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**No. ICC-01/04-01/06 A 4 A 6**

**Date: 1 December 2014**

**THE APPEALS CHAMBER**

**Before:**  
**Judge Erkki Kourula, Presiding Judge**  
**Judge Sang-Hyun Song**  
**Judge Sanji Mmasenono Monageng**  
**Judge Anita Ušacka**  
**Judge Ekaterina Trendafilova**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO**

**Public document**

**Judgment**

**on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the  
“Decision on Sentence pursuant to Article 76 of the Statute”**

**Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:**

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**Legal Representatives of Victims V02**  
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Mr Paul Kabongo Tshibangu  
Mr Joseph Keta Orwinyo

**REGISTRY**

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**Registrar**  
Mr Herman von Hebel



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The Appeals Chamber of the International Criminal Court,

In the appeals of Mr Lubanga and the Prosecutor against the decision of Trial Chamber I entitled “Decision on Sentence pursuant to Article 76 of the Statute” of 10 July 2012 (ICC-01/04-01/06-2901),

After deliberation,

By majority, Judge Sang-Hyun Song partly dissenting, Judge Anita Ušacka dissenting,

*Delivers* the following

## JUDGMENT

The “Decision on Sentence pursuant to Article 76 of the Statute” is confirmed.

The Prosecutor’s and Mr Lubanga’s appeals are dismissed.

## REASONS

### I. KEY FINDINGS

1. A Trial Chamber enjoys broad discretion in determining a sentence. The sentence must be determined by weighing and balancing all the relevant factors. The weight given to an individual factor and the balancing of all relevant factors in arriving at the sentence is at the core of a Trial Chamber’s exercise of discretion. However, a Trial Chamber’s failure to consider one of the mandatory factors listed in rule 145 (1) (b) of the Rules of Procedure and Evidence can amount to a legal error in the context of challenging the Trial Chamber’s discretionary decision on sentencing.
2. With respect to appeals against sentencing decisions, the Appeals Chamber’s primary task is to review whether the Trial Chamber made any errors in sentencing the convicted person. The Appeals Chamber’s role is not to determine, on its own, which sentence is appropriate, unless it has found that the sentence imposed by the Trial Chamber is “disproportionate” to the crime. Only then can the Appeals Chamber “amend” the sentence and enter a new, appropriate sentence.
3. The Appeals Chamber will only intervene in a Trial Chamber’s exercise of its discretion in determining the sentence if: (i) the Trial Chamber’s exercise of

discretion is based on an erroneous interpretation of the law: (ii) the discretion was exercised based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber's weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion.

4. Article 83 (2) of the Statute requires that the sentence be "materially affected by error of fact or law or procedural error". The material effect of such an error is only established if the Trial Chamber's exercise of discretion led to a disproportionate sentence.

## II. BACKGROUND

### A. Procedural history<sup>1</sup>

5. On 14 March 2012, the Trial Chamber found Mr Lubanga guilty of the crimes of conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities.<sup>2</sup>

6. On 10 July 2012, having received written submissions from the parties and participants and having heard them as well as evidence related to sentencing, the Trial Chamber issued the Sentencing Decision, imposing a joint sentence of fourteen years imprisonment.<sup>3</sup>

7. On 3 October 2012, the Prosecutor and Mr Lubanga filed their respective notices of appeal<sup>4</sup> and, on 3 December 2012, they filed their respective documents in support of their appeals against the Sentencing Decision.<sup>5</sup>

8. On 13 December 2012, the Appeals Chamber rendered the Victim Participation Decision in which it, *inter alia*: (i) held that the 120 victims who participated in the trial sentencing proceedings and "whose right to participate in the proceedings was not withdrawn" "may participate in the appeal proceedings against the Sentencing

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<sup>1</sup> A more detailed procedural history is set out in Annex 3 to the *Lubanga* Conviction Judgment. The full citation, including the ICC registration reference, of all designations and abbreviations used in this judgment are included in Annex 2.

<sup>2</sup> [Conviction Decision](#), para. 1358.

<sup>3</sup> [Sentencing Decision](#), paras 3, 5, 8, 11, 98-99.

<sup>4</sup> [Prosecutor's Notice of Appeal A 4](#); [Mr Lubanga's Notice of Appeal A 6](#).

<sup>5</sup> [Prosecutor's Document in Support of the Appeal A 4](#); [Mr Lubanga's Document in Support of the Appeal A 6](#).

Decision”;<sup>6</sup> (ii) invited the Legal Representatives of Victims V01 and Victims V02 to file, by 4 February 2013, their consolidated observations on Mr Lubanga’s and the Prosecutor’s documents in support of their appeals;<sup>7</sup> and (iii) invited Mr Lubanga and the Prosecutor to each file a consolidated response to the Legal Representatives of Victims V01’s and V02’s consolidated observations by 4 April 2013.<sup>8</sup>

9. On 21 December 2012, in response to Mr Lubanga’s First Additional Evidence Request,<sup>9</sup> the Appeals Chamber issued the Additional Evidence Directions pursuant to regulation 62 of the Regulations of the Court, in which it, *inter alia*, extended the page limit for: (i) each of the Prosecutor’s responses to Mr Lubanga’s documents in support of his appeals;<sup>10</sup> (ii) the Legal Representatives of Victims V01’s and Victims V02’s consolidated observations;<sup>11</sup> and (iii) Mr Lubanga and the Prosecutor’s responses to those observations.<sup>12</sup>

10. On 4 February 2013, the Prosecutor<sup>13</sup> and Mr Lubanga<sup>14</sup> filed their respective responses to the documents in support of the appeals against the Sentencing Decision.

11. Also on 4 February 2013, the Legal Representatives of Victims V01 filed their consolidated observations to the documents in support of the appeals against the Sentencing Decision, to which they filed a corrigendum on 11 February 2013 in order to correct certain errors in the original filing.<sup>15</sup>

12. On 5 February 2013, the Legal Representatives of Victims V02 filed a request for an extension of time for the filing of their consolidated observations.<sup>16</sup> After the time for the filing of any response from the parties to the request had expired,<sup>17</sup> the

<sup>6</sup> [Victim Participation Decision](#), paras 3-4.

<sup>7</sup> [Victim Participation Decision](#), pages 3-4, para. 5.

<sup>8</sup> [Victim Participation Decision](#), page 4, para. 5.

<sup>9</sup> The Appeals Chamber notes that, while the [First Additional Evidence Request](#) was filed in relation to both the Conviction and Sentencing Decisions appeals, the additional evidence relates only to grounds of appeal raised in the Conviction Decision and was found to be inadmissible. *See Lubanga* Conviction Judgment, Section V (Mr Lubanga’s Additional Evidence Requests and Additional Ground of Appeal).

<sup>10</sup> [Additional Evidence Directions](#), para. 9.

<sup>11</sup> [Additional Evidence Directions](#), para. 10.

<sup>12</sup> [Additional Evidence Directions](#), para. 10.

<sup>13</sup> [Prosecutor’s Response to the Document in Support of the Appeal A 6](#).

<sup>14</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#).

<sup>15</sup> [Observations of Legal Representatives of Victims V01; Annex 1 to Observations of Legal Representatives of Victims V01](#).

<sup>16</sup> [Legal Representatives of Victims V02’s Time Extension Request](#).

<sup>17</sup> *See* [Order on the Legal Representatives of Victims V02’s Time Extension Request](#).

Appeals Chamber rendered the Decision on the Legal Representatives of Victims V02's Time Extension Request in which it granted, pursuant to regulation 35 (2) of the Regulations of the Court, an extension of time to 7 February 2013.<sup>18</sup> On 7 February 2013, the Legal Representatives of Victims V02 filed their consolidated observations and, on the following day, filed a corrigendum thereto.<sup>19</sup>

13. On 15 February 2013, Mr Lubanga filed his Request for Leave to file a Reply to the Prosecutor's responses to his documents in support of the appeals against the Conviction and Sentencing Decisions.<sup>20</sup> On 20 February 2013, the Prosecutor responded to Mr Lubanga's Request for Leave to file a Reply, opposing the request.<sup>21</sup> On 21 February 2013, the Appeals Chamber issued the Order on the Filing of a Reply, in which it granted Mr Lubanga's request and ordered him to file his reply by 28 February 2013,<sup>22</sup> which he subsequently did.<sup>23</sup>

14. On 6 March 2013, the Prosecutor filed the Prosecutor's Request, in which she requested that the Appeals Chamber strike "supplementary factual allegations" made in Mr Lubanga's Reply to the Response to the Document in Support of the Appeals A 4 A 5 or alternatively, for leave to respond to the new argument.<sup>24</sup> On 12 March 2013, Mr Lubanga filed his Response to the Prosecutor's Request.<sup>25</sup> On 26 March 2013, the Appeals Chamber rejected the Prosecutor's Request.<sup>26</sup>

15. On 4 April 2013, the Prosecutor and Mr Lubanga filed their responses to the observations of the V01 and V02 Legal Representatives.<sup>27</sup> Therein, Mr Lubanga requests that the observations that do not relate to the personal interests of the victims, be rejected *in limine*.<sup>28</sup>

## B. The Sentencing Decision

16. In the Sentencing Decision, the Trial Chamber stated:

<sup>18</sup> [Decision on the Legal Representatives of Victims V02's Time Extension Request](#), para. 5.

<sup>19</sup> [Observations of the Legal Representatives of Victims V02](#).

<sup>20</sup> [Mr Lubanga's Request for Leave to file a Reply](#).

<sup>21</sup> [Prosecutor's Response to Mr Lubanga's Request to file a Reply](#).

<sup>22</sup> [Order on the Filing of a Reply](#), para. 7.

<sup>23</sup> [Mr Lubanga's Reply to the Response to the Document in Support of the Appeals A 4 A 5](#).

<sup>24</sup> [Prosecutor's Request](#), para. 10.

<sup>25</sup> [Mr Lubanga's Response to the Prosecutor's Request](#).

<sup>26</sup> [Decision on the Prosecutor's Request](#), page 3, para. 8.

<sup>27</sup> [Prosecutor's Response to Victims' Observations; Mr Lubanga's Response to Victims' Observations](#).

<sup>28</sup> [Mr Lubanga's Response to Victims Observations](#), page 16, para. 7.

In considering the purposes of punishment at the ICC, the Chamber has taken into account the Preamble of the Statute, which provides that “the most serious crimes of concern to the international community as a whole must not go unpunished”. The Preamble further provides that the States Parties are “[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”. The ICC was established “to these ends and for the sake of present and future generations”.<sup>29</sup> [Footnotes omitted.]

17. The Trial Chamber then set out the statutory framework for sentencing<sup>30</sup> and established the following “preliminary considerations”: (i) evidence submitted for purposes of sentencing may exceed the facts and circumstances set out in the Decision on the Confirmation of Charges;<sup>31</sup> (ii) the standard of proof for aggravating circumstances is “beyond a reasonable doubt”;<sup>32</sup> (iii) mitigating circumstances are not limited to the facts and circumstances described in the Decision on the Confirmation of Charges;<sup>33</sup> (iv) the standard of proof for mitigating circumstances is a “balance of the probabilities”;<sup>34</sup> and (v) any factors taken into account when assessing the gravity of the crime are not to be taken into account as aggravating circumstances and *vice versa*, which it referred to as “double counting”.<sup>35</sup>

18. In respect of the factor of the “gravity of the crime”, the Trial Chamber held that conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities are “very serious crimes” and that the “vulnerability of children means that they need to be afforded particular protection”.<sup>36</sup> In this context, the Trial Chamber discussed the risks of negative physical and mental effects on children used in hostilities<sup>37</sup> and stated that recruitment can cause “potentially serious trauma [...], including separating children from their families, interrupting or

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<sup>29</sup> [Sentencing Decision](#), para. 16.

<sup>30</sup> [Sentencing Decision](#), paras 17-26.

<sup>31</sup> [Sentencing Decision](#), paras 27-31.

<sup>32</sup> [Sentencing Decision](#), para. 33.

<sup>33</sup> [Sentencing Decision](#), para. 34.

<sup>34</sup> [Sentencing Decision](#), para. 34.

<sup>35</sup> [Sentencing Decision](#), para. 35, referring to [M. Nolić Sentencing Appeal Judgment](#), para. 58 where the Appeals Chamber referred to the notion of double-counting of factors that are taken into account twice by a Trial Chamber in its assessment of the gravity of the crimes and the aggravating circumstances. *See also* [Sentencing Decision](#), paras 51, 78.

<sup>36</sup> [Sentencing Decision](#), para. 37.

