alleged were unreliable, as well as the witnesses with whom they had contact.100

In order to assess the role played by . . . each intermediary . . . and to determine whether the evidence given by the witnesses they had contacts with is reliable, the Chamber . . . considered each intermediary’s involvement with the OTP and the relevant witnesses, as well as the particular evidence given by those witnesses.101

For example, two of Intermediary 143’s four witnesses, P-0007 and P-0008,102 were determined to be unreliable because of weaknesses and contradictions in their evidence (particularly as to their ages and true identities) along with the evidence of D-0012 undermine the reliability of their testimony. The difficulties with their accounts are not satisfactorily or sufficiently explained by fears for their safety or that of their family.103

After reviewing all four of Intermediary 143’s witnesses, the Trial Chamber determined that none of them were credible.104 The Trial Chamber concluded that “it is likely that as the common point of contact [Intermediary 143] persuaded, encouraged or assisted some or all of them to give false

96 Id.
97 Id. ¶ 183.
98 Id. ¶ 198.
99 Trial Chamber Judgment, supra note 1, ¶ 202.
100 There were concerns that some intermediaries had coached witnesses to lie. Id. ¶ 180. The Chamber considered this when making credibility determinations. Id.
101 Id. ¶ 207.
102 “P” refers to Prosecution witnesses, and “D” refers to Defense witnesses.
103 Trial Chamber Judgment, supra note 1, ¶ 247.
104 Id. ¶¶ 208-21.
testimony.”\textsuperscript{105} The Trial Chamber proceeded with this method of evaluation for Intermediaries P-0316, P-0321, and P-0031, and it ultimately excluded several of the witnesses with whom they worked. The Trial Chamber determined that several of Intermediary 0321’s witnesses were unreliable and that there was a distinct possibility that they were “encouraged and assisted by P-0321 to give false evidence.”\textsuperscript{106} However, Intermediary 0031’s witnesses were deemed reliable, although the Trial Chamber recognized that their testimony should be carefully evaluated.\textsuperscript{107}

iii. Age Assessments and Determinations of Witness Credibility

One major challenge facing the OTP in \textit{Lubanga} was determining the children’s ages at the time of the crimes.\textsuperscript{108} Because the children did not carry identification, nor did the FPLC keep records,\textsuperscript{109} investigators relied on forensic experts and doctors\textsuperscript{110} to approximate the children’s ages using techniques such as x-rays and physical examinations.\textsuperscript{111}

The Trial Chamber considered a variety of factors to determine children’s ages at the time of the events. In addition to the three experts called by the Prosecution and the four additional experts called by the Trial Chamber,\textsuperscript{112} the Trial Chamber heard evidence from many non-expert witnesses. Age assessments were often “based on the individual’s physical appearance, including by way of comparison with other children; the individual’s general physical development (e.g. whether a girl had developed breasts, and factors such as height and voice); and his or her overall behavior.”\textsuperscript{113} In addition, the Prosecution provided several video excerpts to show that some of the child soldiers were “visibly” under age 15.\textsuperscript{114} Investigators occasionally visited schools in the DRC to attempt to verify children’s ages and identities.\textsuperscript{115} However, this presented a security risk for both the investigators (because the FPLC, which occupied the region, was extremely hostile to the ICC investigators) and for the children (because

\begin{enumerate}
\item[I] Id. \textsuperscript{¶} 291.
\item[II] Id. \textsuperscript{¶} 449.
\item[III] Id. \textsuperscript{¶¶} 476-77.
\item[IV] Id. \textsuperscript{¶} 169-77.
\item[V] One doctor informed the investigators that five or six children were under age 15 because children in the community could not be baptized before a certain age. Id. \textsuperscript{¶} 171.
\item[VI] Id. \textsuperscript{¶} 169-77.
\item[VII] The Defense did not offer expert testimony. Id. \textsuperscript{¶} 641. However, the Trial Chamber Judgment did not provide a reason for this decision.
\item[VIII] Id. \textsuperscript{¶} 641.
\item[IX] Id. \textsuperscript{¶} 644.
\item[X] Trial Chamber Judgment, \textit{supra} note 1, \textsuperscript{¶} 644.
\end{enumerate}
investigatory work would tip off the FPLC, and the FPLC might retaliate against the children or their families).\textsuperscript{116}

iv. Testimonial Deficiencies

Witnesses exhibited a variety of testimonial deficiencies that raised potential doubts about their credibility at trial. Witnesses struggled to understand compound questions and basic terminology.\textsuperscript{117} They had trouble identifying and estimating dates and ages,\textsuperscript{118} durations,\textsuperscript{119} distances,\textsuperscript{120} numbers,\textsuperscript{121} and other details about both the crimes alleged and the investigation.\textsuperscript{122} Furthermore, there were inconsistencies between witnesses’ pretrial statements and trial testimony,\textsuperscript{123} as well as some evidence of perjury.\textsuperscript{124}

D. Elements of the Crimes Charged: Article 8

In order to convict Lubanga as a co-perpetrator of the crime of “conscripting and enlisting children below the age of 15” under either Art. 8(2)(b)(xxvi)\textsuperscript{125} or Art. 8(2)(e)(vii),\textsuperscript{126} the Prosecutor needed to establish several elements.\textsuperscript{127} First, that the FPLC engaged in an armed conflict (of either international or non-international character).\textsuperscript{128} Then, that the crime fit the elements of either of these two provisions of Art. 8(2).\textsuperscript{129} After the crime of conscription and enlistment of children under age 15 in an international or

\textsuperscript{116} Id. ¶¶ 151-68.
\textsuperscript{117} Trial Transcript at 10-12, Lubanga (Feb. 23, 2009), https://www.icc-cpi.int/Transcripts/CR2012_05409.PDF.
\textsuperscript{118} Trial Transcript at 10-12, 23, Lubanga (Feb. 20, 2009), https://www.icc-cpi.int/Transcripts/CR2012_05184.PDF; Trial Transcript at 72, 77, Lubanga (Feb. 23, 2009); Trial Transcript at 7, Lubanga (Feb. 27, 2009), https://www.icc-cpi.int/Transcripts/CR2011_01442.PDF.
\textsuperscript{119} Trial Transcript at 28, 38, 43-44, 46, Lubanga (Feb. 20, 2009); Trial Transcript at 66, 77, Lubanga (Feb. 23, 2009); Trial Transcript at 52, Lubanga (Mar. 6, 2009), https://www.icc-cpi.int/Transcripts/CR2012_04270.PDF.
\textsuperscript{120} Trial Transcript at 65, Lubanga, (Feb. 23, 2009); Trial Transcript at 22-23, Lubanga (Mar. 4, 2009), https://www.icc-cpi.int/Transcripts/CR2012_04208.PDF.
\textsuperscript{121} Trial Transcript at 12, 50, Lubanga (Feb. 20, 2009); Trial Transcript at 4, Lubanga (Feb. 23, 2009).
\textsuperscript{122} Trial Transcript at 16, 26-27, 42, 45, Lubanga (Feb. 20, 2009); Trial Transcript at 76-77, Lubanga, (Feb. 23, 2009).
\textsuperscript{123} Trial Transcript at 5-6, Lubanga (Feb. 27, 2009); Trial Transcript at 7-16, 18, 19, 30-32, 38-40, 49, 56-59, Lubanga (Mar. 4, 2009).
\textsuperscript{124} Trial Transcript at 39-42, Lubanga (Jan. 28, 2009), https://www.icc-cpi.int/Transcripts/CR2012_04208.PDF.
\textsuperscript{125} Rome Statute, supra note 5, at art. 8(2)(b)(xxvi). The war crime under this statute is an international armed conflict.
\textsuperscript{126} Rome Statute, supra note 5, at art. 8(2)(e)(vii). The war crime under this statute is a conflict not of an international character.
\textsuperscript{127} Trial Chamber Judgment, supra note 1, ¶¶ 503-04.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
non-international armed conflict was established, it was also necessary to establish that Lubanga was individually criminally responsible for this crime.\textsuperscript{130} This required establishing the “mental element” in Art. 30 of the Statute—specifically, that Lubanga acted with the intent and knowledge to perpetrate this crime.\textsuperscript{131}

i. Armed Conflict and Its Nature\textsuperscript{132}

To convict Lubanga under Article 8, the Prosecution first needed to establish that the FPLC engaged in an armed conflict. The relevant provisions of Article 8 of the Rome Statute\textsuperscript{133} are as follows:

i. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

ii. For the purposes of this Statute, ‘war crimes’ means:

b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law [. . .]

