Cour Pénale Internationale

International Criminal Court

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No.: ICC-01/04-01/06

Date: **19 February2013**

THE APPEALS CHAMBER

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

SITUATION INTHE DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF
THE PROSECUTOR v.THOMAS LUBANGA DYILO

Public Redacted Document

Prosecution's Response to the "Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la 'Décision relative à la peine, rendue en application de l'article 76 du Statut' rendu par la Chambre de première instance I le 10 juillet 2012"

Source: **Office of the Prosecutor**

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Introduction

1. Thomas LubangaDyilo (the "Appellant") is appealing Trial Chamber I's "Decision on Sentence pursuant to Article 76 of the Statute" (the "Sentencing Decision"), by which he was sentenced to a total period of imprisonment of 14 years.[1]

2. The Appellant raises four grounds of appeal related to (a) errors allegedly made by the Chamber in concluding there was widespread involvement of children within the UPC/FPLC and by taking those conclusions into account in determining gravity for sentencing purposes;[2] (b) the Chamber's alleged failure to reduce the Appellant's sentence due to alleged violations of his rights;[3] (c) the Chamber's alleged failure to take into account his prior period of detention in the Democratic Republic of Congo ("DRC") and reduce his sentence accordingly;[4] and (d) the Chamber's allegedly erroneous conclusion that at sentencing it is possible to consider evidence that exceeds the facts and circumstances of the charges as set out in the Confirmation Decision.[5]

3. The Appellant has failed to show any clear discernible error arising from the Sentencing Decision. The Prosecution challenges all four grounds and requests that the appeal be rejected in its entirety.

Procedural Background

4. On 14 March 2012, Trial Chamber I (the "Chamber") issued its "Judgment pursuant to article 74 of the Statute" in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (the "Judgment"), in which it found Thomas Lubanga guilty as a co-perpetrator of three counts of war crimes: enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities in the Ituri

[1]ICC-01/04-01/06-2901 ("Sentencing Decision").
[2]ICC-01/04-01/06-2949 ("Sentencing Appeal Brief"), paras.2-25.
[3]Sentencing Appeal Brief, paras.26-79.
[4]Sentencing Appeal Brief, paras.80-96.
[5]Sentencing Appeal Brief, paras.97-108.

region of the Democratic Republic of the Congo (the "DRC") from early September 2002 to 13 August 2003.[6]

5. The Prosecution's request for sentence ("Sentence Request") was filed on 14 May 2012.[7] On the same day, the legal representatives of victims filed their views as to the sentence.[8] On 3 June 2012, the Defence filed its submissions on sentence.[9]

6. The sentencing hearing was held on 13 June 2012.[10] On 10 July 2012, the Chamber rendered its "Decision on Sentence pursuant to article 76 of the Statute" in which the Majority imposed a joint sentence of 14 years imprisonment for the Appellant's crimes (the "Sentencing Decision").[11]

7. On 3 October 2012, the Prosecution filed a Notice of Appeal against the Sentencing Decision under articles 81(2), 83(2) and 83(3), requesting the Appeals Chamber to revise upward the sentence imposed against the Appellant.[12] On the same day, the Appellant filed Notices of Appeal against the Judgment[13] and the Sentencing Decision[14].

8. On 3 December 2012, the Appellant filed his document in support of his appeal against the Sentencing Decision ("Sentencing appeal brief"),[15] and his document in support of his appeal against the article 74 Judgment ("Article 74 appeal brief").[16]

9. The same day the Prosecution filed its document in support of its appeal against the Sentencing Decision.[17]

10. The Prosecution is filing together with this response to the Sentencing appeal brief, a separate response to the Appellant's Article 74 appeal brief.

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[6]ICC-01/04-01/06-2842.
[7]ICC-01/04-01/06-2881.
[8]ICC-01/04-01/06-2880 and ICC-01/04-01/06-2882.
[9]ICC-01/04-01/06-2891-Conf-Exp, with public redacted version ICC-01/04-01/06-2891-Red.
[10] ICC-01/04-01/06-T-360-Red2-ENG.
[11]ICC-01/04-01/06-2901. The Sentencing Decision includes the dissenting opinion of Judge Odio Benito, pp.41-52.
[12] ICC-01/04-01/06-2933 OA4.
[13]ICC-01/04-01/06-2934 OA5.
[14]ICC-01/04-01/06-2935 OA6.
[15]Sentencing Appeal Brief.
[16]ICC-01/04-01/06-2948-Conf.
[17]ICC-01/04-01/06-2950.

Confidential filing

11. The Prosecution files this document confidentially given that there are references made to filings and decisions classified as confidential. The Prosecution will file a public redacted version without delay.

Standards of Review

12. Article 81(2) provides that a sentence may be appealed on the basis of "*disproportion between the crime and the sentence*". Article 83(2) provides that a sentence may also be appealed if the proceedings were unfair in a way that affected the reliability of the sentence or on the grounds that it was materially affected by error of fact or law, or a procedural error.[18]

13. The Appeals Chamber will consider whether the Trial Chamber committed a discernible error in the exercise of its discretion. Such an error will exist where the sentence rendered by the Trial Chamber 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".[19] The Appellant must demonstrate how the Trial Chamber "ventured outside its discretionary framework" in imposing the sentence.[20]

14. For *legal errors,* the Appeals Chamber "will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the

[18]Archbold International Criminal Courts: Practice, Procedure and Evidence, Khan and Dixon, Sweet & Maxwell; (3rd.) (2009) p.1453. *See also*, The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence Roy S. Lee (Ed), Brady et al., Chapter 10, p.576; The Rome Statute of the International Criminal Court, A Commentary in Cassese (Gaeta and Jones, OUP, 2002) p.1545.

[19]*Prosecutor v MilanBabic*, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005 ("Babic"), para.44; *Prosecutor v Aleksovski*,Case No. IT_95-14/I-A, Appeals Chamber, Judgement, 24 March 2000 ("Aleksovski"), para.187; *Prosecutor v Milosevic*, Case No.T-98-29/I-A, Appeals Chamber, Judgment, 12 November 2009 ("Milosevic Appeal Judgement"), para.297; *Prosecutor v Galić*, Case No.IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006 ("Galic Appeals Judgement"), para.444.

[20]*Prosecutor v Delalić*, *Mucic, Delic and Lanzo,* Case No.IT-96-21-A, Appeals Chamber, Judgement, 20 February 2001, (Delalic Appeals Judgement") para.725. See also *Galić*, Appeals Judgement, para.455, where the Appeals Chamber held that with regard to proportionality and sentencing, an error will only exist where the Appeals Chamber finds that the Trial Chamber gave insufficient weight to the gravity of the offence or the defendant's degree of responsibility.

appropriate law and determine whether or not the Trial Chamber misinterpreted the law."[21] The Appeals Chamber will therefore articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[22]

15. Finally, the Appeals Chamber has stated that there is an *error of fact* when the Trial Chamber misappreciated facts, disregarded relevant facts or took into account facts extraneous to the *sub judice* issues.[23] The Appeals Chamber has set out a standard of reasonableness in the review of appeals judgments on interim release; its reasoning equally applies to purported errors in the Trial Chamber's appreciation of evidence in an appeal against sentence:

> "The Appeals Chamber will not interfere with a Pre-Trial or Trial Chamber's evaluation of the evidence just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it. In the absence of any clear error on the part of the Pre-Trial Chamber, the Appeals Chamber defers to the Pre-Trial Chamber."[24]

16. The Prosecution finally notes that the Appeals Chamber has repeatedly held that its review is corrective in nature and not *de novo*.[25]

Prosecution's response to the Appellant's four grounds of appeal

17. At the outset, the Prosecution notes that a significant part of the Appellant's submissions refer to findings made by the Trial Chamber in its article 74

[21] ICC-02/05-03/09-295 OA, para.20.
[22] Milosevic, Appeal Judgement, paras.13-14 and authorities cited therein..The ICTY Appeals Chamber has recently held that in cases of an incorrect legal standard, the Appeals Chamber, after identifying the correct standard, will apply it to the evidence contained in the trial record and determine whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant. Prosecutor v *Gotovina*, Case No.IT-06-90-A, Appeals Chamber, Judgement, 16 November 2012, ("Gotovina Appeals Judgement").para.12.
[23] ICC-01/05-01/08-631-Red OA2, para.66.
[24] ICC-01/04-01/10-283 OA, para.17. A standard of reasonableness is also applied by the ICTY Appeals Chamber in the review of purported errors of fact in a final appeal. Gotovina Appeals Judgement, para.13 and authorities cited therein.
[25] *See e.g. Prosecutor v Banda and Jerbo*, Judgment on Rules 111 and 112, ICC-02/05-03/09-295 OA2, 17 February 2012, para.20.

Judgment. The Appellant also advances arguments which effectively replicate those advanced in his appeal against that decision. These arguments should be rejected *in limine* by the Appeals Chamber in this appeal and should be considered only, where appropriate, in the context of the article 74 appeal. An appeal against sentence is not a vehicle to litigate in parallel the issues contained in the appeal against the article 74 Judgment, or to supplement the submissions made in that appeal. The Appellant must instead demonstrate clear discernible errors arising out of the decision on sentencing rendered under article 76 of the Statute ("Article 76 Decision"). Whether the Trial Chamber erred in its factual and legal determinations made in the article 74 judgment is, in principle, immaterial for the purposes of the instant appeal, which is confined to the manner in which the Trial Chamber measured the Appellant's sentence and its proportionality with the crimes of which he was convicted, as reflected in the Article 76 Decision.

18. Nonetheless, the Prosecution has in all instances addressed the merits of the arguments raised by the Defence in its sentencing appeal.

(i) The Appellant's First ground of Appeal: The Chamber's findings as to the 'widespread' involvement of children within the FPLC

(a) The alleged errors do not arise from the Sentencing Decision

19. In his first ground of appeal, the Appellant alleges that the Chamber erred in the Sentencing Decision by concluding that the sentence should reflect the factual finding made in the Article 74 Judgment that there was widespread involvement of children within the UPC/FPLC.[26]

20. He argues that the Chamber erred in law and fact in making those factual findings in the Article 74 Judgment; in particular, he claims that the Chamber:

[26]Sentencing Appeal Brief, paras.2, 7-8.