<sup>37</sup> [Sentencing Decision](#), paras 38-42.

disrupting their schooling and exposing them to an environment of violence and fear.”<sup>38</sup> The Trial Chamber<sup>39</sup> went on to state that

[a]gainst this general background the Chamber has considered the gravity of these crimes in the circumstances of this case, with regard, *inter alia*, to the extent of the damage caused, and in particular “the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.” [Footnote omitted.]<sup>40</sup>

19. The Trial Chamber evaluated the widespread nature of the crimes for which Mr Lubanga was convicted and determined, by reference to the Conviction Decision, that “recruitment by the UPC/FPLC of young people, including children under 15, was widespread, that a significant number of children were used as military guards and as escorts or bodyguards [...], and that children under 15 years of age were used by the UPC/FPLC in hostilities”.<sup>41</sup> The Trial Chamber stated that, while it had not reached conclusions beyond reasonable doubt regarding the precise number of recruits who were under fifteen years, it, “in passing sentence, has reflected its determination that the involvement of children was widespread”.<sup>42</sup>

20. With respect to “the degree of participation and intent” of Mr Lubanga, the Trial Chamber found that

[he] agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. The Chamber did not conclude that Mr Lubanga meant to conscript and enlist boys and girls under the age of 15 into the UPC/FPLC and to use them to participate actively in hostilities. Instead, the Chamber decided Mr Lubanga was aware that, in the ordinary course of events, this would occur.<sup>43</sup>

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<sup>38</sup> [Sentencing Decision](#), para. 38.

<sup>39</sup> By majority, Judge Odio Benito dissenting.

<sup>40</sup> [Sentencing Decision](#), para. 44. Judge Odio Benito opined that despite the majority’s statement that it had considered the harm caused to the victims and their families, it had, in fact, “subsequently disregard[ed] this fundamental factor which shall be considered” and only considered three of the factors contained in rule 145 (1) (c) of the Rules of Procedure and Evidence, namely the nature of the crimes committed, the degree of participation and intent of the convicted person, and the individual circumstances of the convicted person. [Dissenting Opinion of Judge Odio Benito](#), para. 5, citing [Sentencing Decision](#), paras 45-46.

<sup>41</sup> [Sentencing Decision](#), para. 49.

<sup>42</sup> [Sentencing Decision](#), para. 50.

<sup>43</sup> [Sentencing Decision](#), para. 52.

21. As to Mr Lubanga's degree of participation, the Trial Chamber quoted paragraph 1356 of the Conviction Decision, which summarises "the key factors" establishing Mr Lubanga's participation and held that it provided "an important foundation" for the determination of the sentence by the Trial Chamber:<sup>44</sup>

Thomas Lubanga was the President of the UPC/FPLC, and the evidence demonstrates that he was simultaneously the Commander-in-Chief of the army and its political leader. He exercised an overall coordinating role over the activities of the UPC/FPLC. He was informed, on a substantive and continuous basis, of the operations of the FPLC. He was involved in planning military operations, and he played a critical role in providing logistical support, including as regards weapons, ammunition, food, uniforms, military rations and other general supplies for the FPLC troops. He was closely involved in making decisions on recruitment policy and he actively supported recruitment initiatives, for instance by giving speeches to the local population and the recruits. In his speech at the Rwampara camp, he encouraged children, including those under the age of 15 years, to join the army and to provide security for the populace once deployed in the field following their military training. Furthermore, he personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC members of staff who were below the age of 15. The Chamber has concluded that these contributions by Thomas Lubanga, taken together, were essential to a common plan that resulted in the conscription and enlistment of girls and boys below the age of 15 into the UPC/FPLC and their use to actively participate in hostilities.<sup>45</sup>

22. Regarding the "individual circumstances" of Mr Lubanga, the Trial Chamber found that he was "intelligent and well-educated" and therefore understood the "seriousness of the crimes" for which he was convicted. The Trial Chamber held that his "marked level of awareness" was a relevant factor in determining the sentence.<sup>46</sup>

23. The Trial Chamber considered as aggravating circumstances punishment, sexual violence, the particular defencelessness of the victims of the crime, and discriminatory motive and concluded that none of these aggravating circumstances were established.<sup>47</sup> Additionally, the Trial Chamber rejected the Prosecutor's argument to consider Mr Lubanga's position as President and commander-in-chief of the UPC as an aggravating circumstance, finding that for purposes of sentence it could

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<sup>44</sup> [Sentencing Decision](#), paras 52-53.

<sup>45</sup> See [Sentencing Decision](#), para. 52, citing [Conviction Decision](#), para. 1356.

<sup>46</sup> [Sentencing Decision](#), para. 56.

<sup>47</sup> [Sentencing Decision](#), paras 57, 59, 68-75, 78, 81.

not be “double-counted” as his position within the UPC/FPLC was already evaluated in the context of the factor of Mr Lubanga’s “degree of participation”.<sup>48</sup>

24. The Trial Chamber further found that Mr Lubanga’s “notable cooperation with the Court”, particularly in the “aftermath” of certain “onerous” circumstances attributable to the Prosecutor constituted a mitigating circumstance.<sup>49</sup>

25. Based on the above, the Trial Chamber<sup>50</sup> sentenced Mr Lubanga: (i) for conscripting children under the age of fifteen to thirteen years of imprisonment; (ii) for enlisting children under the age of fifteen to twelve years of imprisonment; and (iii) for using children under the age of fifteen to participate actively in hostilities to fourteen years of imprisonment.<sup>51</sup> On the basis of these individual sentences and pursuant to article 78 (3) of the Statute, the Trial Chamber imposed a joint sentence of fourteen years of imprisonment.<sup>52</sup>

26. The Trial Chamber ordered that the time that Mr Lubanga had spent in detention since his arrest on 16 March 2006 until the date of the Sentencing Decision be deducted from the joint sentence.<sup>53</sup> The Trial Chamber rejected Mr Lubanga’s contentions that the sentence be reduced. First, with respect to the request that the time spent in house arrest and detention by the DRC authorities between 2003 and 2006 should be deducted from the sentence imposed, it held that “there is insufficient evidence that Mr Lubanga was detained in the DRC for conduct underlying the crimes for which he was convicted at the Court”.<sup>54</sup> Second, with respect to the reduction of sentence based on the “alleged violations of his fundamental rights during the trial” due to various acts of the Prosecutor, the Trial Chamber stated that it had already considered and rejected these allegations in the Stay of Proceedings Decision and that, “in any event”, they did not merit a reduction of the sentence.<sup>55</sup> Finally, the Trial

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<sup>48</sup> [Sentencing Decision](#), paras 51-52.

<sup>49</sup> [Sentencing Decision](#), para. 91.

<sup>50</sup> By majority, Judge Odio Benito dissenting.

<sup>51</sup> [Sentencing Decision](#), para. 98. Judge Odio Benito would have sentenced Mr Lubanga to fifteen years for each crime, with a joint sentence of fifteen years. [Dissenting Opinion of Judge Odio Benito](#), paras 3, 26-27.

<sup>52</sup> [Sentencing Decision](#), paras 99, 107.

<sup>53</sup> [Sentencing Decision](#), para. 108.

<sup>54</sup> [Sentencing Decision](#), paras 101-102.

<sup>55</sup> [Sentencing Decision](#), paras 89-90.

Chamber considered it “inappropriate to impose a fine” in addition to the term of imprisonment.<sup>56</sup>

### C. Overview of the Sentencing Appeals A 4 and A 6

27. Mr Lubanga raises the following four grounds of appeal: (i) errors of law and fact by the Trial Chamber in its assessment of the “large-scale and widespread” nature of the crimes for which he was convicted in relation to the gravity of the crimes;<sup>57</sup> (ii) errors of law and fact by the Trial Chamber in not taking into account violations of Mr Lubanga’s fundamental rights in determining the sentence;<sup>58</sup> (iii) error of fact by the Trial Chamber in applying article 78 (2) of the Statute and by failing to deduct the period Mr Lubanga spent in detention in the DRC from 13 August 2003 until 16 March 2006;<sup>59</sup> and (iv) error of law by the Trial Chamber in finding that it could consider evidence that exceeded the facts and circumstances set out in the Decision on the Confirmation of Charges for purposes of sentencing.<sup>60</sup>

28. Mr Lubanga requests that the Appeals Chamber set aside the Sentencing Decision or in the alternative, reduce the sentence imposed by the Trial Chamber.<sup>61</sup>

29. The Prosecutor raises the following three grounds of appeal: (i) the manifestly disproportionate sentence due to the Trial Chamber’s failure to adequately consider all the relevant factors and impose a sentence that was commensurate to the gravity of the crimes for which Mr Lubanga was convicted;<sup>62</sup> (ii) the Trial Chamber’s failure to consider Mr Lubanga’s abuse of authority and trust as an aggravating factor;<sup>63</sup> and (iii) error of law in applying the wrong test for aggravating factors or, in the alternative, error of fact in reaching unreasonable findings based on the evidence.<sup>64</sup> The Prosecution requests that the Appeals Chamber increase the sentence.<sup>65</sup>

30. The Prosecutor and Mr Lubanga’s arguments are addressed in turn in sections IV and IV below.

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<sup>56</sup> [Sentencing Decision](#), paras 105-106.

<sup>57</sup> [Mr Lubanga’s Document in Support of the Appeal A 6](#), paras 2-25.

<sup>58</sup> [Mr Lubanga’s Document in Support of the Appeal A 6](#), paras 26-79.

<sup>59</sup> [Mr Lubanga’s Document in Support of the Appeal A 6](#), paras 80-96.

<sup>60</sup> [Mr Lubanga’s Document in Support of the Appeal A 6](#), paras 97-108.

<sup>61</sup> [Mr Lubanga’s Document in Support of the Appeal A 6](#), page 29.

<sup>62</sup> [Prosecutor’s Document in Support of the Appeal A 4](#), paras 20-55.

<sup>63</sup> [Prosecutor’s Document in Support of the Appeal A 4](#), paras 56-66.

<sup>64</sup> [Prosecutor’s Document in Support of the Appeal A 4](#), paras 67-93.

<sup>65</sup> [Prosecutor’s Document in Support of the Appeal A 4](#), para. 96.

### III. THE APPLICABLE LAW

#### A. Sentencing at the trial stage of proceedings

Article 76 of the Statute, entitled “Sentencing”, provides, in relevant part:

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

Article 77, entitled “Applicable penalties”, provides, in relevant part:

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of the Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

31. Article 78 of the Statute and rule 145 of the Rules of Procedure and Evidence, both entitled “Determination of the sentence”, set out the legal requirements for determining a sentence. They provide that:

#### **Article 78 of the Statute**

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

#### **Rule 145 of the Rules of Procedure and Evidence**

1. In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall:

(a) Bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 must reflect the culpability of the convicted person;

(b) Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime;

(c) In addition to the factors mentioned in article 78, paragraph 1, give consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

2. In addition to the factors mentioned above, the Court shall take into account, as appropriate:

(a) Mitigating circumstances such as:

(i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;

(ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court;

(b) As aggravating circumstances:

(i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;

(ii) Abuse of power or official capacity;

(iii) Commission of the crime where the victim is particularly defenceless;

(iv) Commission of the crime with particular cruelty or where there were multiple victims;

(v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3;

(vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

3. Life imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances.

32. Read together with the Preamble to the Rome Statute, these provisions establish a comprehensive scheme for the determination and imposition of a sentence. For purposes of “determining the sentence”, article 78 (1) of the Statute requires that a Trial Chamber consider “such factors as the gravity of the crime and the individual circumstances of the convicted person”. Rule 145 (1) (c) of the Rules of Procedure and Evidence requires, “[i]n addition to the factors mentioned” in article 78 (1) of the Statute, that the Trial Chamber give consideration to a non-exhaustive list of additional factors.<sup>66</sup> Furthermore, rule 145 (2) of the Rules of Procedure and Evidence requires a Trial Chamber, to take into account, “as appropriate” “[i]n addition to the factors mentioned” in rule 145 (1) (c) of the Rules of Procedure and Evidence, the factors of any mitigating and aggravating circumstances.<sup>67</sup>

33. Once all of the relevant factors have been identified and taken into account, rule 145 (1) (b) of the Rules of Procedure and Evidence requires that a Trial Chamber “[b]alance all the relevant factors” and pronounce a sentence. Article 78 (3) provides that, if the person is convicted of more than one crime, the Trial Chamber “shall pronounce a sentence for each crime”, as well as “a joint sentence specifying the total period of imprisonment”, which cannot be less than the highest individual sentence. Additionally, rule 145 (1) (a) of the Rules of Procedure and Evidence contains the overarching requirement that “the totality of any sentence [...] must reflect the culpability of the convicted person”.

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<sup>66</sup> The Appeals Chamber notes that the terminology used in rule 145 (1) (c) of the Rules of Evidence and Procedure could potentially raise questions as to whether these provisions contain mandatory factors or have some other undefined status. Read in isolation, rule 145 (1) (c) of the Rules of Procedure and Evidence could be interpreted as meaning that there are two mandatory factors to be considered pursuant to article 78 (1) of the Statute (“gravity of the crime” and “individual circumstances of the convicted person”) and that the list of rule 145 (1) (c) of the Rules of Procedure and Evidence, while also required to be “given consideration to”, are essentially additional undefined “considerations”. However, the Appeals Chamber considers that, when the different provisions of rule 145 (1) of the Rules of Procedure and Evidence are read together, it is clear that the list in paragraph (c) refers to “factors”. Rule 145 (2) of the Rules of Procedure and Evidence states, in relevant part: “[i]n addition to *the factors* mentioned above [...]” (emphasis added). Therefore, the Appeals Chamber considers that the factors “mentioned above” are those listed in rule 145 (1) (c) of the Rules of Procedure and Evidence.