e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law [. . .]\textsuperscript{134}

Furthermore, Art. 8(2)(f) of the Statute provides:\textsuperscript{135}

Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.\textsuperscript{136}

\textsuperscript{130} Id. ¶ 568-69.
\textsuperscript{131} Id.
\textsuperscript{132} Id. ¶ 503-04.
\textsuperscript{133} Rome Statute, supra note 5, at art. 8.
\textsuperscript{134} Id. at art. 8(1)-(2) (emphasis added).
\textsuperscript{135} Id. at art. 8(2)(f); Trial Chamber Judgment, supra note 1, ¶ 534.
\textsuperscript{136} Furthermore, Common Article 3 to the Geneva Conventions of 12 August 1949 provides: “In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting parties, […]”; Article 1(1) of Additional Protocol II reads: “This Protocol, which develops and supplements Article 3
In *Lubanga*, the Prosecution established beyond a reasonable doubt that during the time frame at issue, the FPLC participated in several simultaneous armed conflicts within Ituri and the surrounding areas within the DRC, some of which involved “protracted violence.”\textsuperscript{137} Furthermore, the conflict with other rebel groups was contained within the DRC, meaning that the conflict was non-international in character. Therefore, Art. 8(2)(e)(vii) was the applicable provision of the Statute.\textsuperscript{138}

ii. Conscription and Enlistment of Children under the Age of 15 or Using them to Participate Actively in Hostilities (Art. 8(2)(e)(vii) of the Statute)\textsuperscript{139}

After establishing that the FPLC was engaged in an armed conflict of a non-international character during this time period, it was necessary to proceed to the elements of conscription and enlistment of child soldiers and the corresponding Elements of Crimes.\textsuperscript{140} Art. 8(2)(e)(vii)\textsuperscript{141} reads:

2. [ . . . ]

\textsuperscript{(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:}

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common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” Article 1(2) of Additional Protocol II provides as follows: “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” Whereas Common Article 2 is limited to international armed conflicts between signatories, Common Article 3 affords minimal protection to organised armed groups involved in any conflict not of an international character.


\textsuperscript{137} Trial Chamber Judgment, *supra* note 1, ¶¶ 543-50.

\textsuperscript{138} Id. ¶¶ 565-66.

\textsuperscript{139} Id. ¶¶ 568-69.

\textsuperscript{140} Id. ¶¶ 568-71.

\textsuperscript{141} The Rome Statute was the first treaty to classify this offense of conscription and enlistment of child soldiers as a war crime. *Id.* ¶ 569.
(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.\textsuperscript{142}

Furthermore, the corresponding Elements of Crimes reads:

The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities.

Such a person or persons were under the age of 15 years.

The perpetrator knew of should have known that such person or persons were under the age of 15 years.

The conduct took place in the context of and was associated with an armed conflict not of an international character.

The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.\textsuperscript{143}

While neither the Statute, nor the Rules, nor the Elements of Crimes defines “conscripting or enlisting children under the age of 15 or using them to participate actively in hostilities,” the SCSL has a nearly identical provision under Art. 4(c) of its Statute.\textsuperscript{144} Therefore, the SCSL’s case law is particularly instructive.

The Trial Chamber concluded that the FPLC engaged in widespread recruitment on both voluntary and forced bases between September 1, 2002 and August 13, 2003.\textsuperscript{145} The Trial Chamber based its conclusion on both documentary evidence and witness testimony.\textsuperscript{146} The Trial Chamber also admitted video evidence from one training camp that showed recruits “clearly” under age 15.\textsuperscript{147} It was established that during this period, Lubanga and several other military leaders participated actively in “mobilization drives and recruitment campaigns that were directed at persuading Hema families to send their children to serve in the UPC/FPLC army.”\textsuperscript{148} Testimony

\textsuperscript{142} Id.; Rome Statute, supra note 5, at art. 8(2)(e)(vii).
\textsuperscript{143} Trial Chamber Judgment, supra note 1, ¶ 569.
\textsuperscript{144} Id. ¶¶ 600-03.
\textsuperscript{145} Id. ¶ 911.
\textsuperscript{146} The Trial Chamber made the following evidentiary determinations, based on the evaluative criteria previously discussed: (1) logbooks from a “demobilization center” were unreliable, id. ¶¶ 733-40; (2) a letter from the National Secretary of Education to the G5 Commander of the FPLC (dated Feb. 12, 2003) referencing recruiting children under age 15, was reliable, id. ¶¶ 741-48; (3) a logbook of radio communications was unreliable, id. ¶¶ 749-52; and (4) a “monthly report” by a member of senior leadership was relevant to establish the “recruitment” aspect, but not to determine children’s ages, id. ¶¶ 753-58.
\textsuperscript{147} Id. ¶ 912.
\textsuperscript{148} Id. ¶ 911.
further revealed that children in the camps “endured a harsh training regime” and that “they were subjected to a variety of severe punishments.”\footnote{149} In addition, testimony revealed that children were deployed as soldiers in Bunia, Tchoia, Kasenyi, and Bogoro, and that they took part in fighting in Kobu, Songolo, and Mongbwalu.\footnote{150} Children were also used as bodyguards: in fact, video evidence revealed that children under age 15 served as bodyguards for Lubanga himself.\footnote{151}

iii. Individual Criminal Responsibility of Thomas Lubanga (Article 25(3)(a) of the Statute)\footnote{152}

After establishing that members of the FPLC committed the crimes of “conscripting or enlisting children under the age of 15, or using them to participate actively in hostilities,” the Prosecution needed to establish that Lubanga was individually criminally responsible as a co-perpetrator.\footnote{153} Art. 25(3)(a) reads, in relevant part:

\begin{enumerate}
\item[A.] The Court shall have jurisdiction over natural persons pursuant to this Statute.
\item[B.] A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
\item[C.] In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
\begin{enumerate}
\item[a.] Commits such a crime, whether as an individual, \textit{jointly with another} or through another person, regardless of whether that other person is criminally responsible.\footnote{154}
\end{enumerate}
\end{enumerate}

The Prosecution also needed to establish the “mental element” of this crime under Article 30\footnote{155} of the Statute.\footnote{156} The Chamber concluded that, in order to

\begin{footnotes}
\footnote{149}{Trial Chamber Judgment, \textit{supra} note 1, ¶ 913.}
\footnote{150}{\textit{Id.} ¶ 915.}
\footnote{151}{\textit{Id.}
\footnote{152}{\textit{Id.} ¶ 917.
\footnote{153}{\textit{Id.} ¶¶ 917-18.
\footnote{154}{\textit{Id.} ¶ 917.
\footnote{155}{Rome Statute, \textit{supra} note 5, at art. 30.
\footnote{156}{Trial Chamber Judgment, \textit{supra} note 1, ¶¶ 974-75. Specifically,
\begin{enumerate}
\item[1.] Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the court only if the material elements are committed with intent and knowledge.
\item[2.] For the purposes of this article, a person has intent where:
\begin{enumerate}
\item[a.] In relation to conduct, that person means to engage in the conduct;
\item[b.] In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
\end{enumerate}
\end{enumerate}}
establish Lubanga’s responsibility as a co-perpetrator, the Prosecution needed to prove that:

(i) There was an agreement or common plan between the accused and at least one co-perpetrator that, once implemented, will result in the commission of the relevant crime in the ordinary course of events;

(ii) The accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime;

(iii) The accused meant to conscript, enlist, or use children under the age of 15 to participate actively in hostilities or he was aware that by implementing the common plan, these consequences “will occur in the ordinary course of events;”

(iv) The accused was aware that he provided an essential contribution to the implementation of the common plan; and

(v) The accused was aware of the factual circumstances that established the existence of an armed conflict and the link between these circumstances and his conduct.157

The Trial Chamber concluded that all five elements had been proven beyond a reasonable doubt.158 First, Lubanga and his co-perpetrators agreed to and participated in a common plan to create an army to secure control over Ituri, which “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 Second, Lubanga provided essential contributions to the common plan because he “exercised an overall coordinating role” over the FPLC’s activities; he was “closely involved” in decision-making and recruitment policies; he gave speeches to recruit children under age 15; and he personally used bodyguards under age 15.160 Finally, regarding elements (iii)-(v) above, Lubanga acted with the requisite intent and knowledge because:

he was aware of the factual circumstances that established the existence of the armed conflict. Furthermore, he was

3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.