(i) erred in law in including children older than 15 in its assessment of the widespread nature of the crimes;[27] and

(ii) made errors of fact that undermine its conclusions on the widespread nature of the crimes, in particular in: (a) its evaluation of numbers of children under 15 based on assessment of ages by witnesses who testified and video evidence, and (b) reliance on evidence to show the widespread involvement of children below 15 but that, according to the Appellant, instead shows low numbers and uncertainty as to numbers of children below 15.[28]

21. The Appellant claims that the Chamber consequently erred in its Sentencing Decision by taking into account those allegedly erroneous conclusions as to the 'widespread' nature of these crimes when assessing the gravity of the crimes for the purposes of determining his sentence.[29]

22. Although the Appellant attempts to cast these arguments as relating to a sentencing error,[30] in reality all of the errors he alleges (both legal and factual) derive from the Chamber's conclusions as to the 'widespread' nature of the crimes made in the Article 74 Judgment and do not arise from the Article 76 Sentencing Decision. The Chamber explicitly states in the Sentencing Decision that it is referring to its conclusions made in the Article 74 Judgment.[31] Indeed, when the Chamber states in the Sentencing Decision that "*in passing sentence, [the Chamber] has reflected its determination that the involvement of children was widespread*",[32] it is clearly referring to "its determination" made in the Article 74 Judgment. Moreover, the Appellant essentially acknowledges that these factual

[27]Sentencing Appeal Brief, paras. 2-6.
[28]Sentencing Appeal Brief, paras.7-25.
[29]Sentencing Appeal Brief, paras.2, 6, 7, 12, p.30.
[30]Sentencing Appeal Brief, para.6, p.30.
[31] Sentencing Decision, para.49: "*The Chamber<u>concluded in the Judgment</u> thatthe 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*". (Emphasis added). Citing its conclusions in the Judgment, ICC-01/04-01/06-2842 ("Judgment"), paras. 857, 911, 915.
[32]Sentencing Decision, para.50.

conclusions were made by the Chamber in the Article 74 Judgment:[33] when addressing the alleged errors he refers to factual findings made in the Article 74 Judgment and evidence presented at trial rather than during the sentencing hearing,[34] and relies on arguments raised in his Article 74 appeal brief.[35] No new factual findings were made by the Chamber in the Sentencing Decision as regards the 'widespread' involvement of children within the UPC/FPLC. Thus, the alleged factual and errors arise, if at all, from the Article 74 Judgment and not the Article 76 Sentencing Decision.

23. The Prosecution finally submits that even if accepting the appropriateness of attacking in this appeal factual determinations made by the Trial Chamber in its Article 74 Judgment, the Appellant's arguments must be rejected:the Appellant's first ground of appeal is mainly an attempt to re-litigate arguments he raised previously before the Chamber at trial[36] and at the sentencing phase,[37] and fail to establish the existence of any error invalidating the Sentencing Decision.[38]

(b) The Chamber did not rely on any factual findings regarding children older than 15 in its assessment of the crimes

24. The Appellant mischaracterizes the Chamber's Sentencing Decision (or rather key findings made in the Article 74 Judgment), when he asserts that the Chamber

[33]Sentencing Appeal Brief, para.7.Citing the Judgment, paras.857, 911 and 915.
[34]Sentencing Appeal Brief, paras.9-25.
[35]Sentencing Appeal Brief, paras. 13, 16,18.
[36]*See e.g.* ICC-01/04-01/06-2773-Conf-tEN, the Appellant's closing brief, in which, (a) paras.700-707: the Appellant raised arguments as to whether video evidence could be used to assess children below the age of 15; (b) paras.737-756: the Appellant argues that there is no other reliable evidence of children being present in the armed forces of the UPC; (c) paras.757-760: the Appellant challenges the evidence of children conscripted within the UPC; and (d) paras. 761-763: the Appellant argues there is no reliable evidence of use of child soldiers.
[37]ICC-01/04-01/06-2891-Conf-Exp, paras.1-42.
[38]*Gotovina*, Appeals Judgment, para.14: "a *party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting intervention of the Appeals Chamber*". Citing *Prosecutor v. LjubeBoskoski, JoranTarculovski*, IT-04-82-A, Appeals Chamber, Judgement, 19 May 2010, ("Boskoski Appeal Judgment"), para.16; *Prosecutor v. Mile Mrksić, VeselinŠljivančanin*, IT-95-13/1-A, Appeals Chamber, Judgement, 5 May 2009, ("Mrksic Appeal Judgment"), para.16; *ThéonesteBagosora, Anatole Nsengiyumva v. The Prosecutor*, Case No. ICTR-98-41-A, Appeals Chamber, Judgement, 14 December 2011, ("Bagasora Appeal Judgment"), para.19.

included in its assessment for sentencing purposes the fact that children *older* than 15 were involved in a widespread manner in the UPC/FPLC.[39]

25. A plain reading of the operative parts of the Judgment regarding the Chamber's findings on widespread recruitment and use of children, which the Chamber then relied upon in its Sentencing Decision,[40] shows that when assessing the crimes perpetrated by the Appellant, the Chamber's focus was on children *below the age of 15* and not on children older than 15.[41] These key factual conclusions from the Article 74 Judgment are as follows:[42]

    (a) A significant number of *children under the age of 15*were used by the UPC/FPLC as escorts and bodyguards for the main staff and the commanders, between September 2002 and 13 August 2002;[43]

    (b) Between 1 September 2002 and 13 August 2003, the armed wing of the UPC/FPLC was responsible for the widespread recruitment of young people, *including children under the age of 15*, on an enforced as well as a 'voluntary basis';[44]

    (c) *Children under the age of 15* were within the ranks of the UPC/FPLC between 1 September 2002 and 13 August 2003. Children were used in fighting in specific locations. *Children under 15* were used as military guards. A "kadogo unit", principally comprised of *children under 15* was formed. Commanders in the UPC/FPLC frequently used *children under 15*as bodyguards; and *children under 15* acted as bodyguards or served within the presidential guard of the Appellant.[45]

26. Similarly, in the Sentencing Decision, the Chamber, again referring to conclusions made in the Article 74 Judgment, observed that it had not reached any

[39]Sentencing Appeal Brief, paras.2-3.
[40]Sentencing Decision, para.49, footnote.84.
[41]*See also* the Prosecution's response to grounds 4 to 6 of the Appellant's Article 74 appeal brief. See paras. 150-257.
[42]Judgment, paras.857, 911 and 915.
[43]Judgment, para.857.
[44]Judgment, para.911.
[45]Judgment, para.915.

conclusions beyond reasonable doubt as to the precise number "*of the recruits who were under 15 years*."[46]

(d) No errors of fact were made by the Chamber when concluding that there was "widespread" involvement of children within the FPLC

27. Likewise, the Prosecution submits that the Chamber did not make any factual errors in reaching its conclusion that there was 'widespread' involvement of children within the UPC/FPLC.

28. As explained above, the Appellant failed to raise a specific ground of appeal in his Article 74 appeal brief in relation to the Chamber's findings in the Article 74 Judgment of widespread involvement of children within the UPC/FPLC.[47] However, in his Article 74 appeal brief, the Appellant does raise many of the same alleged errors of fact that, he claims, underlie the Chamber's findings on the widespread involvement of children and thus affect the sentence. In particular, the Appellant argues that it was wrong for the Trial Chamber to reach the factual conclusions on the 'widespread' involvement of children within the UPC/FPLC, because the evidence did not establish beyond reasonable doubt the widespread nature of the recruitment or participation of children below 15, or the exact numbers or proportion of recruits below 15 within the UPC/FPLC.[48] The Prosecution submits that no factual errors were made.

No requirement to prove exact numbers of children recruited or used or to prove specific factual findings beyond reasonable doubt

29. The Appellant argues that there was no objective evidence to evaluate the proportion of children under 15 from amongst the young people.[49] Since

[46]Sentencing Decision, para. 50. *See also* the relevant evidence the Chamber highlighted by the parties during the sentencing hearing at paras.45-48.
[47]Sentencing Appeal Brief, para.7.Citing Judgment, paras.857, 911, 915.
[48]Sentencing Appeal Brief, paras.9-10.
[49]Sentencing Appeal Brief, para.10.

consequently the Trial Chamber was not able to evaluate the relevant numbers, it should have not used its findings as to the widespread nature of crimes for sentencing purposes to the Appellant's detriment.[50]

30. However, as the Prosecution submits in its response to the Article 74 appeal brief, there is no requirement to prove exact numbers of children recruited or used in hostilities. It suffices that the Trial Chamber finds beyond reasonable doubt that children were extensively recruited and used in hostilities. This is supported by the existing jurisprudence from the Special Court of Sierra Leone in a comparable case.[51] The Prosecution refers to its submissions in response to the Appellant's article 74 appeal.[52]

The Chamber properly assessed the totality of the evidence and made thorough and reasonable assessments of the evidence

31. The Appellant challenges the factual findings as to widespread involvement of children within the UPC/FPLC, alleging that the evidence presented at trial did not demonstrate (a) that between 1 September 2002 and 13 August 2003 children under 15 were recruited into the UPC/FPLC and participated in hostilities;[53] and (b) the 'widespread' nature of the crimes.[54]

[50]Sentencing Appeal Brief, para.11.
[51] See Prosecution response to Article 74 appeal brief, para.107. Citing *Prosecutor v Sesay, Kallon and Gbao ("RUF case"), SCSL*-04-15-A, Appeals Chamber Judgment, 26 October 2009, paras.771-776. The Appeals Chamber of the Special Court for Sierra Leone ("SCSL") rejected a similar argument from the appellant that the trial chamber in that case had erred by not identifying the child soldier victims, to require a specimen count and to approximate the number of child soldiers used pursuant to his plan, which, he claimed, resulted in the Trial Chamber's inability to make proper findings as to whether the crimes of conscription and use of child soldiers were part of his 'design'.
[52] See Prosecution response to Article 74 appeal brief, para.107.
[53]Sentencing Appeal Brief, para.12.
[54]Sentencing Appeal Brief, para.8. The Appellant claims that the evidence instead demonstrates the marginal nature of the enrolment of minors within the FPLC (ibid.)

32. The Appellant alleges that the Chamber erred in the manner in which it evaluated the number of children under 15 years in the FPLC, by relying on the assessment of ages by witnesses who testified and on video evidence.[55]

33. However, as the Prosecution explains in its response to the Article 74 appeal, the Chamber: (a) correctly relied upon the totality of evidence when making its factual findings as to the involvement of children below 15 within the UPC/FPLC and the widespread nature of that involvement; and (b) made thorough and reasonable credibility and reliability assessments for all evidence it relied upon.[56] The Appellant fails to demonstrate that this is not the case.