<sup>67</sup> Similar to the discussion contained in the above footnote, the Appeals Chamber notes that rule 145 (1) (b) of the Rules of Procedure and Evidence states that, in determining the sentence, a Trial Chamber must “[b]alance all the relevant factors, including any mitigating and aggravating *factors*” (emphasis added). The Appeals Chamber is of the view that this clarifies that mitigating and aggravating circumstances, pursuant to rule 145 (2) of the Rules of Procedure and Evidence, are considered as “factors”.

34. The Appeals Chamber considers that the above provisions indicate that, in order to determine a sentence, the Trial Chamber, based on its intimate knowledge of the case, will have to balance all factors it considers relevant. Therefore, the Trial Chamber's determination involves an exercise of discretion with the aim to impose a proportionate sentence that reflects the culpability of the convicted person.

35. Finally, once the sentence has been imposed, article 78 (2) of the Statute requires the deduction of any time that the convicted person spent in detention upon an order of the Court. The Court "may" deduct time during which the convicted person was "otherwise" detained "in connection with conduct underlying the crime".

### **B. Standard of review**

36. Bearing in mind the character of sentencing decisions made under article 76 of the Statute, the Appeals Chamber will now address the standard of review for appeals against decisions on sentencing.

37. Article 81 (2) (a) of the Statute provides:

a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;

38. Article 83 (2) and (3) of the Statute provides in relevant part:

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

a) Reverse or amend the decision or sentence; [...]

When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

39. At the outset, the Appeals Chamber notes that article 83 (2) and (3) of the Statute clarifies that, with respect to appeals against sentencing decisions, the Appeals Chamber's primary task is to review whether the Trial Chamber made any errors in

sentencing the convicted person. The Appeals Chamber's role is not to determine, on its own, which sentence is appropriate, unless – as stipulated in article 83 (3) of the Statute – it has found that the sentence imposed by the Trial Chamber is “disproportionate” to the crime. Only then can the Appeals Chamber “amend” the sentence and enter a new, appropriate sentence.

40. Furthermore, as set out in the previous section, the Trial Chamber's main task is to weigh the relevant factors in order to determine a sentence that reflects the culpability of the convicted person. The Court's legal texts do not lay down any explicit requirements for how the factors should be balanced. As noted above, the Appeals Chamber considers that the Trial Chamber has broad discretion in the determination of a sentence. In this regard, the Appeals Chamber notes that article 81 (2) (a) of the Statute states that a decision on sentence can only be appealed on the ground that there is “disproportion between the crime and the sentence”. The drafting history reveals that delegates considered including the qualifiers of “significantly” or “manifestly disproportionate”, but ultimately rejected them.<sup>68</sup> Proportionality is generally measured by the degree of harm caused by the crime and the culpability of the perpetrator<sup>69</sup> and, in this regard, relates to the determination of the length of sentence. While proportionality is not mentioned as a principle in article 78 (1) of the Statute, rule 145 (1) of the Rules of Procedure and Evidence provides guidance on how the Trial Chamber should exercise its discretion in entering a sentence that is proportionate to the crime and reflects the culpability of the convicted person.

41. In respect of discretionary decisions, the Appeals Chamber has held in relation to appeals raised pursuant to article 82 (1) of the Statute:

79. The Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre-Trial Chamber.

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<sup>68</sup> R. Roth and M. Henzelin, “The Appeal Procedure of the ICC”, in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford University Press, 2002), page 545.

<sup>69</sup> [A.M. Danner, “Constructing a Hierarchy of Crimes in International Criminal Law Sentencing”, 87, \*Virginia Law Review\* \(May 2001\), page 415.](#), at pages 437-438.

80. [...] [T]he Appeals Chamber's functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion [...], save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.<sup>70</sup> [Footnotes omitted.]

42. The Appeals Chamber considers that the above standard of review also applies to sentencing decisions. With respect to legal errors, the Appeals Chamber recalls that rule 145 of the Rules of Procedure and Evidence provides the overall framework for a Trial Chamber's determination of a proportionate sentence<sup>71</sup> and, within this framework, rule 145 (1) (b) of the Rules of Procedure and Evidence states that the Court "shall" balance all of the relevant factors in determining the sentence. Thus, a Trial Chamber's failure to consider one of the mandatory factors listed in rule 145 (1) (b) of the Rules of Procedure and Evidence can amount to a legal error<sup>72</sup> in the context of challenging the Trial Chamber's discretionary decision on sentencing.

43. The Appeals Chamber recalls that rule 145 (1) (a) of the Rules of Procedure and Evidence requires that "the totality of any sentence [...] must reflect the culpability of the convicted person". The Appeals Chamber recalls that a Trial Chamber determines the sentence by weighing and balancing all the relevant factors. The Appeals Chamber considers that the weight given to an individual factor<sup>73</sup> and the balancing of

<sup>70</sup> [Kony et al. OA 3 Judgment](#), paras 79-80. See also [Ruto et al. OA Judgment](#), paras 89-90.

<sup>71</sup> See *supra* para. 40.

<sup>72</sup> See [Karemera et al. Decision on Judicial Notice](#), para. 23: "the general rule that the Trial Chamber has discretion in those areas is superseded by the specific, mandatory language of Rule 94(A) [of the ICTR Rules of Procedure and Evidence]; [...]. For these reasons, a Trial Chamber's decision whether to take judicial notice of a relevant fact under Rule 94(A) is subject to *de novo* review on appeal" (footnotes omitted).

<sup>73</sup> See, in this context, [Zelenović Sentencing Appeal Judgment](#), para. 24; [AFRC Appeal Judgment](#), para. 314; [Milošević Appeal Judgment](#), para. 316: "what constitutes a mitigating circumstance is a matter for the Trial Chamber to determine in the exercise of its discretion. The Trial Chamber is endowed with a considerable degree of discretion in making this determination, as well as in deciding how much weight, if any, to be accorded to the mitigating circumstances identified" (footnotes omitted).

all relevant factors is at the core of a Trial Chamber's exercise of discretion as the court of first instance.

44. Thus, the Appeals Chamber's review of a Trial Chamber's exercise of its discretion in determining the sentence must be deferential and it will only intervene if: (i) the Trial Chamber's exercise of discretion is based on an erroneous interpretation of the law; (ii) the discretion was exercised based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber's weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion.

45. Finally, Article 83 (2) of the Statute requires that the sentence be "materially affected by error of fact or law or procedural error". The Appeals Chamber considers that the material effect of such an error is only established if the Trial Chamber's exercise of discretion led to a disproportionate sentence.

46. The Appeals Chamber notes that the above standard of review applicable to a Trial Chamber's determination of sentence is similar to the standard of review applied by other international tribunals. The Appeals Chamber notes that the ICTY/ICTR and SCSL Appeals Chambers review sentencing decisions as discretionary decisions<sup>74</sup> and that these Appeals Chambers will only revise a sentence where the Trial Chamber has committed a "discernible error" in exercising its discretion.<sup>75</sup>

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<sup>74</sup> [Blagojević and Jokić Appeal Judgment](#), para 321: "Trial Chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualize penalties to fit the circumstances of the accused and the gravity of the crime. As a rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law. It is for the appealing party to demonstrate how the Trial Chamber erred in imposing the sentence" (footnotes omitted). See also [Dorđević Appeal Judgment](#), para. 932; [Strugar Appeal Judgment](#), para. 336; [Deronjić Sentencing Appeal Judgment](#), para. 8; [Babić Sentencing Appeal Judgment](#), para. 7; *D. Nikolić Sentencing Appeal Judgment*, para. 9; *Delalić et al. Appeal Judgment*, paras 716-717; [Ndindiliyimana et al. Appeal Judgment](#), para. 418; [Nahimana et al. Appeal Judgment](#), para. 1037; [Kayishema and Ruzindana Appeal Judgment](#), para. 320; [Musema Appeal Judgment](#), para. 15.

<sup>75</sup> To show a discernible error, the appellant must "demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly" (footnote omitted). [Milošević Appeal Judgment](#), para. 297; [Mrkšić and Šljivančanin Appeal Judgment](#), para. 353; [Babić Sentencing Appeal Judgment](#), para. 44. See also [AFRC Appeal Judgment](#), para. 309.

47. In the next two sections, the Appeals Chamber will consider the arguments raised in the Prosecutor's and Mr Lubanga's appeals pursuant to this standard of review.

48. However, as a preliminary issue relevant to both appeals, the Appeals Chamber notes that the Prosecutor argues that some of Mr Lubanga's arguments should be rejected *in limine* because they do not arise from the Sentencing Decision and should be considered only in the context of the *Lubanga* Conviction Judgment.<sup>76</sup> With respect to Mr Lubanga's appeal against the Sentencing Decision, the Prosecutor argues that Mr Lubanga must demonstrate an error arising out of the Sentencing Decision and that whether the Trial Chamber made factual and legal errors in the Conviction Decision "is, in principle, immaterial for the purposes of the instant appeal".<sup>77</sup>

49. In the present case, the arguments raised by Mr Lubanga that are based on findings from the Conviction Decision fall into two categories: those which raise alleged legal and factual errors for the first time and those which incorporate grounds of appeal from his Document in Support of the Appeal A 5.<sup>78</sup> With respect to the latter category, having already considered these arguments in the *Lubanga* Conviction Judgment,<sup>79</sup> the Appeals Chamber will not re-consider its conclusions on these arguments in the present judgment. Therefore, Mr Lubanga's arguments in this regard will not be addressed.

50. In respect of Mr Lubanga's arguments which challenge findings in the Conviction Decision that are raised for the first time in the present appeals, the Appeals Chamber will consider these arguments on an individual basis and declines, as requested by the Prosecutor, to decide in the abstract whether they can be considered in the context of the present appeals.

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<sup>76</sup> [Prosecutor's Response to the Document in Support of the Appeal A 6](#), para. 17.

<sup>77</sup> [Prosecutor's Response to the Document in Support of the Appeal A 6](#), para. 17.

<sup>78</sup> [Mr Lubanga's Document in Support of the Appeal A 6](#), paras 12-18; [Mr Lubanga's Document in Support of the Appeal A 5](#), paras 124-325 (Part II).

<sup>79</sup> *Lubanga* Conviction Judgment, Sub-Sections IX. A (Alleged Errors in Establishing the Age Element of the Crimes of Enlistment, Conscription and Use to Participate Actively in Hostilities), B. (Alleged Errors in the Findings on the Conscription of Children Under the Age of Fifteen Years into the UPC/FPLC), C. (Alleged Errors in the Findings on the Use of Children Under the Age of Fifteen Years to Participate Actively in Armed Hostilities).

## IV. THE PROSECUTOR'S APPEAL A 4

### **A. Ground 1: Manifestly disproportionate sentence due to the alleged failure to consider all the relevant factors regarding the gravity of the crimes**

51. The Prosecutor submits that the Trial Chamber failed to give sufficient weight to the “gravity of the crime” pursuant to article 78 (1) of Statute and in particular, it did not adequately consider certain factors listed in rule 145 (c) (1) of the Rules of Evidence of Procedure in that assessment, resulting in a disproportionate sentence.<sup>80</sup> In that regard, the Prosecutor argues that the Trial Chamber did not adequately consider the following factors of rule 145 (1) (c) of the Rules of Procedure and Evidence: (i) the harm caused to the victims and their families; (ii) the nature of the unlawful behaviour and Mr Lubanga's degree of participation in the crimes; (iii) the means employed by Mr Lubanga to execute the crimes; and (iv) the circumstances of manner, time and location.<sup>81</sup> In addition, she argues that the sentence given is disproportionate to that imposed in similar cases at the SCSL.<sup>82</sup>

52. Mr Lubanga submits that the Trial Chamber's sentencing determination is discretionary and that the Prosecutor has not shown that the Trial Chamber erred in its discretion.<sup>83</sup>

#### *1. Inadequate consideration of factors*

##### **(a) Submissions of the parties**

53. In respect of the harm to the victims and their families, the Prosecutor argues that the Trial Chamber failed to consider that the UPC/FPLC chose particularly dangerous ways to use young children, such as in the frontlines of battles,<sup>84</sup> and even favoured such use because of the children's inherent immaturity and reduced appreciation of dangers, thus subjecting them to a higher risk of death or injury than adult soldiers,<sup>85</sup> resulting in the actual violent death of some of them on the battlefield.<sup>86</sup> She also submits that the Trial Chamber failed to recognise the effects,

<sup>80</sup> [Prosecutor's Document in Support of the Appeal A 4](#), paras 23-26.

<sup>81</sup> [Prosecutor's Document in Support of the Appeal A 4](#)., paras 27-44.

<sup>82</sup> [Prosecutor's Document in Support of the Appeal A 4](#)., paras 45-55.