Id. ¶ 1018.

Id. ¶¶ 1351-57.

Id. ¶ 1351.

Id. ¶1356.
aware of the nexus between those circumstances and his own conduct, which resulted in this enlistment, conscription and use of children below the age of 15 to participate actively in hostilities.\textsuperscript{161}

\textbf{E. Conviction, Sentencing, and Appeals}

The trial concluded on August 26, 2011.\textsuperscript{162} On March 14, 2012, Lubanga was convicted of “the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of Articles 8(2)(e)(vi) and 25(3)(a) of the Statute from early September 2002 to 13 August 2003.”\textsuperscript{163}

On July 10, 2012, Lubanga was sentenced to 14 years’ imprisonment.\textsuperscript{164} However, the time that Lubanga spent in ICC custody beginning in March 2006 was deducted from his sentence.\textsuperscript{165} On December 1, 2014, the Appeals Chamber confirmed Lubanga’s conviction and sentence.\textsuperscript{166} On September 22, 2015, the Appeals Chamber denied Lubanga’s motion for a sentence reduction.\textsuperscript{167} The Appeals Chamber reexamined the motion on November 3, 2017 and once again rejected the motion for reduction of Lubanga’s sentence.\textsuperscript{168} On December 15, 2017, Trial Chamber II set the amount of Lubanga’s reparations at 10 million USD.\textsuperscript{169} Lubanga spent the rest of his sentence imprisoned in the DRC.\textsuperscript{170}

\begin{footnotes}
\footnote{\textsuperscript{161} Id. ¶ 1357.}
\footnote{\textsuperscript{162} Id. ¶ 11.}
\footnote{\textsuperscript{163} Id. ¶ 1358. Furthermore, “[p]ursuant to Regulation 55 of the Regulations of the Court, the Chamber modifies the legal characterisation of the facts to the extent that the armed conflict relevant to the charges was non-international in character….” Id. ¶ 1359.}
\footnote{\textsuperscript{164} Lubanga Decision on Sentence, \textit{supra} note 9, ¶¶ 107-08.}
\footnote{\textsuperscript{165} Id. ¶ 108.}
\footnote{\textsuperscript{166} Prosecutor v. Lubanga Dyilo, ICC-01/04-01-06-3121, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against His Conviction, ¶ 529 (Dec. 1, 2014).}
\footnote{\textsuperscript{167} Prosecutor v. Lubanga Dyilo, ICC-01/04-01-06-3173, Decision on the Review Concerning Reduction of Sentence of Mr. Thomas Lubanga Dyilo, ¶¶ 77-79 (Sept. 22, 2015).}
\footnote{\textsuperscript{168} Prosecutor v. Lubanga Dyilo, ICC-01/04-01-06-3375, Second Decision on the Review Concerning Reduction of Sentence of Mr. Thomas Lubanga Dyilo, ¶¶ 94-95 (Nov. 3, 2017).}
\footnote{\textsuperscript{169} \textit{See} Prosecutor v. Lubanga Dyilo, ICC-01/04-01-06-3379, Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable, ¶ 281 (Dec. 21, 2017) [hereinafter Lubanga Decision Setting Reparations]. This reparations award was placed in a Victim Compensation Fund to compensate 425 victims. Id. at ¶ 279. In total, 3.4 million USD in compensation was awarded to the victims (8000 USD per victim). Id. The Chamber awarded an additional 6.6 million USD. Id. at ¶ 280; \textit{see also} News Wires, \textit{DR Congo Ex-child Soldiers Awarded $10 Million in Damages}, FRANCE 24 (Dec. 16, 2017), https://www.france24.com/en/20171215-dr-congo-child-soldiers-awarded-10-million-dollars-compensation-lubanga-icc.}
\footnote{\textsuperscript{170} \textit{See generally} Lubanga Decision on Sentence, \textit{supra} note 9.}
\end{footnotes}
F. Separate Opinions

Judge Adrian Fulford filed a separate opinion in the Trial Chamber Judgment in which he concurred with the Trial Chamber’s judgment that Lubanga was guilty of conscripting and enlisting child soldiers under Art. 8(2)(e)(vii) of the Statute and that Lubanga was liable as a co-perpetrator under Art. 25(3)(a), according to the tests set out in Paragraphs 1013 and 1018 of the Judgment. However, Judge Fulford argued that the Trial Chamber should have applied a “different, and arguably lesser, test” to establish Lubanga’s liability under Art. 25(3), because the high standard established in Art. 25(a)(3) placed an “unnecessary and unfair burden on the prosecution.” Judge Fulford conceded that it would be unfair to Lubanga to retroactively apply a different standard.

Judge Fulford disapproved of the “hierarchy of seriousness” through which the Trial Chamber distinguished between “principal” and “accessory” liability. Specifically, the Trial Chamber distinguished between four degrees of liability within Art. 25(3): Art. 25(a)(3) (liability as a co-perpetrator, also referred to as the “control of the crime theory”), and Arts. 25(3)(b-d), which represented lesser forms of liability that included ordering.

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171 “The Chamber is of the view that the prosecution must establish, as regards the mental element, that:
(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...”

Trial Chamber Judgment, supra note 1, ¶ 1013.

172 The Prosecution was required to prove five elements in order to establish Lubanga’s liability as a co-perpetrator:
(i) there was an agreement or common plan between the accused and at least one other co-perpetrator that, once implemented, will result in the commission of the relevant crime in the ordinary course of events;
(ii) the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime;
(iii) the accused meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities or he was aware that by implementing the common plan these consequences “will occur in the ordinary course of events”;
(iv) the accused was aware that he provided an essential contribution to the implementation of the common plan; and
(v) the accused was aware of the factual circumstances that established the existence of an armed conflict and the link between these circumstances and his conduct.

Id. ¶ 1018.


174 Id. ¶ 2-3.

175 Id. ¶ 2.

176 Id. ¶ 9.

177 Id. ¶ 5-6.
soliciting, or inducing (Art. 25(3)(b)), accessory liability (Art. 25(3)(c)), and participation within a group (Art. 25(3)(d)). Judge Fulford advocated instead for a “plain reading” of Art. 25(3) in which “individuals who are involved indirectly can be prosecuted as co-perpetrators.”

Judge Odio Benito filed a dissenting opinion in the Trial Chamber Judgment in which she agreed with the Trial Chamber’s final decision regarding Lubanga’s individual criminal responsibility for the crimes of conscripting and enlisting children under the age of 15 but disagreed with three particular aspects of the judgment. First, Judge Benito disagreed with the “legal definition of the crimes of enlistment, conscription and use of children under the age of 15 to actively participate in the hostilities.” Specifically, Judge Benito argued that the definition should be broadened to include “any type of armed group or force, regardless of the nature of the armed conflict in which it occurs.” Judge Benito highlighted the severity of sexual violence and noted that gender-based and sexual violence are “distinct and separate crimes that could have been evaluated separately... if the Prosecutor would have presented charges.”

Second, Judge Benito disagreed with the Trial Chamber regarding the “dual status victims/witnesses.” Specifically, Judge Benito argued that, while several of the dual status victims/witnesses’ testimonies should not be used to determine Lubanga’s criminal responsibility, these victims/witnesses should still have been permitted to participate in the trial as victims.

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178 Id. ¶ 8.
179 Judge Fulford Separate Opinion, supra note 173, ¶ 14. Specifically, [i]n accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person . . . [c]ommits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible...
180 Id. (emphasis added).
181 Id. ¶ 12.
183 Id. ¶¶ 2-21.
184 Id. ¶ 14.
185 Id. ¶ 20. Specifically, [i]f the war crimes considered in this case are directed at securing [children’s] physical and psychological well being, then we must recognize sexual violence as a failure to afford this protection and sexual violence as acts embedded in the enlisting, conscription and use of children under 15 in hostilities. It is discriminatory to exclude sexual violence which shows a clear gender differential impact from being a bodyguard or porter which is mainly a task given to young boys.
186 Id. ¶ 21.
187 Id. ¶ 22-35. Specifically,
Finally, Judge Benito argued that the Trial Chamber should have considered the evidentiary value of several additional pieces of video evidence.