The evidence does support the finding of widespread involvement of children

34. The Appellant alleges that the Chamber erred in the manner in which it assessed the facts and concluded that children under 15 were used in a widespread manner by FPLC (a) to participate in hostilities; (b) as military guards; (c) as bodyguards to commanders and other senior UPC/FPLC, and (d) as bodyguards to Thomas Lubanga.[57] In particular, he argues that the Chamber erred because the evidence it relied upon did not permit the Chamber to confirm that the enlistment, conscription and participation of children below the age of 15 within the FPLC was widespread;[58] instead, he says that the evidence indicates low numbers of children below the age of 15 used within the FPLC,[59] high numbers of recruits older than 15, and the absence of systematic recruitment.[60] The Appellant alleges that there is uncertainty as regards the number of children under 15 who were actual victims of conscription, bearing in mind that the testimony of witnesses on this point was not relied upon by the Chamber.[61]

[55]Sentencing Appeal Brief, paras.15-16.
[56]*See* the Prosecution's response to the Article 74 appeal brief grounds 4 to 6, at paragraphs 150-257.
[57]Sentencing Appeal Brief, paras.17-18.
[58]Sentencing Appeal Brief, para.19.
[59]Sentencing Appeal Brief, paras.20-23. He refers in particular to the evidence of P-0017, P-0046, P-0041 and P-0055.
[60]Sentencing Appeal Brief, para.22. He refers in particular to the evidence of P-0041 and P-0055.
[61]Sentencing Appeal Brief, para.23.

35. The Prosecution observes that the proportion of adults to underage recruits is not relevant. Even if more persons over than under the age of 15 were recruited, the point remains that children below 15 were involved within the UPC/FPLC in a widespread manner. Critically, and contrary to what the Appellant asserts, the evidence presented at trial indicates that at least 200 children below 15[62] – not the "low numbers" that Appellant claims -- were involved within the UPC/FPLC. Moreover, although not explicit as to what constitutes a 'widespread' involvement of children, the Chamber's findings are consistent with the jurisprudence of the Court and *ad hoc* international criminal tribunals.[63] Nor has the Appellant sought to argue otherwise.

The Chamber focussed on children below 15 in its assessment of the crimes

36. The Appellant further alleges that the Chamber erred because in its findings it did not always make it clear if it was referring to children below the age of 15, for instance by referring to children, young people, "kadogos", or PMF, when concluding the existence of the crimes.[64] However, as set out above, the Chamber made it clear in its final conclusions that it was focusing specifically on children below 15 in its assessment of the crimes.[65]

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[62]*See e.g.* ICC-01/04-01/06-2950 A4, Prosecution's Document in Support of Appeal against the 'Decision on Sentence pursuant to Article 76 of the Statute' (ICC-01/04-01/06-2901), para.43: "*To give an idea of the scale of these crimes, P-0046 spoke of reports by the United Nations that up to 40% of the UPC/FPLC forces were children, including under the age of 15. She further testified about the 87 UPC/FPLC child soldiers she met who were under 15 and had been recruited and used between mid-2000 and mid-2003. P-0017 confirmed that the UPC/FPLC used a full platoon of children under the age of 15 – approximately 45 children. P-0016 stated that at the Mandro training camp there were over 100 recruits and about 35% were under 15. P-0014 estimated that 20% of approximately 100 young recruits being trained at the UPC Headquarters were under 15. P-0031 testified that over 80% of approximately 168 children, between 9 and 17 years old, who went through his centre, had been soldiers in the UPC/FPLC. This evidence alone identifies approximately 200 child soldiers in the UPC/FPLC though this is well under the final count."*

[63]*See e.g. Prosecutor v Katanga and Ngudjolo*. ICC-01/04-01/07-717, para.395. Addressing the meaning of 'widespread' perpetration of crimes for the purposes of crimes against humanity, Pre-Trial Chamber I observed that "the term 'widespread' has also been explained as encompassing an attack carried out over a large geographical area or an attack in a small geographical area but directed against a large number of civilians".Citing ICTY, *Prosecutor v Blaskic*, Case No.IT-95-14-T, Trial Judgement, 3 March 2000, para.206; ICTY, *The Prosecutor v Kordic* and Cerkez, Case No. IT-04-14/2-A, Appeals Judgement, 17 December 2004, para.94. See also WERLE, G., Principles of International Criminal Law (the Hague, TMC Asser Press, 2005), p.225, para.656. *See alsoThe Prosecutor v Jelisic,* Case No. IT-95-10-T, Trial Judgment, 14 December 1999, paras.18, 21, 53 and 57, in which an attack on a single town and municipality of Brcko for crimes against humanity charges was considered enough.

[64]Sentencing Appeal Brief, para.24.

[65] See paragraph 24 above.

37. For the reasons set forth above, there is no legal or factual error in the Chamber's assessment of the widespread nature of the crimes, and therefore the Appellant's first ground of appeal should be dismissed.

(ii) The Appellant's Second Ground of Appeal: The Chamber's findings regarding the implications of the alleged violations of the Appellant's rights

38. In his second ground of appeal, the Appellant alleges that the Chamber erred in deciding that the alleged violations of his fundamental rights did not justify a reduction of his sentence, because the period already spent in detention for the same crimes, including during the trial, would be deducted from the sentence.[66] The Appellant alleges that the Chamber's conclusion was based on: (i) a mistaken interpretation of the applicable principles of the manner in which accused persons should be compensated for prejudice resulting from a violation of their fundamental rights; and (ii) an incorrect assessment of the gravity of the violation of the Appellant's fundamental rights.[67]

39. The Appellant refers to the Chamber's statement in the Sentencing Decision that it has "already examined, and rejected, an abuse of process challenge brought by the defence in relation to many of the abovementioned issues 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".[68]

40. The Appellant asserts that the Chamber made the following errors of law: first, he claims that the Chamber erred in law by deciding that because the Appellant's period in provisional detention would be deducted from the sentence, that the

[66]Sentencing Appeal Brief, para.26.
[67]Sentencing Appeal Brief, para.27.
[68]Sentencing Appeal Brief,para.38. Citing the Sentencing Decision, para.90.

sentence does not need to be reduced to compensate for the alleged violations of his fundamental rights.[69] He asserts that where there is a violation of a convicted person's[70] fundamental rights, there must be effective reparation[71] by way of a reduction of his sentence[72] (including where the Prosecutor violated the accused's rights by failing its disclosure obligations),[73] in addition to any reduction under Article 78(2) of the Statute for time spent in provisional detention from 16 March 2006 onwards.[74]

41. Second, he alleges that the Chamber erred in law by concluding that when it rejected the Appellant's request for a permanent stay of proceedings, this also impacted on the Appellant's right to seek redress for violations of his fundamental rights.[75] He asserts, *inter alia*, that the prior decision on stay of proceedings should not be invoked against him and that it does not constitute *res judicata*.[76]

42. The Appellant asserts that a number of his rights were violated and that serious prejudice to the Appellant was accordingly caused, which the Chamber should have recognized by granting a reduction in sentence. These include his right to

[69]Sentencing Appeal Brief,paras.28-33.
[70] *See* Sentencing Appeal Briefparas.31-32. He argues that a person's conviction cannot justify a refusal to compensate for damage caused by violations of fundamental rights that occurred during the judicial proceedings that led to the conviction.
[71]Sentencing Appeal Brief,para.29.Citing ICTR, *Prosecutor v Barayagwiza*, Case No.ICTR-97-19-AR72, Decision on Prosecutor's Request for Review or Reconsideration, 3 November 1999, para.108; ICTR, *Prosecutor v Semanza*, Case No.ICTR-97-20-A, Decision, 31 May 2000, para.125. He also argues that a person's conviction cannot justify a refusal to compensate damage caused by violations of fundamental rights that occurred during the judicial proceedings that led to the conviction. Citing as examples *Prosecutor v Semanza*, Case No. 97-20-T, Judgment and Sentence, 15 May 2003, para.580; *Prosecutor v Barayagwiza*, Case No. 97-19-AR72, Decision on the request of the Prosecutor for a revision and reconsideration, 31 March 2000, para.54 and 62; Judgment and Sentence, 3 December 2003, para. 1107.
[72]Sentencing Appeal Brief, para.29.Citing ICTR *Prosecutor v Semanza,* Case No.ICTR-97-20-A, Decision, 31 May 2000, disposition; *Prosecutor v Barayagwiza,* Case No.ICTR-97-19-AR72, Decision on Prosecutor's Request for Review or Reconsideration, 31 March 2000, disposition.
[73]Sentencing Appeal Brief, para. 29. Citing ICTR, *Prosecutor v Ndindiliyima*, Case No. ICTR-090-56-T, Decision on the Prosecutor's obligation of disclosure, 22 September 2008, para.59; and Judgement, 17 May 2011, paras.2192-2193.
[74]Sentencing Appeal Brief, paras.30, 33. He argues that the Chamber is required under Article78(2) to deduct the latter period from any sentence in any event.
[75]Sentencing Appeal Brief, paras.34-37.
[76]Sentencing Appeal Brief, paras.35-36. The Appellant cites the Trial Chamber at ICC-01/04-01/06-2690, para.213, in which the Chamber concluded that: it was not necessary at this stage to comment on the various issues of fact raised concerning this aspect of the application; even in the worst case hypothesis, the Chamber does not consider a stay of proceedings is required. The alleged breaches of the Prosecution can be examined in the context of the on-going trial.

have all necessary means for the preparation of his defence (infringed by, *inter alia*, lack of proper disclosure), his right to be tried within a reasonable time (invoking, among others, the two stays of proceedings) and his right to be treated fairly (allegedly affected by interviews given by the former Prosecutor and a former OTP officer).[77]

(a) The Chamber did take into account the alleged violations of the Appellant's rights for sentencing purposes

43. The Prosecution firstly submits that the second ground of appeal should be dismissed because the alleged errors of law do not arise. The Appellant has mischaracterized the Sentencing Decision. Although the Chamber, when referring to factors included in the Appellant's abuse of process challenge, stated that it did not *"find that these factors merit a reduction in Mr. Lubanga's sentence*",[78] it went on to state the following: "[t]he Chamber has, however, reflected certain factors involving Mr. Lubanga in the aftermath of the offences…He was respectful and cooperative throughout the proceedings, notwithstanding some particularly onerous circumstances, which included…a failure to disclose exculpatory material, which in turn resulted in a stay of proceedings…; the prosecution repeatedly failed to comply with the Chamber's disclosure orders, leading to a second stay of the proceedings…; and 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 in the proceedings."[79]

44. Therefore the Chamber considered, under the rubric of "cooperation", (i) the claimed failures by the Prosecution to disclose exculpatory material and/or comply with the Chamber's disclosure orders followed by two stays of proceedings (i.e. essentially an acknowledgement of delays, non-disclosure of

[77] Sentencing Appeal Brief, paras.40-79.
[78] Sentencing Decision, para.90.
[79] Sentencing Decision, para.91.

evidence, and consequent impact on his rights to prepare); and (ii) the OTP officers' allegedly misleading and inaccurate public statements.[80]

45. While the Prosecution has serious concerns with the Chamber's approach - in particular with the manner in which the Chamber labeled what, at most, could be characterized as proper and expected behavior of the Appellant during trial, as "cooperation" - the fact is that the factors identified by the Appellant effectively led to a reduction of the sentence.[81]

46. The only factors raised by the Appellant and not explicitly mentioned by the Chamber are: (i) the allegation that the OTP failed to properly investigate exculpatory evidence, in terms of the use of intermediaries and impact on witnesses' testimonies; and (ii) the former Prosecutor's media statements. However, the Chamber did indicate that its list of "particularly onerous circumstances" was not exhaustive.[82] Moreover, for the reasons explained below, the Chamber was not obliged to take the factors raised by the Appellant into account in any event.