<sup>83</sup> [Mr Lubanga's Response to the Document in Support of the Appeal A 4](#), paras 2-3.

<sup>84</sup> [Prosecutor's Document in Support of the Appeal A 4](#)., para. 27.

<sup>85</sup> [Prosecutor's Document in Support of the Appeal A 4](#)., paras 28-29.

<sup>86</sup> [Prosecutor's Document in Support of the Appeal A 4](#)., para. 30.

both physical and psychological, on former child soldiers, of their enlistment and use in hostilities, and did not adequately appreciate the significance of the testimony of the Prosecutor's expert witnesses in this respect.<sup>87</sup> Finally, the Prosecutor contends that the Trial Chamber failed to consider the very young age of some of the recruits, who could be as young as five years old and generally were "as young as 9".<sup>88</sup>

54. In respect of the nature of the unlawful behaviour and the degree of Mr Lubanga's participation in the crimes, the Prosecutor argues that the Trial Chamber failed to give sufficient weight to the nature of Mr Lubanga's unlawful behaviour on his sentence, which was "at the heart" of the crimes he was convicted for.<sup>89</sup> The Prosecutor further submits that the Trial Chamber failed to consider the seriousness of Mr Lubanga's "zealous determination to persevere with the criminal behaviour against all constraints", which in her view is supported by the fact that not only child soldiers' recruitment continued regardless of the repeated external pressure from international organisations but, in addition, the UPC/FPLC threatened demobilisation workers and attempted to impede the work of NGOs focussed on demobilisation.<sup>90</sup>

55. In respect of the means employed by Mr Lubanga to execute the crimes, the Prosecutor argues that the Trial Chamber failed to sufficiently capture the gravity of Mr Lubanga's intensified recruitment campaigns where families were forced to surrender their young children, were threatened if they refused to do so and were repeatedly pursued for the same children even after their demobilisation.<sup>91</sup>

56. In respect of circumstances of manner, time and location, the Prosecutor contends that while the Trial Chamber noted that the involvement of children under fifteen years was 'widespread', it failed to adequately consider the fact that the crimes for which Mr Lubanga was convicted were "prolonged in time, extended in territory and they were widespread".<sup>92</sup> According to her, the large-scale nature of the commission of the crimes is illustrated, *inter alia*, by (i) the "significant number of

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<sup>87</sup> [Prosecutor's Document in Support of the Appeal A 4.](#), paras 31-34.

<sup>88</sup> [Prosecutor's Document in Support of the Appeal A 4.](#), para. 35.

<sup>89</sup> [Prosecutor's Document in Support of the Appeal A 4.](#), para. 36.

<sup>90</sup> [Prosecutor's Document in Support of the Appeal A 4.](#), para. 37.

<sup>91</sup> [Prosecutor's Document in Support of the Appeal A 4.](#), paras 38-40.

<sup>92</sup> [Prosecutor's Document in Support of the Appeal A 4.](#), para. 41.

children under 15” which were part of the UPC/FPLC army and (ii) the numerous and repeated instances of recruitment and use of child soldiers.<sup>93</sup>

57. In response, in respect of the harm to victims and their families, Mr Lubanga submits that all harm identified by the Prosecutor was considered by the Trial Chamber.<sup>94</sup> Further, he argues that the Trial Chamber’s statement that “the age of the children does not both define the gravity of the crime and act as an aggravating factor” implicitly acknowledges that it considered the age of the victims in assessing the gravity of the crimes and that this is also the case in respect of the harm and trauma suffered by child soldiers.<sup>95</sup> Mr Lubanga strongly disputes that the FPLC favoured the recruitment and use of children under the age of fifteen years or that it chose to use them in particularly dangerous ways.<sup>96</sup> Finally, he argues that the claim that many of the child soldiers were especially young is unfounded.<sup>97</sup>

58. In respect of the nature of the unlawful behaviour and his degree of participation in the crimes, Mr Lubanga submits that the Prosecutor’s submissions are unfounded.<sup>98</sup> First, Mr Lubanga argues that the Trial Chamber did in fact expressly emphasise the weight given to Mr Lubanga’s role and functions in determining the sentence.<sup>99</sup> He contends that the Prosecutor’s submission that he “encouraged” families to provide children, especially young ones to join the army misrepresents the Trial Chamber’s findings and is not supported by the evidence.<sup>100</sup> Mr Lubanga further argues that the Prosecutor’s argument that he “zealously” recruited children under the age of fifteen years is unfounded.<sup>101</sup> In respect of allegedly repeatedly pressuring NGOs and his “zealous determination to persevere with the criminal behaviour”, Mr Lubanga submits that these are “fresh arguments” and are, as such, inadmissible.<sup>102</sup> Finally, he argues that there is no evidence to indicate that he himself

<sup>93</sup> [Prosecutor’s Document in Support of the Appeal A 4](#), paras 42-44.

<sup>94</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), para. 6.

<sup>95</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), para. 7, referring to [Sentencing Decision](#), para. 78.

<sup>96</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), paras 8, 12-14.

<sup>97</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), paras 15-20.

<sup>98</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), paras 21-22.

<sup>99</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), para. 23.

<sup>100</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), para. 28.

<sup>101</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), para. 29.

<sup>102</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), para. 30, referring to [Prosecutor’s Document in Support of the Appeal A 4](#), para. 37.

deliberately impeded the work of the NGOs and, contrary to the Trial Chamber's findings, he did sincerely attempt to demobilise child soldiers.<sup>103</sup>

59. In respect of the means employed by Mr Lubanga to execute the crimes, Mr Lubanga submits that the length of the sentence imposed for the crime of conscription demonstrates that, contrary to the Prosecutor's argument, the Trial Chamber gave "decisive" consideration to the fact that enlistment of children under the age of fifteen years was the result of pressurised recruitment campaigns on the population.<sup>104</sup> In this context, he argues that the Trial Chamber erred in law in finding that the mobilisation campaigns were directed at pressuring the local population for the recruitment of young children.<sup>105</sup>

60. In respect of circumstances of manner, time and location, Mr Lubanga argues that contrary to the Prosecutor's assertion, the Trial Chamber held him responsible for the widespread commission of the crimes charged.<sup>106</sup> He further submits that the recruitment of children under the age of fifteen years.<sup>107</sup> He adds that the Prosecutor misconstrues the evidence regarding the proportion of children in the UPC/FPLC.<sup>108</sup>

#### **(b) Determination of the Appeals Chamber**

61. The Appeals Chamber considers that the Prosecutor's arguments raise the issue of the potential interaction between the factors of article 78 (1) of the Statute and those of rule 145 (1) (c) of the Rules of Procedure and Evidence, which is not addressed in the Court's legal texts. While this issue is not specifically raised in the present appeals against the Sentencing Decision, the Appeals Chamber notes that the Prosecutor's first ground of appeal is based on the argument that the Trial Chamber incorrectly assessed the "gravity of the crime" pursuant to article 78 (1) of the Statute *because* the Trial Chamber allegedly did not give adequate weight to certain factors listed in rule 145 (c) (1) of the Rules of Evidence of Procedure in that assessment.<sup>109</sup> In the Appeals Chamber's view, the Court's legal texts provide for several potential

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<sup>103</sup> [Mr Lubanga's Response to the Document in Support of the Appeal A 4](#), paras 31-32.

<sup>104</sup> [Mr Lubanga's Response to the Document in Support of the Appeal A 4](#), para. 35.

<sup>105</sup> [Mr Lubanga's Response to the Document in Support of the Appeal A 4](#), paras 36-38.

<sup>106</sup> [Mr Lubanga's Response to the Document in Support of the Appeal A 4](#), para. 40.

<sup>107</sup> [Mr Lubanga's Response to the Document in Support of the Appeal A 4](#), para. 41, referring to [Mr Lubanga's Document in Support of the Appeal A 6](#), paras 2-25.

<sup>108</sup> [Mr Lubanga's Response to the Document in Support of the Appeal A 4](#), paras 42-49.

<sup>109</sup> *See e.g.* [Prosecutor's Document in Support of the Appeal A 4](#), para. 23.

interpretations of the interaction between the factors of article 78 (1) of the Statute and those of rule 145 (1) (c) of the Rules of Evidence and Procedure.

62. The Appeals Chamber considers that it could be concluded that the factors of “the gravity of the crimes” and “the individual circumstances of the convicted person” set out in article 78 (1) of the Statute are separate from those listed in rule 145 (1) (c) the Rules of Procedure and Evidence. This would imply that the “gravity of the crime” would be determined *in abstracto*.<sup>110</sup> Under this interpretation, the factors of rule 145 (1) (c) of the Rules of Procedure and Evidence would be assessed separately from the factors of article 78 (1) of the Statute. The Appeals Chamber notes that this interpretation is supported by the text of article 78 (1) of the Statute, which provides, in relevant part, that the Court shall take into account “*such factors as [...]*” (emphasis added), which implies that it was envisioned that additional, separate factors would also be taken into account. It is also supported by a plain reading of rule 145 (1) (c) of the Rules of Procedure and Evidence, which begins with “*in addition to* the factors mentioned in article 78 [...]” (emphasis added).

63. As a variation of the above approach and based on the statutory language, the Appeals Chamber considers that it would also be possible to conclude that some of the factors of rule 145 (1) (c) of the Rules of Procedure and Evidence are subsumed by the factors set out in article 78 (1) of the Statute, but others remain separate factors.

64. The Appeals Chamber considers that, alternatively, the factors listed in rule 145 (1) (c) of the Rules of Procedure and Evidence could be seen as part of, and must be taken into account for the purpose of assessing, the factors of article 78 (1) of the Statute. In this respect, these factors could be said to provide the meaning and scope of the factors of article 78 (1) of the Statute. The Appeals Chamber considers that this interpretation is supported by taking into account the substance of the factors in rule 145 (1) (c) of the Rules of Procedure and Evidence. In this respect, article 78 (1) of the Statute requires that the “individual circumstances of the convicted person” be considered. Rule 145 (1) (c) of the Rules of Procedure and Evidence requires that consideration be given to, *inter alia*, “the degree of

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<sup>110</sup> See, for a discussion of the two forms of “gravity of the crime”, namely *in abstracto* and *in concreto*, [B. Holá, A. Smeulers and C. Bijleveld, “International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR”, 9 Journal of International Criminal Justice \(2011\), page 411, at pages 423-427.](#)

participation of the convicted person; the degree of intent; [...] and the age, education, social and economic condition of the convicted person”. The Appeals Chamber notes that it is difficult to discern the meaning of the “individual circumstances of the convicted person” if it is wholly distinct from what is listed under rule 145 (1) (c) of the Rules of Procedure and Evidence.

65. The Appeals Chamber notes that this last interpretation appears to be in line with the Trial Chamber’s approach. In the Sentencing Decision, the Trial Chamber stated that it “ha[d] considered the gravity of these crimes in the circumstances of this case” and then enumerated the factors of rule 145 (1) (c) of the Rules of Procedure and Evidence as what it had given “regard” to in making this assessment.<sup>111</sup>

66. The Appeals Chamber considers that it is not necessary in the context of the present appeals to determine which of the possible approaches to the interaction between the factors of article 78 (1) of the Statute and those of rule 145 (1) (c) of the Rules of Procedure and Evidence is correct. In the Appeals Chamber’s view, regardless of which interpretation is followed, the issue is whether the Trial Chamber considered all the relevant factors and made no error in the weighing and balancing exercise of these factors in arriving at the sentence. For purposes of the Prosecutor’s appeal against the Sentencing Decision, the Appeals Chamber will examine whether the Trial Chamber erred in its assessment of the relevant factors as argued by the Prosecutor.

67. As a separate matter, the Appeals Chamber notes that certain of Mr Lubanga’s arguments have already been considered and decided upon in the *Lubanga* Conviction Judgment.<sup>112</sup> As set out above, the Appeals Chamber will not re-address alleged errors or arguments already decided upon in the *Lubanga* Conviction Judgment.

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<sup>111</sup> [Sentencing Decision](#), para. 44. The Appeals Chamber also notes that Judge Odio Benito stated that all of the factors listed in rule 145 (1) (c) of the Rules of Procedure and Evidence “are to be taken into account when assessing the *gravity of the crime*” (emphasis added). See Dissenting Opinion of Judge Odio Benito, para. 23.

<sup>112</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), paras 42-49. The Appeals Chamber has addressed these arguments in the *Lubanga* Conviction Judgment in Sub-Sections IX. A. to C. (see *supra* footnote 79). For example, Mr Lubanga refers to his arguments raised against the [Conviction Decision](#) regarding the prejudice occasioned by the admission of certain parts of Witness P-0046’s testimony. See [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), para. 44, referring to [Mr Lubanga’s Document in Support of his Appeal A 5](#), paras 196-204.

68. Turning to the merits, the Appeals Chamber is not persuaded by the Prosecutor's arguments. The Appeals Chamber recalls that, at paragraph 44 of the Sentencing Decision, the Trial Chamber stated that it "ha[d] considered the gravity of these crimes in the circumstances of this case" and then enumerated the factors of rule 145 (1) (c) of the Rules of Procedure and Evidence which it had given "regard" to in making this assessment. The Appeals Chamber is therefore satisfied that the Trial Chamber considered all of the factors listed in rule 145 (1) (c) of the Rules of Procedure and Evidence in its assessment of the "gravity of the crime" factor under article 78 (1) of the Statute.