### III. HISTORY OF CHILD SOLDIER PROSECUTIONS: THE SPECIAL COURT FOR SIERRA LEONE CASES

While *Lubanga* was the first child soldier case\(^{188}\) prosecuted at the ICC, the Special Court for Sierra Leone ("SCSL")\(^{189}\) convicted several individuals in the late 2000s of conscripting and enlisting child soldiers\(^ {190}\) in the three subsequent cases.\(^ {191}\) Both the Pretrial and Trial Chambers in *Lubanga* considered SCSL jurisprudence throughout the case.\(^ {192}\) The three cases that follow consider evidentiary issues, including concerns about testimonial discrepancies and inaccuracies, which ICC prosecutors later faced in *Lubanga*.\(^ {193}\) Because *Lubanga* presented an issue of first impression for the ICC, the SCSL cases are particularly instructive.\(^ {194}\)

\(^{187}\) *Id.* ¶ 32.

\(^{188}\) *Id.* ¶¶ 36-43.

\(^{189}\) It has been postulated that "child soldiers are frequently used to commit war crimes and crimes against humanity, particularly because commanders find it easier to manipulate children to commit more audacious crimes than it is to convince adults." Belinda S.T Hlatshwayo, International Criminal Law and the African Girl Child Soldier: Does the International Criminal Law Framework Provide Adequate Protection to the African Girl Child Soldier? (Mar. 12, 2017) (LLM dissertation, Univ. of Cape Town) (on file with the Univ. of Cape Town library) (citing DAVID M. ROSEN, ARMIES OF THE YOUNG: CHILD SOLDIERS IN WAR AND TERRORISM 9 (Rutgers Univ. Press 2005).

\(^{189}\) The SCSL "was set up in 2002 as the result of a request to the United Nations in 2000 by the Government of Sierra Leone for a ‘special court’ to address serious crimes against civilians and UN peacekeepers committed during the country’s decade-long (1991-2002) civil war." Residual Special Court for Sierra Leone, *supra* note 2.

\(^{190}\) One individual’s conviction for conscripting and enlisting child soldiers was overturned on appeal: however, his convictions for other crimes were upheld on appeal. *See infra* note 191.


\(^{192}\) Trial Chamber Judgment, *supra* note 1, ¶ 603 ("[T]he wording of the provision criminalising the conscription, enlistment and use of children under the age of 15 within the Statute of the SCSL is identical to Article 8(e)(vii) of the Rome Statute, and they were self-evidently directed at the same objective. The SCSL’s case law therefore potentially assists in the interpretation of the relevant provisions of the Rome Statute.").


\(^{194}\) *See* JULIE McBride, THE WAR CRIME OF CHILD SOLDIER RECRUITMENT 147 (Asser Press 2014). Specifically,
The Rome Statute had not addressed the crime of “conscripting, enlisting children under the age of 15, or using them to participate actively in hostilities” prior to Lubanga. Therefore, the Chamber looked to the SCSL’s analysis of child soldier cases prosecuted under Art. 4(c) of the Statute of the SCSL.

A. The Prosecutor v. Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu

The Prosecutor v. Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu (“the AFRC Case”) was the first case to successfully convict—and uphold on appeal—individuals for the crimes of conscripting and enlisting child soldiers. In the AFRC Case, three high-ranking military officials from the Armed Forces Revolutionary Council (“AFRC”) were convicted of, among other crimes, “conscripting children under the age of 15 years into an armed group and/or using them to participate actively in hostilities . . . pursuant to Article 4(c) of the Statute.” All three were held individually criminally responsible pursuant to Art. 6(1) of the Statute of the SCSL.

The AFRC Case tackled many of the issues that would later appear in Lubanga regarding the evaluation of evidence and the assessment of witness credibility. In addressing discrepancies within a witness’s multiple statements, the AFRC Trial Chamber applied the International Criminal
The presence of inconsistencies in the evidence does not, per se, require a reasonable Trial Chamber to reject it as being unreliable. Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the evidence.

The AFRC Trial Chamber conceded that in-court testimony might evoke strong emotional responses from witnesses—including bringing them to tears. It acknowledged that the trauma that victim-witnesses suffered might prevent them from providing a full account of their experiences or could affect their memories. Furthermore, the Trial Chamber asserted that a witness’s observations at the time of the events might be affected by terror or stress. In addition, the Trial Chamber indicated that the passage of time (more than six years had passed since the crimes occurred) could affect the accuracy of witnesses’ memories. Also, interviews conducted in other languages and then translated for the Trial Chamber could pose communications confusion.

The Trial Chamber noted that the appearance of a desire to exculpate oneself from crimes to which the individual was a party by falsifying testimony (a “perjury incentive”) did not automatically render the testimony unusable. Finally, the Trial Chamber was not convinced by the Defense’s argument that witnesses received “financial incentives” to testify—in fact, the “incentives” to which the Defense referred were medical, travel, food, and lodging reimbursement for individuals who testified that they had been forced to become child soldiers. In sum, none of these factors was determinative; rather, the Trial Chamber evaluated each witness on a case-by-case basis. The Trial Chamber did not treat minor discrepancies—such

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203 Id. ¶ 111.
204 Id.
205 Id.
206 Id. ¶ 112.
207 Id.
208 See Combs, supra note 16, at 116 (“Accomplice witness testimony may [seem] particularly reliable…because accomplice witnesses often [know] more than non-accomplice witnesses about the events in question, and specifically about the defendant’s conduct.”).
209 AFRC Case, supra note 191, ¶ 125.
210 Id. ¶¶ 126-30.
211 Id. ¶ 111.
as names or locations\textsuperscript{212}—as “discrediting their evidence where the essence of the incident had nevertheless been recounted in acceptable detail.”\textsuperscript{213} 

The AFRC Trial Chamber was concerned with many types of evidentiary discrepancies. These included: witnesses’ inability to determine their own ages;\textsuperscript{214} remember dates;\textsuperscript{215} estimate durations,\textsuperscript{216} distances,\textsuperscript{217} and numbers;\textsuperscript{218} review two-dimensional representations, such as maps, graphs, and charts;\textsuperscript{219} and understand court procedures.\textsuperscript{220} The Trial Chamber was also concerned with linguistic miscommunication between international witnesses, judges, and attorneys. Witnesses did not always understand the terminology used in the attorneys’ questioning.\textsuperscript{221} Some witnesses struggled to answer compound, multi-part, or generally complex questions\textsuperscript{222} during testimony.\textsuperscript{223} In addition, the Trial Chamber was concerned with cultural and educational barriers. For example, many witnesses were illiterate or had received very little education.\textsuperscript{224} In fact, one witness grew frustrated when he was repeatedly asked to spell names.\textsuperscript{225} Finally, interpreters faced challenges in accurately translating testimony during the trial.\textsuperscript{226} 