(b) The Chamber was not obliged to take the factors into account

47. The Appellant again mischaracterizes the Chamber's Sentencing Decision. The Chamber did not decide that: (a) the Appellant was not entitled to reparation for a violation of his fundamental rights;[83] (b) as a convicted person he had no remedy for a violation of such rights;[84]or that (c) as the Chamber had previously rejected the Appellant's application for a stay of proceedings, which raised many of the same arguments before, this impacted on his right to reparation for the violation of his fundamental rights.[85]

[80]Sentencing Decision, para.91.
[81]ICC-01/04-01/06-2901, paras.90-91.
[82]ICC-01/04-01/06-2901, para.91.
[83]Sentencing Appeal Brief, paras.28-29.
[84]Sentencing Appeal Brief, paras.31-33.
[85]Sentencing Appeal Brief, para.34.

48. Instead, the Chamber did consider and assess the relevance of the alleged factors raised by the Appellant and concluded, based on its assessment of the facts, that these factors did not merit a reduction in the sentence (even though it gave him credit for many of the same factors under the heading of cooperation). [86] The Appellant has failed to demonstrate how the Chamber erred in law or was unreasonable in its conclusions.

A higher threshold of violations warrant reduction in sentence

49. First, the Appellant relies on jurisprudence from the *ad hoc* international criminal tribunals, in particular the International Criminal Tribunal for Rwanda ("ICTR") cases *Prosecutor v Semanza* ("Semanza"),[87]*Prosecutor v Barayagwiza* ("Barayagwiza"),[88] and *Prosecutor v Ndindiliyimana* ("Ndindiliyimana"),[89] in support of his claim that the Chamber erred by not reducing the sentence on the basis of the alleged violations.[90] However, these decisions, and other jurisprudence from the international tribunals,[91] indicate a higher threshold for reduction of sentence based on verified violations of individual rights, in contrast to the factual circumstances of this case.

[86]ICC-01/04-01/06-2901, para.90.
[87]*Prosecutor v Semanza*, Decision, Appeals Chamber, Case No.ICTR-97-20-A, 31 May 2000, paras.87, 90.
[88]*Prosecutor v Barayagwiza*, Decision, Appeals Chamber, Case No.ICTR-97-19-A, 3 November 1999 ("Barayagwiza appeal"), paras.104, 109. *See alsoProsecutor v Barayagwiza,* Decision on Prosecutor's Request for Review or Reconsideration, Appeals Chamber, Case No. ICTR-97-19-AR72, 31 March 2000 ("Barayagwiza review decision"), para.54.
[89]Citing *Prosecutor v Ndindiliyimana*, Case No.ICTR-00-56-T, Decision on the Prosecutor's obligation of disclosure, 22 September 2008, para.59; and Judgement, 17 May 2011, paras.2192-2193.
[90]Sentencing Appeal Brief, paras. 29-32.
[91]*See e.g.Prosecutor v Kajelijeli,* Appeals Judgement, Case No. ICTR-98-44A, 23 May 2005, paras.238-255; 251-324: The ICTR Appeals Chamber found that the accused had been subjected to the following violations: (i) he was not informed of the reasons for his arrest at the time of his arrest; (ii) he was arbitrarily detained in Benin for 85 days (a) without an arrest warrant and a transfer order from the Tribunal being submitted to the Benin authorities by the Prosecution within a reasonable time; and (b) without being promptly informed of the charges against him; (iii) he was arbitrarily detained in Benin for a total of 95 days before being brought before a Judge or an official acting in a judicial capacity; (iv) he was detained at the Tribunal's detention facilities for 147 days before having counsel assigned to him; and (v) he was detained for 211 days at the Tribunal's detention facilities before his initial appearance before a Judge, which the Chamber found to constitute "extreme undue delay'. See para.324: In order to remedy these violations, the ICTR Appeals Chamber converted the accused's two life sentences and fifteen years' sentence to one single sentence consisting of a fixed term of imprisonment of 45 years.

50. For instance in *Barayagwiza*, the accused faced prolonged detentions, attributable directly or indirectly to the Tribunal's proceedings, without being informed of the reasons, without legal assistance, and without a hearing on his writ of *habeas corpus*.[92] Similarly, in *Semanza* there was a failure to afford the accused a hearing on a writ of *habeas corpus*, as well as failure to promptly inform him of the charges.[93]

51. No comparable violations occurred in this case. Whilst the Appellant has raised a number of alleged violations in relation to his prior detention when in the DRC, including allegedly being unlawfully detained under house arrest,[94] never being brought before a judge and never being told of charges against him,[95] Pre-Trial Chamber I found that his detention in the DRC and any alleged violations he suffered during that time could not be attributed to any organ of the Court and did not relate to his arrest and transfer to the Court.[96] These factual findings were not overturned on appeal.[97]

52. In *Ndindiliyimana,* the Trial Chamber found that the accused was prejudiced due to late and non-disclosure of a large number of documents containing potentially exonerating evidence that the defence was unable to use in cross examination.[98]In

[92] See (i) Barayagwiza review decision, para.54: The accused had been detained in Cameroon for 18 days without being informed of the reasons, in violation of his right to be informed without delay of the charges against him; (ii) see Barayagwiza review decision, para.62: There was a 20-day delay between the transfer of the accused and the Tribunal's detention centre and his initial appearance; (iii) See Barayagwiza appeal, paras.104, 109: The Trial Chamber had failed to provide the Accused with a hearing on his writ of *habeas corpus*. See Barayagwiza review decision, para.75: The ICTR Appeals Chamber decided that the accused was entitled to a reduction in sentence if convicted or financial compensation if acquitted. See *Prosecutor v Barayagwiza,* Trial Judgment, Case No. ICTR-99-52-T, 3 December 2003, para.1107: After the accused was convicted, the trial chamber reduced his sentence from life imprisonment to a term of years as a remedy for the unlawful detention and failure to hold a hearing on the writ of *habeas corpus*.

[93] See *Prosecutor v Semanza*, Decision, Appeals Chamber, Case No. ICTR-97-20-A, 31 May 2000, paras.87, 90, 127-128; at Disposition, para.6. See *Prosecutor v Semanza*, Trial Judgment, Case No. ICTR-97-20-T, 15 May 2003, paras.579-580. The trial chamber found that the accused's sentence should be reduced by six months to account for the approximately 36 days of violation of his right to be informed promptly of the charges. Although less clear, the trial chamber appears to have also taken into account the violation of his right to challenge his detention. though at the same time it seems to have considered it less serious that the other violations, namely 36 days of detention without being informed of the charges, which was viewed as causing the accused material prejudice.

[94] Sentencing Appeal Brief, para.86.

[95] Sentencing Appeal Brief, para.85.

[96] ICC-01/04-01/06-512.

[97] ICC-01/04-01/06-772 OA4.

[98] See *Prosecutor v Ndindiliyimana*, Case No. ICTR-00-56-T, Decision on the Prosecutor's obligation of disclosure, 22 September 2008, paras.33, 40, 46, 49, 53.

contrast, in this case the Appellant suffered no such prejudice. He was not prevented from using a large number of documents containing potentially exonerating evidence for cross-examination purposes; and nor has the Appellant sought to allege that. Instead, most documents were disclosed to him prior to the start of the Defence case. Not only was he not prevented from using documents in cross-examination, if individual instances of late disclosure warranted re-calling a witness, he was permitted to do so, as when he recalled witness P-0581 to ask questions about a newly-disclosed document.[99]

53. As regards those few documents that could not be disclosed in their entirety, the Court ensured that there was a remedy to prevent any undue prejudice and properly take into account his rights to a fair trial. In particular, the Appeals Chamber instructed the Trial Chamber in those cases where the provider did not consent to disclosure of the relevant information to "determine whether and, if so, which counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, in spite of the non-disclosure of the information."[100] The Trial Chamber, after reviewing the relevant documents, concluded that "*counter-balancing measures [could be taken] to ensure that the rights of the accused are protected and that the trial is fair, notwithstanding the non-disclosure of the information. The Trial Chamber considered that these protective measures throughout were therefore necessary, and did not significantly affect the rights of the accused*."[101] For instance, the Appellant was granted access to underlying information and alternative evidence, and admissions were made where necessary.[102] This means that the Appellant's rights were at all times subject to careful monitoring by the relevant Chambers of the Court in order to ensure that they were not unfairly curtailed.[103] No reduction of sentence can be claimed on this basis.