69. The Appeals Chamber notes that, while the Trial Chamber elaborated on aspects of some of the mandatory factors,<sup>113</sup> it did not explain the weight given to the other mandatory factors considered in paragraph 44 of the Sentencing Decision. The Trial Chamber also did not indicate in the Sentencing Decision which specific evidence it relied on for its assessment.<sup>114</sup> The Appeals Chamber finds that although the Trial Chamber did not specifically address a particular aspect of the evidence relevant to its assessment of a factor pursuant to rule 145 (1) (c) of the Rules of Procedure and Evidence, the Trial Chamber considered such evidence when assessing the relevant factor.

70. In this regard, the Appeals Chamber observes that the Trial Chamber's conclusions on the factors discussed in the Sentencing Decision are footnoted to the sections of the Conviction Decision, where it made its overall conclusions with respect to the crimes for which Mr Lubanga was convicted.<sup>115</sup> These conclusions are based on findings and supporting evidence thereto established in other sections of the Conviction Decision.<sup>116</sup> This indicates that the Trial Chamber took into account all of

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<sup>113</sup> [Sentencing Decision](#), paras 45-56, where the Trial Chamber assessed the "[l]arge-scale and widespread nature of the crimes committed", "[d]egree of participation and intent of the convicted person", and "[i]ndividual circumstances of the convicted person.

<sup>114</sup> See [Sentencing Decision](#), paras 44, 49, 52, 56.

<sup>115</sup> See [Sentencing Decision](#), para. 49, wherein the Trial Chamber's conclusion as to the widespread nature of the crimes is footnoted to paragraphs 857, 911, and 915 of the [Conviction Decision](#), which are the Trial Chamber's overall conclusions on enlistment, conscription and the use to participate actively in hostilities of individuals below the age of fifteen; para. 52, wherein the Trial Chamber's conclusion regarding Mr Lubanga's degree of participation and intent is footnoted to paragraphs 1271 to 1279, 1351, 1356, and 1357, which are the Trial Chamber's overall conclusions on Mr Lubanga's individual criminal liability.

<sup>116</sup> See e.g. [Conviction Decision](#), paras 911 (relying on, *inter alia*, evidence of witnesses P-0055, P-0017, P-0014, and documentary evidence), 915 (relying on, *inter alia*, evidence of witnesses P-0002,

the relevant findings and related evidence underpinning its overall conclusions in the Conviction Decision for purposes of determining Mr Lubanga's sentence. For that reason, the Appeals Chamber considers that it does not follow that when, for example, the Trial Chamber did not specifically address, in the Sentencing Decision, the evidence pertaining to the re-recruitment of children after their demobilisation, it did not take into account that evidence when assessing the factor of Mr Lubanga's means to execute the crimes for which he was convicted.

71. The Appeals Chamber notes that when the Sentencing Decision is read in the context of the overall conclusions of the Conviction Decision as regards enlistment and conscription of children under the age of fifteen years into the UPC/FPLC, and taking into account the finding on witness P-0024's testimony which underpins these conclusions and which relates to the re-recruitment of children under the age of fifteen years,<sup>117</sup> it is clear that the Trial Chamber, while not expressly addressing the aspect of re-recruitment, did consider this finding and the relevant evidence when assessing the means used by Mr Lubanga to execute the crimes. Similarly, the fact that interference with the NGO's demobilisation work was discussed in the Conviction Decision in the context of the demobilisation efforts<sup>118</sup> indicates that the Trial Chamber was aware thereof, and did take into account, this particular aspect of the evidence. The Appeals Chamber is therefore satisfied that the Trial Chamber was fully cognisant of the evidence that had been placed before it, irrespective of whether it has been specifically addressed in the Sentencing Decision.

72. However, the Appeals Chamber considers that the fact that *certain aspects* of the relevant evidence were not expressly addressed does indicate that they were not considered to be of particular significance to the assessment of the relevant factor. The issue therefore for the Appeals Chamber is whether the Trial Chamber gave adequate weight to the requisite factors, considering the evidence pointed out by the Prosecutor as being particularly significant. In this regard, the Appeals Chamber

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P-0016, P-0017, P-0024, P-0030, P-0038, P-0046, D-0019, D-0037, video excerpt EVD-OTP-00572, EVD-OTP-00571, EVD-OTP-00574).

<sup>117</sup> See [Conviction Decision](#), para. 912.

<sup>118</sup> [Conviction Decision](#), paras 1283-1290.

recalls that it will only intervene if the Trial Chamber's exercise of its discretion in this regard was so unreasonable as to constitute an abuse of discretion.<sup>119</sup>

73. Having reviewed the evidence to which the Prosecutor points as well as the sentence imposed on Mr Lubanga, the Appeals Chamber finds that the Trial Chamber's exercise of its discretion was not unreasonable. The Appeals Chamber considers that it properly weighed and balanced all the relevant factors in imposing a sentence that reflects Mr Lubanga's culpability, as required by rule 145 (1) (a) of the Rules of Procedure and Evidence.<sup>120</sup> Thus, the Appeals Chamber finds that despite not explicitly referring in the Sentencing Decision to the evidence pointed to by the Prosecutor, the Trial Chamber did not err in the weight given to these factors. Accordingly, the Prosecutor's arguments in this regard are dismissed.

2. *Disproportionate to other sentences imposed*

(a) **Submissions of the parties**

74. The Prosecutor submits that while each case has its own specific features, "two accused convicted of similar crimes in similar circumstances" are not expected in principle to receive widely different sentences.<sup>121</sup> Based on domestic and international case law, and specifically by comparing Mr Lubanga's case with the SCSL *RUF* case, the Prosecutor argues that, in contrast with the Trial Chamber's approach, the SCSL attached a "particular high gravity to the crime of enlistment and use of children in hostilities, attracting enhanced punishment".<sup>122</sup> The Prosecutor therefore argues that, in comparison to the sentence imposed by the SCSL, the sentence imposed on Mr Lubanga "is manifestly inadequate in its disregard for criteria by which the sentence should be assessed" and the inconsistency between the two sentences is excessive.<sup>123</sup>

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<sup>119</sup> *Supra* para. 44.

<sup>120</sup> *Supra* para. 43.

<sup>121</sup> [Prosecutor's Document in Support of the Appeal A 4](#), para. 45.

<sup>122</sup> [Prosecutor's Document in Support of the Appeal A 4](#), paras 46-54.

<sup>123</sup> [Prosecutor's Document in Support of the Appeal A 4](#), para. 53. The Prosecutor indicates that the two senior RUF commanders, Mr Issa Hassan Sesay and Mr Moris Kallon were sentenced respectively to 50 and 35 years of imprisonment. See [Prosecutor's Document in Support of the Appeal A 4](#), para. 52.

75. Mr Lubanga submits that the Prosecutor disregards the principle of individualised sentences.<sup>124</sup> Mr Lubanga highlights the factual disparities between his case and the *RUF* case,<sup>125</sup> and argues that such disparities “preclude any transplantation to the case at bar”.<sup>126</sup> Mr Lubanga also disputes the comparison of his case with a recent English case, arguing that the factual situation “differs wholly from the circumstances of the instant case”.<sup>127</sup>

### (b) Determination of the Appeals Chamber

76. The Appeals Chamber is not persuaded by the Prosecutor’s arguments. The Appeals Chamber notes that the ICTY Appeals Chamber has held that, while recognising that “[a] previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances”, any assistance may be limited, given the Trial Chamber’s overriding obligation to tailor a penalty to fit the gravity of the crime and the individual circumstances of the accused.<sup>128</sup> This obligation to individualise the sentence means that “it is frequently impossible to transpose the sentence in one case *mutatis mutandis* to another”.<sup>129</sup> Consequently, “previous sentencing practice is but one factor among a host of others which must be taken into account when determining the sentence”.<sup>130</sup>

77. The Appeals Chamber finds that the approach of the ICTY Appeals Chamber is persuasive in this respect. According to the Court’s provisions, the sentence must be “appropriate” and must be based on all the relevant factors of the specific case.<sup>131</sup> This makes it difficult, at the least, to infer from the sentence that was imposed in one

<sup>124</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), paras 52-54.

<sup>125</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), paras 55-61, referring to [Prosecutor’s Document in Support of the Appeal A 4](#), para. 47.

<sup>126</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), para. 59.

<sup>127</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), para. 62.

<sup>128</sup> [Furundžija Appeal Judgment](#), para. 250; [Delalić et al. Appeal Judgment](#), paras 719 (“[...] as a general principle such comparison is often of limited assistance. While [the Appeals Chamber] does not disagree with a contention that it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results”), 720; [Strugar Appeal Judgment](#), paras 348 (“The Appeals Chamber has held that sentences of like individuals in like cases should be comparable. While similar cases do not provide a legally binding tariff of sentences, they can be of assistance in sentencing if they involve the commission of the same offences in substantially similar circumstances”), 349.

<sup>129</sup> [Strugar Appeal Judgment](#), para. 348.

<sup>130</sup> [Strugar Appeal Judgment](#), para. 349.

<sup>131</sup> See article 76 (1) and 78 of the Statute.

case the appropriate sentence in another case. Further, the Appeals Chamber considers that the value of other sentencing practices is even lower when the reference is to the sentencing practices of another tribunal, as opposed to that of a Trial Chamber of the Court. This is because, even though there are similarities in the sentencing provisions of the Court and those of other international criminal courts and tribunals, the Court has to apply, in the first place, its own Statute and legal instruments.<sup>132</sup> The Appeals Chamber thus considers that the Prosecutor has not identified any error in the Trial Chamber's approach to Mr Lubanga's sentence and her argument in this regard is accordingly dismissed.

## **B. Ground 2: Alleged failure to consider Mr Lubanga's abuse of authority and trust as an aggravating circumstance**

### *1. Submissions of the parties*

78. The Prosecutor submits that the Trial Chamber committed an error of law in failing to consider the abuse of authority or trust either as an aggravating factor or as part of the gravity of the crime.<sup>133</sup> The Prosecutor argues that the Trial Chamber was required under rule 145 (2) (b) (ii) of the Rules of Procedure and Evidence to give consideration to the aggravating circumstance of "abuse of power or official capacity".<sup>134</sup> She argues that this factor pertains to the betrayal of public trust or "abuse of authority", and is as such distinct from the other mandatory factor of the degree of participation of the convicted person, and the degree of intent, pursuant to rule 145 (1) (c) of the Rules of Procedure and Evidence, which solely pertains to the accused's role or "position of authority".<sup>135</sup> In the circumstances, the Prosecutor argues that Mr Lubanga abused his authority as President of the UPC/FPLC and the population's trust and that such abuse constitutes a serious and significant aggravating factor.<sup>136</sup>

79. Mr Lubanga argues that, contrary to the Prosecutor's submissions, the Trial Chamber expressed on numerous occasions the importance it attached to the position

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<sup>132</sup> See article 21 (1) of the Statute.

<sup>133</sup> [Prosecutor's Document in Support of the Appeal A 4](#), para. 56.

<sup>134</sup> [Prosecutor's Document in Support of the Appeal A 4](#), para. 57.

<sup>135</sup> [Prosecutor's Document in Support of the Appeal A 4](#), paras 58-60.

<sup>136</sup> [Prosecutor's Document in Support of the Appeal A 4](#), paras 62-66.

he held within the UPC.<sup>137</sup> Similarly, he claims that it would be unfair to consider this as an aggravating factor given that it has already been taken into account, and further points out that rule 145 (2) (b) of the Rules of Procedure and Evidence solely requires the Court to take into account, “as appropriate”, aggravating circumstances.<sup>138</sup> Mr Lubanga also submits that the Prosecutor failed to demonstrate his “deliberate and criminal use” of his position and a direct form of criminal intent, which in his view is necessary to prove an “abuse” of authority.<sup>139</sup> Mr Lubanga further contends that the Prosecutor misconstrues the evidence submitted at trial, and fails to substantiate in any way her submission that Mr Lubanga abused his position of trust and authority.<sup>140</sup> Mr Lubanga finally argues that the Prosecutor refers to certain pieces of evidence for the first time before the Appeals Chamber and therefore such new submissions should be ruled as inadmissible.<sup>141</sup>

## 2. *Determination of the Appeals Chamber*

80. The Trial Chamber’s findings at issue are as follows:

51. The prosecution has advanced submissions on the extent of the participation of Mr Lubanga and nature of his intent. The prosecution also argues that his position as President and commander-in-chief of the UPC constitutes an aggravating circumstance. As set out above, the Chamber stresses that these factors should not be “double-counted” for the purposes of sentence.