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{212} Id. \textsuperscript{¶} 115.
\item \textsuperscript{213} Id. \textsuperscript{¶} 113.
\item \textsuperscript{214} See Trial Transcript at 64-65, AFRC Case (July 5, 2005). For access to AFRC trial transcripts, visit \textit{AFRC Transcripts}, RESIDUAL SPECIAL COURT FOR SIERRA LEONE, http://www.rscsl.org/AFRC_Transcripts.html (last visited Apr. 17, 2021).
\item \textsuperscript{215} See Trial Transcript at 30, AFRC Case (July 25, 2005); Trial Transcript at 73-75, AFRC Case (Apr. 7, 2005).
\item \textsuperscript{216} See Trial Transcript at 58-59, AFRC Case (Mar. 8, 2005); Trial Transcript at 112, AFRC Case (Apr. 7, 2005).
\item \textsuperscript{217} See Trial Transcript at 31, AFRC Case (Mar. 8, 2005).
\item \textsuperscript{218} See Trial Transcript at 107, AFRC Case (Apr. 7, 2005); Trial Transcript at 79, AFRC Case (June 27, 2005); Trial Transcript at 43, AFRC Case (Mar. 8, 2005).
\item \textsuperscript{219} See Trial Transcript at 29, AFRC Case (July 25, 2005).
\item \textsuperscript{220} See Trial Transcript at 50-52, AFRC Case (Apr. 6, 2005).
\item \textsuperscript{221} See Trial Transcript at 67 (Apr. 7, 2005); Trial Transcript at 21-22, AFRC Case (Apr. 6, 2005); Trial Transcript at 109-11, AFRC Case (July 18, 2005).
\item \textsuperscript{222} Even in Western countries, both child and adult witnesses may struggle to understand compound and multi-part questions. See COMBS, supra note 13, at 46-47 (citing LOUISE ELLISON, THE ADVERSARIAL PROCESS AND THE VULNERABLE WITNESS 95 (Oxford Univ. Press 2002); Ingrid M. Cordon et al., \textit{Children in Court, in ADVERSARIAL VERSUS INQUISTITORIAL JUSTICE: PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE SYSTEMS}, 167, 171 (Peter J. van Koppen & Steven D. Penrod eds., 2003)).
\item \textsuperscript{223} See Trial Transcript at 107-08, AFRC Case (June 30, 2005); Trial Transcript at 35-36, AFRC Case (July 1, 2005); Trial Transcript at 108-09, AFRC Case (July 18, 2005).
\item \textsuperscript{224} See Trial Transcript at 29, AFRC Case (July 25, 2005) (witness could not read or write); Trial Transcript at 3, 12, 45, 58, 77, AFRC Case (Sept. 27, 2005) (witness had trouble spelling). In fact, out of the forty-five witnesses in the AFRC Case for which education and literacy data are available, twenty-one witnesses (forty-seven percent) “were illiterate and/or had never attended school.” COMBS, supra note 13, at 64.
\item \textsuperscript{225} Trial Transcript at 11, 58, 77, AFRC Case (Sept. 27, 2005).
\item \textsuperscript{226} Trial Transcript at 104, AFRC Case (Apr. 7, 2005).
\end{enumerate}
\end{footnotesize}
In evaluating the testimonial evidence, the Trial Chamber heard from expert witnesses, former child soldiers, and individuals who had been harmed or victimized by former child soldiers. The Trial Chamber determined that two witnesses were credible (TF1-157 and TF1-158) and three were not. In its assessment of TF1-157, the Trial Chamber found the precision with which the individual described both (1) his journey from town to town during his time as a child soldier, and (2) the atrocities he witnessed committed against his family members, as well as the fact that he did not appear shaken on cross-examination, to be compelling. TF1-158, the brother of TF1-157, was also found to be credible, not only because of the precise nature with which he described the events, and the fact that he did not appear shaken on cross-examination, but also because his account of his separate experiences was distinct from his brother’s—suggesting that they had not coordinated their stories. The Trial Chamber considered testimonial discrepancies, communications challenges, and cultural and educational barriers, but it ultimately determined that these were overshadowed by the aforementioned compelling factors.

For the three witnesses who were determined not to be credible, the Trial Chamber indicated that their stories could not be corroborated with any other testimony. After the Trial Chamber enumerated many factors that it would consider in assessing witness credibility, the Trial Chamber indicated that each witness’s appearance on cross-examination was particularly important. The Trial Chamber determined that the testimonies of multiple witnesses who alleged that they had been harmed by child soldiers were not credible because one individual could not remember the child soldiers’ ages; one individual’s descriptions of various locations were too vague; and in several cases, the Trial Chamber could not find evidence, based on their testimonies, linking the information to the Accused. Despite the fact that some testimony was ultimately excluded, the Trial Chamber stated that “a significant amount of evidence has been adduced by both Prosecution and Defense witnesses in respect of each of these crimes over the course of a lengthy trial.”

The AFRC Case is instructive because it applied Art. 4(c) of the Statute of the SCSL which, as previously discussed, is nearly identical to Art.

227 The Trial Chamber in the AFRC Case also considered documentary evidence.
228 AFRC Case, supra note 191, ¶¶ 1248-51.
229 Id. ¶ 1252-61.
230 Id. ¶ 1262-75.
231 Id. ¶ 1252.
232 Id. ¶ 1262.
233 Id. ¶ 1252-55.
234 Id. ¶ 1256-58.
235 Id. ¶ 1276-78.
236 Id. ¶ 1259-61.
237 Id. ¶ 1262-75.
238 Id. ¶ 1262-75.
239 Id. ¶ 41.
8(2)(e)(vii) of the Rome Statute. Furthermore, the Trial Chamber highlighted many factors that it considered in evaluating evidence that would ultimately serve to convict three individuals of, among other crimes, conscripting and enlisting child soldiers. The two SCSL cases that followed the AFRC Case also provide important context for the Lubanga case.

B. The Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa

Two months after the AFRC Case was decided, in The Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa (“CDF Case”), the SCSL Trial Chamber found Moinina Fofana and Allieu Kondewa, two leaders of the Civil Defence Forces (“CDF”), guilty of multiple crimes including murder, cruel treatment, and pillage. The crime of conscripting and enlisting child soldiers (Count 8) was analyzed: however, the Trial Chamber acquitted Fofana on Count 8, and Kondewa’s conviction on Count 8 was overturned on appeal.

As in both the AFRC Case and Lubanga, the Trial Chamber acknowledged that “[m]inor inconsistencies in testimony do not necessarily discredit a witness. The events in question took place several years ago and, due to the nature of memory, some details will be confused, and some will be forgotten.” Furthermore, witnesses’ testimony need not be identical to prior statements: for example, oral testimony at trial involves more comprehensive questions and questions not previously asked.

The Trial Chamber convicted Kondewa on Count 8 pursuant to Art. 6(3) of the Statute of the SCSL based on the testimony of a single child witness, TF2-021, despite inconsistencies between TF2-021’s testimony and that of other witnesses. In addition to this child witness’s testimony,

240 See CDF Case, supra note 191.
242 See CDF Case, supra note 191, ¶ 975-78. Notably, the Appeals Chamber held, in a decision on a preliminary motion, that conscripting and enlisting soldiers was a violation of international humanitarian law at the time of the crime. See generally Prosecutor v. Norman, SCSL-2004-14-ART72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ¶ 54 (May 31, 2004).
243 Prosecutor v. Fofana, SCSL-04-14-A, App. Chamber Judgment, at 134/246 (May 28, 2008). Furthermore, the Appeals Chamber overturned convictions for both Fofana and Kondewa on Count 7 (collective punishments). Id.
244 CDF Case, supra note 191, ¶ 262.
245 Id. ¶ 263.
246 The Trial Chamber indicated that, because it found Kondewa guilty pursuant to Art. 6(3), it was not necessary to consider Art. 6(1). Id. ¶ 973.
247 Witness TF2-021 was nine years old when he was captured and eleven years old when he was sent on his first mission. Id. ¶ 968.
248 Id. ¶¶ 967-72.
the Trial Chamber accepted other types of inconsistencies in witness testimony to convict the defendants of other crimes. In some cases, witnesses were unable to identify their ages, months in which events occurred, or dates on which events occurred. Additionally, some witnesses could not tell time. Witnesses struggled to estimate distances and measurements, as well as durations, numerical estimations and two-dimensional representations, such as maps. Finally, some witnesses did not understand the adversarial court procedures of an international trial.

The CDF Trial Chamber, like the AFRC Trial Chamber, was also concerned with communications challenges between judges, attorneys, and international witnesses who spoke many different languages. In addition, the Trial Chamber considered witnesses’ cultural and educational barriers.

As in the AFRC Case, for the counts on which the CDF Trial Chamber decided to convict Fofana and Kondewa, the Trial Chamber considered testimonial deficiencies and inconsistencies, communications challenges, and cultural and educational barriers, but it determined the overall character of the testimony to be credible.

C. The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao

In *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (“RUF Case”), the third relevant SCSL case involving evidentiary challenges in a child soldier case, two of the three defendants from the Revolutionary United Front (“RUF”) who were charged with, among other crimes, conscripting and enlisting child soldiers (Count 12),

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250 Trial Transcript at 54-55, CDF Case (June 21, 2004).

251 Trial Transcript at 56-57, CDF Case (Sept. 13, 2004).

252 Trial Transcript at 53-54, CDF Case (June 17, 2004).

253 Trial Transcript at 29, CDF Case (Nov. 11, 2004); Trial Transcript at 104, CDF Case (Mar. 11, 2005); Trial Transcript at 69, CDF Case (Sept. 28, 2006); Trial Transcript at 88-89, CDF Case (Sept. 27, 2004).