[99] *See*: ICC-01/04-01/06T-310-CONF-ENG, p.69, line 14 to p.70, line 8.
[100] ICC-01/04-01/06-1486, OA13, para.48.
[101] ICC-01/04-01/06-1644, para.46.
[102] ICC-01/04-01/06-1644, *see e.g.* paras.34-35, 46-47, 52, 56.
[103] *See* Judgment, paras.119-123, in which the Chamber rejects the Appellant's challenge to the Prosecution's evidence on the basis of alleged failures as regards disclosure and investigation of exculpatory circumstances, confirming that it is: "unpersuaded by the suggested violations of the prosecution's statutory duties, particularly since the Chamber took measures throughout the trial to mitigate any prejudice to the defence whenever these

54. Finally, the Appellant refers to three examples of late disclosure, to try to assert that the Prosecution had an erroneous concept of its disclosure obligations.[104] None of these documents could justify a reduction of sentence:

(i) The first example is that the Prosecution did not timely disclose a report of a meeting with a witness-- who claimed to have been the Appellant's former bodyguard throughout the period and who denied having seen child soldiers in the UPC and the Appellant's Presidential Guard; and that Appellant was opposed to the recruitment of child soldiers.[105] The Appellant refers to his Article 74 appeal brief, in which he complains that disclosure was too late for him to be able to locate this person and that the Chamber is not entitled to reject the information in his statement solely on the basis that it is undermined by other, credible evidence.[106] This is not a serious complaint: If the person had been the Appellant's bodyguard, surely the Appellant would have known his identity and that he would have first-hand knowledge of the facts. It is wholly irrational for the Appellant to assert that the late disclosure of this information denied him the ability to identify his own bodyguard as a potentially exculpatory witness and the opportunity to call the witness at trial. Further, there is no support for the argument that the late disclosure caused fundamental prejudice that, at a minimum, should have been redressed by a reduction in the Appellant's sentence. The Prosecution finally notes that Chamber considered this document

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concerns were expressed. Additionally, the Chamber kept these obligations on the part of the prosecution permanently under review."; "Throughout the trial, the Chamber addressed any potential prejudice to the accused arising from incomplete or late disclosure….any problems that have arisen have been addressed in a manner which has ensured the accused has received a fair trial". *See also* ICC-01/04-01/06-2690, Decision on the 'Defence Application Seeking a Permanent Stay of the Proceedings'", para.188: "The Chamber is of the view that this is not a situation in which alleged prosecutorial misconduct has disabled the accused from properly defending himself. The Chamber has responded comprehensively to the defence submissions so as to ensure that the totality of the available evidence on the relevant intermediaries is explored during the trial. Four intermediaries have been called to give evidence; the investigators who were principally responsible for each of them have testified; and the prosecution has indicated that it has effected disclosure of all relevant materials, following various rulings by the Chamber. Reverting, therefore, to the question posed by the Chamber in paragraph 166 above, the Chamber is unpersuaded, in these circumstances, that 'the accused's rights have been breached to the extent that a fair trial has been rendered impossible'".

[104] Sentencing Appeal Brief, paras.62-68.

[105] Article 74 Appeal Brief, para.70. The Appellant made arguments on this document at trial: ICC-01/04-01/06-2773-Red-tEng, para.848, referring to ICC-01/04-01/06-2657-Red-tEng, paras.279-280.

[106] See Sentencing Appeal Brief, para.63. Article 74 Appeal Brief, para.72 citing the Judgment, para.1261. *See also* Prosecution response to the Article 74 appeal brief, paras.127-130.

and found it not credible as it was contradicted by numerous other items of evidence.[107] While this is also criticized by the Appellant, his claim is baseless: it is not valid for the Appellant to assert that a Trial Chamber is precluded from performing its ordinary task of evaluating evidence and determining which evidence is worthy of belief – which necessarily entails assessing competing evidence, making determinations as to reliability and discarding evidence that is not credible, either in whole or in part - by preferring the credible evidence.

(ii) The second example is an FPLC list of soldiers who were listed for integration into the DRC national army.[108] The Appellant is requesting to present this evidence for the first time on appeal. The Prosecution submits that this item of evidence should not be admitted as it has no impact on the Judgment or Sentencing decision and could have been previously identified by the Appellant's Defence counsel if exercising due diligence.[109]

(iii) The third example is the identity of intermediary P-0143. The Prosecution notes that: (a) the Trial Chamber's initial determination was that disclosure of the intermediary's identity was not required;[110]and (b)the arguments now raised about the alleged prejudice suffered from late disclosure of this intermediary

[107] The Appellant has previously raised arguments on the basis of this document in (a) their abuse of process application (see ICC-01/04-01/06-2657-Conf, paras.279-281); (b) their closing submissions (ICC-01/04-01/06-2773-Red-tENG, para.848); and (c) their Article 74 appeal brief (ICC-01/04-01/06-2948-Conf, paras.70-75). *See also*Prosecution response to the Article 74 appeal brief, paras.127-128.

[108] See the Article 74 appeal brief, paras.84-94, 127-128. See the Prosecution's response to the Article 74 appeal brief, para. 126.

[109] See Prosecution response to the Article 74 appeal brief, para. 126.

[110]*See* ICC-01/04-01/06-T-72-Conf-Exp-Eng-ET, p.2, lines 8-17: On 18 January 2008, Trial Chamber I ordered the redaction of the name of 143 because: *"[…] his name is irrelevant to the known issues in the case […]".See also* ICC-01/04-01/06-1146-Conf-Exp, paras.8-9: On 31 January 2008, the Chamber elaborated on its reasoning for permitting this redaction, namely that there was no known issue that related to his role as an intermediary of the Prosecution. The Chamber authorised the Prosecution to implement proposed redactions on the basis of Article 54(3)(f). On 5 March 2009 the Chamber indicated that during a separate *ex parte* status conference with defence that an issue had arisen as regards the role of 143 (ICC-01/094-01/06-T-143-Conf-Exp-Eng-Et, p.1, lines 13-17). On 13 March 2009, the Chamber rejected a request from the Defence to disclose his name (ICC-01/04-01/06-T-146-Conf-Exp-Eng-ET). *See also* ICC-01.04-01/05-2190-Red, Redacted Decision on the application to disclose the identity of intermediary 143, para.31. The Chamber concluded that it was unnecessary to disclose 143's identity and vary its original orders in the Lubanga trial. *See also* ICC-01/04-01/2434-Conf-Exp, Decision on Intermediaries, paras. 143, 150. It was in 12 May 2010 that the Chamber ordered the Prosecution to disclose 143's identity.*See also* ICC-01/04-01/06-2517-Red, para. 20. The Chamber subsequently ordered disclosure, which triggered the chain of events which led to the second stay of proceedings. From the outset, however, it was clear that this situation was time-limited, as recognized by the Trial Chamber itself, since as soon as protective measures were in place disclosure would be effected (Ibid.). Indeed, on 13 September 2010, the Prosecution offered disclosure of the identity of the intermediary pending resolution of the appeal against the stay decision, which the Appellant rejected (see.ICC-01/04-01/06-2567, paras. 5-6).

were not raised in the Appellant's abuse of process litigation, closing submissions or in his Article 74 appeal brief. These factors combined indicate that that the Appellant suffered little or no prejudice at trial on this basis.[111]

55. The examples cited by the Appellant do not demonstrate that the Prosecution had an erroneous view of its disclosure obligations, and in any event do not impact on either the ultimate Judgment or the Sentencing Decision. Nor has the Appellant identified prejudice from this late disclosure, much less has he explained why that prejudice warranted a reduction in his sentence.[112] And, even if he had demonstrated some prejudice arising from these three late disclosures, it does not reach the threshold of the violations in the cases relied upon by the Appellant. The Trial Chamber's conclusion that it did not consider these factors for the purposes of reducing the Appellant's sentence is correct and should remain undisturbed.

Consideration of delays

56. Although, as indicated above, the Chamber did in fact take into account delays in the proceedings,[113] the Appellant is incorrect in asserting that alleged delays of more than 413 days are solely attributable to the Prosecution. For instance, with respect to the first stay of proceedings, the Appeals Chamber acknowledged that there was a potential tension between the confidentiality to which the Prosecutor had agreed and the requirements of a fair trial; and in particular, that where information was obtained on the condition of confidentiality that the confidentiality agreement had to be respected and disclosure could not be

[111] *See e.g. Rwamakuba v The Prosecutor,* Case No. ICTR-98-44C-A, Decision on Appeal against decision on appropriate remedy, 13 September 2007, para.13; *Prosecutor v Bagosora, Kabiligi, Ntabakuze, Nsegiyumva,* Case No.ICTR-98-41-T, Judgment and Sentence, Trial Chamber I, 18 December 2008, paras.89-90, 96.
[112] As the jurisprudence of the ad hoc international criminal tribunals indicates, where the appellant alleges prejudice (e.g. because of delays), a mere assertion without demonstrating how he was prejudiced is not sufficient. *See e.g. ThéonesteBagosora Anatole Nsengiyumvav.The Prosecutor*, Case No. ICTR-98-41-A, AppealsJudgment, 14 December 2011 para 36. See further *The Prosecutor v Jean-Baptiste Gatete*, Case No. ICTR-00-61-A, Appeals Judgement, 9 October 2012, para 43.
[113] Sentencing Appeal Brief, para.91.

ordered without prior consent of the information provider.[114] And regarding the second stay, the Appeals Chamber found that it had not been a necessary measure,[115] so consequently any such delays arising from the imposition of that stay of proceedings cannot be attributed to the Prosecution.