52. [...] The Chamber has summarised the key factors establishing Mr Lubanga’s participation, as follows:

Thomas Lubanga was the President of the UPC/FPLC, and the evidence demonstrates that he was simultaneously the Commander-in-Chief of the army and its political leader. He exercised an overall coordinating role over the activities of the UPC/FPLC. He was informed, on a substantive and continuous basis, of the operations of the FPLC. He was involved in planning military operations, and he played a critical role in providing logistical support, including as regards weapons, ammunition, food, uniforms, military rations and other general supplies for the FPLC troops. He was closely involved in making decisions on recruitment policy and he actively supported recruitment initiatives, for instance by giving speeches to the local population and the recruits. In his speech at the Rwampara camp, he encouraged children, including those under the age of 15 years, to join the army and to provide security for the populace once deployed in

<sup>137</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), para. 64.

<sup>138</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), paras 65-66, 72-73.

<sup>139</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), paras 67-69.

<sup>140</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), paras 70-71.

<sup>141</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), para. 73.

the field following their military training. Furthermore, he personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC members of staff who were below the age of 15. The Chamber has concluded that these contributions by Thomas Lubanga, taken together, were essential to a common plan that resulted in the conscription and enlistment of girls and boys below the age of 15 into the UPC/FPLC and their use to actively participate in hostilities.

53. These conclusions have provided an important foundation for the sentence to be passed by the Chamber. [Footnotes omitted.]<sup>142</sup>

81. The Appeals Chamber notes that the Trial Chamber took Mr Lubanga's position as President and commander-in-chief of the UPC into account to establish the degree of his participation in the crimes for which he was convicted.<sup>143</sup> Further, rule 145 (2) (b) (ii) of the Rules of Procedure and Evidence requires a Chamber to take into account, as appropriate, abuse of power or official capacity as an aggravating circumstance.

82. The first question is therefore whether the consideration of Mr Lubanga's abuse of power in accordance with rule 145 (2) (b) (ii) of the Rules of Procedure and Evidence entails more than the simple consideration of his *position* of authority. In this respect, the Appeals Chamber of the ICTY and the ICTR has determined that "[a] high rank in the military or political field does not, in itself, merit a harsher sentence. But a person who abuses or wrongly exercises power deserves a harsher sentence. Consequently, what matters is not the position of authority taken alone, but that position coupled with the manner in which the authority is exercised" (footnotes omitted).<sup>144</sup> The Appeals Chamber endorses this approach and considers that the two concepts are indeed distinct.

83. In this regard, the Trial Chamber expressly noted the Prosecutor's contention regarding Mr Lubanga's position as "President and commander-in-chief" of the UPC/FPLC, which was raised by the Prosecutor as an "[a]buse of power or official authority".<sup>145</sup> The Appeals Chamber considers that this indicates that (i) the Trial Chamber was cognisant of the Prosecutor's request to consider the abuse of

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<sup>142</sup> [Sentencing Decision](#), paras 51-53, referring to [Conviction Decision](#), para. 1356.

<sup>143</sup> [Sentencing Decision](#), paras 52, 97.

<sup>144</sup> [Babić Sentencing Appeal Judgment](#), para. 80. See also [Ndindabahizi Appeal Judgment](#), para. 136; [Deronjić Sentencing Appeal Judgment](#), para. 67.

<sup>145</sup> [Sentencing Decision](#), para. 51, referring to [Prosecutor's Sentence Request](#), para. 37.

Mr Lubanga's authority and not only his position of authority taken alone as an aggravating factor and (ii) it did in fact take this into account in its assessment of the degree of Mr Lubanga's participation in the crimes.<sup>146</sup>

84. A review of the relevant portion of the Sentencing Decision indicates that the Trial Chamber took into account the fact that Mr Lubanga "encouraged children, including those under the age of 15 years, to join the army and to provide security for the populace", "personally used children below the age of 15 amongst his bodyguards" and "regularly saw guards of other UPC/FPLC members of staff who were below the age of 15".<sup>147</sup> The Appeals Chamber notes that the Prosecutor formulated similar arguments to establish Mr Lubanga's degree of participation in the crimes but also, more importantly, to support her submissions that Mr Lubanga had abused his power.<sup>148</sup> In addition, among the key factors set forth by the Trial Chamber to establish Mr Lubanga's participation, the Trial Chamber listed Mr Lubanga's exercise of an overall coordinating role over the activities of the UPC/FPLC as well as the constant information he was provided with on the operations of the FPLC, which are factors that are also found in the Prosecutor's submissions in relation to Mr Lubanga's alleged abuse of power.<sup>149</sup> Therefore, the Appeals Chamber finds that the language used by the Trial Chamber demonstrates that not only Mr Lubanga's position of authority, but also the manner in which his authority was exercised, were taken into account.<sup>150</sup>

85. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber did not err in not taking into account Mr Lubanga's abuse of power as an aggravating factor when it had already considered it in its assessment of the gravity of the crime.<sup>151</sup> The Prosecutor's arguments are accordingly dismissed.

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<sup>146</sup> [Sentencing Decision](#), para. 51.

<sup>147</sup> [Sentencing Decision](#) para. 52, citing [Conviction Decision](#), para. 1356.

<sup>148</sup> [Prosecutor's Document in Support of the Appeal A 4](#), paras 64-65; [Prosecutor's Sentence Request](#), para. 28.

<sup>149</sup> [Sentencing Decision](#), para. 52; [Prosecutor's Sentence Request](#), para. 37.

<sup>150</sup> The Appeals Chamber notes that it is not uncommon to find in the jurisprudence of the *ad hoc* tribunals references to an accused's position of leadership or authority as an aggravating factor where in fact it is clear from the overall reasoning of the Trial Chamber that what has been considered is the manner in which that particular accused used his authority, *i.e.*, the actual abuse of authority, and not the position of authority itself. *See e.g.* [Obrenović Sentencing Judgment](#), paras 99-100.

<sup>151</sup> [Sentencing Decision](#), para. 51.

### **C. Ground 3: Alleged error regarding the test for aggravating circumstances and alleged errors in the assessment of the evidence**

#### *1. Submissions of the parties*

86. The Prosecutor submits that the Trial Chamber erred in law in holding that cruel treatment, in the form of punishment, and sexual violence were not aggravating factors because there was no proof beyond reasonable doubt that Mr Lubanga knew or intended that those harmful events would occur.<sup>152</sup> According to the Prosecutor, the Trial Chamber applied the wrong test in requiring, for the purposes of assessing aggravating circumstances, the same nexus that would be required for the purposes of convicting the accused.<sup>153</sup> She argues that, in the context of sentencing, it is sufficient to show that those circumstances are a direct and objectively foreseeable consequence of the crimes committed, regardless of whether the accused in fact intended or even contemplated those consequences.<sup>154</sup> The Prosecutor argues that, in the circumstances, cruel treatment and sexual violence were a direct and foreseeable consequence of Mr Lubanga's crimes and that they did occur regularly over the period of the charges.<sup>155</sup> Further, the Prosecutor contends that, even if the Appeals Chamber were to accept the legal test as articulated by the Trial Chamber, the Trial Chamber erred in fact, in that it was proven beyond reasonable doubt that Mr Lubanga was aware that cruel treatment and sexual violence would occur in the ordinary course of events and that, given his personal authority over the activities of his militia, he must have known of their occurrence.<sup>156</sup>

87. Mr Lubanga submits that cruel treatment and sexual violence constitute offences that are separate from the crimes Mr Lubanga was convicted for, and that crimes not included in the Decision on the Confirmation of Charges may not be raised as aggravating factors.<sup>157</sup> Mr Lubanga argues further that the attribution of aggravating factors must be appraised in light of the Court's "culpability" principles pursuant to which a person shall be criminally liable for punishment 'only if the

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<sup>152</sup> [Prosecutor's Document in Support of the Appeal A 4](#), paras 67-68, 72.

<sup>153</sup> [Prosecutor's Document in Support of the Appeal A 4](#), para. 71.

<sup>154</sup> [Prosecutor's Document in Support of the Appeal A 4](#), paras 72-77.

<sup>155</sup> [Prosecutor's Document in Support of the Appeal A 4](#), paras 78-80.

<sup>156</sup> [Prosecutor's Document in Support of the Appeal A 4](#), paras 81-93.

<sup>157</sup> [Mr Lubanga's Response to the Document in Support of the Appeal A 4](#), paras 76-78.

material elements are committed with intent and knowledge’ and that these general principles were accurately taken into account by the Trial Chamber.<sup>158</sup> Mr Lubanga contends that, for the purpose of assessing whether or not cruel treatment and sexual violence were aggravating factors, the Trial Chamber did not require a higher *mens rea* requirement than for the purpose of assessing the gravity of the crime and that in fact, in relying on the concept of *dolus eventualis*, the Trial Chamber applied a test that was identical to or even more restrictive than the Prosecution’s foreseeability test.<sup>159</sup> Mr Lubanga further contends that the crimes of cruel treatment and sexual violence cannot be considered as the direct and foreseeable consequences of the crime of enlistment in that the two sets of crimes “are wholly independent and have no constituent element in common”, and that it was not established that cruel treatment and sexual violence were the direct and foreseeable consequences of the common plan.<sup>160</sup> Regarding the alleged factual errors of the Trial Chamber, Mr Lubanga submits that, contrary to the Prosecutor’s assertion, it was not established that soldiers younger than fifteen years were subjected to cruel treatment and sexual violence during the material time, let alone that Mr Lubanga was aware that such acts occurred in the ordinary course of events.<sup>161</sup>

## 2. *Determination of the Appeals Chamber*

88. The Appeals Chamber is not persuaded by the Prosecutor’s arguments. The Appeals Chamber notes that the Trial Chamber, in order to determine whether both the aggravating factors of cruel treatment and sexual violence were established, considered whether it was satisfied beyond reasonable doubt, that: (i) child soldiers were subjected to sexual violence or punishment; and (ii) those factors could be attributed to Mr Lubanga in a way that reflects his culpability.<sup>162</sup>

89. The Trial Chamber responded in the negative to both questions. First, having reviewed the evidence presented at trial on these issues,<sup>163</sup> the Trial Chamber concluded that it was unable to establish beyond reasonable doubt that such conducts

<sup>158</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), para. 81.

<sup>159</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), paras 82-84.

<sup>160</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), paras 85-89.

<sup>161</sup> [Mr Lubanga’s Response to the Document in Support of the Appeal A 4](#), paras 92-109.

<sup>162</sup> [Sentencing Decision](#), para. 69.

<sup>163</sup> [Sentencing Decision](#), footnote 98, paras 70-74.

occurred in the ordinary course of the implementation of the common plan.<sup>164</sup> Secondly, the Trial Chamber determined that nothing suggested intent, awareness or *any* other form of culpability on the part of Mr Lubanga.<sup>165</sup>

90. The Appeals Chamber notes that a review of the Sentencing Decision reveals that the Trial Chamber not only considered whether the evidence demonstrated that Mr Lubanga intended or was aware of the alleged aggravating circumstances, but also whether they (i) occurred “in the ordinary course of the crimes for which Mr Lubanga has been convicted” or (ii) could otherwise be attributable to him “in a way that reflects his culpability”.<sup>166</sup> Therefore, contrary to the Prosecutor’s submissions, absent proof of intent or knowledge, the Trial Chamber would still have had a basis for attributing the aggravating factors to Mr Lubanga, had *any* element of culpability, covering a broad range of possibilities from objective foreseeability to intent, been established beyond reasonable doubt. The Appeals Chamber accordingly finds that the Prosecution mischaracterises the legal test and standard applied by the Trial Chamber.

91. While the Trial Chamber did not expressly state which nexus shall apply, the Appeals Chamber considers that this does not need to be determined in order to resolve this ground of appeal because, irrespective of what the standard should be, it would have no impact on the Trial Chamber’s conclusion as based on its findings, the lower standard was not met. The Appeals Chamber accordingly dismisses the Prosecutor’s argument in that regard.

92. Turning to the alleged factual errors of the Trial Chamber, the Prosecutor submits that the Trial Chamber’s findings were unreasonable because: (i) it was entirely foreseeable to any reasonable person that cruel treatment, in the form of punishment/harsh discipline and sexual violence would occur as a result of the enlistment, conscription and use of children; and (ii) that evidence accepted by the Trial Chamber demonstrated that punishment and sexual violence occurred regularly during the period of the charges.<sup>167</sup> In addition, the Prosecutor contends that, contrary to the Trial Chamber’s findings, it was proven beyond reasonable doubt that

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<sup>164</sup> [Sentencing Decision](#), para. 74.

<sup>165</sup> [Sentencing Decision](#), paras 59, 74.

<sup>166</sup> [Sentencing Decision](#), paras 59, 74.

<sup>167</sup> [Prosecutor’s Document in Support of the Appeal A 4](#), paras 78-80.