255 Trial Transcript at 32, CDF Case (June 21, 2004); Trial Transcript at 22, CDF Case (Sept. 23, 2004).

256 Trial Transcript at 38, CDF Case (Nov. 4, 2004).

257 Trial Transcript at 45-46, 52, 68, CDF Case (May 22, 2006).

258 Trial Transcript at 60-61, CDF Case (June 15, 2004); Trial Transcript at 16-17, CDF Case (June 18, 2004); Trial Transcript at 115-16, CDF Case (Sept. 27, 2004).

259 A study of fifty-five prosecution witnesses indicated that eighteen (thirty-three percent) “were illiterate and/or had never attended any school” and seven (thirteen percent) “had attended school for only a few years.” [COMBS](http://www.rscsl.org/CDF_Transcripts.html), *supra* note 13, at 65 (citing CDF Trial Transcripts).

260 Defendant Gbao was found “not guilty” of conscripting and enlisting child soldiers but was found guilty of other crimes. [RUF Case](http://www.rscsl.org/CDF_Transcripts.html), *supra* note 191, at 686.
were found guilty, pursuant to Art. 6(1) of the Statute of the SCSL and punishable under Art. 4(c) of the Statute.\textsuperscript{261} The RUF Trial Chamber focused on similar evidentiary considerations and concessions as those made by the AFRC and CDF Trial Chambers. The RUF Trial Chamber evaluated the evidence for witness credibility and general inconsistencies between multiple testimonies.\textsuperscript{262} Specifically,

\begin{quote}
[i]n assessing the credibility and reliability of oral witness testimony, the Chamber has considered factors such as the internal consistency of witness’ testimony; its consistency with other evidence in the case; any personal interest witnesses may have that may influence their motivation to tell the truth; and observational criteria such as witnesses’ demeanour, conduct and character. In addition, the Trial Chamber has considered the witnesses’ knowledge of the facts on which they testify and the lapse of time between the events and the testimony.\textsuperscript{263}
\end{quote}

The Trial Chamber then conducted a credibility analysis of each witness. The Trial Chamber assessed four former child soldiers,\textsuperscript{264} as well as three additional witnesses.\textsuperscript{265} The RUF Trial Chamber was concerned with many of the same discrepancies raised in prior SCSL cases, including ages,\textsuperscript{266} dates,\textsuperscript{267} durations,\textsuperscript{268} and numerical estimations;\textsuperscript{269} communications challenges;\textsuperscript{270} and educational\textsuperscript{271} and cultural barriers.\textsuperscript{272} While the RUF Trial Chamber

\begin{footnotes}
\textsuperscript{262} The RUF Trial Chamber considered the following types of evidence: identification, RUF case, supra note 191, ¶¶ 492-94; hearsay, id. ¶¶ 495-96; accomplice, id. ¶¶ 497-98; circumstantial, id. ¶ 499; and expert evidence, id. ¶¶ 511-12. It considered whether testimony could be corroborated, id. ¶¶ 500-01, and it reviewed measures taken to protect witnesses, id. ¶¶ 504-05. Finally, it considered testimonial deficiencies regarding names and spellings of locations, id. ¶¶ 506-07; nicknames, id. ¶ 508; and time frames, id. ¶¶ 509-10.
\textsuperscript{263} Id. ¶ 486 (citing Prosecutor v. Blagojevic, Case No. IT-02-60-T, Trial Chamber Judgement, ¶ 23 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005); Prosecutor v. Halilović, Case No. IT-01-48-T, Judgement, ¶ 17 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005).
\textsuperscript{264} RUF Case, supra note 191, ¶¶ 579-94.
\textsuperscript{265} Id. ¶¶ 595-603.
\textsuperscript{266} Trial Transcript at 56, RUF Case (July 27, 2004).
\textsuperscript{267} Trial Transcript at 74, RUF Case (July 19, 2004).
\textsuperscript{268} Trial Transcript at 57, RUF Case (July 27, 2004).
\textsuperscript{269} Trial Transcript at 50, 78, RUF Case (July 19, 2004); Trial Transcript at 35, RUF Case (July 15, 2004).
\textsuperscript{270} Trial Transcript at 20-22, RUF Case (July 28, 2004).
\textsuperscript{271} Out of 40 prosecution fact witnesses in the RUF Case, 19 (48 percent) “were illiterate and/or had never attended school” and three (eight percent) “had attended school for only a very short time.” COMBS, supra note 13, at 65 (citing additional RUF Case Trial Transcripts).
\textsuperscript{272} Trial Transcript at 70, RUF Case (Feb. 3, 2005) (“That which is not up to a month, we call it [a] week.”).
\end{footnotes}
considered these factors, as in the previous two SCSL cases, it found the testimony to be credible.

As these three SCSL cases illustrate, reliance on eyewitness testimony in general, and child witnesses in particular, presents significant evidentiary challenges and impediments to both fact-finding and presenting credible testimony at trial. The ICC\textsuperscript{273} continues to grapple with evidentiary issues, because international criminal courts persist in relying heavily on eyewitness testimony, despite the fact that some scholars have raised concerns about this practice.\textsuperscript{274}

IV. EVIDENTIARY CHALLENGES AND CRITIQUES OF LUBANGA EVIDENTIARY APPROACH

\textit{Lubanga} presented significant challenges for the ICC evidentiary evaluation process. First, ICC investigators were forced to overcome major obstacles during testimony-gathering. Second, Trial Chambers struggled to verify testimony due to language, educational, and cultural barriers. Third, both courts and attorneys were beset by inconsistencies in testimony caused by investigatory errors, translation issues, and contradictory witness statements.

\textit{Lubanga} established critical evidentiary decision-making processes for the investigation and prosecution of the crimes of conscripting and enlisting child soldiers. Moreover, evidentiary issues demonstrated in \textit{Lubanga} may apply to domestic cases regarding potentially unreliable eyewitness testimony. Therefore, the ICC must recognize the burdens created by evidentiary barriers and the harm they can cause to both witnesses and fact-finding procedures.

A. Evaluating Evidentiary Issues Outside the Case Law Context

i. Gathering Testimony is Difficult Due to Safety Concerns and Logistical Barriers

As the multi-year ICC investigation in \textit{Lubanga} highlighted, one significant challenge that ICC investigators faced in the early stages of an international criminal case was gathering reliable testimony in the field. The ICC confronted three major obstacles during testimony-gathering. First, investigators faced security challenges that made it difficult to obtain information and to connect with witnesses.\textsuperscript{275} Specifically, the areas in which

\textsuperscript{273} Domestic courts also struggle to handle testimony from child witnesses (or witnesses who were children at the time of the crime). \textit{See}, \textit{e.g.}, Lacy & Stark, \textit{supra} note 14.

\textsuperscript{274} Combs, \textit{supra} note 16, at 56 (“[W]itness testimony usually forms the exclusive basis for international criminal convictions, and that in itself is a problem.”).

\textsuperscript{275} \textit{See} Trial Chamber Judgment, \textit{supra} note 1, ¶¶ 151-68.
the most heinous crimes were committed were also the ones that were too dangerous to investigate, because the forces controlling these regions were often hostile to the investigators. Second, logistical difficulties, like impassible or nonexistent roads, made travel challenging. Third, investigators faced language and cultural barriers, similar to the barriers later faced at trial, once they connected with witnesses.

ii. Language and Educational Barriers Impede the Chamber’s Ability to Verify Testimony

Once testimony has been gathered, it must also be verified. Within the context of international criminal law, while:

[t]here was once reason to believe that the incidence of [testimonial] deficiencies would decline over time, and the fact that they did not provides clues as to their causes. What did decline, however, was the Trial Chambers' willingness to credit prosecution witnesses and rely on their testimony. Indeed . . . over time [international criminal law has] strengthened its commitment to factual accuracy and, more broadly, to the beyond-a-reasonable-doubt standard for convictions.