57. The Appellant further alleges that 77 days were added to the length of trial because he was compelled to call additional witnesses (including 16 Defence witnesses and three investigators) and submit defence evidence.[116] His claim appears to be that their testimony would not have been required had it not been for the Prosecution's alleged failings in investigating more rigorously certain Prosecution intermediaries and witnesses.[117] This argument is misconceived. The Prosecution is not aware of any support for the proposition that an accused person who calls witnesses to challenge – successfully or not – the Prosecution's case in whole or in part is entitled to a reduction in sentence as compensation for the delay caused by hearing his evidence. The number of witnesses called or evidence relied upon by the Appellant to deal with the credibility of Prosecution witnesses was his own strategic choice to make.[118] Moreover the Appellant was not prevented from properly preparing his case as he was perfectly well-informed of the Prosecution's case, could fully investigate, and could explore the totality of available evidence regarding the relevant intermediaries during trial.[119] The Chamber acknowledged that: (a) the alleged prosecutorial misconduct did not prevent the Appellant from properly defending himself (in its decision regarding

[114] ICC-01/04-01/06-1486 OA13, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008' , paras. 1-5.
[115] ICC-01/04-01/06-2583, paras.23-27. The Appeals Chamber determined that the Trial Chamber erred when it imposed a stay of proceedings for the Prosecutor's refusal to comply with the Chamber's orders, without first imposing sanctions under article 71 of the Statute. Accordingly, the Appeals Chamber reversed the decision to stay proceedings.
[116] Sentencing Appeal Brief, para.75.
[117] Sentencing Appeal Brief, paras.74-75.Citing Judgment, para.482.The Appellant states that the whole of their testimony related to the issue of "lies of a large number of Prosecution witnesses". Again, the Prosecution observes that the Appellant is mischaracterising the Chamber's findings in the Article 74 Judgment, as the Chamber rejected the testimony of four, not nine, witnesses. The Prosecution further observes that the Appellant mischaracterises the Article 74 Judgment, regarding its findings on the potential role of intermediaries in influencing witnesses to lie.
[118] See Prosecution response to the Article 74 appeal brief, paras. 109-110.
[119] See Prosecution response to the Article 74 appeal brief, paras. 109-110.

the Appellant's request for stay of proceedings);[120] and (b) that the Chamber took measures to mitigate any potential prejudice to the defence resulting from issues related to disclosure and reliability of the evidence, ensuring that the Appellant received a fair trial (in the Article 74 Judgment).[121]

58. In any event, although delay during trial proceedings may be taken into account by a Trial Chamber in its determination of a sentence, it falls within the discretion of the Trial Chamber to do so. As the Appeals Chamber of the ICTR held in *Barayagwiza,* "length of proceedings is not one of the factors the trial chamber must consider, even as a mitigating circumstance, in determination of a sentence".[122] (Emphasis added). In this case, however, the Trial Chamber, while correctly rejecting that the delays alleged amounted to a breach of the Appellant's right to an expeditious trial warranting a reduction of the sentence, did in fact consider some of the delays invoked under the rubric of "cooperation with the Court", as already explained.[123]

59. Finally, in terms of what constitutes 'undue delay' in terms of length of proceedings, the Prosecution refers as an example to the finding of the ICTR Appeals Chamber in the *Prosecutor v Nahimana et al.* that a period of seven years and eight months between the arrest of co-accused Barayagwiza and his judgment did not constitute undue delay, apart from some initial delays which had violated his rights.[124] This means that the length of the proceedings in this

[120] ICC-01/04-01/06-2690-Conf, para.188:

> *The Chamber is of the view that this is not a situation in which alleged prosecutorial misconduct has disabled the accused from properly defending himself. The Chamber has responded comprehensively to the defence submissions so as to ensure that the totality of the available evidence on the relevant intermediaries is explored during the trial. Four intermediaries have been called to give evidence; the investigators who were principally responsible for each of them have testified; and the prosecution has indicated that it has effected disclosure of all relevant materials, following various rulings by the Chamber. Reverting, therefore, to the question posed by the Chamber in paragraph 166 above, the Chamber is unpersuaded, in these circumstances, that 'the accused's rights have been breached to the extent that a fair trial has been rendered impossible'.*

[121] See Article 74 Judgment, paras.119-123. *See also* Prosecution response to the Article 74 appeal brief, paras.118-120.

[122] See *Prosecutor v Barayagwiza,* Appeal Judgment, Case No. ICTR-99-52-A, 28 November 2007, para.1073.

[123] See Sentencing Decision, paras. 89-91.

[124] The *Prosecutor v Nahimana, Barayagwiza, Ngeze*, Appeal Judgment, ICTR-99-52-A, 28 November 2007, paras.1076-1077.

case is not disproportionate as compared to proceedings at other international criminal jurisdictions.

(c) The Chamber did not say it was unnecessary to deduct time as compensation for the alleged violations because time in provisional detention was already deducted from the sentence

60. The Appellant also mischaracterizes the Chamber's decision when he claims that it concluded that since the Appellant's period in provisional detention would be deducted from the sentence, the sentence did not need to be reduced further to compensate for the alleged violations of his fundamental rights.[125] The Chamber merely observed that "[a]ny relevant period that [the Appellant] has spent in detention, including during the trial, will be deducted from the sentence that is passed."[126]And indeed, as the Appellant acknowledges the Statute requires that result:[127] Article 78(2) provides that "the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court". There is no indication whatsoever that the Chamber viewed this as compensation for all alleged injuries.

(d) Consideration of prior request for stay of proceedings

61. Further, and contrary to the Appellant's contention, the Chamber did not state that when it rejected the request for a permanent stay of proceedings this somehow impacted on the Appellant's right to request other forms of reparations for violations of his rights.[128] The Chamber simply observed that it had already considered and rejected an abuse of process challenge brought by the Defence in relation to many of the issues raised by the Appellant in his sentencing

[125]Sentencing Appeal Brief, paras.28-33.
[126]Sentencing Appeal Brief, para.90.
[127]Sentencing Appeal Brief, para.30.
[128]Sentencing Appeal Brief, para.34.

submissions, and added that "[…]in any event it does not find that these factors merit a reduction in Mr. Lubanga's sentence".

62. Thus, the Chamber simply stated that it was not convinced that the alleged violations justified a reduction of sentence. This also demonstrates that the Chamber, far from considering that the Appellant was somehow precluded from raising these grievances during the sentencing process, did in fact consider the merits of the Appellant's arguments as to whether the alleged violations of his rights warranted a reduction of his sentence.

(e) No errors established

63. The Prosecution submits that, as demonstrated above, the Appellant has failed to establish that there were any errors made by the Chamber under this ground of appeal. The second ground of appeal should be accordingly dismissed.

(iii) The Appellant's Third ground of appeal: The Appellant's prior period of detention in the DRC

64. The Appellant alleges that the Chamber erred in fact by concluding that it had not been proven, on a balance of probabilities, that his prior detention in the DRC (both whilst under "house arrest" from 13 August 2003 to 19 March 2005 and at the Centre Pénitentiaire et de Rééducation de Kinshasa ("CPRK") from 19 March 2005 until 17 March 2006) was for conduct underlying the crimes for which he was found guilty by the Court.[129]

65. As noted above, article 78(2) provides that: "[i]n 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

[129] Sentencing Appeal Brief, paras. 80 and 96. Citing Sentencing Decision (ICC-01/04-01/06-2901), para.102 :

crime." The Appellant argues that article 78(2) permits a Chamber to consider the whole period passed in prior detention whether or not it was under an order of the Court.[130] He acknowledges that any non-Court ordered detention must be in connection with conduct underlying the crimes,[131] but urges that the Court erred in finding that his prior detention did not meet the test.

66. In particular, the Appellant alleges that when the Chamber assessed whether his prior detention in the DRC related to "conduct underlying the crimes", the Chamber failed to take into account the following:

(i) The Appellant was allegedly arbitrarily detained from 13 August 2003 to 16 March 2006 by the DRC authorities[132]for his activities as President of the UPC/RP politico-military movement during the years 2002-2003, which he alleges is the same conduct for which he was convicted by the Chamber.[133]

(ii) The Chamber based its findings on the Appellant's responsibility essentially on his role as President of UPC/RP during that same period.[134] In particular, the Appellant refers to the Chamber's findings that: (a) the Appellant agreed to a common plan and participated in implementation of that common plan, which consisted of having an army with the aim of preserving control over Ituri both politically and militarily;[135] and (b) he made essential contributions, describing the Appellant's role within the UPC.[136]

(iii) The Prosecutor led his investigations against the Appellant and maintained regular contact with the Congolese authorities in furtherance of these investigations, whilst the Appellant was being arbitrarily detained

[130] Sentencing Appeal Brief, para.81.
[131]Sentencing Appeal Brief, para.82.Citing *The Prosecutor v Tadic,* Case No. IT-94-1-A and IT-91-1-A bis, Decision concerning the judgements relative to the sentence, 26 January 2000, para. 38.
[132]Sentencing Appeal Brief, paras.84-87.
[133] Sentencing Appeal Brief, para.90. Citing ICC-01/04/01/06-348-Conf, p.5-6; ICC-01/04-01/06-32-US-AnxB1, p.17/17; ICC-01/04-01/06-32-Conf-AnxB, paras.7-15; T-1Conf-Fr, p.7, lines 4-5 (Audience of 2 February 2006); ICC-01/04-01/06-32-AnxB, para.17; T-1Conf-Fr, p.7, lines 4-5 (Audience of 2 February 2006); T-1-Conf-FR, p.29, line 1 (Audience of 2 February 2006).
[134]Sentencing Appeal Brief, para.92.
[135]Sentencing Appeal Brief, para.93.
[136]Sentencing Appeal Brief, para.94.

in the DRC,[137] at least since August 2005.[138] Although not explicit, it would seem that the Appellant implies some form of collusion with the DRC authorities or knowledge of the Prosecution of the alleged violations that the Appellant alleges occurred during his detention because of the Prosecution's contact with the DRC authorities at the time of his detention.[139]

67. The Appellant further alleges that the Prosecutor did not contest – thereby presumably conceded -- that: (a) the Appellant was in detention from 13 August 2003 until 19 March 2005, when he was under 'house arrest' (including during its submissions on sentencing;[140]and (b) the Appellant had been detained in the DRC for reasons of conduct underlying the crimes for which he appeared before the ICC. This is factually wrong and legally irrelevant. First, the Prosecution contested from the outset the very existence of the alleged "house arrest" prior to 2005,[141] as did the DRC authorities.[142] Second, the Prosecution also clearly stated from the outset that it considered the Appellant's prior detention was "in respect of the investigation and prosecution of crimes unrelated to the present case and under domestic law".[143] There is no basis to suggest that the Prosecution accepted that the Appellant was arrested for the same conduct underlying those crimes.[144]

68. The Prosecution submits that the Appellant's third ground of appeal should be dismissed for the following reasons.

[137]Sentencing Appeal Brief, para.83. Citing ICC-01/04-01/06-32-AnxB, paras.20-21.
[138]Sentencing Appeal Brief, para.95.
[139]Sentencing appeal brief, para.95.
[140]Sentencing Appeal Brief, para.87.
[141]Sentencing Appeal Brief, paras.84-87.*See e.g.* ICC-01/04-01/06-149-Conf, paras.8-10. *See also* ICC-01/04-01/06-401-Conf, paras.7-9. Whilst Pre-Trial Chamber I did state at footnote 267 of the Confirmation Decision (ICC-01/04-01/06-796-Conf that "the Prosecution did not appear to refute the point [that the Appellant was placed under house arrest in Kinshasa by the DRC authorities from 13 August 2003 to the end of 2003] and itself stated that {the Appellant] was indeed residing in Kinshasa in November and December 2003", this was not correct as these two Prosecution filings indicate.
[142] See ICC-01/04-01/06-348, pp.7-8: The Defence relies in part on submissions made by the DRC authorities to support his contention that he was under house arrest from August 2003, in his capacity as President of the UPC/FPLC. However, [REDACTED] the DRC authorities do not admit that contention. [REDACTED].
[143] See e.g. ICC-01/04-01/06-709-Conf, para.9.
[144] See e.g. ICC-01/04-01/06-149-Conf, paras.11-16.