Mr Lubanga was aware that cruel treatment and sexual violence would occur in the ordinary course of events and that, given his personal authority over the activities of his militia, he must have known of their occurrence.<sup>168</sup>

93. The Appeals Chamber considers that it was not unreasonable for the Trial Chamber to conclude that the link between Mr Lubanga and the alleged aggravating factors, “in the context of the charges, has not been established beyond reasonable doubt”.<sup>169</sup> The Trial Chamber’s conclusion was based on the underlying evidence introduced during the trial on this issue.<sup>170</sup> Given the standard of review regarding factual assessments, the Appeals Chamber finds that the Prosecutor has not demonstrated that no reasonable trier of fact could have reached this conclusion. The Prosecutor’s arguments in this respect are rejected.

## V. MR LUBANGA’S APPEAL A 6

94. With respect to Mr Lubanga’s request that the Observations of the Legal Representatives of Victims V01 and V02 related to the appropriate sentence be dismissed *in limine*, the Appeals Chamber recalls that it has addressed this argument in the *Lubanga* Conviction Judgment.<sup>171</sup> The Appeals Chamber’s finding therein applies to the present appeal and the Appeals Chamber therefore will not address Mr Lubanga’s request further.

### A. Ground 1: Alleged errors in the assessment of the “large-scale and widespread” nature of the crimes

#### 1. Submissions of the parties

95. Mr Lubanga argues that by referring to the “recruitment and participation of ‘children’”, the Trial Chamber included children over the age of fifteen years in its factual finding regarding the “widespread” nature of the crimes for which he was convicted and thereby erred in law because it took into account non-criminal acts.<sup>172</sup>

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<sup>168</sup> [Prosecutor’s Document in Support of the Appeal A 4](#), paras 81-93.

<sup>169</sup> [Sentencing Decision](#), para. 75. *See also* Sentencing Decision, para. 59.

<sup>170</sup> [Sentencing Decision](#), footnote 98, paras 70-74.

<sup>171</sup> *See Lubanga* Conviction Judgment, paras 35-36.

<sup>172</sup> [Mr Lubanga’s Document in Support of the Appeal A 6](#), paras 2-6, referring to [Sentencing Decision](#), paras 49-50.

He argues that this legal error materially affected the Sentencing Decision because it was considered for the length of the sentence imposed.<sup>173</sup>

96. In respect of the errors of fact, Mr Lubanga refers to arguments raised in his appeal against the Conviction Decision to challenge the evidence presented at trial, requesting that his arguments be examined *mutatis mutandis*.<sup>174</sup> He argues that the remaining evidence does not demonstrate widespread recruitment, but rather shows that the “proportion was small in comparison to the number of FPLC soldiers as a whole”.<sup>175</sup>

97. The Prosecutor responds that Mr Lubanga’s allegation of error regarding the Trial Chamber’s conclusions on the widespread nature of the crimes does not arise from the Sentencing Decision, but rather stems from the Conviction Decision.<sup>176</sup> In that regard, she argues that Mr Lubanga attempts to present arguments challenging the Trial Chamber’s findings made in the Sentencing Decision by relying on arguments presented in his appeal against the Conviction Decision.<sup>177</sup> The Prosecutor avers further that Mr Lubanga mischaracterises the Sentencing Decision as the Trial Chamber did not include children over the age of fifteen years in its assessment of the widespread nature of the crimes for sentencing purposes.<sup>178</sup>

98. With respect to the alleged errors of fact, the Prosecutor first points out that while Mr Lubanga failed to raise specific arguments regarding the Trial Chamber’s findings on the widespread nature of the crimes in his appeal against the Conviction Decision, he challenges these findings through his appeal against the Sentencing Decision.<sup>179</sup> She further responds to numerous arguments by referring to her Response to Mr Lubanga’s Document in Support of the Appeal A 5.<sup>180</sup> The Prosecutor also argues that the Trial Chamber did not commit any factual or legal errors in concluding that there was widespread involvement of children under fifteen years of age in the

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<sup>173</sup> [Mr Lubanga’s Document in Support of the Appeal A 6](#), para. 6.

<sup>174</sup> [Mr Lubanga’s Document in Support of the Appeal A 6](#), paras 7-19; Mr Lubanga’s Document in Support of the Appeal A 5, paras 124-325 (Part II).

<sup>175</sup> [Mr Lubanga’s Document in Support of the Appeal A 6](#), paras 20-25.

<sup>176</sup> [Prosecutor’s Response to the Document in Support of the Appeal A 6](#), para. 22.

<sup>177</sup> [Prosecutor’s Response to the Document in Support of the Appeal A 6](#), para. 22.

<sup>178</sup> [Prosecutor’s Response to the Document in Support of the Appeal A 6](#), paras 24-26.

<sup>179</sup> [Prosecutor’s Response to the Document in Support of the Appeal A 6](#), para. 28.

<sup>180</sup> See [Prosecutor’s Response to the Document in Support of the Appeal A 6](#), paras 30, 33, referring to Prosecutor’s Response to the Document in Support of the Appeal A 5, paras 107, 150-257.

FPLC.<sup>181</sup> Further, the Prosecutor argues that the proportion of individuals under fifteen years to those over fifteen years is not relevant and that the evidence at trial does indicate widespread recruitment of children below fifteen years.<sup>182</sup>

## 2. *Determination of the Appeals Chamber*

99. Mr Lubanga challenges the following findings of the Sentencing Decision:

49. The Chamber concluded in the [Conviction Decision] that the evidence established beyond a reasonable doubt that during the period of the charges, recruitment by the UPC/FPLC of young people, including children under 15, was widespread, that a significant number of children were used as military guards and as escorts or bodyguards for the main staff commanders, and that children under 15 years of age were used by the UPC/FPLC in hostilities.

50. The Chamber has not reached conclusions to the criminal standard, namely beyond reasonable doubt, as to the precise number, or proportion, of the recruits who were under 15 years. The Chamber, in passing sentence, has reflected its determination that the involvement of children was widespread. [Footnote omitted.]<sup>183</sup>

100. As a preliminary issue, the Appeals Chamber notes that Mr Lubanga did not challenge the Trial Chamber's finding of the widespread nature of the crimes in his appeal against the Conviction Decision. However, the Appeals Chamber does not consider this to be fatal to Mr Lubanga's arguments. Mr Lubanga argues that the Trial Chamber considered findings made in the Conviction Decision that related to children both over and under the age of fifteen in its assessment of the widespread nature of the crimes for purposes of sentencing.<sup>184</sup> Thus, he is not challenging the findings in the Conviction Decision as such, but how they were used to determine the nature of the crimes for sentencing purposes. Therefore, the Appeals Chamber considers that Mr Lubanga may raise this argument in the context of his appeal against the Sentencing Decision.

101. In respect of the alleged legal error, the Appeals Chamber is not persuaded by Mr Lubanga's arguments. The Appeals Chamber notes that, in the Conviction Decision, the Trial Chamber stated that the UPC/FPLC was "responsible for the

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<sup>181</sup> [Prosecutor's Response to the Document in Support of the Appeal A 6](#), paras 27-28, 31-37.

<sup>182</sup> [Prosecutor's Response to the Document in Support of the Appeal A 6](#), para. 35.

<sup>183</sup> [Sentencing Decision](#), paras 49-50, referring to [Conviction Decision](#), paras 857, 911, 915.

<sup>184</sup> [Mr Lubanga's Document in Support of the Appeal A 6](#), paras 2-6.

widespread recruitment of young people, including children under the age of 15”.<sup>185</sup> This language is repeated in the Sentencing Decision at paragraph 49. Taken in isolation, the phrase used by the Trial Chamber could be interpreted to mean that this finding of “widespread” recruitment does in fact relate to “young people” generally, thus those over and under the age of fifteen years.

102. However, the Appeals Chamber considers that, while the Trial Chamber’s language could have been clearer, it found that recruitment of young people generally was “widespread” *and* that the recruitment of individuals under the age of fifteen years was also “widespread”. The Appeals Chamber notes that paragraph 49 of the Sentencing Decision is footnoted to paragraphs 857, 911, 915 and 916 of the Conviction Decision. Paragraphs 911, 915 and 916 are the overall conclusions of the Trial Chamber on enlistment and conscription of individuals *under* the age of fifteen years. Further, the Appeals Chamber notes that while paragraph 49 of the Sentencing Decision also states that “a significant number of children were used as military guards and as escorts” without including a qualifier as to those “children” being under the age of fifteen years, the Trial Chamber found at paragraph 857 of the Conviction Decision that “a significant number of children *under the age of 15* were used [...] as escorts and bodyguards” (emphasis added). The Appeals Chamber therefore considers that when paragraph 49 of the Sentencing Decision is read in the context of the Conviction Decision it is clear that the finding on the “widespread recruitment” pertained to individuals under the age of fifteen. The Appeals Chamber therefore finds that the Trial Chamber did not take into account non-criminal acts, namely the recruitment of individuals over the age of fifteen, in its determination that recruitment was “widespread” for purposes of determining the sentence. Accordingly, the Trial Chamber did not err and Mr Lubanga’s argument is dismissed.

103. With respect to the alleged factual errors, as set out above, the Appeals Chamber will not re-address errors already decided upon in the *Lubanga* Conviction Judgment.<sup>186</sup>

104. Accordingly, the Appeals Chamber rejects Mr Lubanga’s first ground of appeal.

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<sup>185</sup> [Conviction Decision](#), para. 911.

<sup>186</sup> *Supra* para. 49.

## **B. Ground 2: Alleged failure to take into account violations of Mr Lubanga's fundamental rights**

### *1. Submissions of the parties*

105. Mr Lubanga submits that the Trial Chamber erred in law in finding that he was not entitled to a reduction of his sentence as reparation for violations of his fundamental rights because the period spent in detention would, in any case, be deducted from his sentence.<sup>187</sup> He argues further that the Trial Chamber erred in finding that its rejection of these allegations made in the Stay of Proceedings Decision affected his right to seek reparation for violations of his fundamental rights.<sup>188</sup> Mr Lubanga argues that the jurisprudence of the ICTY and the ICTR establishes that an accused whose rights have been violated is entitled to a reduction of sentence in addition to the time deducted for the time already spent in detention.<sup>189</sup> Mr Lubanga alleges fair trial violations, which he raises as factual errors, related to the Prosecutor's behaviour which pertain to: late disclosure; violation of the right to be tried without undue delay; and violation of his right to fair treatment caused by inaccurate statements made to the press by members of the Prosecutor's staff.<sup>190</sup> He argues that these factual errors should "lead the [Appeals] Chamber to recognise [Mr Lubanga]'s right to reparations in the form of a reduced sentence".<sup>191</sup>

106. In respect of the errors of law, the Prosecutor submits that Mr Lubanga mischaracterises the Sentencing Decision as the Trial Chamber did not find that he was not entitled to reparation for a violation of his rights or that the Stay of Proceedings Decision impacted on his right to reparations.<sup>192</sup> The Prosecutor argues that the Trial Chamber considered Mr Lubanga's arguments in respect of the alleged violations and determined that they did not merit a reduction of sentence, but were taken into account as a mitigating circumstance under the heading of "cooperation".<sup>193</sup> The Prosecutor avers further that jurisprudence of the *ad hoc* tribunals cited by Mr Lubanga indicates a "higher threshold for reduction of sentence based on verified violations of individual rights", which is not applicable to Mr Lubanga's factual

<sup>187</sup> [Mr Lubanga's Document in Support of the Appeal A 6](#), paras 28-33.

<sup>188</sup> [Mr Lubanga's Document in Support of the Appeal A 6](#), paras 34-37.

<sup>189</sup> [Mr Lubanga's Document in Support of the Appeal A 6](#), paras 29-32.

<sup>190</sup> [Mr Lubanga's Document in Support of the Appeal A 6](#), paras 38-79.

<sup>191</sup> [Mr Lubanga's Document in Support of the Appeal A 6](#), para. 79.

<sup>192</sup> [Prosecutor's Response to the Document in Support of the Appeal A 6](#), paras 43, 47, 60-61.

<sup>193</sup> [Prosecutor's Response to the Document in Support of the Appeal A 6](#), para. 48.

circumstances, as no comparable violations found in this case-law have occurred in the present case.<sup>194</sup>

107. Regarding the factual errors, the Prosecutor argues that the examples cited by Mr Lubanga regarding late disclosure do not show prejudice, and that the Trial Chamber was correct to conclude that they did not warrant a reduction of the sentence.<sup>195</sup> She avers further that the length of proceedings did not constitute “undue delay” and that these cannot anyway be attributed to the Prosecution and were, in certain cases, taken into account under the heading of “cooperation”.<sup>196</sup> The Prosecutor does not address the arguments of Mr Lubanga’s right to fair treatment.

## 2. *Determination of the Appeals Chamber*

108. Mr Lubanga challenges the following finding in the Sentencing Decision:

90. The Chamber has already considered, and rejected, an abuse of process challenge brought by the defence in relation to many of the abovementioned issue and in any event it does not find that these factors merit a reduction in Mr Lubanga's sentence. Any relevant period that he has spent in detention, including during the trial, will be deducted from the sentence that is passed.