An initial challenge in assessing potential testimonial deficiencies is verifying basic information. Trial Chambers rely on witness candor in the absence of accurate identification. As the AFRC, CDF, and RUF Cases from the SCSL highlight, there are many barriers to confirming information—and to eliciting accurate testimony at trial. For example, Trial Chambers struggle to communicate with international witnesses due to

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276 See COMBS, supra note 13, at 147.
277 See Trial Chamber Judgment, supra note 1, ¶¶ 151-68.
278 See COMBS, supra note 13, at 147.
279 See Trial Chamber Judgment, supra note 1, ¶¶ 151-68.
280 For example, one study by John Jackson and Yassin Brunger found that witness statements frequently included inaccuracies because “investigators did not understand the information they were being provided.” Combs, supra note 16, at 112. Furthermore, the investigators “failed to be culturally sensitive” and asked “inappropriate questions.” John D. Jackson & Yassin M. Brunger, Fragmentation and Harmonization in the Development of Evidentiary Practices in International Criminal Tribunals, in PLURALISM IN INTERNATIONAL CRIMINAL LAW 159, 173-74 (Elies van Shledregt & Sergey Vasiliev eds., 2014). Furthermore, the investigators “failed to be culturally sensitive” and asked, “inappropriate questions.” Id.
281 Combs, supra note 16, at 109 (Combs’ conclusions are based on data and regression analysis of International Criminal Tribunal for Rwanda cases.).
282 See id. at 58 (This was specifically noted in Lubanga: the Trial Chamber relied on witness testimony about anatomical indicators of age); see also COMBS, supra note 13, at 145 (Furthermore, “[l]ack of documentation stymies efforts to ascertain . . . basic facts.”).
translation and interpretation errors,\textsuperscript{283} as well as educational\textsuperscript{284} and cultural barriers that make witnesses either incapable of conveying the necessary information or generally unwilling to testify fully.\textsuperscript{285} In addition, international courts do not necessarily consider cultural differences when assessing witness testimony.\textsuperscript{286} For example, certain cultures view the concept of “childhood” differently from the way Western cultures do.\textsuperscript{287} This makes it difficult to elucidate accurate age information from witnesses.

A significant passage of time between the crime and the trial also presents a substantial challenge to maintaining an accurate memory of the events. Memory naturally fades over time.\textsuperscript{288} Furthermore, if significant time has passed, even a well-intentioned witness might hear additional information about a case that affects his or her perception of the events.\textsuperscript{289} This information could come from interview questions (witnesses may be interviewed multiple times), the national or international news, or discussions with friends and family.\textsuperscript{290} In fact, one study of International Criminal Tribunal for Rwanda cases concluded that “the number of statements/testimonies that a witness provided was a very strong predictor of serious inconsistencies.”\textsuperscript{291} Furthermore, witnesses or victims of violent crimes are more likely than witnesses of non-violent events to misperceive events because of the effect of stress on perception.\textsuperscript{292}

\textsuperscript{283} See Joshua Karton, Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony, 41 VAND. J. TRANSNAT’L L. 1, 40-41 (2008); see also COMBS, supra note 13, at 66-70.
\textsuperscript{284} See COMBS, supra note 13, at 63-66.
\textsuperscript{285} See id. at 79-81.
\textsuperscript{286} Teresa A. Doherty, Evidence in International Criminal Tribunals: Contrast Between Domestic and International Trials, 26 LEIDEN INT’L. L. 937, 938 (2013).
\textsuperscript{287} TIM KELSALL, CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT FOR SIERRA LEONE 151 (2009) (analyzing the CDF Case at the SCSL). Specifically, “[r]elationships . . . which would doubtless be regarded as neglectful or abusive in many societies, are legitimised in southern Sierra Leone by a local ideology anchored on the belief that there is ‘no success without struggle.’” Id. at 152.
\textsuperscript{289} See David F. Hall et al., Postevent Information and Changes in Recollection for a Natural Event, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 124 (Gary L. Wells & Elizabeth F. Loftus eds., 1984).
\textsuperscript{290} See COMBS, supra note 13, at 17. Combs examined six International Criminal Tribunal for Rwanda cases and three SCSL cases and “found that, on average, approximately 50 percent of witnesses in those cases testified seriously inconsistently with their previous statements/testimonies.” See Combs, supra note 16, at 107; COMBS, supra note 13, at 118-22.
\textsuperscript{291} Combs, supra note 16, at 108.
\textsuperscript{292} See Douglas P. Peters, Eyewitness Memory and Arousal in a Natural Setting, in 1 PRACTICAL ASPECTS OF MEMORY: CURRENT RESEARCH AND ISSUES: MEMORY IN EVERYDAY LIFE 89, 94 (Michael M. Gruneberg et al. eds., 1988).
iii. Inconsistencies in Testimony May Result in Important Testimony Being Excluded

Many of the factors used to evaluate testimonial deficiencies are also applicable when evaluating testimonial inconsistencies (i.e. contradictory statements).\(^{293}\) For example, an illiterate witness cannot review each transcribed statement taken throughout the case to verify its accuracy.\(^{294}\) In addition, using multiple translators throughout the case may produce discrepancies, especially if some of the translators are connected to the case and harbor ulterior motives.\(^{295}\) Also, investigative errors, either unintentional or intentional,\(^{296}\) may lead to inconsistencies.\(^{297}\) However, extremely consistent statements should also be treated with caution because “it is possible that perjuring witnesses—and particularly perjuring witnesses who are lying in order to receive tangible and substantial benefits—take greater care than truthful witnesses to keep their representations consistent.”\(^{298}\)

In evaluating testimonial inconsistencies when witnesses make multiple statements, Trial Chambers concede that some inconsistencies are serious, whereas others can be reconciled by the factors previously discussed. Specifically, “an inconsistency or omission [may] be serious either if it pertained to a key issue in the trial or if it pertained to the kind of fact that one is unlikely to forget.”\(^{299}\) However, during lengthy testimony, Trial Chambers may decide to admit certain portions of the testimony while excluding others.

iv. Evidentiary Issues in Domestic Criminal Cases Parallel Those Issues in *Lubanga*

Many of the evidentiary challenges that ICC prosecutors faced in *Lubanga* also persist in domestic criminal cases, despite the fact that prosecutors in the United States may face fewer linguistic and cultural barriers. Eyewitness testimony in domestic cases is similarly prevalent and

\(^{293}\) See COMBS, *supra* note 13, at 122.

\(^{294}\) Id.

\(^{295}\) Id. at 124.

\(^{296}\) Intentional investigative “errors” are less common than witnesses allege, but they do sometimes occur. See Combs, *supra* note 16, at 113-14.

\(^{297}\) See COMBS, *supra* note 13, at 126. (“Interviews . . . generate off-the-record stories of investigators who at best lack an adequate understanding of the conflict that they are investigating and the culture and habits of the people who are to be witnesses, and who at worst are lazy and/or incompetent.”).

\(^{298}\) Combs, *supra* note 16, at 111.

\(^{299}\) COMBS, *supra* note 13, at 121; see Combs, *supra* note 16, at 67 (defining a “serious” inconsistency: for example, “when a witness failed to mention in his previous statements/testimonies a fact that was central to his testimony”).
may be unreliable, potentially leading to wrongful convictions in some instances. Similar to witnesses in ICC cases, domestic witnesses’ memories fade over time. Furthermore, witnesses, including victims of violent crimes, are more likely than witnesses of nonviolent acts to misperceive events due to the effects of fear and psychological stress on perception. These inaccuracies include incorrectly identifying the numbers and identities of the perpetrators. In addition, a witness’s memory may be altered if he or she learns additional information about an event through the news, casual conversations, or facts gleaned during several rounds of pretrial and trial questioning. ‘These challenges mirror the evidentiary issues plaguing ICC prosecutors. Similar to ICC judges, a United States judge’s ability to discern truth and falsity when evaluating a witness may be crucial to threshold admissibility determinations.

B. Critiques of the ICC’s Evidentiary Process in Lubanga

The crime of conscripting and enlisting child soldiers under Art. 8(2)(e)(vii) of the Rome Statute was an issue of first impression for the ICC

300 Recent DNA testing indicates that nearly 80 percent of wrongful convictions in U.S. criminal cases involved errors in eyewitness testimony. See Brandon L. Garrett, Judging Innocence, 108 COLUM. L. REV. 55, 78-79 (2008).


302 The author is not making a value judgment about eyewitness testimony in domestic cases. Rather, the author has provided domestic research as a point of comparison.