(a) Domestic detention that was not connected to the same conduct and same crimes for which the Appellant was charged by the ICC cannot count for sentencing purposes

69. First, as the Appellant concedes,[145] article 78(2) of the Statute specifically requires that any non-ICC court ordered prior detention, must have a "connection with conduct underlying the crime". (Emphasis added). A plain textual reading of article 78(2) makes it clear that what is required is a connection with the crimes for which the individual is prosecuted before the ICC.[146]

It is irrelevant that the domestic charges were based on the Appellant's position in his political/military organization. Otherwise, accused persons could ask for any period of domestic detention to be considered by the Court, no matter what the reasons for that detention were, simply by virtue of having had the same position when they performed the conduct underlying the domestic detention. The relevant criterion is the conduct underlying the crimes for which he was detained and its connection, or lack thereof, with the crimes prosecuted before the Court. In this instance, the Appellant concedes that he was initially detained by the DRC authorities for alleged threats to security of the State.[147] He was later charged with [REDACTED].[148] In other words, he was not detained in the DRC previously for the crimes of enlistment, conscription or use of children below the age of 15. Thus, as the Appeals Chamber observed in the context of the Appellant's challenge to the Court's jurisdiction: "[i]t is worth reminding that the crimes for which [the Appellant] was detained by the Congolese authority were separate and distinct from those which led to the issuance of the warrant for his

[145]Sentencing appeal brief, para.82.
[146]*See e.g.* Jennings, in Triffterer et al. (ed.), 'Article 78', in Commentary on the Rome Statute of the International Criminal Court, Second Edition, Beck. Hart.Nomos, 2008, p.1437: "The second sentence of paragraph 2 gives the Court the discretion to deduct from a sentence of imprisonment the time spent by a person in detention because of a conviction under national law for conduct constituting a crime within the jurisdiction of the Court." (Emphasis added).
[147]Sentencing Appeal Brief, para.90. [REDACTED].
[148] [REDACTED].

arrest".[149] (Emphasis added). Moreover, these findings were made in response to the very same argument by the Defence when it urged that his prior period of detention was relevant because of alleged (a) "concerted action" between the Office of the Prosecutor and the DRC authorities,[150] and (b) serious violations related to the process of bringing him before the Court.[151]

70. The Appeals Chamber's findings regarding the circumstances underlying the Appellant's prior period in detention are demonstrably accurate, and thus should rebut the Appellant's attempt to argue that his prior period of detention in the DRC entitled the Trial Chamber to credit his time served to the sentence in this case. Accordingly, prior detention can only be considered for the purposes of Article 78(2) if it relates to crimes that form the subject-matter of the proceedings before the Court; this Chamber's finding that the prior detention was not for the same conduct continues to be correct and resolves the issue.

71. Accordingly, the Trial Chamber correctly required evidence showing that the DRC detention was for the same conduct underlying the crimes for which the Appellant was convicted, and rejected the Appellant's request due to the lack of sufficient evidence supporting it.[152] No error invalidating this conclusion has been established by the Appellant.

(iv) The Appellant's Fourth ground of appeal: Alleged violation of Article 74(2)

72. The Appellant alleges that the Chamber erred in law, and violated article 74(2), by stating that: (a) pursuant to article 76(2) of the Statute "*the evidence admitted at this*

[149] ICC-01/04-01/06-772 OA4, para.42. *See also* para.5. The Appeals Chamber observed that: "[p]rior to his arrest on the authority of the warrant of the Court, [the Appellant] was held in custody by the Congolese authorities for crimes other than those that were found to justify the issue of a warrant for his arrest by the Court."
[150] ICC-01/04-01/06-512, p.9.
[151] ICC-01/04-01/06-512, p.10.
[152] SentencingDecision, para. 102.

stage can exceed the facts and circumstances set out in the Confirmation Decision, provided the defence has had a reasonable opportunity to address them";[153] and (b) even though the Appellant was not charged for rape or sexual violence and it did not form part of the Confirmation Decision, the Chamber was entitled to consider sexual violence under rule 145(1)(c) as part of the harm suffered by victims, the nature of the unlawful behaviour, the circumstances or manner in which the crime was committed and also to consider if, under rule 145(2)(b)(iv) the crime was committed with particular cruelty.[154]

73. The Appellant argues that article 74(2), which specifies that "[t]he decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges" applies not only to the decision on conviction but also to the decision on sentencing.[155] He argues that this reflects a fundamental principle according to which the Appellant can only be punished on the basis of facts of which he received notification at the start of the trial and in respect of which he was able to defend himself, in accordance with his fundamental rights set out in Article 67.[156]

74. He further asserts that: (i) rule 145, which enables the Chamber to take into account the "circumstances" of the crime and "aggravating circumstances" for consideration of sentence, does not allow the Chamber to consider circumstances that are not an integral part of the charges and about which the accused did not have actual notice before the start of proceedings against him;[157] and (ii) thus, the "circumstances" that can be considered at sentencing must necessarily be limited to the 'facts and circumstances' enunciated in the decision confirming the charges.[158] He asserts that article 76(2) does not enable consideration of new facts that were not notified before the start of the proceedings, but only allows

[153]Sentencing Appeal Brief, paras.97-99, p.30.Citing ICC-01/04-01/06-2901, para.29.
[154]*See* Sentencing Appeal Brief, para.97, citing Sentencing Decision, paras.59, 67-68.
[155]Sentencing Appeal Brief, paras.100-102.
[156] Sentencing Appeal Brief, para.101.
[157] Sentencing Appeal Brief, para.102.
[158]Sentencing Appeal Brief, para.103.

presentation of new evidence pertinent to sentence.[159] He finally argues that, contrary to what is suggested by the Chamber, a failure to give notice of such facts at the start of the trial deprives the accused of a "reasonable opportunity to address them" at sentencing, and that having to deal with new allegations at the sentencing stage violates his rights.[160]

(a) The Appellant does not raise a true ground of appeal at this stage

75. As an initial matter, the Appellant is contradictory as to whether he is seeking to raise a ground of appeal on the basis of this alleged error of law. On the one hand, he asks, as part of the relief sought, that the Appeal Chamber decide that the Chamber committed errors of fact and law which impacted on the sentence pronounced, including in concluding that it could take into account facts going beyond the facts and circumstances set out in the charges.[161] On the other hand, the Appellant indicates that he does not intend to formally raise this alleged error of law as a ground of appeal at this stage,[162] but reserves the right to do so if necessary in response to any ground of appeal that might be raised by the Prosecutor on the factual conclusions made by the Chamber in this regard.[163] It therefore would be appropriate for the Chamber to disregard the complaint in this pending appeal.[164]

76. Moreover, as the Appellant concedes,[165] this alleged error of law *did not occur*. Rejecting the Prosecution's argument, the majority found that neither the sexual violence evidence[166] nor the harsh conditions in the camps and brutal treatment of

[159]Sentencing Appeal Brief, para.104.
[160]Sentencing Appeal Brief, para.105.
[161]Sentencing Appeal Brief, p.30.
[162]Sentencing Appeal Brief, para.107.
[163]Sentencing Appeal Brief, para.108.
[164]Plainly, the Appellant anticipated that the Prosecution would contest on appeal the Chamber's resolution of the issue. The appropriate time to raise the Defence argument is in response to the Prosecution's cross-appeal. And in fact the Prosecution did argue the issue extensively in its appeal (ICC-01/04-01/06-.2950 A4, paras.67-93. It would, however, be abusive if the Defence were to make the argument here, where it does not belong, and then incorporate it by reference into its response to the Prosecution's appeal if that strategy were undertaken in order to conserve pages in the latter filing for other issues.
[165]Sentencing Appeal Brief, para.106.
[166]Sentencing Decision, para.81.

children[167] could be attributed to the Appellant and thus declined to consider them as aggravating factors (or as part of the assessment of the gravity of the crimes).[168]

(b) The Chamber is permitted to consider evidence that exceeds facts and circumstances set out in the Confirmation Decision

77. Should the Appeals Chamber consider that it is appropriate to entertain the Appellant's arguments included in this ground of appeal, the Prosecution submits that the Chamber did not err when it stated that: (a) pursuant to Article 76(2): "*…the evidence admitted at this stage can exceed the facts and circumstances set out in the Confirmation Decision, provided the defence has had a reasonable opportunity to address them*";[169] and (b) even though the Appellant was not charged for rape or sexual violence and it did not form part of the Confirmation Decision, that the Chamber was entitled to consider sexual violence under Rule 145(1)(c) as part of the harm suffered by victims, the nature of the unlawful behaviour, the circumstances or manner in which the crime was committed; and to consider if, under Rule 145(2)(b)(iv) the crime was committed with particular cruelty.[170]

The aggravating circumstances or factors that a Chamber can consider under Rule 145 do not need to be an integral part of the charges

78. First, the Prosecution submits that it is not correct that the aggravating circumstances or the aggravating factors that a Chamber is permitted to consider

[167] Sentencing Appeal Brief, para.106.Citing ICC-01/04-01/06-2901, paras.59, 69-75.
[168] See also ICC-01/04-01/06-2950, para.67. The Prosecution proposed that the Chamber consider as aggravating factors the harm of cruel treatment and sexual abuse that the victims of these crimes suffered. The Majority declined, on the ground that the evidence failed to show that Thomas Lubanga knew and/or intended that the children be subjected to cruel treatment and sexual abuse.
[169] Sentencing Decision, para.29.
[170] *See* Sentencing Appeal Brief, para.97, citing Sentencing Decision, paras.59, 67-68.

under Rule 145 must form an *integral* part of the charges and be specifically notified to an accused from the outset.[171]

79. Indeed, as stated by the Trial Chamber of the Special Court of Sierra Leone ("SCSL") in *Prosecutor v Taylor* ("Taylor"), citing decisions from the ICTY Appeals and Trial Chambers, aggravating factors need only have a "direct relation to the offences charged".[172] Similarly, in *Prosecutor v Kunarac*, the ICTY Trial Chamber held that it could consider as aggravating "those circumstances directly related to the commission of the offence charged and to the offender himself when he committed the offence, such as the manner in which the offence was committed."[173] The ICTY Appeals Chamber in *Prosecutor v Deronjic,* further elaborated that aggravating circumstances are those directly related to the commission of the crime or to the offender himself when he committed the offence (such as the manner in which the offence was committed).[174]