91. The Chamber has, however, reflected certain factors involving Mr Lubanga in the aftermath of the offences, along with his notable cooperation with the Court, as set out below. He was respectful and cooperative throughout the proceedings, notwithstanding some particularly onerous circumstances, which included:

- a) the prosecution gathered an extensive quantity of evidence under confidentiality agreements (Article 54(3)(e) of the Statute) leading to a failure to disclose exculpatory material, which in turn resulted in a stay of the proceedings and a provisional order to release Mr Lubanga;
- b) the prosecution repeatedly failed to comply with the Chamber's disclosure orders, leading to a second stay of the proceedings and a second provisional order releasing Mr Lubanga; and
- c) the prosecution's use of a public interview, given by Ms Beatrice le Fraper du Hellen, to make misleading and inaccurate statements to the press about the evidence in the case and Mr Lubanga's conduct during the proceedings. [Footnotes omitted.]

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<sup>194</sup> [Prosecutor’s Response to the Document in Support of the Appeal A 6](#), paras 49-51.

<sup>195</sup> [Prosecutor’s Response to the Document in Support of the Appeal A 6](#), paras 52-55.

<sup>196</sup> [Prosecutor’s Response to the Document in Support of the Appeal A 6](#), paras 54-59.

109. The Appeals Chamber is not persuaded by Mr Lubanga's arguments. In respect of whether Mr Lubanga is entitled to an automatic reduction of sentence as a remedy, the Appeals Chamber considers that, as argued by the Prosecutor, the cited jurisprudence is not applicable to the circumstances of this case. The Appeals Chamber notes that the jurisprudence of the ICTR indicates that an effective remedy should automatically be available where there has been a serious violation of a person's fundamental rights.<sup>197</sup> Examples of such violations have been found to include a person not being promptly informed of the nature of the charges against him for a significant period of time<sup>198</sup> and a person being held in provisional detention for more than three years.<sup>199</sup> In the present case, the Appeals Chamber notes that Mr Lubanga's allegations have already been addressed and dismissed in the *Lubanga Conviction Judgment*<sup>200</sup> and that neither the Appeals Chamber in that judgment, nor the Trial Chamber in the Stay of Proceedings Decision or Conviction Decision found that a serious violation of Mr Lubanga's fundamental rights had occurred. In the Appeals Chamber's view, these allegations were dealt with as part of the trial proceedings and finds that the jurisprudence referred to by Mr Lubanga is not applicable to the circumstances of this case.

110. With respect to the alleged errors of law, the Appeals Chamber considers that Mr Lubanga mischaracterises the Sentencing Decision regarding the Stay of Proceedings Decision. The Trial Chamber did not find that the Stay of Proceedings Decision affected his right to reduction of sentence as a form of remedy. Rather, the Trial Chamber mentioned that it had already considered many of the same issues in the Stay of Proceedings Decision and concluded that "in any event it does not find that these factors merit a reduction in Mr Lubanga's sentence".<sup>201</sup> Thus, the Appeals Chamber is satisfied that the Trial Chamber did consider these arguments in respect of a reduction of sentence even though they had not warranted a stay of proceedings. The Trial Chamber stated further that "[a]ny relevant period that he has spent in

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<sup>197</sup> See e.g. [Kajelijeli Appeal Judgment](#), para. 324; [Barayagwiza Appeal Decision](#), para. 109; [Semanza Appeal Decision](#), para. 87.

<sup>198</sup> See [Barayagwiza Appeal Decision](#), paras 84-85 in which the Appeals Chamber distinguished between a person not being promptly informed of the nature of the charges against him for a short period of time and a period of 11 months.

<sup>199</sup> See [Barayagwiza Appeal Decision](#), para. 104.

<sup>200</sup> See *Lubanga Conviction Judgment*, Sections VII (Alleged Violation of the Prosecutor's Statutory Obligations), VIII (Prejudice to the Integrity of the Trial).

<sup>201</sup> [Sentencing Decision](#), para. 90.

detention, including during the trial, will be deducted from the sentence that is passed".<sup>202</sup> In the Appeals Chamber's view, while this statement is legally correct and does not have any impact on the issue of an alleged violation of the right to be tried without undue delay, its reference in the Sentencing Decision could cause concern. However, in the following paragraph, the Trial Chamber explicitly referred to the two stays of proceedings it had ordered and considered as a mitigating factor Mr Lubanga's cooperative behaviour throughout the proceedings.<sup>203</sup> While the Trial Chamber did not refer to delay caused by the stays of proceedings, the Appeals Chamber infers that the Trial Chamber implicitly considered this issue when making this finding. Further, the Trial Chamber took this mitigating circumstance into account in its determination of the sentence.<sup>204</sup> Therefore, the Appeals Chamber finds that the Trial Chamber did not err in law and dismisses Mr Lubanga's argument.

111. Turning to the alleged factual errors, the Appeals Chamber understands Mr Lubanga to argue that the Trial Chamber failed to give adequate weight to these fair trial allegations in its assessment of the length of sentence. In this regard, the Appeals Chamber notes that the Trial Chamber did consider these allegations and found them to be a mitigating factor.<sup>205</sup> The question is therefore whether the Trial Chamber erred in the weight it gave to this mitigating factor. The Appeals Chamber recalls that the weight given to a mitigating factor falls within the discretion of the Trial Chamber.<sup>206</sup> The Appeals Chamber considers that Mr Lubanga has not demonstrated that the weight given to this mitigating factor by the Trial Chamber was so unreasonable as to constitute an abuse of discretion. Therefore, the Appeals Chamber dismisses this argument.

112. In light of the foregoing, the Appeals Chamber dismisses Mr Lubanga's second ground of appeal.

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<sup>202</sup> [Sentencing Decision](#), para. 90.

<sup>203</sup> [Sentencing Decision](#), para. 91.

<sup>204</sup> [Sentencing Decision](#), para. 97.

<sup>205</sup> See [Sentencing Decision](#), para. 91.

<sup>206</sup> See *supra* para. 43.

### **C. Ground 3: Alleged failure to deduct time served in detention in the DRC**

#### *1. Submissions of the parties*

113. Mr Lubanga submits that the Trial Chamber erred in fact by holding that it had not been demonstrated that he was detained in the DRC for the same conduct underlying the crimes for which he was convicted.<sup>207</sup> Mr Lubanga argues that the Trial Chamber failed to take into account that: (i) he was detained from 13 August 2003 until 16 March 2006 by the DRC authorities for his activities as President of the UPC/RP;<sup>208</sup> (ii) the mode of liability under which he was convicted is based on his role as President;<sup>209</sup> and (iii) while he was in detention, the Prosecutor conducted investigations and maintained regular contact with the DRC authorities.<sup>210</sup> He argues in particular regarding the mode of liability charged against him that the Trial Chamber's findings regarding his "essential contribution" were not based on the fact that he intended to conscript, enlist, or use child soldiers, but based on his role as President of the UPC/RP, which, he argues, is the same conduct for which he was detained in the DRC.<sup>211</sup>

114. The Prosecutor submits that the DRC charges were based on Mr Lubanga's position as President and thus he was not detained in the DRC for the same conduct underlying the crimes of enlistment, conscription or use of children below the age of fifteen.<sup>212</sup> Further, the Prosecutor argues that the Trial Chamber correctly rejected Mr Lubanga's request to take the time spent in detention into account because Mr Lubanga did not provide sufficient evidence showing that he was detained for the same conduct underlying the crimes for which he was convicted.<sup>213</sup>

#### *2. Determination of the Appeals Chamber*

115. Mr Lubanga challenges the following findings in the Sentencing Decision:

101. Under [Article 78(2) of the Statute], [Mr Lubanga] submits that the Chamber should deduct the period of Mr Lubanga's house arrest and detention

<sup>207</sup> [Mr Lubanga's Document in Support of the Appeal A 6](#), para. 80.

<sup>208</sup> [Mr Lubanga's Document in Support of the Appeal A 6](#), paras 84-87.

<sup>209</sup> [Mr Lubanga's Document in Support of the Appeal A 6](#), paras 88-96.

<sup>210</sup> [Mr Lubanga's Document in Support of the Appeal A 6](#), para. 83.

<sup>211</sup> [Mr Lubanga's Document in Support of the Appeal A 6](#), paras 92-96.

<sup>212</sup> [Prosecutor's Response to the Document in Support of the Appeal A 6](#), para. 69.

<sup>213</sup> [Prosecutor's Response to the Document in Support of the Appeal A 6](#), para. 71.

by the DRC authorities between 2003 and 2006. The defence argues that the detention of Mr Lubanga in the DRC was imposed as a result of the same conduct underlying the crimes for which he has been convicted at the Court, namely his activities as President of the UPC/FPLC in 2002-2003. On this basis, the defence requests that the Chamber deducts this period of domestic detention from Mr Lubanga's sentence.

102. In the judgment of the Chamber, there is insufficient evidence that Mr Lubanga was detained in the DRC for conduct underlying the crimes for which he was convicted at the Court, namely the conscription and enlistment of children under the age of 15 and using them to participate actively in hostilities. This contention has not been established on the balance of probabilities, and as a result the Chamber declines to deduct this period of time from Mr Lubanga's sentence. [Footnotes omitted.]

116. The Appeals Chamber rejects Mr Lubanga's argument that the Trial Chamber erred in determining that "the conscription and enlistment of children under the age of 15 and using them to participate actively in hostilities" is the conduct underlying the crimes for which he was convicted, as opposed to his "role as President". In the Appeals Chamber's view, Mr Lubanga's interpretation would overly broaden the meaning of "conduct" in that any action taken by an elected official for which he/she was domestically detained could be considered the same "conduct" in respect of crimes prosecuted under the Statute. The Appeals Chamber further finds that the Trial Chamber did not err in finding that Mr Lubanga had not demonstrated that his detention was related to conduct underlying the crimes of conscription, enlistment or use of children. Mr Lubanga has not pointed to any evidence not taken into account by the Trial Chamber in this regard that would lead to the Appeals Chamber's intervention. The Appeals Chamber therefore dismisses Mr Lubanga's argument as not substantiated.

#### **D. Ground 4: Alleged error regarding evidence exceeding facts and circumstances set out in the Decision on the Confirmation of Charges**

117. Mr Lubanga submits that the Trial Chamber committed an error of law by holding that it could consider sexual violence and harsh treatment for purposes of the sentence despite the fact that they did not form part of the Decision on the Confirmation of Charges.<sup>214</sup> However, Mr Lubanga argues that the Trial Chamber's finding "had no effect" on his sentence since the Trial Chamber concluded that it was

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<sup>214</sup> [Mr Lubanga's Document in Support of the Appeal A 6](#), paras 97-106.

not established beyond a reasonable doubt that “sexual violence and mistreatment suffered by the children were widespread or that [he] ordered or encouraged their perpetration” or that “he was aware of them”.<sup>215</sup> He avers in this context that “the Defence does not intend formally to raise this ground of appeal in this brief. Nonetheless, the Defence reserves the right to raise this clear error of law, if appropriate, in response to any ground of appeal which may be submitted by the Prosecutor in response to the Chamber’s factual findings in this regard”.<sup>216</sup> Mr Lubanga nevertheless requests the Appeals Chamber to find that the Trial Chamber erred in finding that “it was entitled to consider facts that exceed the ‘facts and circumstances’ set out in the charges”.<sup>217</sup>

118. The Appeals Chamber considers that Mr Lubanga has not properly raised this ground of appeal, given his statement that he “does not intend to formally raise this ground of appeal”. The Appeals Chamber also rejects Mr Lubanga’s ‘reservation’ of his right to raise this error on the basis that such a ‘right’ does not exist in the Court’s legal texts. Pursuant to the Statute and Rules of Procedure and Evidence, parties have a right to file a document in support of their appeal, wherein they may set out their grounds of appeal and arguments in support thereof, and to file a response to the opposing party’s document in support of his or her appeal. However, these filings must comply with the procedures, including page and word limits, as set out in the Rules of Procedure and Evidence and the Regulations of the Court. Permitting a party to incorporate arguments made in the context of a separate appeal would frustrate the intent of these provisions. The Appeals Chamber therefore dismisses this ground of appeal *in limine*.

## VI. APPROPRIATE RELIEF

119. The Appeals Chamber recalls that it has dismissed all the grounds of appeal put forward by the Prosecutor and Mr Lubanga. Accordingly, the Appeals Chamber finds that it is appropriate to reject the Prosecutor’s and Mr Lubanga’s appeals and to confirm the Sentencing Decision.

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<sup>215</sup> [Mr Lubanga’s Document in Support of the Appeal A 6](#), paras 106.

<sup>216</sup> [Mr Lubanga’s Document in Support of the Appeal A 6](#), paras 107-108.

<sup>217</sup> [Mr Lubanga’s Document in Support of the Appeal A 6](#), page 29.

Judge Sang-Hyun Song appends a partly dissenting opinion to this judgment. In her dissent to the *Lubanga* Conviction Judgment, Judge Anita Ušacka dissented with respect to the majority's decision to confirm Mr Lubanga's conviction and with respect to this judgment.

Done in both English and French, the English version being authoritative.



**Judge Erkki Kourula**  
**Presiding Judge**

Dated this 1<sup>st</sup> day of December 2014

At The Hague, The Netherlands