303 See JOHN W. SHEPHERD ET AL., IDENTIFICATION EVIDENCE: A PSYCHOLOGICAL EVALUATION 80-86 (1982) (describing a study in which subjects’ memories declined significantly over an eleven-month period).


306 There are many opportunities for new information to alter a witness’s recollection over the course of a lengthy case. See COMBS, supra note 13, at 14-15.

307 See Hall, supra note 289, at 124.
in *Lubanga* and was therefore a critical precedent-setting decision.\(^\text{310}\) The Trial Chamber in *Lubanga* relied heavily on three SCSL cases: it applied the factors developed in the AFRC, CDF, and RUF Cases to evaluate *Lubanga* witnesses’ and intermediaries’ potential testimonial deficiencies and inconsistencies.\(^\text{311}\)

The staggering amount of evidence presented in this case—more than 1300 pieces of physical evidence, as well as testimony from more than 65 witnesses\(^\text{312}\)—overwhelmingly indicates that *Lubanga* committed the crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities under Art. 8(2)(e)(vii) of the Statute, and that *Lubanga* was individually criminally responsible as a co-perpetrator under Art. 25(a)(3) of the Statute. While the case was ultimately correctly decided, some of the Trial Chamber’s determinations about witness credibility and reliability were troublesome, and they led to the unfair exclusion of some potentially valuable witnesses and intermediaries.

As Judge Benito suggested in her dissenting opinion, many of the excluded victim-witnesses should have been permitted to participate in the trial as victims.\(^\text{313}\) The Trial Chamber’s decision to exclude victims from the proceedings was misguided for several reasons. First, trials are extreme emotionally taxing, especially on children. Individuals would not voluntarily subject themselves to this trauma unless they had true and compelling stories to tell. Second, witnesses put themselves and their families at significant risk by testifying.\(^\text{314}\) The security precautions taken by the Prosecution are not necessarily protective enough, especially once witnesses return home, since the FPLC retains a powerful presence in the DRC.\(^\text{315}\) Furthermore, these protections do not continue after the completion of the trial.\(^\text{316}\) In the meantime, witnesses’ families in the DRC are vulnerable to retribution.\(^\text{317}\) In addition, witnesses invest significant time to prepare for interviews and to provide multiple pretrial and trial statements. Finally, witnesses may face financial hardships related to travel, lodging, and meals that the ICC cannot guarantee will be fully covered.\(^\text{318}\) Agreeing to testify at an international criminal trial is not a decision that a witness would take lightly, and individuals would not assume these risks and hardships only to testify either inaccurately or deliberately falsely.

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\(^{310}\) The issue of child soldiers is one that the ICC has only tackled a few times since *Lubanga*. See, e.g., Prosecutor v. Ntaganda, ICC-01/04-02/06-2359, Judgment (July 8, 2019); Prosecutor v. Ongwen, ICC-02/04-01/15-1762, Trial Judgment (Feb. 4, 2021).

\(^{311}\) See supra Section III for a thorough description of these factors.

\(^{312}\) See Trial Chamber Judgment, supra note 1, ¶ 11.

\(^{313}\) See Separate and Dissenting Opinion of Judge Benito, supra note 182.

\(^{314}\) See Trial Chamber Judgment, supra note 1, ¶¶ 151-68.

\(^{315}\) See id.

\(^{316}\) See id.

\(^{317}\) See id.

\(^{318}\) See id. ¶¶ 198-202.
The Trial Chamber’s decision to exclude several intermediaries—as well as some of the witnesses with whom they worked, who were excluded because the Trial Chamber was concerned that the intermediaries had coached them to lie—was also concerning. The suggestion that intermediaries lied, or coached witnesses to lie, was unpersuasive. On the one hand, because the intermediaries put themselves in danger while working in the DRC, they might have sought to make the risks worthwhile. However, intermediaries are told very little about the cases on which they work, partially to minimize the likelihood that biases or ulterior motives will affect their work. Therefore, besides coaching witnesses to lie about their ages (which was not the only factor that the Trial Chamber considered in making these determinations), it would be difficult to concoct substantive lies that would significantly damage the credibility of the totality of their testimony. Furthermore, because intermediaries are not paid and are serving the ICC honorably, they might be less likely to act dishonestly.

The Trial Chamber conceded at the outset of the Lubanga trial that it would consider factors including, but not limited to, the length of time between the crimes and the trial, trauma that caused somewhat conflicting recollections, and communication barriers, among other considerations. However, some witnesses and intermediaries were excluded based on what appeared to be minor deficiencies or inconsistencies in their testimonies. Fortunately, even after excluding several witnesses and intermediaries, the Trial Chamber heard admissible testimony from more than enough Prosecution, Defense, and expert witnesses to convict Lubanga of horrific crimes against children.

The evidentiary challenges faced by ICC prosecutors persist in domestic cases as well. Judges, attorneys, and witnesses in U.S. criminal cases may face fewer language and cultural barriers (although these do exist). However, eyewitness testimony in domestic cases, while commonly used, is subject to the same deficiencies discussed in this Article in the context of ICC cases. While many legal scholars, law enforcement professionals, and attorneys concede that memory fades and can be reshaped over time, and that trauma affects a witness’s perception of the crime, judges and juries continue to find eyewitness testimony compelling. While evidentiary issues are heightened in the international context, they are by no means unique to the ICC.

While this Article did not analyze sentencing issues, it is also concerning that Lubanga only received a 14-year sentence for his heinous

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319 See id. ¶¶ 37–41.
320 See Trial Chamber Judgment, supra note 1, ¶ 180.
321 See id. ¶¶ 151–61.
322 Id. ¶ 183.
323 Id. ¶ 198.
324 See id. ¶ 11.
crimes. In fact, Lubanga’s sentence was reduced by six years because he was imprisoned during the investigation and trial. Lubanga was ordered to pay significant reparations to the Victim Compensation Fund. However, because Lubanga allegedly could not afford to pay reparations, the DRC government was asked to assist with the payments. Because the FPLC remains a significant presence in the DRC, Lubanga’s victims may never receive reparations. Perhaps some of the excluded witnesses could have provided sufficiently compelling testimony to influence the Chamber during sentencing to extend Lubanga’s term of imprisonment.

While some of the Trial Chamber’s evidentiary determinations raised significant concerns, ultimately, the Trial Chamber’s most important conclusion was that Lubanga was guilty of conscripting and enlisting child soldiers under Arts. 8(2)(e)(vii) and 25(3)(a) of the Statute.

V. CONCLUSION

ICC prosecutors in *Lubanga* tackled many evidentiary hurdles that continue to beleaguer the ICC to this day. As cases such as *Lubanga* proceed from security concerns, as well as language and cultural barriers, during the investigatory process; to miscommunication and errors during pretrial interviews; to determining witness credibility; to evaluating testimonial deficiencies and inconsistencies, it is clear that the road to an international criminal conviction is beset with challenges.

Since *Lubanga* was decided, several additional child soldier cases have been tried before the ICC. However, potential war criminals—both within and outside the DRC—continue to conscript and enlist child soldiers, often with apparent impunity. The challenges discussed in this Article persist into the third decade of the ICC’s existence. As the ICC strives to prosecute additional child soldier cases in the future, the concerns explored in this Article suggest that procedural reforms are necessary. Reforms might include hiring more experienced translators, increasing the number of investigators, and punishing witnesses who intentionally perjure themselves. The ICC might also consider a larger annual investment of resources into its investigations and prosecutions, as well as a more aggressive and dogged

325 See generally Lubanga Decision on Sentence, *supra* note 9.
326 *Id.*, ¶ 108.
327 See generally Lubanga Decision Setting Reparations, *supra* note 169.
328 See generally *id*.
330 On a larger scale, one scholar suggested that the ICC should consider the more controversial move of transitioning toward a non-adversarial process of elucidating testimony. See COMBS, *supra* note 13, at 302-04 (“Whereas, in an adversarial system, testimony is elicited through a formal interrogation, in a non-adversarial trial, witnesses convey their testimony through exchanges that bear greater resemblance to an informal conversation than a judicial interrogation.”).
approach to its cases. Regardless of whether the ICC ultimately decides to make structural changes, each judge’s ability to make both accurate determinations about witness credibility and effective rulings about admissible testimony will be critical to obtaining successful criminal convictions and to achieving justice for victims.