80. In this instance, there is no doubt that the two aggravating factors or circumstances[175] to which the Appellant expressly objects, namely cruel treatment and sexual abuse of child soldiers within the UPC/FPLC[176] have a direct relation to the crimes charged. Both sexual violence and cruel treatment of child soldiers

[171]Sentencing Appeal Brief, para.102.
[172] See *The Prosecutor v Charles GhankayTaylor, SCSL*-03-01-T, Trial Chamber II, Sentencing Judgement, 30 May 2012 ("Taylor, Sentencing Judgement"), paras.24 and 30. *See also* the RUF case (emphasis added), Sentencing Judgment, para.24: "only circumstances directly related to the commission of the offence charged, and for which the Accused has been convicted, can be considered to be aggravating". See also *The Prosecutor v. MoininaFofana, AllieuKondewa,* SCSL-04-14-T, Trial Chamber I,Judgement on the Sentencing of *MoininaFofanaand AllieuKondewa,* Special Court for Sierra Leone, 9 October 2007,("CDF case, Judgment on the Sentencing of MoininaFofana and AllieuKondewa"), para.36.*See also*ICC-01/04-01/06-2950, Prosecution's Document in Support of Appeal against the 'Decision on Sentence pursuant to Article 76 of the Statute' (ICC-01/04-01/06-2901), ("Prosecution's Sentencing Appeal Brief"), para.74.
[173]*SeeProsecutor v Kunarac,Kovac, Vukovic,* IT-96-23-T &IT-96-23/1-T, Trial Chamber, Judgment, 22 February 2001, para.850.*See also* Prosecution's Sentencing Appeal Brief, para.74.
[174]See *Prosecutor v Deronjic*, IT-02-61-A, Appeals Chamber, Judgment on Sentencing Appeal, 20 July 2005 ("Deronjic"), paras.124-125.*See also* Prosecution's Sentencing Appeal Brief, para.74.
[175]*See* Prosecution's Sentencing Appeal Brief, para.69. *Prosecutor v Hadzihasnovic*, IT-01-47-A, Appeals Chamber, Judgement, 22 April 2008 para.317*; Prosecutor v Vasiljevic,* IT-98-32-A, Appeals Chamber,Judgement,25 February 2004, para.157; Taylor, Sentencing Judgment, para.28, noting that some international Trial Chambers consider gravity and aggravating circumstances together. *See alsoProsecutor v. Alex TambaBrima, BrimaBazzyKamara, SantigieBorborKanu*, SCSL-04-16-T, Trial Chamber II, Sentencing Judgement, 19 July 2007, ("Brima, Sentencing Judgment"), para.23.
[176]Sentencing appeal brief, paras.97, 106.

within the UPC/FPLC are simply examples of harm directly related to the crimes charged.[177]

81. The Appellant is also wrong when he claims that a Chamber is limited to considering only aggravating circumstances or factors explicitly described in the charges at the outset.[178] For example, article 76(2) explicitly empowers a Chamber to consider additional evidence or submissions not presented at trial, at a subsequent sentencing hearing.[179] Moreover, rule 145refers to aggravating factors and circumstances that clearly do not have to be an integral part of the charges, such as prior criminal convictions for crimes under the Court's jurisdiction or of a similar nature and the effect of the crime on a victim and his or her family.[180]

82. Second, contrary to the Appellant's contention,[181] it was correct for the Chamber to state that it was entitled to consider sexual violence under rule 145(1)(c) as part of the harm suffered by victims, the nature of the unlawful behaviour, the circumstances or manner in which the crime was committed; and to consider if, under rule 145(2)(b)(iv), the crime was committed with particular cruelty.[182]

83. Article 78 of the Statute empowers a Chamber, when determining sentence, to consider gravity of the crime. Rule 145 requires that a Chamber, when balancing

[177] Prosecution's Sentencing Appeal Brief, paras 67, 73.
[178]Sentencing Appeal Brief, paras.97-108. For example, when the consequences of a crime on a victim are an integral part of the definition of the offence this factor cannot be considered an 'aggravating circumstance' in imposing sentence but must instead be considered in the context of the gravity of the offence. *See e.g.*Archbold, p.490: "where such consequences on a victim are part of the definition of the offence, 'they may not be considered as an aggravating circumstance in imposing sentence, but the extent of the long-term physical, psychological and emotional suffering of the immediate victims is relevant to the gravity of the offences" (Citing *Prosecutor v Krnojelac*, Judgment, 15 March 2002, para.512).
[179] The drafting history of Article 76 also indicates that the drafters from the outset envisaged that this broad scope of evidence could be considered for sentencing purposes. *See e.g.* 1996 Report of the preparatory Committee, U.N.Doc A/51/22 (1996) Vol.1, Vol.11. Draft Article 46, Sentencing: "…the Trial Chamber shall hold a further hearing …to hear any evidence relevant to the sentence." *See also* 1998 Report of the Preparatory Committee, Draft Statute, A/Conf.183/2/Add.1, draft Article 74, Sentencing: "…the Trial Chamber may…hold a further hearing to hear any additional evidence or submissions relevant to sentence, in accordance with the rules."
[180] See Archbold, International Criminal Courts, Practice, Procedure and Evidence, Thomson Sweet & Maxwell, 2003, ("Archbold"), p.490. The physical and mental consequences of a crime upon its victims constitute an aggravating circumstance. Citing rule 145(1)(c) of the Rules. Also citing *Prosecutor v Delalic et al*., Judgment, 20 February 2001, paras.1226, 1260, 1273; *Prosecutor v Krnojelac,* Judgment, 15 March 2002, para.512: the Trial Chamber held that the consequences of the crime upon the victim who is directly injured is always a relevant consideration in assessing sentence.
[181]Sentencing Appeal Brief, para.97.
[182]*See* Sentencing Appeal Brief, para.97, citing Sentencing Decision, paras.59, 67-68.

all relevant factors, consider aggravating factors and the circumstances of the crime. Rule 145(1)(c) explicitly enables a Chamber to consider *inter alia,* "the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behavior and the means employed to execute the crime…". Rule 145(2)(b) further enables a Chamber to consider as aggravating circumstances, the commission of the crime where: (a) the victim is particularly defenseless,[183] and (b) if committed with particular cruelty. [184] These are all factors that have been recognized by the other international criminal tribunals as appropriate for determining sentence.[185]As the ICTY Appeals Chamber confirmed in *Prosecutor v Jelisic,* a Trial Chamber has a "broad discretion as to which factors it may consider in sentencing and the weight to attribute to them".[186]

84. Accordingly, even if the Majority had agreed with Judge Odio Benito that cruel treatment and sexual victimization of child soldiers within the UPC/FPLC amounted to aggravating factors or circumstances (or as part of their assessment of the gravity of the crimes) for sentencing purposes, they would have not violated the Appellant's rights under Article 67 of the Statute, as these factors <u>are directly connected to the crimes charged and did not need to be explicitly described as an integral part of the charges from the outset</u>.

[183] Rule 145(2)(b)(iii).
[184] Rule 145(2)(b)(iv).
[185]See Archbold, p.489. As regards cruelty as an aggravating factor, Archbold cite e.g. *Prosecutor v Blaskic,* Judgment, 3 March 1998, para.783, in which the ICTY Trial Chamber declared that the 'extreme cruelty of the beatings, the sadism with which they were inflicted and the especial humiliation which ensued', were significant considerations in determining sentence. ,As regards vulnerability of the victim, Archbold observe: "the status of the victims as civilians, women and children, may constitute an aggravating factor. Citing *e.g. Prosecutor v Furndzija,* Judgment, 10 December 1998, para.283; Prosecutor v Kunurac, Judgment, 22 February 2001, para.879, where the Trial Chamber considered the young age of the victim to be an aggravating factor.
[186]*Prosecutor v Jelisic*, Judgment, 5 July 2001, para.100. See also *Prosecutor v Kambanda,* [?], para.30: "as far as the individualisation of penalties is concerned, the judges of the Chamber cannot limit themselves to the factors mentioned in the Statute and the Rules…their unfettered discretion to evaluate the facts and attendant circumstances should enable them to take into account any other factor that they deem pertinent".

Article 74(2) does not apply to Article 76 sentencing decisions

85. Second, contrary to the Appellant's arguments, the limitations of Article 74(2), in particular that "[t]he decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges", do not apply to sentencing decisions.[187] As indicated above, the requirement instead is that the aggravating circumstances or factors taken into account for sentencing decisions have a "direct relation to the offences charged".[188]

86. A plain textual reading of Article 74 makes it clear that it sets out the requirements for a decision in relation to conviction or acquittal,[189] and that it does not relate to the decision on sentencing, the parameters of which are dealt with by Articles 76 and 78 and Rule 145 of the Rules.

Rights of the accused are protected

87. Moreover, and as stressed by the Trial Chamber, the accused's rights are protected in this process, since the defence must be given a reasonable opportunity to address the evidence.[190] In the instant case, the Appellant had ample opportunity at the sentencing hearing to address additional arguments raised by the Prosecution regarding to the instances of sexual violence and cruel treatment of children within the UPC/FPLC raised as aggravating circumstances.[191]

88. The Prosecution submits that the Appellant's fourth ground of appeal should be dismissed.

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[187] ICC-01/04-01/06-2949, paras.97-108.
[188] Prosecution's Sentencing Appeal Brief, para.73. Citing Taylor, Sentencing Judgment, paras.24 and 30. See also the RUF case, Sentencing Judgment, para.24: "only circumstances directly related to the commission of the offence charged, and for which the Accused has been convicted, can be considered to be aggravating". See also the CDF case, Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, para.36.
[189] See e.g. Triffterer, "Article 74", in Triffterer (ed.)., Commentary on the Rome Statute of the International Criminal Court, Second Edition, Beck.Hart.Nomos, 2008, p.1391: "The purpose of regulations like article 74 in international and national law is to establish certain corner stones as the indispensable requirements for the final decision."
[190] Sentencing Decision, para.29.
[191] *See e.g.* ICC-01/04-01/06-2891-Conf-Exp, paras.43-85.

Relief Sought

89. For all the above-stated reasons, the Prosecution asks that the Appellant's appeal against the Sentencing Decision be dismissed in its entirety.

Fatou Bensouda, Prosecutor

Dated this 19 February 2013

At The Hague, The Netherlands